

# **UN Transitional Administrations**

## **Creating Legitimate Government**

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## List of Abbreviations

AAK	Alliance for Future of Kosovo ( <i>Aleanca për Ardhmërinë e Kosovës</i> )
ASDT	Timorese Social Democratic Association ( <i>Associação Social Democrática Timor</i> )
Adopeti	Timorese Popular Democratic Association ( <i>Associação Popular Democrática Timorese</i> )
BiH	Bosnia-Herzegovina ( <i>Bosna i Hercegovina</i> )
CEC	Central Election Commission
CEP	Community Empowerment and Local Governance Project
CNRT	Council for Timorese Resistance / National Congress for Timorese Reconstruction
COIN	Counterinsurgency
ETTA	East Timorese Transitional Administration
EU	European Union
EULEX	European Union Rule of Law Mission (in Kosovo)
EUSR	European Union Special Representative (for Kosovo)
Falintil	The Armed Forces for the National Liberation of East Timor ( <i>Forças Armadas da Libertação Nacional de Timor-Leste</i> )
F-FDLT	Timor Leste Defence Force ( <i>Forças de Defesa de Timor Leste</i> )
Fretilin	Revolutionary Front for an Independent East Timor ( <i>Frente Revolucionária do Timor Leste Independente</i> )
FRY	Federal Republic of Yugoslavia
IAC	Interim Administrative Council
INTERFET	International Force in East Timor
ICO	International Civilian Office
ICR	International Civilian Representative
ITA	International Territorial Administration
JIAS	Joint Interim Administrative Structure
JWG	Joint Working Group on Legal Framework
KFOR	Kosovo Force
KLA	Kosovo Liberation Army ( <i>UÇK; Ushtria Çlirimtare e Kosovës</i> )
KPC	Kosovo Protection Corps
KPS	Kosovo Police Service
KTC	Kosovo Transitional Council
KVM	Kosovo Verification Mission
LDK	Democratic League of Kosovo ( <i>Lidhja Demokratike e Kosovës</i> )
NATO	North Atlantic Treaty Organization
NC	National Council
NCC	National Consultative Council
NGO	Non-Governmental Organization
OECD	Organization for Economic Cooperation and Development
ONUC	United Nations Operation in Congo ( <i>Organisation des Nations Unies au Congo</i> )
OSCE	Organization for Security and Cooperation in Europe
PDK	Democratic Party of Kosovo ( <i>Partia Demokratike e Kosovës</i> )
PISG	Provisional Institutions of Self-Government
PNTL	National Police of East Timor ( <i>Polícia Nacional de Timor-Leste</i> )
SRS	Special Representative to the Secretary General
UDT	Timorese Democratic Union ( <i>União Democrática Timorese</i> )
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNAMET	United Nations Mission in East Timor
UNDP	United Nations Development Programme
UNHCR	(Office of the) United Nations High Commissioner for Refugees

UNMIT	United Nations Integrated Mission in East Timor
UNMIK	United Nations Interim Administration Mission in Kosovo
UNMISSET	United Nations Mission of Support in East Timor
UNOSOM II	United Nations Operation in Somalia II
UNOTIL	United Nations Office in East Timor
UNSC	United Nations Security Council
UNTAES	United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium
UNTAET	United Nations Transitional Administration in East Timor
UNTAC	United Nations Transitional Administration in Cambodia
UNTEA	United Nations Temporary Executive Authority
UK	United Kingdom
US	United States





## Introduction

The increase of UN operations throughout the world since the early 1990s has produced mixed results at best. In less than twenty-five years, several 'generations' of peacekeeping have been devised, armies transformed and numerous studies conducted on means and ends of such operations. In this master thesis, I will contribute to this academic debate, though on a specific subfield, that is, efforts of UN transitional administrations in creating legitimate government. Nowadays, nearly all aspects of peace operations and post-conflict reconstruction are being discussed. Much of this literature is policy-oriented and often conducted by think tanks and governmental institutions that, learning from experiences, try to come up with 'best practices'. Instead, this research will be theoretical and historical on the one hand, combined with an empirical analysis of past policies on the other. The present analysis offers an innovative approach by focusing on the concept of legitimacy. As will be explained, legitimacy is essential for a government to function. In fact, although the challenge of creating legitimate governments is admitted reluctantly in the literature on interventions, a proper conceptualization of this problem is still missing.

The main question this research seeks to address is how the UN has tried to create legitimate governments in territories they administered. To elucidate, what kind of instruments did UN interim administrations use for the goal of building a domestic government with legitimacy and consent from the constituency of the 'host nation', and were they successful? To be sure, the proposed research focuses on government, on administrations, and not on equally interesting but less relevant issues of economy and security. It is not an analysis of military interventions, of economic reconstruction packages, or of the creation of a capitalist market. There will not be much attention for the policies of individual countries, nor for other international organizations (e.g. NATO, EU and OSCE) or NGOs involved in reconstruction processes. This research will neither go deeply into a discussion of the position of the UN in the international arena, nor how individual members (try to) shape its policies. Instead, the UN will be treated as a unitary actor operating in the international arena. The focus here is on UN administrations that pursue policies devised and carried out by UN officials, thereby circumventing the problem of the UN as a sum of its parts.

In the first chapter, I will conceptualize the problem. Subsequently, the literature on territorial administrations will be reviewed. This means that, firstly, the history of such administrations will be reviewed, and, secondly, current debates will be analyzed. This chapter then is a historiographical context, in the sense that it analyses the 'state of the art' on administering such territories. At the same time, it serves as a more general introduction to the topic of transitional administrations.

In the second chapter, focus will be on the theoretical question. The salient issue of creating good government or effective government has been researched frequently, but there is relatively little research that addresses the question of how such governments can be made legitimate. How can the UN, as external intervener, create a government that is legitimate in the eyes of the 'indigenous people' (the constituency of the 'host nation')? Elections have often been earmarked as the most suitable instrument. While some authors still cling to this concept<sup>1</sup>, practice has shown the many pitfalls of elections in unstable states.<sup>2</sup> In recent academic literature, this issue is acknowledged, but empirical research to alternatives for creating legitimacy is still scarce.<sup>3</sup> In fact, it is argued that past and current templates for statebuilding are too much rooted in a Western (Weberian) rational-legal conception of legitimacy. Several authors favor a more context-specific, subjective approach that fits better to local circumstances.<sup>4</sup> To address this issue thoroughly, a more theoretical chapter on legitimacy and creating legitimacy is necessary.

Next, an empirical analysis will follow. Therefore, I have chosen for two case studies. First, the United Nations Transitional Administration in East Timor (UNTAET), which was officially active from October 25, 1999 until independence of East Timor on 20 May 2002. The second case study is the United Nations Interim Administration Mission in Kosovo (UNMIK). Studying UNMIK is somewhat problematic, since it is still active, although in a very small capacity nowadays. Therefore, I have chosen to limit this case study in time, that is, from its establishment on 10 June 1999 until the declaration of independence of the Republic of Kosovo, on 17 February 2008. This declaration of independence, and hence the legal status of Kosovo, is still contested, yet, does serve as a good benchmark and eases comparison to the case of East Timor.

These case studies will follow in the third and fourth chapter. Here, the focus is on how the UN has tried to create a working government, more specifically, a legitimate government in the two territories. To make such an empirical analysis, I will examine relevant UN policy documents and take

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<sup>1</sup> Michael W. Doyle and Nicholas Sambanis, *Making War and Building Peace. United Nations Peace Operations* (Princeton and Oxford: Princeton University Press 2006); Joris Voorhoeve, *From War to the Rule of Law. Peacebuilding After Violent Conflicts*, Scientific Council for Government Policy (WRR) (Amsterdam: Amsterdam University Press 2007); Roland Paris, and Timothy D. Sisk (eds). *The Dilemmas of Statebuilding: confronting the contradictions of postwar peace operations* (New York: Routledge 2009); United States Institute of Peace (USIP), *Guiding Principles for Stabilization and Reconstruction* (Washington D.C.: United State Institute of Peace Press 2009).

<sup>2</sup> Michael Mann, *The Dark Side of Democracy. Explaining Ethnic Cleansing* (Cambridge: Cambridge University Press 2005); Toby Dodge, 'Iraq: The contradictions of exogenous state-building in historical perspective', *Third world quarterly* 27 (1) (2006), 187-200; Chiyuki Aoi, *Legitimacy and the use of armed force: stability missions in the post-Cold War era* (London: Routledge 2010).

<sup>3</sup> Bo Rothstein, 'Creating Political Legitimacy. Electoral Democracy Versus Quality of Government', *American Behavioral Scientist* 53 (3) (2009), 311-330; Robert Egnell, 'Winning Hearts and Minds? A Critical Analysis of Counter-Insurgency Operations in Afghanistan', *Civil Wars* 12 (3) (2010), 282-303; Geert Gompelman, *Winning Hearts and Minds? Examining the Relationship Between Aid and Security in Afghanistan's Faryab Province* Feinstein International Center, Tufts University (January 2011).

<sup>4</sup> Egnell, 'Winning Hearts and Minds?'; Gompelman, *Winning Hearts and Minds?*.

additional literature on the two administrations into account. After thoroughly researching these two case studies, empirics and theory can be combined to analyze how the case studies actually fit in with the theory. By subsequently comparing the two the case studies, it is possible to identify the reasons for success or failure of the UN administrations.

Finally, in the conclusion the main question of the UN's achievements in creating legitimate government in East Timor and Kosovo by means of UNTAET and UNMIK respectively will be answered. The proposed research as outlined thus aims to contribute to the current debate on interventions and reconstruction efforts by taking a new approach in which the focus is on the concept of legitimacy, combined with scrutiny of empirics, consequently combining them into an analysis.

## Chapter 1: Territorial Administration: History and Debates

The act of governing territory (temporarily) is just one of the many forms in which the UN has intervened in conflicts since its foundation in 1945. Usually, UN activities in (post-)conflict settings are classified as forms of UN peacekeeping or peace enforcement, made possible by Chapter VI and VII of the UN Charter. Administering territory by the UN is actually a phenomenon in its own right, born out of the mandate system of the League of Nations. At the same time, recent UN interim administrations like UNMIK and UNTAET have taken on extraordinary responsibilities and tasks. As a result, some authors have classified this practice as ‘fourth generation of peacekeeping’.<sup>5</sup> Two leading scholars in the field of International Relations, Michael W. Doyle and Nicholas Sambanis, argue that ‘the United Nations has proven to be a very ineffective peace enforcer, or war-maker, in the many intrastate, civil conflicts that emerged in the post-Cold War world’. Yet, so they state, ‘while the UN is very poor at “war”, imposing a settlement by force, it can be very good at “peace”, mediating and implementing a comprehensively negotiated peace’.<sup>6</sup> This bold statement remains to be analyzed in the present study for the cases of Kosovo and East Timor.

Study on peacekeeping relates to interesting discussions on humanitarian and military interventions, democratization, and statebuilding. Creating legitimate government is in fact a core element of statebuilding. Hence, I will first review the academic debate on interventions and statebuilding. As will be shown, how to create a legitimate government should be central in this discussion, but remains fundamentally underexposed. Next, I will go into the history of the practice of territorial administration, taking into account both the League of Nations and the UN. Instead of chapter VI and VII of the UN Charter, for present purposes Chapter XI, XII and XIII on ‘Non-Self Governing Territories’ and the Trusteeship System and Council are more interesting. In this chronological overview, the two cases UNMIK and UNTAET will be neglected, since they are subject of analysis in the third and fourth chapter. After sketching the history of international administration, I will outline current discussions on goals and means of such administrations.

The present research specifically concentrates on transitional administration, sometimes labeled as ‘(international) territorial administration’.<sup>7</sup> These administrations constitute a specific form of third party intervention. Some scholars compare them with previous practices of

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<sup>5</sup> Boris Kondoch, ‘The United Nations Administration of East Timor’, *Journal of Conflict and Security Law* 6 (2) (2001), 245-265; D. Silander, ‘The United Nations and Peace Building: Lessons From the UN Transitional Administrations in East Timor and Kosovo’, *Social alternatives* 28 (2) (2009), 23-28.

<sup>6</sup> Doyle and Sambanis, *Making War and Building Peace*, 2, 5.

<sup>7</sup> For a discussion on definitions, see 1.3.

colonialism.<sup>8</sup> According to the British scholar of law, Ralph Wilde, such comparisons are wrong. First, the actors in transitional administration are international, 'rather than individual states whose motives and actions are always to be questioned'. Second, they implement international law and policies, 'universally validated policies, rather than the particular agenda of certain states, as in colonialism'. Third, these international projects lean on international legal authority, namely authorization by the United Nations Security Council (UNSC).<sup>9</sup> While the debate on comparisons to colonialism is interesting, it is out of the scope of the present research to deal with the colonial past and (possible) similarities to UN interim administrations extensively. Nevertheless, there seems to be continuity in goals, as will be shown below.

### 1.1 The problem: statebuilding by intervention

Interventions by the international community in societies and states to restore order have since the end of the Cold War been provided with specific models for state (re)construction, i.e. democracy and capitalism. The collapse of the Soviet Union signified the theoretical and practical failure of communism, while Western liberalism, democracy, and market capitalism triumphed. Hence, this template became the dominant 'blueprint' for statebuilding efforts. This is all the more remarkable when one considers the spread of Communism in the 1970s, leading to numerous Marxist regimes throughout the Third World. Of course, the Western World tried to counter this trend, leading to frequent clashes in the Third World, so-called 'proxy wars'. In addition, global financial institutions helped to spread of the Western market-based economy from the early 1980s on. The International Monetary Fund and the World Bank proposed 'structural adjustment programs' to faltering and underdeveloped economies. Those economic reform programs entailed 'budget austerity and devaluation, price and trade liberalization, privatization and – in some cases – wholesale abolishment of public services'.<sup>10</sup> Demise of the Soviet Union signified a renewed sense of optimism in the Western world. The publications of Francis Fukuyama on the 'end of history' and the *Agenda for Peace* by then Secretary-General of the UN Boutros Boutros Ghali, followed in 1996 by *An Agenda for*

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<sup>8</sup>Kimberly Zisk Marten, *Enforcing the Peace. Learning from the Imperial Past* (New York: Columbia University Press 2004).

<sup>9</sup> Ralph Wilde, 'The Post-Colonial Use of International Administration and Issues of Legitimacy', *Proceedings of the 99<sup>th</sup> Annual Meeting of the American Society of International Law* 99 (2005), 38-42 (41); Ralph Wilde, *International Territorial Administration. How Trusteeship and the Civilizing Mission Never Went Away* (Oxford: Oxford University Press 2008) 422.

<sup>10</sup> Odd Arne Westad, *The Global Cold War. Third World Interventions and the making of our time* (Cambridge: Cambridge University Press 2007) 361.

*Democratization*, exemplify the mood back then.<sup>11</sup> A bright future loomed, which translated itself in a resurgence of UN operations throughout the world.

By now, one can reflect on the numerous operations that have been undertaken since the fall of the Berlin Wall. It has been noted above that the role and responsibilities of transitional administrations have increasingly expanded. In fact, this applies to the whole spectrum of interventions and ‘peace operations’ undertaken by the international community since the early 1990s. The Dutch historian Duco Hellema notes in this context a trend in which ‘the goals of peace missions shifted from achieving *negative* peace (ending violence), to *positive* peace (creating political and social relations that no longer give rise to violence)’.<sup>12</sup> Similarly, the two American political scientists Roland Paris and Timothy Sisk observe an evolution in ‘peacebuilding operations’. From ‘quick fixes’ such as ‘rapid elections and bursts of economic privatization’, attention has shifted ‘to constructing the institutional foundations for functioning postwar governments and markets’, in other words, statebuilding.<sup>13</sup>

Several schools of thought can be identified in the literature on intervention with regards to the objective of statebuilding. Those different views are in fact derivatives from the debate on the European history of state formation. The political scientist Hendrik Spruyt has categorized this debate in three broad positions.<sup>14</sup> Firstly, there are theories in which war is the catalyst for the development of the state. The renowned scholar Charles Tilly propagates this thesis most strongly, typified by his concise pose ‘War made the state, and the state made war’.<sup>15</sup> In essence, Tilly demonstrates how rulers centralized means of coercion and capital, which made state formation possible.<sup>16</sup> This view has been translated to the literature on intervention in the theory of ‘security first’.<sup>17</sup> In this reasoning, security, and especially a monopoly of violence, is an essential prerequisite for further state formation. Secondly, scholars emphasize economic factors. In this analysis, the change from feudalism to capitalism during the Industrial Revolution is the decisive step for the

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<sup>11</sup> Francis Fukuyama, ‘The End of History?’, *National Interest* 16 (1989) 3-18; A/47/277 - S/24111, *An Agenda for Peace. Preventive diplomacy, peacemaking and peace-keeping*, 17 June 1992; A/51/761, Boutros Boutros Ghali, *An Agenda for Democratization* (New York: United Nations 1996).

<sup>12</sup> Duco Hellema, ‘Humanitaire interventie en de verbreiding van de democratie’, 175-186 (178), in: Duco Hellema en Hilde Reiding (ed.), *Humanitaire interventie en soevereiniteit. De geschiedenis van een tegenstelling* (Amsterdam: Boom 2004). Original: ‘verschoven de doelstellingen van vredesmissies van het bewerkstelligen van *negatieve* vrede (het beëindigen van geweld) naar *positieve* vrede (het scheppen van politieke en sociale verhoudingen die geen aanleiding meer geven tot geweld)’.

<sup>13</sup> Roland Paris and Timothy D. Sisk, ‘Introduction: understanding the contradictions of postwar statebuilding’, 1-20, in: idem (eds.), *The Dilemmas of Statebuilding*.

<sup>14</sup> Hendrik Spruyt, ‘The Origins, Development, and Possible Decline of the Modern State’, *Annual Review of Political Science* 5 (2002), 127-149.

<sup>15</sup> Charles Tilly (ed.), *The Formation of National States in Western Europe* (Princeton: Princeton University Press 1975) 42.

<sup>16</sup> Charles Tilly, *Coercion, Capital, and European States AD 990-1992* (Cambridge and Oxford: Blackwell Publishers 1992).

<sup>17</sup> Amitai Etzioni, ‘Security First’, *National Interest* 88 (2007), 11-15 (12).

success of the European state.<sup>18</sup> As a result, scholars have argued that economic development should be the first goal of interventions.<sup>19</sup> Thirdly, Spruyt sets forth the institutional view on state formation, represented by the work of the Norwegian scholar Stein Rokkan.<sup>20</sup> In the literature on intervention, Roland Paris propagates this view most forcefully by arguing ‘Institutionalization before Liberalization’.<sup>21</sup> One might add another school of thought to the three positions laid out by Spruyt. That is the crucial role of ideas, particularly the Enlightenment regarding democracy. Likewise, various scholars emphasize cultural factors in the process of state formation by pointing to the influence of Christian religion, the Reformation and European technology.<sup>22</sup>

While those well-informed theories exist, the track record of statebuilding by intervention, or by transitional administrations, is disappointing, to put it mildly. Consequently, there is much research that argues that ‘international interveners have tried to do too much [or] too little’.<sup>23</sup> According to Paris and Sisk the main problem is not so much under-commitment of the international community, neither a lack of strategic coherence. Rather, ‘the deeper problem is an insufficient understanding of statebuilding’s complexities – in particular, its intrinsic tensions and contradictions’.<sup>24</sup> This ‘conflicted nature’ of statebuilding leads to a number of dilemmas, which ‘can only be managed, not resolved’.<sup>24</sup>

The British political scientist David Chandler, who has issued a number of thought-provoking and refreshing publications on the topic, discards such easy conclusions. In an edited volume, he makes a threefold classification of the various critiques. He discerns criticisms on policies, practices, and paradigms, which all seriously doubt means, ends, objectives, utility, necessity and possibility of statebuilding by intervention.<sup>25</sup> Though there are many erudite critiques by now, there are equally

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<sup>18</sup> Michael Mann, *The sources of social power. Volume I. A history of power from the beginning to AD 1760*, and *Volume II. The rise of classes and nation-states, 1760-1914* (Cambridge; Cambridge University Press 1986, 1993); Fareed Zakaria, *The Future of Freedom. Illiberal Democracy at Home and Abroad* (New York and London; W.W. Norton & Company 2003); Seymour Martin Lipset, ‘Some Social Requisites of Democracy: Economic Development and Political Legitimacy’, *The American Political Science Review* 53 (1959), 69-105.

<sup>19</sup> Paul Collier et. al., *Breaking the Conflict Trap. Civil War and Development Policy*, World Bank Policy Research Report (Oxford: Oxford University Press 2003); Susan L. Woodward, *Economic Priorities for Peace Implementation*, International Peace Academy Policy Paper Series on Peace Implementation (New York 2002).

<sup>20</sup> Peter Flora, Stein Kuhnle en Derek Urwin (eds.), *State Formation, Nation-Building, and Mass-Politics in Europe. The Theory of Stein Rokkan* (Oxford; Oxford University Press 1999) 95-128.

<sup>21</sup> Roland Paris, *At War’s End. Building Peace After Civil Conflict* (Cambridge: Cambridge University Press 2004).

<sup>22</sup> Timothy Earle, *How Chiefs Come to Power: The Political Economy in Prehistory* (Stanford: Stanford University Press 1997); George Steinmetz (ed.), *State/culture: the study of state-formation after the cultural turn* (Ithaca: Cornell University Press 1999); Patrick Carroll, *Science, Culture, and Modern State Formation* (Berkeley and Los Angeles: University of California Press 2006).

<sup>23</sup> David Chandler, ‘Introduction’, 1-14, in: idem (ed.), *Statebuilding and intervention. Policies, practices and paradigms* (London and New York: Routledge 2009); David Chandler, *International Statebuilding. The Rise of Post-Liberal Governance* (London and New York: Routledge 2010).

<sup>24</sup> Paris and Sisk, ‘Conclusion: confronting the contradictions’, 304-315 (309), in: idem (eds.), *The Dilemmas of Statebuilding*.

<sup>25</sup> Chandler (ed.), *Statebuilding and intervention*.

various positive reviews, such as the argument that ‘alternative ideologies to democracy (...) are no longer legitimate’, or the observation of ‘a normative consensus on the desirability of democracy’.<sup>26</sup>

The British scholar David Roberts notes in this respect that ‘the literature suggest that the solution is not to rethink the approach per se but to develop the existing model until it does succeed’. After all, recommendations of managing dilemmas, doing more, or doing less, still mean that the current templates of the possibility of statebuilding by interventions are accepted. In fact, so Roberts observes, ‘external intervention to help build post-conflict peace and stability is now a global governance norm’.<sup>27</sup> Professor of International Relations Beate Jahn adds that the ‘transition paradigm’ has quite a tradition. She argues that current efforts ‘rely on the same liberal assumptions identified as underpinning modernization theories and policies [of the Cold War era]’, generating ‘the same counterproductive political dynamics as their predecessors, ultimately producing enemies instead of allies and heightening insecurity instead of enhancing security’.<sup>28</sup>

Thus, one might conclude that there is an extensive debate on interventions, statebuilding efforts and transitional administrations with the goal of creating Western-style liberal, capitalist democracies. Despite this ongoing thorough debate, there is still one fundamental issue constantly overlooked: the issue of creating legitimate government. To be fair, the issue of gaining and creating legitimacy for the ‘host government’ is acknowledged in some academic literature and policy proposals.<sup>29</sup> The US Counterinsurgency Field Manual, for example, states unequivocally that ‘legitimacy is the main objective’.<sup>30</sup> Equally, Paris and Sisk define ‘postwar statebuilding’ as ‘the strengthening or construction of legitimate governmental institutions in countries that are emerging from conflicts’.<sup>31</sup> Yet, while mentioning the issue of legitimacy and creating legitimate governmental institutions, there are no further thoughts on how this should happen. In that respect, the recent study of the Organization for Economic Cooperation and Development (OECD) on state’s legitimacy is more encouraging.<sup>32</sup> Nevertheless, this study is still mostly concerned with policy recommendations and improving donors’ efforts. In the last part of the present analysis, more detail on these specific

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<sup>26</sup> Yossi Shain and Juan J. Linz, *Between States. Interim governments and democratic transitions* (Cambridge: Cambridge University Press 1995) 93; Karen Guttieri and Jessica Piombo, ‘Issues and Debates in Transitional Rule’, 3-34 (4), in: idem (eds.), *Interim governments. Institutional bridges to peace and democracy?* (Washington: United States Institute of Peace Press 2007).

<sup>27</sup> David Roberts, ‘Hybrid polities and indigenous pluralities. Advanced lessons in statebuilding from Cambodia’, 165-188 (168, 180), in: Chandler (ed.), *Statebuilding and intervention*.

<sup>28</sup> Beate Jahn, ‘The tragedy of liberal diplomacy’, 210-229 (211), in: Chandler (ed.), *Statebuilding and intervention*.

<sup>29</sup> Doyle and Sambanis, *Making War and Building Peace*, 30; Voorhoeve, *From War to the Rule of Law*; USIP, *Guiding Principles for Stabilization and Reconstruction*.

<sup>30</sup> Field Manual 3-24, Marine Corps Warfighting Publication 3-33.5, *Counterinsurgency* (Washington: Headquarters Department of the Army 2006) 1-21.

<sup>31</sup> Paris and Sisk, ‘Introduction’, 14.

<sup>32</sup> OECD, *The State’s Legitimacy in Fragile Situations. Unpacking Complexity* (Paris: OECD 2010).



recommendations of the OECD will be provided, after theory and practice on creating legitimate government have been researched thoroughly.

The challenging task of creating legitimate government is, or at least should be, the main objective of transitional administrations. When those administrations temporarily exercise control, they should take care that the administrative and governmental structures they set up gain legitimacy among the constituency of the 'host nation'. Such legitimacy is essential if one wants those newly created structures to be sustainable and to remain once the international intervening power, the transitional administration, disappears from the scene. In other words, this is the fundamental challenge of creating legitimate government by the instrument of transitional administration, which is the main question this research seeks to address. As the American scholars Karen Guttieri and Jessica Piombo Guttieri state in their edited volume: 'Creating domestic legitimacy through external trusteeship proves to be quite problematic'. While they claim that 'this is a theme that surfaces in many of the cases in the volume', none of these essays show a thoughtful conceptualization of legitimacy or profound analysis of this problematic challenge.<sup>33</sup>

In the next chapter, I will attempt such a conceptualization and analysis, in combination with some deeper reflections on state formation. As will be shown, the current policies on creating government are firmly rooted in Western interpretations of legitimacy, premised on a one-sided interpretation of the history of state formation. Recently, some alternatives have been proposed that seek to alter these erroneous guidelines. Before turning to that discussion, I will first go into the history of territorial administration and subsequently review current debates on this particular type of 'intervention' by the international community.

## 1.2 The history of international territorial administration

Scholars who deal with the subject of territorial administration by international actors start their analysis by referring to the Mandate System of the League of Nations and its administration of various territories. The League was instituted after the First World War, and had, amongst others, the responsibility to deal with international disputes, of which territorial claims were of course an important part. Here, only the few cases where the League actually took over government, and thus administered territory, will be reviewed.

In the Treaty of Versailles it was already stipulated that the Saar Basin should be administered by the League of Nations Governing Commission. This region hitherto belonged to Germany, but France was given the right to exploit its mines. This right was part of the costs Germany had to pay for waging war on France and for destroying French coal mines. The Governing

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<sup>33</sup> Guttieri and Piombo, 'Issues and Debates in Transitional Rule', 34.

Commission responsible for the administration was especially occupied with mediating between French and German interests. According to professor of law Carsten Stahn, this resulted in an administration with 'quasi-absolutist powers', responsible, or accountable, not to the people but to the League of Nations. As we shall see, this problem of accountability is in fact one of the main issues when an international power seizes (temporarily) control of a territory. Despite the neglect of local actors noted by Stahn, the inhabitants of the Saar Basin were given the right to vote on the future of the territory on 13 January 1935, already stipulated in the Treaty of Versailles. Being (former) Germans, the people choose for unification with Germany, which meant transferring authority back to Germany.<sup>34</sup>

Contrary to the Saar Basin, which was never intended to be permanent internationalized territory or an independent status, the Treaty of Versailles also provided for the creation of the Free City of Danzig. This city was also contested territory, with on the one hand (historical) claims by Germany, and Polish interests on the other. Here, the inhabitants favored either integration with Germany, or full sovereignty. Hence, between 1920 and 1939 the League administered the city in order to balance these competing interests, turning it into distinct judicial territory, an independent legal entity. While the League appointed a High Commissioner for control, Danzig had its own administration with full executive and legislative powers. Yet, Poland enjoyed certain privileges with respect to trade and the use of infrastructure. Therefore, the League of Nations served mainly as arbiter, responsible for dealing with legal disputes arising out of these complicated regulations. The special status of Danzig ended when German troops invaded Danzig on 1 September 1939.<sup>35</sup>

Following the end of the First World War, many more territories were subject to competing claims by different countries. Examples are the Danish-German border at Schleswig and parts of the Polish-German border in Eastern Prussia. An International Commission was instituted to organize plebiscites on the future status of these territories.<sup>36</sup> In other cases, the League of Nations exercised administrative powers temporarily. For example, an International Harbour Board administered the port in Memel (nowadays Klaipeda in Lithuania). Equally, the League decided to take control over Leticia for a year, a Colombian town invaded by Peru in 1933. While the status of the International Harbour Board remained contested and legally complicated, the goal in Leticia was straightforward,

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<sup>34</sup> Wilde, *International Territorial Administration*, 111-114; Carsten Stahn, *The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond* (Cambridge: Cambridge University Press 2008) 163-173; Eric De Brabandere, *Post-Conflict Administrations in International Law. International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice* (Leiden and Boston: Martinus Nijhoff Publishers 2009) 15-18.

<sup>35</sup> Stahn, *Law and Practice of International Territorial Administration*, 173-185; Wilde, *International Territorial Administration*, 114-127.

<sup>36</sup> De Brabandere, *Post-Conflict Administrations in International Law*, 18; Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press 2004) 21.

that is, to return a smooth transfer of authority back to Colombia.<sup>37</sup> Poland and Germany also clashed over the territory of Upper Silesia. In March 1921, the inhabitants of the region chose for unification with Germany, though by slight margin. This outcome led to an uprising of Polish inhabitants. Hence, the League set up another special committee, which decided to divide the territory along the lines of the outcome of the plebiscite.

Apart from these disputed territories, another important issue with respect to territorial administration in the period between the First and Second World War is the so-called Mandates System. The League of Nations stipulated this system in Article 22 of its Covenant. Because of the war, many former colonies were no longer under the jurisdiction, or administration, of a sovereign State, while the League considered the inhabitants 'not yet able to stand by themselves under the strenuous conditions of the modern world'. Yet, 'the well-being and development of such peoples form a sacred trust of civilisation'. Hence, 'the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League'.<sup>38</sup>

In other words, for the well-being of the people, the colonies and territories that formerly belonged to Germany and the Ottoman Empire should be administered by Western powers. Nevertheless, as the signatories to the Covenant acknowledged, not every colony or territory had the same level of development. Hence, a threefold Mandate System was composed: ' "A" class mandates for nations which were nearly ready to run their own affairs. "B" class mandates which would be run by the mandatory power. "C" class mandates for territories contiguous or close to the mandatory power which would be run as an extension of its own territory subject to certain restrictions'.<sup>39</sup> Interestingly, there was no direct reference to the principle of self-determination for these mandated territories. Instead, it was merely noted that they were administered 'until such time as they are able to stand alone'. To be sure, the Mandate system did not mean territorial administration by an international actor, but single states (Britain, France, Belgium, Japan) governed those territories. However, the League also decided to form a Permanent Mandates Commission, to which the

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<sup>37</sup> Chesterman, *You, The People*, 23-25; Stahn, *Law and Practice of International Territorial Administration*, 185-187; Wilde, *International Territorial Administration*, 127-129.

<sup>38</sup> *The Covenant of League of Nations*, Article 22; via:

[http://avalon.law.yale.edu/20th\\_century/leagcov.asp#art22](http://avalon.law.yale.edu/20th_century/leagcov.asp#art22), The Avalon Project. Documents in Law, History and Diplomacy, last visit: 19 April 2011.

<sup>39</sup> Tom Parker, *The Ultimate Intervention: Revitalizing the UN Trusteeship Council for the 21<sup>st</sup> Century* (Sandvika, Norway: Center for European and Asian Studies, Norwegian School of Management 2003) 7.

administering powers had to submit annual reports concerning the progress and development of the territories.<sup>40</sup>

Turning to the post-1945 period, two notorious examples of successful statebuilding, or international territorial administration, are the reconstruction of Germany and Japan right after the Second World War. Scholars mention these cases often, but equally note their exceptionality. Stahn explains that instead of an international actor administering territory, Germany and Japan are clear cases of occupation, complemented by an 'ideological motive, namely the will to plant democracy'.<sup>41</sup> Marina Ottaway further comments that 'first, the military defeat had fundamentally destroyed the power structure in both countries; and second, both countries had a history of rule by law and institutions, although not democratic ones'.<sup>42</sup> Hence, comparisons of contemporary statebuilding projects to Germany and Japan seem reasonable, but are actually quite wide of the mark.

The Second World War not only raised the issue of governing and reconstructing the defeated powers. Again, it had to be decided what to do with territories administered by these defeated powers. At the same time, the UN (as successor to the League of Nations) had to deal with the Mandate system. The settlement that eventually was formed consisted of two components. First, there was a Declaration Regarding Non-Self Governing Territories, outlined in Chapter XI of the UN Charter. This Declaration dealt with the issue of colonial administration, put mildly 'the administration of territories whose peoples have not yet attained a full measure of self-government'.<sup>43</sup> In fact, the declaration mainly confirmed the current practice of colonialism. While it noted the goal of self-government, there was no clear intention of attaining independence.<sup>44</sup>

Second, Chapter XII and XIII provided for an International Trusteeship System with a Trusteeship Council. Here, the goal was independence, or self-government. However, while intended to bring all colonies and dependencies in this system, it only affected the territories of the former League's Mandates. Already in the 1950s, commentators criticized those shortcomings, just as they noted the lack of clear definitions and usable instruments, and the unsure role of the Council.<sup>45</sup> Nevertheless, with the benefit of hindsight one can conclude that the Trusteeship System and the Council have proven to be successful. In total, the Trusteeship System administered eleven

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<sup>40</sup> Parker, *The Ultimate Intervention*, 7-11; Stahn, *Law and Practice of International Territorial Administration*, 73-91.

<sup>41</sup> Stahn, *Law and Practice of International Territorial Administration*, 125.

<sup>42</sup> Marina Ottaway, 'Rebuilding State Institutions in Collapsed States', *Development and Change* 33 (5) (2002), 1001-1023 (1017).

<sup>43</sup> *The United Nations Charter*, Chapter XI Declaration regarding non-self governing territories, Article 73, via: <http://www.un.org/en/documents/charter/chapter11.shtml>, last visit: 19 April 2011.

<sup>44</sup> Chesterman, *You, The People*, 38.

<sup>45</sup> Chetlur Venkatramana Lakshmi-Narayan, *Analysis of the Principles and System of International Trusteeship in the Charter* (Geneva: Imprimeries Populaires 1951) 199-200; F.C.E. Toussant, *The Trusteeship System of the United Nations* (London: Stevens and Sons Limited 1956) 248-254; George Thullen, *Problems of the Trusteeship System. A Study of Political Behavior in the United Nations* (Geneva: Libraire Droz 1964) 118.

territories, which all achieved independence. The last one was Palau on 10 November 1994, which practically terminated the Trusteeship Council, though it still exists nowadays on paper.

While the International Trusteeship System appears to be similar to the League's Mandates system, Stahn observes an important difference. Apart from the fact that the trust territories actually gained independence, the language in Chapter XII of the UN Charter gives evidence of a growing awareness of equality of people, by stressing this equality and the inhabitants' freedom of expression.<sup>46</sup> Nevertheless, already in 1951 an analyst claimed that the Trusteeship System gave evidence of a 'European approach to this problem [of dependent territories] (...), [which] has been until recently generally coloured by the belief that Western Civilisation represents the last world in the field of cultural development, and that the weaker peoples of Asia and Africa should be led to adopt this Civilisation'.<sup>47</sup>

While the International Trusteeship System stands out as the prime example of territorial administration during the second half of the 20<sup>th</sup> century, there have been more efforts by the UN in this field. An early example is the transfer of authority from the Netherlands to Indonesia in West Irian. To facilitate this transfer, the United Nations Temporary Executive Authority (UNTEA) was formed, active from October 1962 until May 1963. Interesting about this case is that the inhabitants were not consulted on the question of who would exercise administrative control over them.<sup>48</sup> The Dutch scholar of international law Eric de Brabandere claims UNTEA was an 'important historical precedent', since the UN acted as administering power outside the Trusteeship System for the first time and took on a wide range of powers. Full authority was vested within UNTEA, which meant that it had to replace Dutch officials, could issue new laws, and amend existing ones. However, Stahn and Simon Chesterman contest De Brabandere's claim. They point to the earlier UN operation in Congo (ONUC; 1960-1964), which was designed 'to assist the Congolese government in the restoration of order and security after the withdrawal of the Belgian colonial authorities from the newly independent territory'. While intended to be a military operation, ONUC eventually functioned as executive authority, undertaking activities in 'a broad range of areas, including agriculture, communications, education, finance, foreign trade, health and public administration' and exercising 'extensive policing powers in the absence of the local central authorities'.<sup>49</sup>

There are a number of other examples of the UN taking on governmental responsibility, or exercising de facto administrative authority. One can think of the operations in South-West Africa (later changed to Namibia) in 1967 and 1989-1990, and the second United Nations operation in

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<sup>46</sup> Stahn, *Law and Practice of International Administration*, 92-96.

<sup>47</sup> Lakshmi-Narayan, *Analysis of the Principles and System of International Trusteeship*, 197.

<sup>48</sup> Wilde, *International Territorial Administration*, 168-170.

<sup>49</sup> Chesterman, *You, The People*, 83-84; Stahn, *Law and Practice of International Administration*, 236-237, 244-245.

Somalia (UNOSOM II). Missions like ONUC and UNOSOM II give evidence of an 'evolution in the granting of administrative powers to international actors in the context of comprehensive peacebuilding missions'.<sup>50</sup> Another important UN operation in the early 1990s was the United Nations Transitional Administration in Cambodia (UNTAC). UNTAC was the result of negotiations by formerly warring parties, stipulated in the Paris Agreement on Cambodia in October 1991. It was to be a peacekeeping force responsible for 'ensuring "a neutral political environment", conducive to free and fair elections'.<sup>51</sup> In fact, UNTAC exercised authority in Cambodia during a 'transitional period' from February 1992 to September 1993, as provided for by UNSC Resolution 745.<sup>52</sup> According to Doyle and Sambanis, it was a success story, since the mission succeeded in establishing a government that was both legitimate and sovereign. They base their claim on legitimacy on the fact that the government was elected.<sup>53</sup> This is a rather remarkable statement when considering the opinions of other scholars. There seems to be a general understanding that UNTAC indeed succeeded in its goal of facilitating elections, but that it ultimately failed in the long run.<sup>54</sup> While there was a peaceful atmosphere during the elections in May 1993, the outcome did not prove to be lasting. A few years later, Cambodia had reverted to civil conflict. This fact clearly belies the statement that the government was legitimate. After all, if it were legitimate, the outcome would have been accepted and not led to renewed fighting. The main lesson for the UN was thus that a narrow focus on elections was not enough for producing stable and legitimate government.

The international administration in Bosnia-Herzegovina [BiH] was another notorious case in which the international community gained hitherto unforeseen powers. After signing the Dayton Peace Agreements in December 1995, a High Representative was appointed to facilitate its implementation. This specific case is actually too complicated to describe, let alone analyze, in a few sentences. What stands out is that the constitutional structure of BiH created by the Dayton Peace Agreements seriously hampered reconstruction efforts. In addition, commitment of multiple organizations like the UN, EU, NATO and OSCE clearly frustrated the goals of administration. Each organization with its own mission and its own respective mandate seriously disadvantaged the authority of the High Representative in the early years of the mission. Heavy involvement of the international community went along with creating domestic institutions that had to provide for a

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<sup>50</sup> De Brabandere, *Post-Conflict Administrations in International Law*, 25, 30-31.

<sup>51</sup> Mats Berdal and Michael Leifer, 'Cambodia', 32-64 (41), in: Mats Berdal and Spyros Economides (eds.), *United Nations Interventionism 1991-2004* (Cambridge: Cambridge University Press 2007).

<sup>52</sup> S/RES/745, 28 February 1992.

<sup>53</sup> Doyle and Sambanis, *Making War and Building Peace*, 221; Aurel Croissant, 'International Interim Governments, Democratization, and Post-Conflict Peace Building: Lessons from Cambodia and East Timor', 217-238 (230), in: Guttieri and Piombo (eds.), *Interim governments*.

<sup>54</sup> Chesterman, *You, The People*, 73-75; De Brabandere, *Post-Conflict Administrations in International Law*, 28-30; Stahn, *Law and Practice of International Territorial Administration*, 269-279.

legitimate government. Similar to the reconstruction process in Cambodia, the main instrument for such legitimation was elections. However, the result was democratically elected war criminals, who obstructed the peace process.<sup>55</sup> Moreover, the extraordinary powers vested in the High Representative from 1997 on, clearly created problems of accountability. BiH then stands out as a prime example of the difficulties of effectively administering post-conflict territories by the international community. It plainly reveals the fundamental problem of creating legitimate government when international actors are in control. In the same region, the UN also took temporarily control over contested territory between Croatia and Serbia. Resolution 1037 of the UNSC provided for the United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium (UNTEAS), operational from January 1996 until January 1998.<sup>56</sup> UNTAES proved to be successful in its straightforward goal, integration of the territory into Croatia.<sup>57</sup>

The new millennium has witnessed somewhat a relapse in territorial administration by the international community. Yet, scholars note the United Nations Assistance Mission in Afghanistan (UNAMA). UNAMA was based on the concept of 'light footprint' as envisaged by Lakdar Brahimi. This concept of Brahimi entailed that 'ownership' of the Afghans was key in the reconstruction process. The UN should limit its involvement and merely provide assistance to Afghan leadership where necessary. UNAMA then is no clear example of territorial administration by the international community. Instead, the Afghan government is responsible for administration of the country, and the various goals of democratization, justice, economic (re)construction, and security. However, multiple insurgent forces, warlords, and clans still (violently) challenge Karzai's government, which points to its fundamental lack of legitimacy. Moreover, the meager results thus far have generated renewed debate over the proper role, and responsibility, of the international community. Disappointing outcomes in Iraq also spurred this debate. While the counterinsurgency campaign here does not lend itself for easy comparison with territorial administration, the 'Coalition of the Willing' did temporarily seize control over the country and carried out administration from early 2004 until June 2004. However, similar to the case of Afghanistan, the 'Coalition of the Willing' intended to let the Iraqis take control over their own 'reconstruction process'. Yet, the government of Iraq also remains contested and violently challenged, equally pointing to a severe crisis of its legitimacy.

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<sup>55</sup> Richard Caplan, *A New Trusteeship? The International Administration of War-Torn Territories*, Adelphi Paper No. 341 (Oxford: Oxford University Press/International Institute for Strategic Studies, 2002) 41; Richard Caplan, *International Governance of War-torn Territories: Rule and Reconstruction* (Oxford: Oxford University Press 2005) 122.

<sup>56</sup> S/RES/1037, 15 January 1996.

<sup>57</sup> Chesterman, *You, the People*, 70-72; De Brabandere, *Post-Conflict Administrations in International Law*, 33-35.

### 1.3 Current debates on territorial administrations

The preceding paragraph was about the history of 'international territorial administration'. According to Wilde, 'territorial administration' is 'a formally-constituted, locally-based management structure operating with respect to a particular territorial unit, whether a state, a sub-state unit or a non-state territorial entity'.<sup>58</sup> Stahn defines 'international territorial administration' as 'the exercise of administering territory by an international entity for the benefit of a territory that is temporarily placed under international supervision or assistance for a communitarian purpose'.<sup>59</sup> Wilde rejects such a definition that emphasizes the temporal aspect of international administrations: 'To label ITA [international territorial administration] as necessarily "temporary," "interim," "transitional," and so forth, ignores those projects in which ITA's temporal duration is conceived as permanent (e.g., Danzig) or left open (e.g., Bosnia and Herzegovina)'.<sup>60</sup> While Wilde's observation might be true for some cases, this nuance is discarded here. The present research is concerned with UN transitional administrations, meaning those international administrations that try to realize a transition in government by temporarily administering and taking control. Since scholars disagree about the precise definitions of the subject they are dealing with, there is equally a variety of classifications and typologies.

In their volume *Between States*, the two political scientists Yossi Shain and Juan Linz study the role of interim governments in democratic transitions. They discern four 'ideal types'. First, (opposition-led) revolutionary provisional governments, which follow after the old regime is ousted from power. Second, 'power-sharing interim governments' in which both the authoritarian incumbent government and the democratic opposition take seat. Third, in 'incumbent caretaker governments' members of the outgoing elites take care of the transfer of power. Fourth, there are international interim governments which 'direct and monitor the process of democratic change', typically through the aegis of the United Nations. In essence, their typology is thus based on who is in power during transition, either supporters or opponents of the previous regime, or total outsiders.<sup>61</sup>

Guttieri and Piombo take up this typology in their edited volume on international interim governments. They define an 'interim regime', as 'an organization that rules a polity during the period between the fall of the ancien régime and the initiation of the next regime'. They expand the concept of international interim governments by discerning between administrative, executive, and supervisory authority.<sup>62</sup> The amount of power exercised by the international actor thus founds the

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<sup>58</sup> Wilde, *International Territorial Administration*, 21.

<sup>59</sup> Stahn, *Law and Practice of International Territorial Administration*, 2-3.

<sup>60</sup> Ralph Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', *American Journal of International Law* 95 (3) (2001), 583-606 (605).

<sup>61</sup> Shain and Linz, *Between States*, 5, 93.

<sup>62</sup> Guttieri and Piombo 'Issues and Debates in Transitional Rule', 16.



typology. The British professor Richard Caplan also uses such a classification. He categorizes 'on the basis of the degree of the authority that the international community assumes in each case'.<sup>63</sup> Chesterman on the contrary, bases his typology on the goals of international administrations. He argues that 'more important than the amount of power exercised, is its purpose and trajectory'.<sup>64</sup> Consequently, Chesterman identifies five different types of operations, that is, decolonization, transfer of territory, elections, peace process and state failure.

Wilde's conceptualization of 'international territorial administration' as a distinct policy institution is also worth considering. Although the international actors, legal bases, means and goals may differ, Wilde argues that there is a clear continuity in the various types of international administration, ranging from colonialism to current UN transitional authorities. He states that 'these institutions constitute a family because they involve a common activity performed in pursuance to a common range of purposes, although these purposes vary significantly both within and between the different institutions'. What unites those different international administrations is the commonality of displacing local actors in the activity of administration. International administrations are called upon to deal with either a sovereignty problem or a governance problem. Responding to a sovereignty problem means that the administration is concerned with the status of a territory or the identity of local actors exercising control. When the administration is primarily concerned with the quality of governance, it responds to a (perceived) governance problem, closely related to 'statebuilding or nation building'.<sup>65</sup>

Wilde's views on international actors displacing local ones relates to another discussion on why international administration are used. Apart from debates over means and goals, it has been said that those administrations fill a (perceived) administrative vacuum.<sup>66</sup> There is either a lack of governance, or a lack of good governance, to be solved by international actors. However, Wilde rightly points out those international actors often create this vacuum themselves. In the case of West Irian for example, existing authorities were dismissed and replaced by international ones.<sup>67</sup> Moreover, it often assumed, or even argued, that there is a political vacuum when international actors arrive.<sup>68</sup> Such an assumption is false. While there might be a malfunctioning government or even a collapse of state structures, this does not mean that there is no (political) power anymore.

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<sup>63</sup> Caplan, *A New Trusteeship?*; Caplan, *International Governance of War-torn Territories*.

<sup>64</sup> Chesterman, *You, The People*, 57.

<sup>65</sup> Wilde, 'Post-Colonial Use of International Administration', 38-42; Wilde, *International Territorial Administration*, 233-234, 430; Wilde, 'From Danzig to East Timor and Beyond'.

<sup>66</sup> Caplan, *International Governance of War-torn Territories*, 93.

<sup>67</sup> Wilde, *International Territorial Administration*, 203-207, 226, 364.

<sup>68</sup> Croissant, 'International Interim Governments' 237; Lenard J. Cohen, 'State Building before Statehood: Kosovo's Evolution from and Interim Polity to "Conditional Independence"', 239-261 (242), in: Gutteri and Piombo (eds.), *Interim governments*.

Nevertheless, so Chesterman reasons, if the 'local population had the military and economic wherewithal to provide for their security and economic development then a transitional administration would not have been created'.<sup>69</sup> Such reasoning is not only contradictory, but also misses the point. The so-called vacuum is often a presumption, rather than an empirical observation. In addition, improving governance or (temporarily) administering is nearly always a political decision, driven rather by the 'supply side' than the 'demand side'. In fact, 'the supply-driven nature of international assistance' is noted by Chesterman himself: 'Assistance is not merely more responsive to international than local need, the timeline on which it is available tends to reflect the fickle interests of donors rather than growing capacity on the ground'.<sup>70</sup>

The debate outlined above on the perceived administrative vacuum and displacement of local actors relates to a bigger issue concerning means and ends of transitional administrations. Two issues, or concepts, are of prime importance for present purposes and in fact approximate the fundamental problem of creating legitimate governments by international actors. Those two issues, or concepts, are 'accountability' and 'ownership'. In short, the problem is that a lack of ownership of local actors in reconstruction processes not only hinders the objective of building local capacity, but also builds government and institutions without participation of local actors. As a result, those externally created institutions lack domestic legitimacy. The fact that international actors are unaccountable to the constituency of the host nation further aggravates this problem.

To start with ownership, Chesterman and De Brabandere argue that it surely is the end of any transitional administration, but cannot be the means. According to Chesterman, the reconstruction process should go through a period of 'benevolent autocracy', to which he adds that current transitional administrations have to be more 'colonial' in character. 'Ownership' is mostly a 'buzzword', characterized by its fuzziness and 'lacking in specified content'. Consequently, he criticizes the international efforts in Afghanistan, in which 'ownership' is key to the reconstruction process, and invokes the reconstruction of Germany after the Second World War as a successful example without 'ownership'. Instead of 'ownership', both Chesterman and De Brabandere assert that consultation with local actors might be necessary.<sup>71</sup> It has however already been argued above that such comparisons to Germany are misleading. Moreover, while the frustrating experiences with statebuilding in Afghanistan might prove Chesterman's point, it is equally clear that neglect of local knowledge and know-how produces disastrous results as well. In a fascinating book, the American political scientist James C. Scott gives 'a convincing account of the logic behind the failure of some of

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<sup>69</sup> Chesterman, *You, The People*, 5-6, 128, 143.

<sup>70</sup> Simon Chesterman, 'Ownership in Theory and in Practice: Transfer of Authority in UN Statebuilding Operations', *Journal of Intervention and Statebuilding* 1 (1) (2007), 3-26 (19).

<sup>71</sup> Chesterman, *You, The People*, 9, 12, 45, 126-153; Chesterman, 'Ownership in Theory and in Practice', 10, 20; De Brabandere, *Post-Conflict Administrations in International Law*, 300-301.

the great utopian social engineering schemes of the twentieth century'. He demonstrates that local know-how and practices are often ignored, precisely because they do not fit into the developed schemes for reconstruction and state-building, which are based on unified and standardized principles.<sup>72</sup>

In a recent article, the British political scientist David Chandler comments on the concept of 'ownership', which he conceptualizes as a 'process of deferring policy responsibility'. He argues that there is a trend noticeable in which responsibility of the efforts of exogenous statebuilding is being transferred to the 'host nation', further aggravated by a 'lack of strategic policy direction':

At the same time as it is asserted that failing states lack the capacity to help themselves, they are to carry the responsibility not for developing and deciding on policy, but for providing the 'coherence' lacking in external actors. The obvious contradiction then arises between the self-governing autonomy necessary for national coordination and the assumption that external intervention is essential to facilitate and guide this process and to strengthen coordinating institutions. (...) Far from Western powers and institutions projecting a clear and accountable set of policy directives, the assertion of external power is presented as merely one of facilitating, empowering, and capacity-building non-Western-states. The projection of Western power takes the form of a non-political discourse where political interests are held to be subservient to the technical expertise of administration. This creates artificial state institutions.<sup>73</sup>

The other main problem in transitional administrations is the lack of accountability of international actors. In the words of Caplan:

International administrations, like protectorates and trusteeships before them, derive their legitimacy in part from the notion of trust. 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. To establish international administration on any other basis primarily would constitute exploitation. (...) Trust, in turn, is assured through the principle of accountability: the idea that a trustee must be responsible for its actions.<sup>74</sup>

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<sup>72</sup> James C. Scott, *Seeing Like a State. How Certain Schemes to Improve the Human Condition Have Failed* (New Haven and London: Yale University Press 1998).

<sup>73</sup> David Chandler, 'The liberal peace. Statebuilding, democracy and local ownership', 77-88 (81, 86-87), in: Shahrbanou Tadjbakhsh (ed.), *Rethinking Liberal Peace. External models and local alternatives* (New York: Routledge 2011).

<sup>74</sup> Caplan, *A New Trusteeship?*, 57-58.

Such accountability is clearly lacking in international administrations, since they are only responsive to an international audience, not to the domestic one, the inhabitants of the territory. Caplan argues nonetheless that such international administrations cannot function as governments accountable to their citizens. Since they are internationally sanctioned, they have a legitimate basis. Yet, international legitimacy of UN operations does not create domestic legitimacy of newly instituted governments. In other words, the fact that the UNSC authorizes a mission does not mean that the constituency of the 'host nation' gives consent to a newly created governmental structure.<sup>75</sup>

To cope with this problem, elections are often earmarked as the most suitable mechanism. In current Western thought, elections serve as the key instrument for legitimation. Moreover, holding elections has additional advantages. First, they serve as exit strategy. Once a newly elected government is in place, the transitional administration can leave, as the case of UNTAC exemplifies best. Second, they serve as some sort of education in non-violent political activity. Third, 'elections provide a quantifiable measure of international activity (...) In a place where significant progress seems unlikely in the short term, elections provide instant gratification'.<sup>76</sup> They thus mainly serve a critical international audience, while they have little meaning for the domestic audience.<sup>77</sup> By now, not only scholars argue that holding elections too early produces undesirable results and that just elections is not enough for durable outcomes of a reconstruction process. Also governmental studies acknowledge this fact.<sup>78</sup> Yet, the assumption of elections as the main instrument for legitimation remains largely uncontested, as evidenced by such statements like 'liberal democracy has become the only acceptable form of the *Rechtsstaat*, and the holding of democratic elections has acquired the status of a natural right'.<sup>79</sup>

#### 1.4 Conclusion

The practice of international territorial administration is a phenomenon with quite a history. Already right after the First World War, the League of Nations took on the responsibility of governing disputed territory. The United Nations continued this practice after the Second World War. Form, substance, means, and ends of such administrations increasingly proliferated in the second half of the 20<sup>th</sup> century, especially in the last decade. As a result, scholars disagree about proper conceptualizations of such administrations, debating means, ends, and legal aspects. The present research is specifically concerned with transitional administrations by the UN, a specific form of

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<sup>75</sup> Lindsey Cameron and Rebecca Everly, 'Conceptualizing the Administration of Territory by International Actors', *The European Journal of International Law* 21 (1) (2010), 221-244 (236).

<sup>76</sup> Chesterman, *You, The People*, 205-230

<sup>77</sup> Guttieri and Jessica Piombo 'Issues and Debates in Transitional Rule', 21.

<sup>78</sup> Voorhoeve, *From War to the Rule of Law*, 65; USIP, *Guiding Principles for Stabilization and Reconstruction*, 8-127.

<sup>79</sup> Shain and Linz, *Interim governments*, 14. Cf.: A/51/761, *An Agenda for Democratization*, 1-2.

intervention of the international community. Those administrations seek to create legitimate governments by temporarily seizing control, or rather, by temporarily functioning as government. As might be read from this wording, there is fundamental contradictory element in transitional administrations. This fundamental contradiction is the main problem this research seeks to address.

Wilde conceptualized this problem foremost as the practice of ‘displacing local actors in the act of territorial governance’, a commonality of all international administrations. Others have approached this problem from the concepts of ownership and accountability. A scholar like Chesterman argues that ownership can only be the end and surely not the means, while Caplan deems the international sanctioning of transitional administrations sufficient to resolve the issue of accountability. However, while those administrations may indeed enjoy international legitimacy, this does not guarantee consent from the constituency. Moreover, the decision to intervene or to set up a transitional administration is often a political decision of the so-called ‘supply side’. Hence, some scholars also dispute international legitimacy understood by others. For example, one can conceptualize UNMIK as a case of transitional administration for the benefit of the Kosovars and legitimized by the international community through a UNSC Resolution. However, one could also argue that it is a clear case of intervention by force, or even ‘empire lite’, meaning a new form of imperial rule.<sup>80</sup>

The main instrument to enhance domestic legitimacy is elections, though it is clear by now that they have many negative side effects. Moreover, they often fall short in creating legitimacy, as for example the violent challenges to the Iraqi and Afghan government demonstrate. The issue of legitimacy appears to be the most salient issue concerning the practice of building government by the international community. Taking into account the discussion on statebuilding and intervention, this aspect is consequently overlooked. Some academic literature and policy proposals acknowledge that creating legitimacy is crucial to functioning government, but they lack a fundamental discussion of the concept. Nevertheless, some scholars have merited the issue of creating legitimacy recently. The next chapter will address this issue in the context of statebuilding.

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<sup>80</sup> Michael Ignatieff, *Empire Lite. Nation Building in Bosnia, Kosovo and Afghanistan* (London: Vintage 2003).

## Chapter 2: Political Legitimacy

Discussions on legitimacy stretch across a variety of disciplines. Psychologists, sociologists, legal experts, philosophers, historians and political scientists are all concerned with conceptualizing and defining the seemingly ungraspable notion of the essence of legitimacy. Often, the works of Max Weber are not just a starting point in this respect. As the American political theorist John H. Schaar puts it: 'His [Weber's] exposition of the three types of authority, or the three grounds upon which claims to legitimate authority can be based, has the same status in social science that an older trinity has in Christian theology'.<sup>81</sup> Nonetheless, a close reading of different works on legitimacy makes clear that it is necessary to go beyond Weber and his rational-legal conceptualization of legitimacy.

This chapter has a threefold goal and accompanying structure. First, I will conceptualize the notion of legitimacy. Focus will be on the descriptive/empirical, perhaps even subjective, conceptualization of legitimacy. This means that the normative/philosophical point of view, and thus the moral bases and implications, will be discussed less. Second, the discussion on creating legitimacy will be reviewed. Regardless of lack of attention for legitimacy in literature on statebuilding, scholars have identified several mechanisms for creating legitimacy, most importantly carrots and sticks. Those presumed instruments are however firmly rooted in a one-sided interpretation of Western history. Therefore, I will reconsider this history of state formation. Third, I will go into the question of how to transfer legitimacy, and thus how to create legitimate government. The aim in the third part of the chapter is thus to highlight the different alternatives of scholars to current ideas on creating legitimacy. Again, it appears that a narrow interpretation of Western practices leads to wrong conclusions and ill-informed proposals. What thus follows is an analysis of various accounts on political legitimacy, across disciplines, trying to capture not only what legitimacy is, but also the contemporary discussion on how to create legitimacy in relation to statebuilding.

### 2.1 Conceptualizing legitimacy

Browsing the state of research on legitimacy, one encounters a wide variety of examinations across disciplines, with an equal variety of conceptualizations and debates. Here, I will try to capture the most important debates on the issue and try to answer what makes legitimacy. First, attention will be paid to the dichotomy of a normative and an empirical/descriptive interpretation of legitimacy (2.1.1). Second, I will pay attention to the different conceptualizations of legitimacy (2.1.2). Is the focus on the individual, the cognitive and subjective experience of legitimacy, or on the practical implications of the exercise of legitimacy by the ruler, the state or the government? Is it a matter of

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<sup>81</sup> John H. Schaar, 'Legitimacy in the Modern State', 104-133 (104), in: William Connolly (eds.), *Legitimacy and the State* (Oxford: Basic Blackwell Publishers 1984).

beliefs and norms or of lawfulness? In short, what do these different avenues of research add to an understanding of the concept of legitimacy?

### 2.1.1 Normative vs. descriptive

Before discussing the arbitrary, and perhaps even artificial, distinction between a normative and empirical/descriptive conceptualization of legitimacy, it is useful to first point to some sort of single denominator, a basic commonality. Without setting proper boundaries, it seems to be clear that legitimacy entails something like 'rightful rule', something that is morally valid, appropriate, in accordance with norms and/or grounded by shared beliefs.<sup>82</sup> The notion of 'rightfulness' seems to be the glue that holds the variety of conceptualizations of legitimacy together, and definitions of legitimacy flow from this shared understanding.<sup>83</sup> Going deeper into these different conceptualizations, it appears there are two main approaches to studying and conceptualizing legitimacy.

The British political scientist Rodney Barker argues that political theorists and philosophers are concerned with the moral basis of obedience and disobedience. Likewise, 'writers on law and constitutional theory' focus on this normative character of legitimacy. Historians and political scientists however, are rather interested 'only in whether the claim is accepted, and by whom and with what consequences'.<sup>84</sup> The British sociologist Beetham makes a similar distinction between legal experts, philosophers and social scientists. Whereas the former two focus on legal validity and moral justifiability, the latter are concerned with 'identifying the empirical consequences that legitimacy has for the character for power relations'.<sup>85</sup> While moving beyond the dichotomy in his own analysis, the Dutch philosopher Thomas Fossen also mentions the distinction between 'de jure' and 'de facto' legitimacy:

legitimacy *de jure* means an authority's *being* legitimate with respect to valid norms, and legitimacy *de facto* means an authority's being *taken to be* legitimate. As it is usually conceived, the distinction between these senses of legitimacy coincides with a division of labor between philosophy and the social sciences. Political legitimacy in the normative sense refers to some

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<sup>82</sup> Bruce Gilley, *The Right to Rule: How States Win and Lose Legitimacy* (New York: Columbia University Press 2009) 3.

<sup>83</sup> For such definitions, see: Blandine Kriegel,, 'The legal and sociological construction of norms', 21-28 (21), in: Chris Thornhill and Samantha Ashenden (eds.), *Legality and Legitimacy: Normative and Sociological Approaches* (Baden-Baden: Nomos 2010); Gilley, *The Right to Rule*, 3; David Beetham, *The Legitimation of Power* (Basingstoke and London: Macmillan 1991) 5; Rodney Barker, *Political Legitimacy and the State* (Oxford: Clarendon Press 1990) 11; Tom R. Tyler, 'Psychological Perspectives on Legitimacy and Legitimation', *Annual Review of Psychology* 57 (2006), 375-400 (375); Mark C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches', *The Academy of Management Review* 20 (3) (1995), 571-610 (574).

<sup>84</sup> Barker, *Political Legitimacy and the State*, 11.

<sup>85</sup> Beetham,, *The Legitimation of Power*, 5.

kind of *normative status* of political institutions—the “right to rule.” (...) The descriptive conception of political legitimacy, in contrast, usually refers to the beliefs or attitudes of individuals or social groups toward some form of political institution. Under what conditions are individuals or groups likely to believe the state to be legitimate? (...) According to this traditional division of labor, the *de facto* sense of legitimacy (the efficacy of a certain kind of beliefs or attitudes) is captured by a descriptive conception which serves the aims of empirical description and causal explanation, which is the specialty of social science, whereas the *de jure* sense of legitimacy is captured by a normative conception for the purpose of prescription, the concern of political philosophers.<sup>86</sup>

This ‘conventional antinomy between normative and sociological approaches’ is also addressed by the British political scientist Chris Thornhill. However, Thornhill discards the presumed distinction since it rests on ‘false constructions’. By elaborating on the ‘evolution’ of constitutions and constitutional rights, he shows that the two different approaches are in fact complementary: ‘normatively weighted debates about legitimacy have profoundly shaped the ways in which power is perceived and applied, and normative theories of legitimacy are integrally interwoven with and so directly articulate and consolidate the factual and historical conditions of power and legitimacy’.<sup>87</sup> Thornhill’s suggestion of normative and explanatory approaches being complementary does indeed seem a fruitful direction of research. It surely needs to be taken into account when considering how to create legitimacy. Before turning to that discussion, some further comments on various analyses of legitimacy is in order.

### 2.1.2 Analyzing legitimacy

The Weberian trinity on the types of legitimate domination can be summarized as legitimacy based on rational-legal grounds, tradition, and charisma. While such a clear demarcation might seem a useful starting point, both Beetham and Fossen explain the shortcomings of Weber’s conceptualization. Weber grounded his conception of legitimacy in people’s beliefs in legitimacy. He considered the normative question, thus the moral validity and bases of such beliefs, less important. As Fossen and Beetham explicate, after Weber many sociologists focused merely on this notion of belief. According to Beetham, this has led to ‘reductionist conclusions that can be drawn from the Weberian definition of legitimacy’. Therefore, Beetham proposes his own trinity of legitimacy. He points to the multi-dimensional character of legitimacy by considering both normative and empirical/explanatory aspects. In trying to explain the legitimation of power, he classifies three

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<sup>86</sup> Thomas Fossen, *Political Legitimacy and the Pragmatic Turn* (forthcoming 2011) 20; emphasis in original.

<sup>87</sup> Chris Thornhill, ‘Towards a historical sociology of constitutional legitimacy’, *Theory and Society* 37 (2) (2008), 161-197 (168).



'dimensions' of legitimacy: i) conformity to established rules, that is, legal validity; ii) justifiability of those rules in terms of shared beliefs; and iii) legitimation through expressed consent.<sup>88</sup> Similar to Thornhill, Beetham thus tries to merge the philosophers and sociologists' approach.

In his standard work *Modern Political Analysis*, the renowned political scientist Robert Dahl also addresses the issue of power and legitimacy. Dahl argues that people have different amounts of influence, a concept that is defined as 'a relation among actors such that the wants, desires, preferences, or intentions of one or more actors affect the actions, or predispositions to act, of one or more other actors'. Influence comes in a variety of forms, such as rational persuasion, manipulative persuasion, inducement, power, coercion, physical force, and domination. Dahl further explicates that in a political system, leaders will try to convert their influence into authority. This is possible if such influence is 'clothed' with legitimacy. Authority thus follows from legitimacy, or more specifically: 'Authority, then, is a special kind of influence, legitimate influence'.<sup>89</sup>

The American sociologist Dennis H. Wrong even more meticulously explicates the issue of power. Employing a definition of power similar to Dahl's 'influence', Wrong argues that there are essentially four forms of power, that is, force, manipulation, persuasion, and authority. In Wrong's typology, legitimacy and coercion are forms of authority, i.e. coercive authority and legitimate authority. He defines legitimate authority as 'a power relation in which the power holder possesses an acknowledged *right to command* and the power subject and acknowledged *obligation to obey*. The *source* rather than the *content* of any particular command endows it with legitimacy and induces willing compliance on the part of the person to whom it is addressed'.<sup>90</sup> Similar to Dahl, Wrong adds that 'naked (that is, coercive) power always seeks to clothe itself in the garments of legitimacy', and that 'every stable political order strives to convert coercive into legitimate authority'.<sup>91</sup> With those definitions and explications by Wrong and Dahl, one comes across an interesting difference. In Dahl's work, legitimacy seems to be an instrument to turn rule into authority. Wrong, however, treats legitimate authority as a form of authority, which is a form of power instead of a base of power (or perhaps even an instrument). To add, Wrong asserts that 'legitimate authority presupposes shared norms'.<sup>92</sup> Wrong's conceptualization is in this sense closer to Beetham.

Particularly interesting is that Beetham, just like Thornhill, considers historical situations in his concept of legitimacy. In fact, Beetham's legitimation of power 'is a judgment of its contextualized validity, that is, its validity for a specific population at a particular historical moment. He asks not whether a political authority can be justified as such, but whether it can be justified in

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<sup>88</sup> Beetham, *The Legitimation of Power*, 10-20.

<sup>89</sup> Robert Dahl, *Modern Political Analysis* (Englewood Cliffs: Prentice-Hall, fifth edition, 1991 [1963]) 32, 54.

<sup>90</sup> Dennis H. Wrong, *Power. Its Forms, Bases and Uses* (Oxford: Basil Blackwell 1979) 49; emphasis in original.

<sup>91</sup> Wrong, *Power. Its Forms, Bases and Uses*, 52, 86.

<sup>92</sup> *Ibidem*, 49.

terms of the beliefs of those who are subject to it—which he takes to be an empirical question’.<sup>93</sup> A fierce critic of such subjective interpretations of legitimacy is the Swedish political scientist Sofia Näsström. She argues that theorists have been mistaken when arguing that who make up the people is the result of the ‘contingent forces of history’, since this leads to reductionism and evasion of the question of who legitimately make up the people.<sup>94</sup>

Nevertheless, other scholars have taken up Beetham’s conceptualization, most notably the American political scientist Bruce Gilley. In good fashion of American political science, Gilley measured the degree of state legitimacy for 72 countries.<sup>95</sup> He conceptualized legitimacy according to Beetham’s criteria of legality, justification and consent and subsequently employed nine quantitative indicators to measure these ‘sub-types’ of legitimacy. This quantitative examination led to remarkable results. Out of the 72 countries ranked for their degree of legitimacy, place one to eight are for Western states. On ninth place, however, is Azerbaijan, while Great Britain is on 18, just below Spain (17) and above South Africa (19). Equally interesting, France takes 33th (!) position, far below China (13), Nigeria (29) and Morocco (32). Likewise, on the 40<sup>th</sup> place is Egypt, above members of the EU like Slovakia (46), Latvia (53), Bulgaria (54), Romania (57) and Lithuania (64). The relative high rankings of Morocco (32), Egypt (40), Iran (44) and Algeria (48) are especially surprising when taking into account the recent (violent) political protests in North Africa and the Middle East. While Gilley’s findings may be methodologically correct, his results are still dazzling. Perhaps most importantly, these findings show the profound difficulty of properly assessing the degree of legitimacy.

Gilley is not the only one who has tried to devise some measures to determine the degree of legitimacy. In 1992 already, the American political scientist M. Stephen Weatherford made such an attempt. Weatherford combined top-down ‘system-level’ determinants of legitimacy with bottom-up individual (or public) perceptions, an interesting combination. He identified several dimensions of legitimacy orientations to come up with a ‘measurement model - a middle-range formulation of the linkage between the concept of legitimacy as a multidimensional theoretical entity and the empirical indicators through which we observe citizens’ legitimacy orientations’.<sup>96</sup> However, Weatherford’s measurement model does not seem very practical either. It is mostly concerned with determining the degree of influence various ‘empirical indicators’ have on each other.

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<sup>93</sup> Fossen, *Political Legitimacy and the Pragmatic Turn*, 25.

<sup>94</sup> Sofia Näsström, ‘The Legitimacy of the People’, *Political Theory* 35 (5) (2007), 624-658 (625); Cf. Sofia Näsström, ‘What Globalization Overshadows’, *Political Theory* 31 (6) (2003), 808-834.

<sup>95</sup> Bruce Gilley, ‘The Meaning and Measure of State Legitimacy: Results for 72 countries’, *European Journal of Political Research* 45 (3) (2006), 499-525.

<sup>96</sup> M. Stephen Weatherford, ‘Measuring Political Legitimacy’, *The American Political Science Review* 86 (1) (1992), 149-166 (149, 151-152).

Nevertheless, by trying to measure legitimacy, Gilley and Weatherford's work presupposes that legitimacy is a variable. Instead of treating it like a fixed entity, various authors have argued indeed that when conceptualizing legitimacy, it is best to treat it as a process, as something that is changeable across time and space. This is precisely the approach towards legitimacy of the Dutch anthropologist Henri J.M. Claessen, who explicitly speaks of a 'degree of legitimacy' and therefore discerns between legitimacy and legitimation: 'legitimacy is the quality, or the *condition* of being legitimate; legitimation expresses the *process*, or the act of making legitimate'.<sup>97</sup> These notions of legitimacy as a construction are especially prevalent in such academic disciplines like organizational and governmental studies. For example, the American sociologist Mark C. Suchman discusses strategies for gaining, maintaining and repairing legitimacy.<sup>98</sup> In fact, he conceptualizes legitimacy as an instrument, an operational resource to be used by organizations. While Suchman's article is not that interesting, his approach is quite valuable. It shows that legitimacy is something to be created or constructed if only the right procedures are followed, or the right instruments are used. This is in fact the starting point for the next part on creating legitimacy.

Next to this instrumental approach, other scholars look to individual experiences of legitimacy by focusing on people's perceptions, or one might say 'beliefs' in Weberian terminology. The most prominent example in this respect is the work of the American psychologist Tom Tyler. He defines legitimacy as a 'psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just'. He continues by arguing that 'because of legitimacy, people feel that they ought to defer to decisions and rules, following them voluntarily out of obligation rather than out of fear of punishment or anticipation of reward'.<sup>99</sup> In such a perspective, legitimacy thus entails both a moral component, something being appropriate, proper and just, as well as a rational decision of agents to comply. Beetham argues similarly, when stating that 'human beings are rational moral agents seeking to ensure that their social relations and arrangements meet their needs and conform to their moral sense'.<sup>100</sup>

Tyler's and Beetham's positions are somewhat troubling when considering the academic discipline of political science. In political science, there are two main 'schools of thought' to explain peoples' (actors) behavior. On the one hand, scholars build on economic theory and argue that actors make rational calculations in order to maximize utility: 'actors have a set of fixed preferences or tastes (...) behave entirely instrumentally so as to maximize the attainment of these preferences,

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<sup>97</sup> Henri J.M. Claessen, 'Changing Legitimacy', 23-44 (25), in: Ronald Cohen and Judith D. Toland (eds.), *State Formation and Political Legitimacy* (New Brunswick, NJ: Transaction Books 1988); emphasis in original.

<sup>98</sup> Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches'.

<sup>99</sup> Tyler, 'Psychological Perspectives on Legitimacy and Legitimation', 375.

<sup>100</sup> Beetham, *The Legitimation of Power*, 22.

and do so in a highly strategic manner that presumes extensive calculation'.<sup>101</sup> There is thus strategic interaction between different actors according to the principles of game theory. On the other hand, there is a more sociological or normative approach, in which it is argued that actors behave out of a logic of appropriateness or rule following.<sup>102</sup> There are certain standard operating procedures that guide behavior under circumstances in which it is impossible to make rational calculations. People are bound by values and norms and act accordingly, or what is deemed correct behavior. For proponents of the sociological/normative approach cultural codes are thus important in explaining behavior, as opposed to those favoring rational choice institutionalism: 'It is true that historical, temporal, cultural, racial, or other qualifiers do not enter directly into any rational choice explanation'.<sup>103</sup>

However, already in 1936 the American economist John R. Commons argued that human beings had not only fixed interests, but that 'real-life behavior had to be understood as shaped by institutional forms, especially those of customs and social norms'. The American scholar Herbert Simon took up the work of Commons and introduced the concept of 'bounded rationality', which means that 'not all the facts can be known or all the possible options considered'.<sup>104</sup> More recently, other economists and institutionalists have acknowledged the merits of Commons and Simon, arguing that 'individuals freely and rationally chose, but on the basis of their cultural contexts and understanding'.<sup>105</sup>

Taking these conflicting interpretations of people's behavior into account adds to the difficulty of how to perceive and create legitimacy. The most fruitful approach seems to be to follow Beetham and Thornhill in integrating the normative and empirical approach, which resonates with the work of economists and political scientists outlined above. Legitimacy then is indeed a construct of different elements; a construct that is rooted in people's interests as well as moral views. Barker interprets legitimacy similarly, by arguing 'three possible, *and not mutually exclusive*, components of relations of either obedience or support', that is, coercion, reward (rational interests) and ideology/belief (moral).<sup>106</sup> Pointing to ideology and belief, he thus confirms the *subjective* quality of

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<sup>101</sup> Peter A. Hall and Rosemary C. R. Taylor, 'Political Science and the Three New Institutionalisms', *Political Studies* 44 (1996), 936-957 (944-945).

<sup>102</sup> Mark Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness', *The American Journal of Sociology* 91(3) (1985), 481-510; James G. March and Johan P. Olsen, *The Logic of Appropriateness*, ARENA Working Papers, WP 04/09 (2004).

<sup>103</sup> George Tsebelis, *Nested Games: Rational Choice in Comparative Politics* (Berkeley: University of California Press 1990) 44.

<sup>104</sup> Chandler, *International Statebuilding*, 78.

<sup>105</sup> Chandler, *International Statebuilding*, 78; cf.: J. Forest and C. Mehier, 'John R. Commons and Herbert A. Simon on the Concept of Rationality', *Journal of Economic Issues* 35 (3) (2001), 591-605; Neil J. Mitchell, 'Calculating and Believing: Ideological Norms in the Cradle of Utility Maximization', *Social Justice Research* 18 (3) (2005), 243-256.

<sup>106</sup> Barker, *Political Legitimacy and the State*, 37; my emphasis.

legitimacy for which no direct measures exist, but that is specific to circumstances of space and time. Interesting about Barker's interpretation is his tripartite classification by adding coercion as a base for compliance. While others have noticed the use of force, or coercion, in creating legitimacy, legitimacy is in fact precisely compliance, or consent, that is not based on coercion, but that is voluntary.<sup>107</sup>

Apart from these bottom-up approaches to legitimacy in which it people's views are explanatory, quite some scholars take a more top-down approach. In this perspective, legitimacy flows from the ruler or the state.<sup>108</sup> Such a view is very much bound up with Western history, and actually comes down to what has been called a 'Weberian rational-legal' interpretation of legitimacy. As the name implies, in the Western, rational-legal conception of legitimacy the legal order, rules and laws, take prime importance. In fact, the importance of rules and laws for giving meaning to the concept of legitimacy is emphasized frequently: 'legitimacy is a situation in which the rulers as well as the ruled share the conviction that the existing division of power – and as a consequence of this, the rules and regulations issued by the government – is right'.<sup>109</sup>

Given Western developments, it is not surprising that the legal-rational conception of legitimacy has become dominant in current Western thought, and in fact underlies contemporary statebuilding efforts.<sup>110</sup> Yet, this particular template, or interpretation of legitimacy, seems rather one-sided, as will be shown in the remainder of this chapter.

## 2.2 Creating legitimacy

The fact that the literature on statebuilding and intervention largely lacks a thoughtful debate on the issue of how to create legitimacy does not mean that scholars have wholly ignored this question. In fact, there are a number of competing ideas on how to realize legitimate government. The most important mechanisms, or instruments, are so-called 'carrots and sticks', which will be explicated below. However, a lot of academic literature and current policy proposals are firmly rooted in a rather one-sided interpretation of Western state formation, leading to a top-down approach that does not resonate with actual history. Though security, economy, and institutions might be the main issues, and accompanying templates, they are rather the result of interaction between rulers and subordinates than top-down creations. State formation is thus a give and take between forces top-down and bottom-up, as exemplified by social contract theory. The existing templates for exogenous

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<sup>107</sup> Wrong, *Power. Its Forms, Bases and Uses*; Dahl, *Modern Political Analysis*; David Lake, 'Building Legitimate States after Civil Wars', 29-51, in: Caroline Hartzell and Matthew Hoddie (eds.) *Strengthening Peace in Post-Civil War States: Transforming Spoilers into Stakeholders* (Chicago: University of Chicago Press 2010); Tyler, 'Psychological Perspectives on Legitimacy and Legitimation'.

<sup>108</sup> Aoi, *Legitimacy and the use of armed force*, 13.

<sup>109</sup> Claessen, 'Changing Legitimacy', 23.

<sup>110</sup> Egnell, 'Winning Hearts and Minds?'

statebuilding practices contain several presuppositions that are open to discussion. To be sure, the present analysis is not primarily concerned with Western state formation, or how rulers have gained legitimacy in current well-established democracies. However, to stir the debate and make sound analysis, reflection on this history is necessary.

### 2.2.1 *Carrots and sticks: good government, social order, and coercion*

In his article on counterinsurgency (COIN) operations, the American scholar Michael Fitzsimmons concisely states the current template of COIN:

The premise of most Western thinking on counterinsurgency is that success depends on establishing a perception of legitimacy for the ruling regime among some critical portion of the local population. Among the mechanisms available to counterinsurgents for establishing that legitimacy, one of the most prominent in both practice and doctrine has been the improvement of governance in the form of effective and efficient administration of government and public services. Good governance, by this logic, is the key to ‘winning hearts and minds’.<sup>111</sup>

Good government is supposed to serve as a ‘carrot’ from which legitimacy can flow. As a result, a host of articles concentrates on this issue of how to create good government.

Two outspoken proponents of this ‘good governance’-approach are Margaret Levi and Audrey Sacks, both currently employed for the World Bank. In a 2005 working paper, they state that ‘law and services are insufficient without government commitments to procedural fairness and relative transparency’. This means that government is good, or effective, when it is transparent and fair. Transparency and fairness will only be possible with qualified public servants that withstand corruption and serve constituents: ‘And that in turn rests on a symbiotic relationship with an alert citizenry willing to make demands and hold their public servants accountable. They will do so only if they believe—and for good reason—that they are getting something in return for their compliance and active citizenship’. This points to a reciprocal relationship between ruler and ruled, which for Levi and Sacks forms ‘a chicken and egg problem’: ‘Without services, citizens will not find government legitimate, but funds for services can be a source of corruption rather than legitimate government. The way to break this cycle often involves local action and knowledge, perhaps facilitated by international agency expertise’.<sup>112</sup> Despite the fact that they acknowledge the importance of local know-how, Levi and Sacks are clearly advocating a role for the World Bank here.

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<sup>111</sup> Michael Fitzsimmons, ‘Hard Hearts and Open Minds? Governance Identity and the Intellectual Foundations of Counterinsurgency Strategy’, *Journal of Strategic Studies* 31 (3) (2008), 337-365 (338).

<sup>112</sup> Margaret Levi and Audrey Sacks, ‘Achieving Good Government – And, Maybe, Legitimacy’, Conference Paper Arusha Conference, “New Frontiers of Social Policy” – December 12-15, 2005, 22.

Their notion of fairness is particularly interesting when considering Tyler's work on procedural fairness and trust.<sup>113</sup> He argues that research shows that what matters for an institution's legitimacy, like the police, is not so much its effectiveness or performance, but instead peoples' views of the fairness of its procedures.<sup>114</sup> The ideas of Levi, Sacks and Tyler have gained further prevalence by their combined efforts. In a 2009 article by the three scholars, they find that the trustworthiness of government and procedural justice determine 'citizens' willingness to defer to the police, courts, and tax department in a wide range of African societies'. They consequently conclude that only if a government has these qualities it will 'be able to promote the kind of trust and confidence in its agencies that induces legitimating beliefs and actual compliance'.<sup>115</sup>

Several variations exist on this notion of promoting good governance to enhance legitimacy. The American sociologists Karen A. Hegtvedt and Cathryn Johnson argue that that the outcome of interactions between authorities and subordinates, rulers and ruled, determine for a large part whether the ruled conceive the ruler to be legitimate. If exchanges are viewed as just and fair, this eventually will confer legitimacy to the hierarchy.<sup>116</sup> The Swedish political scientist Bo Rothstein claims that quality of government, the so-called 'output side', creates political legitimacy. This quality of government is determined by 'the absence of corruption, discrimination, and similar violations of the principle of impartiality in exercising political power'.<sup>117</sup> Interesting about Rothstein's article is his distinction between input and output side. While one may question the merits of good, or effective, government for the creation of legitimacy, it is interesting to see that Rothstein departs from the assumption that elections will create legitimacy. These elections, or the input side in Rothstein terms, have long been regarded as the vehicle for creating legitimacy, as explained in the first chapter. Rothstein's contestation of this assumption is thus reasonable.

At the same time, the importance attached to governmental quality is increasingly questioned: 'What if legitimacy is sometimes conferred to governments not according to the quality of their governance, but according to their conformance to group loyalties and traditional hierarchies of power?'.<sup>118</sup> According to Fitzsimmons, it does not matter *how* is governed and what the results

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<sup>113</sup> Tom R. Tyler, 'Justice, Self-Interest and the Legitimacy of Legal and Political Authority', 171-179, in: Jane J. Mansbridge (ed.) *Beyond Self-Interest* (Chicago: University of Chicago Press 1990); Tom R. Tyler, 'A Psychological Perspective on the Legitimacy of Institutions and Authorities', 416-436, in: John T. Jost and Brenda Major (eds.), *The psychology of legitimacy: Emerging perspectives on ideology, justice, and intergroup relations* (Cambridge, UK: Cambridge University Press 2001); Tyler, 'Psychological Perspectives on Legitimacy and Legitimation'.

<sup>114</sup> Tyler, 'Psychological Perspectives on Legitimacy and Legitimation', 393-394.

<sup>115</sup> Margaret Levi, Audrey Sacks and Tom Tyler, 'Conceptualizing Legitimacy, Measuring Legitimate Beliefs', *American Behavioral Scientist* 53 (3) (2009), 354-375 (354).

<sup>116</sup> Karen A. Hegtvedt, and Cathryn Johnson, 'Power and Justice. Towards an Understanding of Legitimacy', *American Behavioral Scientist* 53 (3) (2009), 376-399.

<sup>117</sup> Rothstein, 'Creating Political Legitimacy', 325.

<sup>118</sup> Fitzsimmons, 'Hard Hearts and Open Minds?', 351-352.

are. Rather, *who* governs determines whether people confer legitimacy to a particular regime. Identity is thus of prime importance, as is noted frequently in post-(civil) war elections as well. Apart from this contestation, Rothstein and other scholars simply assume that the creation of legitimacy is a top-down process, which in some way or another can be forced on the population. While paying lip service to people's beliefs, legitimacy is conceptualized as something to be created and constructed from above to foster compliance from below.

Other scholars show however that legitimacy is the result of social interaction between authorities and subordinates, as premised in social contract theory. The most outspoken proponent of a statebuilding approach based on social contract theory is the American political scientist David Lake. He claims:

authority derives from a mutually-beneficial contract in which the ruler provides a social order of benefit to the ruled, and the ruled in turn comply with the extractions (e.g., taxes) and constraints on their behavior (e.g., law) that are necessary to the production of that order (...) the contract becomes self-enforcing – or legitimate – when individuals and groups become “vested” in that social order by undertaking investments specific to the particular contract, in short, when they become stakeholders to the peace. In this way, legitimacy follows from social order, not the other way around as in the current model.<sup>119</sup>

Lake thus offers a somewhat different conception of providing carrots to gain consent from the population. In several articles, he sets forth his view, which clearly deviates from the ‘formal-legal approach of Weber’.<sup>120</sup> The problem, according to Lake is that current theories on statebuilding are rooted in this formal-legal conception of authority. Such theories take it for granted that authority follows from the creation of institutions, which eventually will lead to social order. In short: institutions → authority → order.<sup>121</sup> Contrary to such a formal-legal conception of authority, Lake regards authority not necessarily, or primarily, rooted in law, but as a contract. He employs, in his own words, a concept of ‘relational authority’. This conception of relational authority has three implications. First, it signifies that both ruler and ruled are integral to the contract. Second, authority

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<sup>119</sup> Lake, ‘Building Legitimate States after Civil Wars’, 2010, 30-31.

<sup>120</sup> David Lake, ‘Building Legitimate States after Civil Wars: Order Authority and Institutions’, Paper prepared for the Workshop on Building Peace in Fragile States, University of California, 1-2 December 2006; David Lake, ‘Building Legitimate States after Civil Wars: Order Authority and International Trusteeship’, Version 2.0, April 17, 2007; Lake, ‘Building Legitimate States after Civil Wars’, 2010.

<sup>121</sup> Note that Lake's path to authority is quite different from the ones envisaged by Dahl and Wrong, as explicated in 2.1.2.



is a variable, existing in greater or lesser degrees in different times and places. Third, the key problem in any hierarchy is limiting abuses of authority by the ruler.<sup>122</sup>

To this concept of relational authority, Lake adds rational, utility maximizing, actors: 'legitimacy arises from the self-interests of actors who invest in or acquire assets that are specific to or have more value in a particular authority relationship than in others. Such "vested interests" (...) are the foundation for the contract between ruler and ruled and essential to the group's interest in supporting a specific authority relationship. (...) Authority becomes more robust – more legitimate – as subordinates acquire more assets that are dependent on that hierarchy'.<sup>123</sup> This equally applies to constitutions. In sum:

In this world of relational authority, self-enforcing constitutions and vested interests, formal legal institutions are the reflection of authority, not its foundation. It is not the constitution itself that confers authority, but the self-interest of the parties to that contract that permits the ruler to rule. As relationally specific assets accumulate and the parties become vested in a particular social order, this self-interest legitimates the ruler's authority. The ruled confer the authority on the ruler and, indeed, empower the ruler to preserve and enforce the rules under which they benefit.<sup>124</sup>

Contrary to the formal-legal approach of statebuilding, Lake argues a route of order → authority → institutions. This does seem like a new and viable route to statebuilding, and has two clear implications. First, establishing social order should be highest priority of state builders. Thus not writing constitutions or holding elections, but providing general public safety and reestablishing a functioning legal system: 'Only once persons, property, and promises are relatively secure will individuals grant legitimacy to the state'.<sup>125</sup> This resonates with Etzioni's thesis of 'security first'. Second, the social order must be credible to become legitimate. Unfortunately, Lake fails to specify this second proposition.

Apart from this shortcoming, Lake's scheme is still troubling. First, he assumes that people are rational actors. In his conception, there is no place for a normative approach, for moral grounds for compliance. In fact, the whole notion of justice and fairness is absent. Second, there is no room for historical and/or geographical variation. Given the fact that actors are rational and utility-maximizing, it seems as if Lake conceives of a single-dimensional actor, uniform across time and place. Third, while creating social order might be a viable route to statebuilding, it is not entirely clear

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<sup>122</sup> David Lake, 'Relational Authority in the Modern World: Towards a Positive Theory of Legitimacy', Prepared for the Workshop on Legitimacy in the Modern World, University of California, San Diego, December 8-9, 2006.

<sup>123</sup> Lake 'Building Legitimate States after Civil Wars', 2007, 23-24.

<sup>124</sup> Lake 'Building Legitimate States after Civil Wars', 2010, 39.

<sup>125</sup> Lake 'Building Legitimate States after Civil Wars', 2007, 28; Lake 'Building Legitimate States after Civil Wars', 2010, 40.

how this is exactly different from institutionalizing. There seems to be a fundamental inconsistency in rejection of the formal-legal approach while at the same time advocating the reestablishment of a functioning legal system and secure environment. Moreover, it is unsure how Lake conceives people to vest their interests into the state. It seems if vesting interests is only possible when there are some (basic) institutions to guarantee and defend those stakes.

Yet, Lake is clear about the importance of coercion in creating legitimacy, the so-called sticks. Defeating the enemy and establishing a secure environment are necessary conditions for any reconstruction. The distinguished political scientist Stathis Kalyvas gives an interesting variation on the significance of coercion for creating legitimacy. Basing his analysis on actors' rational choices, he demonstrates in his *Logic of Violence in Civil War* that physical control over territory determines peoples' behavior. The armed force that controls territory will enjoy peoples' collaboration. Collaboration, and by extension consent, is thus a function of the control of territory of armed forces.<sup>126</sup>

In elaboration on his article of measuring legitimacy, Gilley has also written on how states win and lose legitimacy. To determine the most salient sources of legitimacy, Gilley uses (again) statistical analysis. His results are that 'participation (democratic rights), welfare (welfare level and gains), efficiency (economic governance), and accountability (general governance) are valued by citizens across the globe'. Hence, he concludes, legitimacy is defined by performance, and by 'common-interest orientation, such as governance, rights, and general welfare', to which he adds, 'in the end, the "rational choices" made about legitimacy appear to have significant social and nonmaterial content'.<sup>127</sup> Thus, while on the one hand leaning towards an interpretation of legitimacy in line with Tyler, Levi and Sacks, Gilley clearly acknowledges the more normative, sociological character. He elaborates on pluralism and 'common-interest demands' in his third chapter, but still seems to deny the subjective, or historical, qualities of legitimacy by concluding that 'governance, democracy/rights, and development' are the most important sources of legitimacy, across time and space.<sup>128</sup> He argues that states that fail to perform in these respects enjoy least legitimacy. With such reasoning, we are back at square one, the development-security-democracy nexus: the goals of statebuilding nowadays.

Yet, remarkably, while Gilley holds these interests to be uniform, he does denounce the practice of 'effective institution building'. Instead, he provides an alternative model of transferring legitimacy later in his book, which comes close to Lake's 'creating social order': 'the legitimation process is an ongoing and mutually conditioning relationship between citizen demands and state

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<sup>126</sup> Stathis N. Kalyvas, *The Logic of Violence in Civil War* (Cambridge: Cambridge University Press 2006).

<sup>127</sup> Gilley, *The Right to Rule*, 41-43.

<sup>128</sup> *Ibidem*, 44, 63.

structure and performance'. Consequently, he proposes a 'state-trusting-society' model of legitimation, which means that in developing or post-conflict states the state can win the society's trust by empowering it. The key instrument for success is the 'devolution of political power to social actors, (...) to reform-oriented state-society alliances at the local level. In this way, states can win the initial compliance and support needed to jump-start a virtuous cycle of legitimation'.<sup>129</sup> At first instance, Gilley's account seems to be another variation to the Western rational-legal approach of legitimacy. However, while his insistence on homogeneous interests of people is questionable, his proposed solution might bear more fruit.<sup>130</sup> Lake and Gilley's emphasis on the reciprocal relationship between rulers and ruled for the creation of legitimacy shed new light on the process of state formation. Contrary to providing carrots in the form of good governance, which are essentially top-down constructs, their conceptualizations put forward the salience of interaction between top-down and bottom-up forces. In fact, it asks for a reconsideration of the history of state formation, which is the basis of current statebuilding.

### 2.2.2 *Reconsidering state formation*

In his well-known study on the origin of national states, Tilly argues convincingly how and why European rulers in the past accumulated and concentrated 'capital' and 'coercion' to make war, and hence, rule. Such concentration and accumulation of capital and coercion led to 'an infrastructure of taxation, supply and administration', which upheld and could further extend a rulers' control, specifically his capacity for warfare.<sup>131</sup> Eventually, the state was born out of these constellations of taxation, supply and administration. Rule, and power, crystallized towards the center at the cost of local/regional notables and power holders. Apart from the significance of coercion, Tilly equally shows that the ruler's ability to make war was dependent on interaction with his subordinates, most notably the nobility and merchants, upon which he relied for coercive power and capital. By helping the ruler (via financial contracts or materiel), the merchants became vested in his rule, in his exercise of political power, and thus had an interest to uphold it. The political scientist Tuong Vu equally explains that Western history shows that rulers' need for resources led to bargains with their subjects. Such bargains 'contributed to the later development of representative institutions in Europe but do not explain their origins. These institutions had their first roots in the medieval period. Their survival depended on particular contexts, in particular, on how bad the rulers' need for

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<sup>129</sup> Gilley, *The Right to Rule*, 91, 210.

<sup>130</sup> Vsevolod Gunitskiy's criticism on Gilley's book that 'people interested in the concept might want to read the entire book; for everyone else, the first two chapters will suffice', is totally unjustified then. Cf. Vsevolod Gunitskiy, 'Review', *Political science quarterly* 125 (1) (2010), 163-165 (165).

<sup>131</sup> Tilly, *Coercion, Capital, and European states*, 20.

resources was and how those institutions were organized'.<sup>132</sup> Both Tilly and Vu then explicate state formation *not* as a process enforced top-down by the ruler, but dependent on interaction between ruler and ruled.

Similar to Tilly's interpretation, Thornhill asserts that 'state building and political formation should be examined as elements of *societal self-construction*, in which the functional exigencies of emergent societies, at different junctures in their evolution, have reflected themselves and which these societies have adapted to meet their own structural and functional necessities'.<sup>133</sup> In other words, in Thornhill's examination politics developed out of societal needs: 'The condition of legitimacy, in consequence, is primarily a condition in which a society establishes and adequately reflects on the means for the adequate diffusion of that power that, as a society, it requires and that it constructs as political'. Thus, as the political domain developed out of societal needs, so did legitimacy eventually come to reside with the state: 'To arrive at a sustainable account of political legitimacy, therefore, historical sociology needs to abandon its idea that the state is the dominant center of all social power'.<sup>134</sup>

Thornhill's idea of 'societal self-construction' comes close to the 'state-in-society' approach of Professor of International Studies Joel S. Migdal. In essence, Migdal's 'state-in-society' is 'a process-oriented approach in which state and societies are in a mutually transformative relationship'.<sup>135</sup> To elucidate:

The model I am suggesting, what I call state-in-society, depicts society as a *mélange* of social organizations rather than a dichotomous structure. Various formations, including the idea of the state as well as many others (which may or may not include parts of the state) singly or in tandem offer individual strategies of personal survival and, for some, strategies of upward mobility. Individual choice among strategies is based on the material incentives and coercion organizations can bring to bear and on the organizations' use of symbols and values concerning how social life should be ordered. (...) Societies are not static formations but are constantly *becoming* as a result of these struggles over social control. (...) The state is part of the environment of conflict in which its own parts struggle with one another. (...) the interaction of states and other social formations is a continuing process of transformation. States are not fixed entities, nor are societies; they both change structure, goals, constituencies, rules, and social control in their process of interaction. They are constantly *becoming*.<sup>136</sup>

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<sup>132</sup> Tuong Vu, 'Studying the State Through State Formation', *World Politics* 62 (1) (2010), 148-175 (164).

<sup>133</sup> Thornhill, 'Towards a historical sociology of constitutional legitimacy', 169; emphasis in original.

<sup>134</sup> *Ibidem*, 170, 196.

<sup>135</sup> Joel S. Migdal, *State in society: studying how state and societies transform and constitute one another* (Cambridge: Cambridge University Press 2001) 252.

<sup>136</sup> Migdal, *State in society*, 49-50, 57; emphasis in original.

However, it is not entirely clear how Migdal perceives this process of interaction between state and society. One might conclude from the quote above that state and society are constantly struggling and in this process transforming each other, as Migdal notes at the end of his book: 'States are in conflict with a heterogeneous flock of other social organizations that do not share the rule of states'. Yet, in another chapter, he stresses that 'we must move away from a perspective that simply pits state against society'. Subsequently, he shows how in many (developing) states 'social control is vested in numerous local level social organizations', most notably in the form of local strongmen, on which the central state relies.<sup>137</sup> Such a perspective emphasizes cooperation of state and society instead of struggle and conflict. Despite the fact that Migdal's concept of 'state-in-society' inhibits some contradictions, it still seems a viable approach for the issue of statebuilding. By highlighting 'the engagement of state and society', Migdal proposes to approach the study of state 'within these dynamic institutional arrangements', meaning their mutual transformative relationship.<sup>138</sup>

Similarly, one might consider the comments of the American professor of law Nicholas Kittrie on the principle of subsidiarity. This principle means that 'the smallest unit of society which can properly perform a given function, should be allowed to do so'.<sup>139</sup> 'Subsidiarity' is currently used in the European Union, first stipulated in the Treaty of Maastricht (1992). It not only resonates with Thornhill's notes on social power, but equally with Gilley's proposition on the devolution of political power towards society and Migdal's comments on local strongmen. Moreover, it seems especially feasible in the context of exogenous statebuilding, where the 'host nation' typically fails to administer and perform many functions of the state. While lacking a substantial realization of the principle, Kittrie's proposal is worth considering.

The different analyses of state formation reviewed above show an important commonality. In fact, they all interpret this history as an interactive process between ruler and ruled. Although variations exist, the work of these scholars gives important nuances to the process of legitimation. In the current Western rational-legal interpretation of legitimacy, it seems as if legitimacy is to be created top-down. The former UN official Antonio Donini comments in this respect that 'the norm has been to create top-down "Westphalian" constructions, focusing primarily on pushing Western rationality down the center-periphery governance pike, with scant attention to outcome'.<sup>140</sup> Multiple studies show however that statebuilding, and its wake creating legitimate government, is a reciprocal

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<sup>137</sup> Migdal, *State in society*, 58-94.

<sup>138</sup> *Ibidem*, 263-264.

<sup>139</sup> Nicholas N. Kittrie, *The War Against Authority. From the Crisis of Legitimacy to a New Social Contract* (Baltimore and London: John Hopkins University Press 1995) 256.

<sup>140</sup> Antonio Donini, 'Knocking on Heaven's Door: Meeting Social Expectations in Post-conflict Transitions', 35-52 (48), in: Guttieri and Piombo (eds.), *Interim governments*.

process, a social exchange between rulers and ruled. Partly based on the insights noted above, and partly based on the continuous failures of exogenous statebuilding, others question the current statebuilding templates more fundamentally, criticizing the peculiar Western template. They have good reasons for such skepticism, as will be shown in the final part of this chapter.

### 2.3 Transferring legitimacy, creating government

The observation of the Swedish scholar Robert Egnell of how to ‘improve the performance and legitimacy of indigenous actors’ encapsulates the problem of transferring legitimacy best.<sup>141</sup> How can external actors create legitimacy for the indigenous government of the host nation, while at the same time trying to win the hearts and minds of the population for their own presence? Lake notes equally that ‘to the extent that the United States [read: external actors] claims credit for its role in providing essential services to bolster its position and legitimacy, it risks detracting from and undermining the legitimacy of the new state it is supposedly there to support’.<sup>142</sup>

Western history shows that legitimation is *not* a process enforced top-down, but a result of interaction between society and state, between ruler and ruled. Transferring legitimacy then should take account of this reciprocal process, as Lake and Gilley already argued. The critical question in current statebuilding efforts is how to gain consent from the population, to make them invest into state structures and to defend these structures. In fact, this is the problem of ownership discussed in the preceding chapter. The top-down reconstruction process is a period of ‘benevolent autocracy’ that lacks incentives for people to invest in the state. In current exogenous statebuilding practices rulers are not dependent on their populations’ compliance, but on external actors. This leads to a problem of accountability, equally noted in the previous chapter. It thus seems that creating a social contract fails at the outset. Consent of the governed, the indigenous population, is sought for legitimacy of the state, but nothing is given in return. As one critic puts it: ‘they [citizens of the new ‘liberal’ states] have remained subjects and objects rather than becoming agential, liberal citizens’.<sup>143</sup> Although the US COIN Field Manual acknowledges ‘that legitimacy is best defined by the host population’, and that ‘a COIN effort cannot achieve lasting success without the HN [Host Nation] government achieving legitimacy’, it is merely an observation and lacks elucidation or follow-up.<sup>144</sup>

On top of this of this problem of top-down enforcement, typical Western concepts of good and effective governance, rule of law and justice are expected to create a legitimate social order. This

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<sup>141</sup> Egnell, ‘Winning Hearts and Minds?’, 300.

<sup>142</sup> David Lake, ‘The Practice and Theory of US Statebuilding’, *Journal of Intervention and Statebuilding* 4 (3) (2010), 257-284 (277).

<sup>143</sup> Oliver P. Richmond, ‘Becoming liberal, unbecoming liberalism: liberal-local hybridity via the everyday as a response to the paradoxes of liberal peacebuilding’, 37-56 (37), in: Tadjbakhsh (ed.), *Rethinking Liberal Peace*.

<sup>144</sup> FM 3-24, MCWP 3-33.5, *Counterinsurgency*, 1-22; Alex Marshall, ‘Imperial nostalgia, the liberal lie, and the perils of postmodern counterinsurgency’, *Small Wars & Insurgencies* 21 (2) (2010), 233-258 (247).

precisely is the 'Weberian rational-legal' interpretation of legitimacy, in which a rational-legal order is often identified as key component of creating a viable legitimate state and government.<sup>145</sup> However, law in itself has no legitimacy, like Habermas argued: 'Legality can produce legitimacy only to the extent that the legal order reflexively responds to the need for justification that originates from the positivization of law and responds in such a manner that legal discourses are institutionalized in ways made pervious to moral argumentation'.<sup>146</sup> In other words, legality can produce legitimacy, but 'moral argumentation' and 'need for justification' underlie legality, which means that legal rules, or law, are worthless without social content, that is, prevailing values and norms in society. The importance of rule of law and a legal order must however not be underestimated. Apart from legitimizing power or authority and establishing fair procedures, a rule of law equally serves as a limitation of power. It is thus a resource both for the dominant and subordinates.<sup>147</sup>

This problem of the dominance of Western rational-legal interpretation of legitimacy has recently gained attention in academic discussions. In an impressive, empirical study, Egnell demonstrates the failure of the current counterinsurgency campaign in Afghanistan. The extensive quote that follows summarizes his argument best:

Western state-building in a failed state is an intervention in an existing system of political power-sharing – regardless if we recognise it as such or not. The establishment of Western norms of governance and certain tactical efforts to win the hearts and minds of the local population is not simply an attempt to establish legitimacy. It may also constitute a crisis of legitimacy as it starts out by tearing down the existing structures of power-sharing, thereby threatening the power and status of existing power-holders. Every change in the direction of our perception of a legitimate system may in fact be the opposite in the eyes of the local population, or at least in the eyes of the local leaders with stakes to lose. (...) *it is of importance for Western counterinsurgents to understand that their basic assumption about what creates legitimacy in a particular society may be false.* Western counter-insurgents should also acknowledge that they are not the defenders of status quo but often the opposite – they are agents of change and thereby also sources of crisis in societal legitimacy. Struggling to win the support of the local population while at the same time forcing modernisation makes for a difficult balancing act and may create inherent contradictions.<sup>148</sup>

In line with Fitzsimmons, Egnell therefore argues to take account of ethnic identity and dynamics.

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<sup>145</sup> Voorhoeve, *From War to the Rule of Law*; Levi, Sacks and Tyler, 'Conceptualizing Legitimacy, Measuring Legitimate Beliefs'.

<sup>146</sup> Quoted in: David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press 1999) 239.

<sup>147</sup> Beetham, *The Legitimation of Power*, 68.

<sup>148</sup> Egnell, 'Winning Hearts and Minds?', 294-295; my emphasis.

One more interesting, empirical study on the effectiveness of external interveners in creating legitimacy is the policy study of the Dutch Geert Gompelman on the effect of aid in Afghanistan.<sup>149</sup> He shows that providing aid to insecure areas can have negative consequences on security:

Allocating aid money to insecure areas for stabilization purposes may be creating perverse incentives. Insecurity may be seen to pay off in that insecure areas receive more aid than secure areas do. This benefits local power holders who have an interest in the status quo (conflict) and who profit from the aid flows to their area through misappropriation and corruption. Also, respondents living in secure areas feel punished, or at least not rewarded, for maintaining security. The extent to which this resentment influences behavior is unclear, but the current use of aid money is widely characterized as discriminatory. This discrimination takes on an important ethnic dimension that fuels divisions between different ethnic groups. This perceived injustice in the distribution of aid, coupled with corruption throughout the system, has decreased trust in both the Afghan government and the international community.<sup>150</sup>

The underlying assumption of providing aid to insecure areas in order to bolster legitimacy of the government thus proves to be false. Instead, 'the reputation and legitimacy of the government have suffered significantly from the flaws associated with the political economy that results from development activities'.<sup>151</sup> Gompelman also found that Afghans have more trust in individuals than institutions and that legitimacy of the government is influenced greatly by the charisma and capacities of its top layer of bureaucrats. This is of course very important for current reconstruction efforts in Afghanistan, and in fact, a good example of local, cultural beliefs determining what legitimacy means.

Moreover, interaction between rulers and ruled does not only happen at the level of rational interests. Such a small notion tends to be too functionalistic, or perhaps too rational-legal. Amongst others, Egnell and Gompelmann already pointed to the salience of identity, of norms and local, subjective perceptions and beliefs. This is what Beetham is also referring to when talking about the 'justifiability of rules'. Considering once more the process of European state formation, the issue of legitimacy, or the act of legitimation, in fact only becomes salient during the Enlightenment. While questions of rule and domination have occupied philosophers long before, it is mainly then that they start to reject the idea of legitimacy of rule based on religious authority and tradition. It is in this long Age of Reason (roughly 1650-1789) that Hobbes' 'Leviathan', Locke's 'Two Treatises of Government', Rousseau's 'social contract', Montesquieu's 'trias politica' and the Federalist Papers give new

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<sup>149</sup> Gompelman, *Winning Hearts and Minds?*.

<sup>150</sup> *Ibidem*, 6.

<sup>151</sup> *Ibidem*, 59.



interpretations to exercise of (political) power. They give new content, and new meaning, to justification (or legitimation) of rulers' domination.

For present purposes, it is not necessary to go into these ideas. Nevertheless, it is important to note that a large share of legitimation precisely lies in this justification of rules, or rather, of domination. Whether in terms of ideas, ideologies, or narratives, the beliefs and norms on which rule is based matters a lot: 'Master narratives – often founding societies – are both *constructed by the state* and help to *construct the state*'.<sup>152</sup> A telling example: 'In the case of South Africa, the state never enjoyed any legitimacy to exercise political authority. The immorality of its ideological framework always put into question its legitimacy as the supreme institution of political authority over the inhabitants of its political terrain'.<sup>153</sup> Legitimacy then again appears to be contextualized, i.e. bound up within systems of belief. In fact, Rousseau, who argued that 'the social order is a sacred right which is the basis of all other rights', equally asserted that 'this right does not come from nature, and must therefore be founded on conventions'.<sup>154</sup>

The current template is spread of Western liberal democracy, a system of political power that rests on, and is justified by, sovereignty of the people and representation symbolized by the act of voting, joined by the liberal notion of individual (and economic) freedom. As hinted at above, legitimacy is absent when the ideological framework that underlines rule does not match the identity, or norms, of the ruled. Barker meticulously analyzes the importance of legitimizing rule in his *Legitimizing Identities*.<sup>155</sup> In this study, he researches the question what governments or rulers are actually doing when they are legitimizing themselves. Weber already discussed rulers' self-legitimation thoroughly and argued that 'every system attempts to establish and to cultivate its belief legitimacy'.<sup>156</sup> According to Barker, Weber 'is not talking about some abstract quality, "legitimacy", but about an observable activity in which governments characteristically engage, the making of claims'.<sup>157</sup>

In line with Weber and Thornhill's account on 'societal self-construction', Barker argues that rulers devote a lot of time and energy to legitimating their rule. He notes that it is 'in the first place persons, not systems, rulers not regimes, who are legitimated', and thus that the 'subject of

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<sup>152</sup> Migdal, 'Researching the State', 190; emphasis in original.

<sup>153</sup> Siphon Shezi, 'South Africa: State Transition and the Management of Collapse', 191-204 (191), in: I. W. Zartman (ed.), *Collapsed states: the disintegration and restoration of legitimate authority* (Boulder: Lynne Rienner 1995) 191.

<sup>154</sup> Jean-Jacques Rousseau, *On the Social Contract or Principles of Political Right*, translated by G.D.H. Cole (Mineola, NY: Dover Publications Inc. 2003 [1762]) 2.

<sup>155</sup> Rodney Barker, *Legitimizing Identities: The Self-Presentations of Rulers and Subjects* (Cambridge: Cambridge University Press 2001); cf. Wrong, *Power. Its Forms, Bases and Uses*, 103-113.

<sup>156</sup> Max Weber, *Economy and Society. An Outline of Interpretive Sociology*, Guenter Roth and Claus Wittich eds. (Berkeley etc.: University of California Press 1978) 213.

<sup>157</sup> Barker, *Legitimizing Identities*, 14.

legitimation is specific and personal, rather than abstract or structural'.<sup>158</sup> Barker acknowledges the reciprocal characteristic of legitimation. He draws attention to the identification of citizens with rulers, and argues that conceptions matter more than anything else: 'The crucial factor in determining a coherent relationship of legitimations is not the relation between the actions or policies of government and the self-assessed interests of its supporters, but the relation between their conceptions of themselves (...) and of their rulers'.<sup>159</sup> Consequently, if such identification is absent, rebellion, dissonance or non-compliance is a logical result. Conversely, the scholar of United Nations University Jean-Marc Coicaud argues that identification between 'the group and governors is based on shared values' instead of identity.<sup>160</sup> In addition, research shows that output and objective criteria certainly matter too. When rulers create certain expectations and fail to meet them, or simply fail to meet the demands of society, resistance is a logical result.<sup>161</sup>

Clearly, Barker renounces the importance of objective criteria, of good governance, of procedural fairness, and of rules. In fact, Barker also puts aside the Weberian rational-legal interpretation and emphasizes the subjective qualities of legitimacy instead, specifically the rulers' act of legitimation. He denounces the 'concept of a utility maximizing individual', and states in line with Egnell, Fitzsimmons and Gompelman that 'in the matter of legitimation it is more illuminating to pay attention to those aspects of politics which involve identity seeking'.<sup>162</sup> It may be too much to put aside the rational interests of individuals completely. Lake, Tyler, Sacks, Levi, and Gilley all make quite convincing arguments as well. Despite that, following Barker's reasoning one can claim once more that the act of legitimation is a reciprocal process rooted in perceptions and beliefs. Even Gilley, who discards the possibility of 'manufacturing consent', does note that rulers have increased their legitimacy by reconfiguring evaluative norms.<sup>163</sup> Creating legitimacy then is not only the result of giving carrots and employing sticks, even if it is a reciprocal process. A very important part of legitimacy lies in the contextualized validity of authority and rule. In other words, another mechanism for creating legitimacy is its construction based on identity, subjective qualifications, and local norms and values. Nonetheless, scholars point out that paying attention to local practices and beliefs has its limits, and that one should not fall back to cultural relativism: 'it is through a political focus on representation, agency, autonomy and equality rather than an essentialist conception of

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<sup>158</sup> Barker, *Legitimizing Identities*, 32-33.

<sup>159</sup> *Ibidem*, 120.

<sup>160</sup> Jean-Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility*, translated by David Amis Curtis (Cambridge: Cambridge University Press 2002) 32.

<sup>161</sup> Gilley, *The Right to Rule*, 80-81. Barker and Gilley's disagreement is best 'summarized' in the greed versus grievances-debate, cf: Paul Collier and Anke Hoeffler, *Greed and Grievance in Civil War*, World Bank CSAE WPS/2002-01 (2002).

<sup>162</sup> Barker, *Legitimizing Identities*, 138-139.

<sup>163</sup> Gilley, *The Right to Rule*, 88-89.

culture that cultural diversity is best promoted'.<sup>164</sup> Equally, and contrary to Fitzsimmons' proposal, reconstruction processes that take ethnicity as guiding principle seem to be dysfunctional too. In post-conflict reconstruction processes like Bosnia and Afghanistan ethnicity has been institutionalized into the country's constitution, hampering reconciliation and 'peacebuilding'.<sup>165</sup>

Somewhat in line with Barker's description of citizens' identification is the work by psychologists who value identity, norms, and moral codes. As the editors of *The Psychology of Legitimacy* state: 'what this book represents is a convergence of interest in the notion that attitudes, beliefs, and stereotypes serve to legitimize social arrangements and to provide ideological support for social and political systems'.<sup>166</sup> More forcefully, Tyler claims that 'a legitimating ideology is a set of justifications or "legitimizing myths" that lead a political or social system and its authorities and institutions to be viewed as normatively or morally appropriate by the people within the system'.<sup>167</sup> Coicaud also takes a more normative approach to legitimacy in his *Legitimacy and Politics*, while at the same time placing the concept in historical perspective. He argues that 'consent is a necessary condition for the right to govern' and thus for legitimacy, and that values and norms form the substance of legitimacy.<sup>168</sup>

Where does this leave the rule of law, constitutions, and legitimacy in the legal sense? I would argue that the rule of law, or a legal system, is a product of norms and beliefs. As Coicaud sharply states:

The authority of law – or, if one prefers, its effective operation – rests upon the belief that legality is the expression of the values of society. The law contributes to the 'rule of law', a rights-based State, a *Rechtsstaat* [*l'État de droit*], but it cannot, all alone, invent it. (...) In order for legality to intervene in the legitimation process – that is to say, in order for conformity to the law to be indicative of a *de jure* government – the laws must be in accord with the values in which the governed recognize themselves.<sup>169</sup>

This is in line with conceptualizations of legitimacy such as Beetham's, who observes that justifiability of rules lies in reference to shared beliefs of the dominant and the subordinate.<sup>170</sup> Hence, while (rule

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<sup>164</sup> Kristoffer Lidén, 'Peace, self-governance, and international engagement: from neo-colonial to post-colonial peacebuilding', 57-74 (67), in: Tadjbakhsh (ed.), *Rethinking Liberal Peace*.

<sup>165</sup> Sven Gunnar Simonsen, 'Addressing Ethnic Divisions in Post-Conflict Institution-Building: Lessons from Recent Cases', *Security Dialogue* 36 (3) (2005), 297-318.

<sup>166</sup> John T. Jost and Brenda Major, 'Emerging Perspectives on the Psychology of Legitimacy', 3-32 (4), in: idem (eds.), *The psychology of legitimacy*.

<sup>167</sup> Tom R. Tyler, 'Introduction: Legitimizing Ideologies', *Social Justice Research* 18 (3) (2005), 211-215 (212).

<sup>168</sup> Coicaud, *Legitimacy and Politics*, 10-18.

<sup>169</sup> Ibidem, 24-25; emphasis in original.

<sup>170</sup> Beetham, *The Legitimation of Power*, 12-20, 68-69.

of) law is certainly important, especially in curbing rulers' power, it is not so much the foundation of legitimacy, but rather its reflection. Thornhill's analysis of law and constitutions in European history shows this too. Law developed 'co-evolutionary' with power, to constitute the latter's autonomy. Next, law was to 'develop a set of more abstracted theoretical principles to provide explanations and validations of the origins and actions of their political institutions'. Similarly, constitutions 'had the explicit role of externalizing a universal account of the political system's legitimacy'. Hence, 'political legitimacy is the result of a process in which states have evolved as functionally autonomous and it is also the result of a process in which they have generated theoretical arguments about the preconditions of this autonomy and learned to examine and reflect on themselves in normatively integrative and theoretically adequate and sustainable terms'.<sup>171</sup> He adds that 'socially generalizable constructions of legitimacy presuppose autonomously political constructions of legitimacy'.<sup>172</sup> In other words, Thornhill interprets constitutions foremost as reflecting society's norms.<sup>173</sup>

Law then reflects the normative character of legitimacy rather than the reverse. The legal expert Michael Schoiswohl voices this powerfully, by stating that law 'transports specific contents, in fact values and value-based assumptions'. He further comments that 'for the rule of law to function, a minimum degree of buy-in (hence legitimacy) is needed that ensures its implementation'.<sup>174</sup> Schoiswohl thus confirms the point made above, that law not necessarily creates legitimacy, but is rather a reflection, which can only function according to society's values. Yet, 'the macro-legal approach is inherently "top-down", viewing the domestic constituency as the recipients of reform processes, not the owners or drivers of it'.<sup>175</sup> Schoiswohl asserts that in creating rule of law 'community-based needs assessments' and 'greater degree of civic participation' are essential. Professor of International Relations Oliver Richmond proposes similarly to 'bring back the local voices which are supposed to be part of the social contract upon which the liberal state is built. (...) The state cannot be legitimate without those voices being present and without their views being part (...), this would require the polity and government to be built from the bottom up as well as top down'.<sup>176</sup>

While society's norms and values may be the foundation for legitimacy and law, this does not necessarily mean that Western norms are incompatible with local contexts of failing and developing states. In a recent article, the Iranian-American scholar Shahrbanou Tadjbakhsh explains that 'the juxtaposition of external/universal and local/particularist models implies that they are mutually

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<sup>171</sup> Thornhill, 'Towards a historical sociology of constitutional legitimacy', 173, 174, 176.

<sup>172</sup> *Ibidem*, 196-197.

<sup>173</sup> Chris Thornhill, 'Legality, legitimacy and the constitution: A historical-functionalist approach', 29-56, in: Thornhill and Ashenden (eds.), *Legality and Legitimacy*.

<sup>174</sup> Schoiswohl, 'What's law got do with it?', 118.

<sup>175</sup> *Ibidem*, 121.

<sup>176</sup> Richmond, 'Becoming liberal, unbecoming liberalism', 45, 47.

exclusive, while that is often not the case'.<sup>177</sup> She finds, first, that 'liberalism, with its moral precepts on human rights and individualism, *seemed* to contradict the collectivist principles of duty, authority, and justice embodied in tradition and Islam for Afghans. Yet the two could easily have co-existed and fused, as long as there was respect, traditions were not offended, and lives were improved'. Second, 'the local culture did not also simply respond as native and particularist hegemonic counter-resistance to the existence of liberal peace, but resisted its failures. Afghans were more interested in saving liberal peace by modifying it, while the international community was seeking its abandonment as exit strategy'.<sup>178</sup>

In addition, Tadjbakhsh concludes that Afghans would reject liberalism if it meant 'sole insistence on individual absolute freedoms'. They favor equality and justice in line with the principles of Islam instead. Similarly, they view capitalism negatively as 'being based on competition without pity and compassion, hence perceived as being against values of social cohesion and harmony'. Moreover, the Afghans especially regret the failure to 'provide tangible benefits such as jobs, food and security'.<sup>179</sup> This last finding of Tadjbakhsh resonates with the more analytical chapter in the same volume of Amal Slash and Patrick Tom on Iraq. These two scholars note the failure of implementing a neo-liberal market economy in Iraq, a state that hitherto had 'a pivotal role in public expectations for providing welfare, security, and services such as employment'.<sup>180</sup>

In the concluding chapter of the same volume, Tadjbakhsh and Richmond advocate a model of 'post-liberal peace' with some suggestions for how to combine the local and the international:

In this model [of post-liberal peace], the populations of post-conflict countries are not seen as 'objects' of models, or 'subjects' of interventions, but 'agents' who choose their own peace, models and priorities, be it through national consensus or through continued conflict. It is they who can assess the legitimacy of their own political orders, security, institutions, rights, and welfare needs, drawing on examples set elsewhere. If the core of statebuilding is legitimacy, history and local circumstances create that legitimacy and not cosmopolitan ideals, no matter how justified in the eyes of some.<sup>181</sup>

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<sup>177</sup> Shahrbanou Tadjbakhsh, 'Liberal peace and the dialogue of the deaf in Afghanistan', 206-220 (206), in: idem (ed.), *Rethinking Liberal Peace*.

<sup>178</sup> Ibidem, 208. Her study is based on in-depth interviews with 100 Afghans and 60 members of the international community. It must be noted however that respondents were not the 'common man', but all in some position of power like politicians, governors, clergy, and tribal leaders.

<sup>179</sup> Ibidem, 215.

<sup>180</sup> Amal Slash and Patrick Tom, 'Is liberal democracy possible in Iraq?', 195-205 (200), in: Tadjbakhsh (ed.), *Rethinking Liberal Peace*.

<sup>181</sup> Shahrbanou Tadjbakhsh and Oliver P. Richmond, 'Conclusion: Typologies and modifications proposed by critical approaches', 221-241 (237), in: Tadjbakhsh (ed.), *Rethinking Liberal Peace*.

## 2.4 Conclusion

From the first section on conceptualizing legitimacy, it follows that the most viable use of legitimacy was the one that builds on both normative and descriptive concepts. Authors like Beetham, Thornhill and Barker favor such an approach. These conceptualizations take account of people's beliefs, their cultural codes and norms, and their rational interests. In that way, it equally combines the conflicting views on people's behavior in political science. While actors are certainly utility-maximizing rational actors, they are bound nevertheless by their context of local values. Therefore, it seems best to conceptualize legitimacy as something that is historically and geographically determined. In other words, legitimacy is a subjective quality contingent on space and time.

Another important finding is that legitimacy is variable, and legitimation a process. This was the starting point for the second part. After reviewing several articles on good government, it soon was clear that the Weberian rational-legal, or Western formal-legal, interpretation of legitimacy is not practical. The conventional wisdom is, or rather *was*, that elections serve to legitimize power, complemented by building effective institutions, especially 'good governance'. There are many variations to promoting governance, such as procedural fairness, relative transparency, trustworthiness, and quality of output of government, that is, impartiality. In fact, all these scholars point to the provision of carrots by those in power in order to foster compliance from below. Lake gives an interesting variation to this view by emphasizing the creation of social order, which is in fact an updated version of the social contract thesis. Such a social contract also holds employing sticks. Coercion proved to be consequential in the European history of state formation, and is equally relevant for the practice of exogenous statebuilding. Creating and maintaining security and controlling territory appear to be significant for people's collaboration. While coercion in itself is not sufficient for legitimacy, it is at least necessary.

Apart from the social contract, the carrots and sticks, various authors draw attention to the importance of identity and ideology. Legitimacy is a subjective quality, rooted in normative conceptions of moral validity. One commonality of these different mechanisms for transferring legitimacy is the often made observation that legitimation is a reciprocal process between ruler and ruled, as a reconsideration of the history of state formation exemplified. I have tried to capture the mechanisms for creating legitimacy in Appendix A (p. 104). In this figure, the reciprocal process of creating legitimacy is acknowledged by indentifying both top-down and bottom-up processes. Likewise, I have acknowledged rational interests, the social contract, as well as the more sociological / normative character of people's behavior, classified as beliefs, identity and (local) norms and values.

Several solutions were put forth to better current exogenous statebuilding efforts, of which one common feature stands out. In line with a reconsideration of the history of state formation and

given the interaction between ruler and ruled for creating legitimacy, multiple scholars point out the solution precisely lies there. Thornhill's 'societal self-construction', Migdal's 'state-in-society', Kittrie's 'subsidiarity', Lake's 'vested interests', and Gilley's 'state-trusting-society' with devolution of political power, all point to a process of creation of legitimacy in the interaction between ruler and ruled where their interests meet, the middle-level one might say. Whether this entails some sort of federalism, extensive decentralization, or regional autonomy remains to be seen. What is clear is that top-down creation of legitimacy in Western rational-legal fashion via elections, rule of law and governance continuously fails to achieve desired results. On top of that, it is based on a one-sided, erroneous reading of legitimacy and state formation and therefore fundamentally wrong.

Nevertheless, it is important that the state provides certain services, that it employs carrots and sticks, as the examples of Afghanistan and Iraq show. Most importantly is to address the 'host population' as citizens with agency, not as passive bystanders. Equally, though conceptions of legitimacy 'of contextualized validity' take center-stage, this must not belie the work done by other scholars. The current approach of 'good governance' might fail to create legitimate government, yet Levi, Sacks and Tyler have shown that procedural fairness and governments' trustworthiness matter. Creating political legitimacy then, or rather legitimate government, is conceptualized best as an exchange process between ruler and ruled, taking into account context, that is, historical and cultural factors, and people's interests and 'local knowledge' (like Gompelman's finding that Afghans rely on individuals rather than institutions).<sup>182</sup> Such a conceptualization of legitimacy, which accounts for strategic behavior within particular, normative settings confined to time and space, subsequently make it possible to employ the concept for empirical analysis.

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<sup>182</sup> This example is repeated here to show that these conflicting interpretations can be combined. It proves that Afghans indeed rely on, and look upwards to, hierarchy for certain goods, but at the same time within certain cultural confined settings, that is, not institutions, but individuals.

### Chapter 3: United Nations Transitional Administration in East Timor

This chapter deals with the United Nations Transitional Administration in East Timor (UNTAET), active from 25 October 1999 until 20 May 2002. The main purpose is to analyze UNTAET's policies in view of creating a legitimate government. First, East Timor's history will be described in order to determine why the UN decided to intervene in the first place and how the Transitional Administration came about. Second, UNTAET's main activities in the sphere of governance and administration will be explicated. What were the goals of UNTAET, and what was achieved? What kind of reconstruction package was devised and implemented? Therefore, relevant UN policy documents will be researched as well as additional literature. Next, an analysis of UN activities in East Timor will follow. Relevant questions here are if it was a clear case of 'top-down' enforcement, or if local views mattered. How did the activities of the UN fit in with local norms and values, and local views on legitimacy? After having described its origin, mandate and policies, this third section thus serves as the main analysis of UNTAET's policies in view of creating legitimacy. To make a sound judgment, there will be equally some reflection on developments in East Timor after UNTAET's withdrawal. In the Conclusion then, a final answer will be given to the question of UNTAET's achievements with respect to creating a legitimate government.

#### 3.1 History of East Timor: from 'turning a blind eye' to 'beacon of democracy'

While UNTAET might be seen as a new period in the history of East Timor, for the people of this territory, it probably meant another foreign ruler in a long history of subjugation to alien powers. Early in the sixteenth century, Portuguese explorers discovered the island and exploited it for its sandalwood. Next to Portuguese navigators, Dutch colonizers were active in this region and settled on the western side of the island. The two colonizers clashed over the issue of control well into the twentieth century, when they settled the border dispute with the Selenca Arbitral of 1913. As happened so often, the Portuguese combined their commercial activities with religious ones, bringing missionaries and establishing churches. Though some military and administrative posts were set up, the colonial administrators never made any serious investments into the territory. When sandalwood lost its importance in the course of the 19<sup>th</sup> century, so did East Timor's significance decline for the Portuguese authorities. Consequently, the colony lapsed into despair. East Timor then was the 'most economic backward colony in South East Asia' around the time of the First World War.<sup>183</sup> During the Second World War, the Timorese were shortly subject to another foreign ruler, the Japanese. In the postwar years, Portugal reaffirmed its rule and turned it into an overseas

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<sup>183</sup> James Dunn, *East Timor. A rough passage to independence* (Longueville Books: third edition, Double Bay 2003) 15.



province. The UN contested this, and designated East Timor as a 'non-self governing territory'. Portugal however did little to promote the goal of self-government as obliged to by Article 73 of the UN Charter.<sup>184</sup>

The 'Carnation Revolution' in Portugal in 1974 eventually led to a new period of foreign rule for the people of East Timor. The new rulers in Portugal reaffirmed the right to self-determination of the East Timorese, and envisaged elections, followed by independence in 1978. Political parties were quickly formed in East Timor, most notably UDT, Fretilin (ASDT), and Apodeti.<sup>185</sup> Fretilin favored immediate independence, UDT wanted continued association with Portugal, while Apodeti preferred to integrate within Indonesia as an autonomous province. In a tumultuous struggle for power that followed, Fretilin clashed with UDT, leading to civil war. Being able to mobilize considerable war fighting capabilities, Fretilin quickly claimed control over the territory, declared independence and established the Democratic Republic of East Timor on 28 November 1975. Apodeti and UDT however, formed a coalition, obtained Indonesian support, and proclaimed integration within Indonesia.

Hitherto, Indonesia never bothered much for the territory. The struggle for control however created an opportunity. Though there was discussion within the Indonesian government, President Suharto decided to intervene and Indonesian forces invaded East Timor on 7 December 1975. The international community condemned the act, issuing Resolution 384. This resolution reaffirmed the 'territorial integrity of East Timor as well as the inalienable right to self-determination' and called upon Indonesia to withdraw.<sup>186</sup> Yet, the context of the Cold War meant that the international powers in fact 'turned a blind eye to what was happening in East Timor'.<sup>187</sup> Indonesia feared involvement of the Soviet Union and China, especially because Fretilin had anti-capitalist rhetoric and ties to left-wing groups in Portugal and Africa. The US too worried about the advance of communism in Indo-China after retreating from Vietnam. Hence, US President Gerald Ford told Suharto that 'we will not press you on this issue. We understand the problem you have and the intentions you have', while Ford's Secretary of State Henry Kissinger reiterated this message and added 'the need to move quickly'.<sup>188</sup>

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<sup>184</sup> Ian Martin, *Self-Determination in East Timor. The United Nations, the Ballot, and International Intervention*, Lynne Rienner Publishers: Boulder and London 2001) 15; Markus Benzing, 'Midwifing a New State: The United Nations in East Timor', *Max Planck Yearbook of United Nations Law* 9 (2005), 295-372 (300).

<sup>185</sup> UDT stands for Timorese Democratic Union (*União Democrática Timorese*). ASDT stands for Timorese Social Democratic Association (*Associação Social Democrática Timor*). ASDT was however soon, in a few months, renamed to Fretilin, Revolutionary Front for an Independent East Timor (*Frente Revolucionária do Timor Leste Independente*). Apodeti stands for Timorese Popular Democratic Association (*Associação Popular Democrática Timorese*).

<sup>186</sup> S/RES/384, 22 December 1975.

<sup>187</sup> Katsumi Ishizuka, *The history of peace-building in East Timor. The issues of international intervention* (Delhi: Foundation Books 2010), 7.

<sup>188</sup> Westad, *The Global Cold War*, 247.

Having conquered the territory, Suharto integrated East Timor into Indonesia as its 27<sup>th</sup> province, only recognized by Australia. The Indonesian powers ruled ruthlessly and brutally, responsible for the deaths of between a quarter to a third of the population in their period of occupation (1975-1999). After the disintegration of the Soviet bloc, the situation in East Timor gained increasing attention. An important event for this increased attention was the massacre at the Santa Cruz cemetery on 12 November 1991, where Indonesian military opened fire on protesters at close range, killing more than 270 people. International negotiations and meetings were organized, while the head of the East Timorese Catholic Church Bishop Belo and external representative of the resistance movement José Ramos-Horta were awarded the Nobel Peace Prize in 1996 for their work towards peaceful resolution of the conflict. At the same time, internal opposition grew and the Council for Timorese Resistance (CNRT) was established under the leadership of Xanano Gusmão.<sup>189</sup>

A breakthrough was eventually achieved in 1999. Suharto resigned his presidency on 21 May 1998 after demonstrations and rioting in Indonesia, fueled by the Asian Financial crisis that severely hit Indonesia. His successor, vice-president Habibie, quickly decided to grant more autonomy to East Timor in exchange for economic support from the international community. At the same time, the East Timorese pro-independence movement and its armed forces Falintil stepped up its campaign, leading to numerous violent clashes with Indonesian forces and pro-integration militias.<sup>190</sup> Pressure from the international community and a cooperative stance from Habibie eventually led to an agreement between Indonesia, Portugal and the UN, the so-called 5 May Agreements, endorsed by Resolution 1236 of the UNSC.<sup>191</sup> The signatories decided to organize a 'popular consultation' in which the people of East Timor could vote in favor or against special autonomy within Indonesia, the latter meaning independence. Indonesia concurred with such a consultation because it believed that East Timor wanted to stay with Indonesia.<sup>192</sup>

The agreement stipulated that the UN was responsible for organizing and monitoring these elections, while Indonesia guaranteed peace and security before, during and after the elections. In addition, if the East Timorese rejected the proposal of special autonomy within Indonesia, 'arrangements' would be made for 'a peaceful and orderly transfer of authority in East Timor to the United Nations', initiating 'the procedure enabling East Timor to begin a process of transition

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<sup>189</sup> Examples of negotiations are the Tripartite Talks between Indonesia, Portugal and the UN in 1992, the 'Asia-Pacific Conference on East Timor' in May-June 1994, and the 'All Inclusive Intra-East-Timorese Dialogue' that lasted from 1995 to 1998. Ishizuka, *The history of peace-building in East Timor*, 25-27; Benzing, 'Midwifing a New State', 303; Martin, *Self-Determination in East Timor*, 18-19.

<sup>190</sup> The Armed Forces for the National Liberation of East Timor (*Forças Armadas da Libertação Nacional de Timor Leste*).

<sup>191</sup> S/1999/513 -A/53/951, 5 May 1999; S/RES/1236, 7 May 1999.

<sup>192</sup> Simon Chesterman, 'East Timor in transition. Self-determination, state-building and the United Nations', *International Peacekeeping* 9 (1) (2002), 45-76 (60).

towards independence'.<sup>193</sup> Thus, already long before the people of East Timor had voiced their 'inalienable right to self-determination', outside powers had come to the decision that this self-determination would be subject to a transition process under auspices of the UN, meaning another period of foreign rule.

On 11 June 1999, the United Nations Mission in East Timor (UNAMET) was established, consisting of a political, electoral and information component.<sup>194</sup> Yet, in an earlier report by the Secretary-General it was noted that 'credible reports continue to be received of political violence, including intimidation and killings, by armed militias against unarmed pro-independence civilians'.<sup>195</sup> Clearly, Indonesia was not living up to its task of providing peace and security. In the period leading up to the popular consultation, concerns about the security situation were frequently raised. This resulted in postponement of the consultation, now scheduled for 30 August 1999. More troubling, many observers warned already in July that pro-integration militias were acting with 'acquiescence of members of the Indonesian army'.<sup>196</sup> Several members of the UNSC reiterated these troubling messages in a meeting of the Council in late August. Indonesia ward off this criticism by arguing that it was a 'distortion of facts', that 'misperceptions continue to be cultivated, as though the majority of East Timorese were still living under colonial domination', and that 'East Timorese that have expressed their wish to remain part of Indonesia are immediately and arbitrarily condemned as "military-backed militias"'.<sup>197</sup>

The popular consultation itself on 30 August can be seen as a success, a clear victory for the independence movement of East Timor with 78.5 percent in favor of independence. Yet, the immediate aftermath was a political and humanitarian catastrophe. Unfortunately, allegations of Indonesian involvement in violent pro-autonomy militias appeared to be true. The Indonesian military, which was still responsible for East Timor's peace and security, and pro-autonomy militias terrorized the country and effectively carried out their 'Operation Clean Sweep', killing 'several thousands'. About 250,000 refugees fled to West Timor, while an equal number or more was internally displaced.<sup>198</sup> On top of that:

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<sup>193</sup> S/1999/513 -A/53/951, 5 May 1999, Annex I, 7.

<sup>194</sup> S/RES/1246, 11 June 1999.

<sup>195</sup> S/1999/595, 22 May 1999, 5.

<sup>196</sup> S/1999/803, 20 July 1999, 3.

<sup>197</sup> S/PV.4038, 27 August 1999, 2, 6.

<sup>198</sup> Estimates of refugees and internally displaced people range between 500,000 and 'more than three quarters of the country's population of 890,000'. Jonathan Steele, 'Nation Building in East Timor', *World Policy Journal* 19 (2) (2002), 76-87 (78); Anthony L. Smith, 'The Role of the United Nations in East Timor's Path to Independence', *Asian Journal of Political Science* 9 (2) (2001), 25-53 (26); Kondoch, 'The United Nations Administration of East Timor', 248; Jarat Chopra, 'The UN's Kingdom of East Timor', *Survival* 42 (3) (2000), 27-40 (27).

Main cities as well as remote towns and villages were laid waste, and 70% of the physical infrastructure was gutted. Some areas were 95%-destroyed in street-by-street burnings more precise than smart-bombing. Worse still was the removal of the human skills base; these resources will be impossible to reconstruct for a generation. No international military force was available to halt the violence; there were only contingency plans for the evacuation of foreign nationals.<sup>199</sup>

Not only commentators, but even official UN documents coined this immense destruction a policy of 'scorched earth'.<sup>200</sup> Remarkably, local media and NGOs working in East Timor anticipated such violence long before the popular consultation. Yet, the international community was reluctant to send troops without Indonesia's approval.<sup>201</sup>

When eventually a massive wave of violence and terror struck East Timor, several countries like Portugal, Ireland and Brazil asked for discussion in the UNSC to propose intervention. In a meeting on 11 September, Portugal spoke of the 'rape of East Timor' and numerous countries wanted to intervene, though others only agreed if such a multinational force was with the consent of Indonesia. Indonesia on its part saw no point in such an intervention, since 'a peacekeeping mission under the present circumstances could hardly be effective when there is no peace to keep; rather, it would evolve into a peace-enforcing mission. Recent experience has demonstrated that such missions are bound to fail, even with the best of intentions and resources'.<sup>202</sup> After considerable international pressure, (threats of) sanctions and isolation, Indonesia reluctantly agreed to an international force. Resolution 1264, adopted on 15 September, provided for the deployment of a multinational force under Australian command, the International Force in East Timor (INTERFET).<sup>203</sup> Securing stability of the region, asserting its power, domestic politics and humanitarian concerns all have seemed to play a role in Australia's decision.<sup>204</sup>

UNTAET succeeded INTERFET and was officially active from 25 October 1999 on when the UNSC adopted Resolution 1272. The 5 May Agreements already provided for deployment of such a transitional administration. Interestingly, a reading of the meeting on adopting Resolution 1272 gives evidence of the high hopes attached to UNTAET, while at the same time revealing some interesting points. Portugal for example, hoped that 'the concerted action of the international community will help turn East Timor into a beacon of democracy, rule of law, respect for human rights, tolerance and prosperity in the region', while Australia argued that 'UNTAET (...) must also build the foundations for

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<sup>199</sup> Chopra, 'The UN's Kingdom of East Timor', 27.

<sup>200</sup> Chopra, 'The UN's Kingdom of East Timor', 27; Chesterman, 'East Timor in transition', 61; S/1999/976, 14 September 1999, 9.

<sup>201</sup> Ishizuka, *The history of peace-building in East Timor*, 39-47.

<sup>202</sup> S/PV.4043/Resumption, 11 September 1999, 29.

<sup>203</sup> S/PV.4045, 15 September 1999; S/RES/1264, 15 September 1999.

<sup>204</sup> Smith, 'The Role of the United Nations in East Timor's Path to Independence', 39.

a democratic and stable State' and France welcomed the 'ambitious mission'.<sup>205</sup> Several countries emphasized the need for participation, cooperation and consultation with East Timorese in their process to self-determination. Apparently, the member of the UNSC saw no contradiction between self-determination and imposing democratic rule by foreign powers, as evidenced by Portugal's statement that 'UNTAET is the culmination of a process of self-determination'. Likewise, Norway considered UNTAET necessary as 'a transitional step on the way to full independence for East Timor'. While China remarked that 'East Timor will ultimately have to be governed by the East Timorese people themselves', they too considered the United Nations presence acceptable for 'that island's people to achieve independence and self-reliance'. Resolution 1272 even stated that the vote for independence was 'a clear wish to begin a process of transition *under the authority of the United Nations*'.<sup>206</sup> Canada's argument that 'the people of East Timor finally has the opportunity to organize its own society as it wishes' is nonsense then. Instead, the international community had already decided on how to (re)build East Timor. The exact content, goals and implementation of the mandate of UNTAET is the subject of the next section.

### 3.2 UNTAET 1999-2002: 'smooth Timorization, smooth transition'.

UNTAET was 'endowed with overall responsibility for the administration of East Timor and empowered to exercise all legislative and executive authority, including the administration of justice'. The tasks were 'to provide security and maintain law and order throughout the territory of East Timor, to establish an effective administration, to assist in the development of civil and social services, to ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance, to support capacity-building for self-government', and 'to assist in the establishment of conditions for sustainable development'. The mission itself consisted of three main components: governance and public administration, humanitarian assistance and emergency rehabilitation, and a military component. In addition, UNTAET was authorized 'to take all necessary measures to fulfil its mandate'. The Brazilian diplomat Sergio Vieira de Mello was appointed as Special Representative to the Secretary General (SRSG), and as head of UNTAET, 'responsible for all aspects of the United Nations work in East Timor' with 'the power to enact new laws and regulations and to amend, suspend or repeal existing ones'. Nevertheless, UNTAET was 'to consult and cooperate closely with the East Timorese people in order to carry out its mandate effectively with a view to the development of local democratic institutions'.<sup>207</sup>

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<sup>205</sup> S/PV.4057, 25 October 1999, 4, 6, 16.

<sup>206</sup> S/RES/1272, 25 October 1999, 2; my emphasis.

<sup>207</sup> Ibidem, 2-3.

The East Timorese had hardly been consulted on the issue of how to rebuild their country, though they had their own proposals. According to the British journalist Jonathan Steele, East Timorese leaders had given the UN a detailed proposal for a mixed Timorese-U.N. administration in mid-October 1999. The UNSC never considered this proposal and instead, the UN devised a mission where they had total control.<sup>208</sup> Nevertheless, it was clear to De Mello that participation from the East Timorese was required, as also clearly voiced by the members of the UNSC and laid down in Resolution 1272. Hence, he decided to seek cooperation from the CNRT, especially Gusmão who had considerable prestige and power as leader of the independence movement and therefore enjoyed 'charismatic legitimacy'.<sup>209</sup> Moreover, the CNRT was 'the one organization with nationwide political reach in an institutional vacuum and acted in many areas as a de facto government authority'.<sup>210</sup>

De Mello formalized the East Timorese participation by establishing the National Consultative Council (NCC) on 2 December 1999. This NCC consisted of 15 members, four of which of the UN, seven from the CNRT, three from other political groups in East Timor, and one representative from the Catholic Church. Though the UN welcomed the NCC for 'East Timorese people to participate in the decision-making process', the NCC was as its name implies merely consultative.<sup>211</sup> No real power was given to the NCC, and the SRSG could act without its permission. At the same time, district administrations were set up to decentralize political authority. Nevertheless, as Chopra explains, the tendency in UNTAET was on centralization and top-down authority, which seriously hampered operational capabilities of these district administrations.<sup>212</sup>

The Community Empowerment and Local Governance Project (CEP) of the World Bank is a clear case in point. The CEP was to empower the people at local level, by giving them a say over where to spend the money from donors on. UNTAET opposed the project for various reasons, amongst other because it did not fit with UNTAET's centralized system of rule and UNTAET's officials had no power over the village and sub-district councils to be created by the CEP. In addition, local elections would determine who would run these councils, but UNTAET feared that the Timorese would confuse such elections with national elections. Ultimately, UNTAET had to yield after continuing pressure from the World Bank. However, 'the CEP was unable to recover from the acrimonious negotiations leading up to its establishment. It continued to be effectively rejected by

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<sup>208</sup> Steele, 'Nation Building in East Timor', 79.

<sup>209</sup> Naazneen, H. Barma, 'Brokered Democracy-Building: Developing Democracy through Transitional Governance in Cambodia, East Timor and Afghanistan', *International Journal on Multicultural Societies* 8 (2) (2006), 127-161 (147); Simon Chesterman, 'East Timor', 192-216 (215), in: Berdal and Economides (eds.), *United Nations Interventionism 1991-2004*.

<sup>210</sup> Barma, 'Brokered Democracy-Building', 147.

<sup>211</sup> S/2000/53, 26 January 2000, 2.

<sup>212</sup> Jarat Chopra, 'Building State Failure in East Timor', *Development and Change* 33 (5) (2002), 979-1000 (986-989).

UNTAET internally, with the consequence that the transitional administration never had much of a presence below the district level, where 80 percent of the population lives. The UN failed to create any kind of local government and lost the opportunity for introducing democratization alongside existing hierarchical paradigms'.<sup>213</sup> Interestingly, the UN did claim credit for the CEP when informing the UNSC.<sup>214</sup>

Such despotic behavior of UNTAET's officials and the lack of East Timorese participation led to 'a growing crisis of legitimacy' of UNTAET by the early months of 2000.<sup>215</sup> Equally, members of the UNSC frequently insisted on the need for participation and 'ownership' of East Timorese, stressed the importance of capacity-building and favored a process of 'Timorization'. Hence, the NCC was reformed by De Mello in July 2000 and turned into the 'National Council' (NC), in which 33 (later 36) representatives from the CRNT and other political parties, the Church, women's and youth organizations, NGO's, professional and labor organizations, the farming and business community, and Timor's 13 districts took seat. At the same time, a so-called Transitional Cabinet was instituted in which four positions were for East Timorese leaders (later five), and four for UN officials. Together, the NC and the new Cabinet formed the East Timorese Transitional Administration (ETTA), which replaced UNTAET's governance and public administration pillar as government. At the same time, UNTAET recruited as many Timorese as possible in the civil service. Consequently, De Mello claimed that 'UNTAET has made demonstrable progress in administering East Timor in a strengthened partnership with the East Timorese leading to what you tasked us to achieve, namely capacity for self-governance'.<sup>216</sup> Similarly, he claimed two months later that 'the creation of this [Transitional] Cabinet and the appointment of the National Council together represent a significant new phase in the transition towards East Timorese rule, one where power is increasingly shared between the Transitional Administrator and broadly selected representatives of East Timorese society'.<sup>217</sup> Still, executive power was in hands of De Mello, which led to frequent complaints from the Cabinet ministers. Five months after its establishment, four of the five Cabinet ministers threatened to withdraw, arguing that 'the East Timorese cabinet members are caricatures of ministers in a government of a banana republic. They have no power, no duties, no resources to function adequately'.<sup>218</sup>

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<sup>213</sup> Chopra, 'Building State Failure in East Timor', 993.

<sup>214</sup> S/PV.4114, 21 March 2000, 3; S/2000/738, 26 July 2000, 2.

<sup>215</sup> Joel C. Beauvais, 'Benevolent Despotism: A Critique of UN State-building in East Timor', *New York University Journal of Law and Politics* 33 (2001), 1101-1178 (1127).

<sup>216</sup> S/PV.4203, 29 September 2000, 5.

<sup>217</sup> S/PV.4236, 28 November 2000, 5.

<sup>218</sup> Oisin Tansey, *Regime-building: democratization and international administration* (Oxford: Oxford University Press 2009) 81.

Upon the ministers' threat, De Mello quickly promised them future increases in authority. De Mello favored a process of 'smooth Timorization, smooth transition', meaning gradually putting executive and legislative power into the hands of the East Timorese. The rationale behind this gradual transfer of powers was to recast UNTAET not as 'an international transitional administration, but rather as a support structure for the embryonic government of East Timor and other institutions of the state'.<sup>219</sup> Interesting in this respect is that the UNSC, and the UN officials informing them, still regarded their efforts compatible with East Timorese self-determination and independence. The rhetoric in their meetings on East Timor are interlard with references to 'independence', 'ownership', transferring authority and 'self-government'. China was the only member who sometimes stressed the necessity 'to respect local tradition and culture and the will and choices of the local people' and to honor 'their own aspirations'.<sup>220</sup> Even more interesting is that while working on this gradual transfer of authority, it was already envisaged in late 2000 that independence of East Timor had to be accompanied by continued involvement of the UN.<sup>221</sup> The Assistant Secretary-General for Peacekeeping Operations of the UN, Hédi Annabi, stated in the UNSC that 'subject to the continuing assistance of the international community, the East Timorese should be able to realize their aspirations for a democratic and sustainable State'.<sup>222</sup> This continued assistance was not simply enforced by the UN, but actively plead for by East Timorese leaders like Gusmão and Ramos-Horta when addressing the UNSC.<sup>223</sup>

The next and final step of the transition process was national elections for a Constituent Assembly. This assembly then could draft a new Constitution, and once this Constitution was in place, the assembly would become the new national assembly of an independent East Timor.<sup>224</sup> In the run-up to the elections, the CNRT had dissolved after internal discord. Gusmão resigned his position as leader of the CNRT, as did members of the NC, since many of them were running for election. Political parties were formed, which remarkably were 'not basing its campaign appeal on regional or ethnic affiliations', despite the fact that East Timor is 'highly heterogeneous in its ethnic and linguistic composition'. Instead, 'the election is likely to be fought more on the basis of personalities, past record, and symbols especially during the independence struggle, rather than on the basis of ideology'.<sup>225</sup> Although dissolution of the CNRT and NC might indicate increasing antagonism, the signing of a 'national pact of unity' by fourteen of the sixteen registered political parties early in July 2001 showed otherwise. In this pact, the political parties committed themselves

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<sup>219</sup> S/PV.4265, 26 January 2001, 4.

<sup>220</sup> S/PV.4180, 28 July 2000, 9; S/PV.4236, 28 November 2000, 15.

<sup>221</sup> S/RES/1338, 31 January 2001, 3.

<sup>222</sup> S/PV.4308, 5 April 2001, 5-6.

<sup>223</sup> S/PV.4321, 18 May 2001.

<sup>224</sup> S/PV.4203, 29 September 2000, 5; S/PV.4236, 28 November 2000, 5.

<sup>225</sup> S/2001/719, 24 July 2001, 1-2.



to respecting the outcome of the election, to defend non-violence, multiparty democracy, peace and stability, and promote national unity and equality.

The elections for the 88-member assembly were held on 30 August 2001, in a peaceful atmosphere and without reports of fraud, violence or intimidation. Fretilin gained 55 of the 88 seats, and 23 women were chosen into the assembly. This last point is especially remarkable given the fact that 'traditionally, women have not been encouraged to participate in public life in East Timor'.<sup>226</sup> Now, it was up to the members of the assembly to draft a Constitution. Before the elections took place, thirteen constitutional commissions had been established. These constitutional commissions conducted popular consultations, by holding several public meetings throughout East Timor. This produced reports that summarized the views expressed by 36,000 Timorese. In addition, four thematic committees of the Constituent Assembly held three weeks of public hearings shortly after the elections.<sup>227</sup> Yet, Fretilin, that dominated the drafting process, 'quickly made it clear that the findings from the commissions would not play a significant role'.<sup>228</sup>

On 15 September 2001, the members of Constituent Assembly were sworn in and five days later, the Second Transitional Government was formed, presided by a Council of Ministers, still under overall authority of the SRS. This Second Transitional Government developed a framework for a national development plan. Again, the Government consulted civil society such as youth and women's organizations, churches, NGOs and intellectuals. In total, almost 40,000 people directly participated in planning for the future. After voting, the Constituent Assembly decided to set 20 May 2002 as the date for independence, later endorsed by the UN.<sup>229</sup> Yet, in January 2002 the Secretary-General reported 'the comparative fragility of the political foundations of this new country, its very limited pool of professional and administrative expertise, lack of strong independent security mechanisms and nascent state of economic development'. Hence, he concluded, 'East Timor will continue to require significant assistance from the international community well after independence, in order to ensure stability and realize the potential for progress that has been generated over the past two years'.<sup>230</sup>

The Constitution that was eventually formed was signed on 22 March 2002, to come into effect on 20 May 2002. It established the 'Democratic Republic of East Timor' as 'a democratic, sovereign, independent and unitary State based on the rule of law, the will of the people and the respect for the dignity of the human person'. It provided for a weak President and strong Prime

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<sup>226</sup> A/56/337, 6 September 2001, 11.

<sup>227</sup> S/2001/983, 18 October 2001, 1; S/2002/80, 17 January 2002, 2.

<sup>228</sup> Tansey, *Regime-building*, 94.

<sup>229</sup> S/PV.4403, 31 October 2001; S/PV.4403 (Resumption 1), 31 October 2001; S/PV.4404, 31 October 2001; S/PRST/2001/32, 31 October 2001; S/PV.4462, 30 January 2002, 28; S/PV.4522, 26 April 2002, 7.

<sup>230</sup> S/2002/80, 17 January 2002, 1.

Minister, a multi-party democracy, acknowledged the role of the Catholic Church in the national liberation of East Timor, and stressed the equality of men and women.<sup>231</sup> Before independence and the Constitution to take effect, presidential elections were to be organized. On 14 April 2002, the people of East Timor again went to the poll. With a turnout of over 86 percent, it became clear that Gusmão still enjoyed immense popular support, gaining 82.69 percent of the vote.<sup>232</sup> On 20 May 2002 then, East Timor gained its official independence, was removed from the list of 'Non-Self Governing Territories' and welcomed as Timor-Leste to the 'family of nations' and new member of the UN.<sup>233</sup>

On balance, the record of UNTAET seems mixed. Recognizing the level of destruction, the peacekeepers and UN officials can claim some clear successes. Apart from the established institutions, in about 30 months almost 11,000 civil servants were recruited against some 15,000 approved posts. These East Timorese civil servants gained full responsibility in decision-making and day-to-day district administration. However, there was especially a lack of capacity at the upper levels of administration. Similarly, district administrations still required strengthening. While about 202,000 refugees returned, UNHCR estimated that there were still 50,000 in West Timor. In addition, issues of landownership remained unresolved, which hampered foreign investments. Moreover, the new country was, and is, one of the poorest countries, despite the fact that the Timor Sea Treaty was signed with Australia, which gave East Timor the right to 90 percent of the revenues derived from oil and gas located between East Timor and Australia. In April 2002, a UN report observed that East Timor was 'desperately poor' and that 'about 340,000 people, or 41 percent of the population of about 800,000, live under the absolute poverty line of \$0.55 per day'.<sup>234</sup>

Members of the UNSC agreed that UNTAET was quite a success, something of which the UN could be proud. Still, they worried about the future and noted that 'the emerging institutions in East Timor remain fragile', while 'shortcomings exist in a number of critical public administration elements of East Timor in the post-independence period'. Hence, 'in the period immediately after independence assistance will be required to ensure sustained momentum in the development and strengthening of East Timor's infrastructure, public administration, law enforcement and defense capacities'.<sup>235</sup> On 17 May 2002, Resolution 1410 was adopted which provided for the United Nations

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<sup>231</sup> *Constitution of the Democratic Republic of Timor-Leste*, via: <http://timor-leste.gov.tl/?cat=37&lang=en>, Government of Timor Leste, last visit: 24 May 2011.

<sup>232</sup> S/2002/432/Add. 1, 24 April 2002, 1; S/PV.4522, 26 April 2002, 20.

<sup>233</sup> A/56/953–S/2002/558, 20 May 2002; S/PV.4537, 20 May 2002; S/PRST/2002/13, 20 May 2002; S/PV.4540, 22 May 2002; S/2002/566, 23 May 2002; S/PV.4542, 23 May 2002; S/PRST/2002/15, 23 May 2002; S/RES/1414, 23 May 2002.

<sup>234</sup> S/2002/432, 17 April 2002, 7, 15.

<sup>235</sup> S/PV.4522, 26 April 2002; S/PV.4522 (Resumption 1), 29 April 2002; S/PV.4534, 17 May 2002; S/RES/1410, 17 May 2002; S/PRST/2002/13, 20 May 2002, 2.

Mission of Support in East Timor (UNMISET), active until 20 May 2005. Next, UNOTIL (United Nations Office in East Timor, May 2005—August 2006) followed, to be succeeded by UNMIT (United Nations Integrated Mission in East Timor, August 2006-present). Apparently, more than nine years after independence the East Timorese are still not entirely ready for self-government.

### 3.3 Analysis of UN involvement: 'building a nation from scratch'

One of the most remarkable features of UNTAET was the goal of creating democratic government in a future country where this specific template was completely alien. Having experienced foreign rule, a 24-year long independence struggle, and widespread destruction in 1999, there was simply hardly any capacity to rule the country at the central level, let alone to build a functioning democracy. It must nonetheless be acknowledged that the main political parties and elites in East Timor were all united in adopting democracy.<sup>236</sup> One can interpret the high turnout at peaceful elections, a constitution, and eventual independence as evidence of commitment to democracy. This picture becomes however more problematic on closer inspection. First, no such thing as democracy had ever existed in East Timor. The term 'democracy' was translated as *biti boot*, meaning big mat, a referral to woven grass mats on which elders sat when discussing communal problems.<sup>237</sup> Second, it appeared that Timorese people did not know what they were voting for. The Catholic Church had warned for this, and even De Mello stated in his address to the UNSC that 'the East Timorese may not know precisely what democracy is'.<sup>238</sup>

The clear victory of Fretilin in the elections for the Constituent Assembly, and for Gusmão in the presidential elections, are explained best by East Timor's history. Fretilin enjoyed considerable legitimacy due to the symbolism of a popular and successful national resistance front. Under the overarching structure of the CNRT, they had been the organizational driving force behind the pro-independence victory in the referendum. As leader of the guerilla resistance, Xanana Gusmão had tremendous charisma and popular support. Moreover, Fretilin's armed wing Falintil had continuously challenged Indonesian forces during their occupation. They had established an extensive non-military network in towns and villages of East Timor during the course of the resistance. This network could now be used as organizational platform to win voters. As 'the one organization with nationwide political reach in an institutional vacuum', CNRT was the only force capable of acting as government after Indonesia's sudden withdrawal.<sup>239</sup>

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<sup>236</sup> Tansey, *Regime-building*. 67.

<sup>237</sup> Chesterman, *You, the people*, 232.

<sup>238</sup> S/PV.4351 (Resumption 1), 30 July 2001, 26.

<sup>239</sup> Barma, 'Brokered Democracy-Building', 147.

Nevertheless, UNTAET approached its task as 'building a nation from scratch', as frequently voiced by members of the UNSC during their discussions.<sup>240</sup> Indeed, there was little left in East Timor after the wave of violence and destruction following the popular consultation. As a result, UNTAET handled East Timor as if it was a *tabula rasa*.<sup>241</sup> However, while there might have been an administrative vacuum, there was clearly no political vacuum. Especially the work of the German anthropologist Tanja Hohe underscores this. She shows how the Transitional Administration and its new institutions effectively ruptured East Timorese society, instead of successfully transferring new legitimizing principles. Instead of working with, or alongside, traditional forms of legitimacy and power-sharing, new institutions were imposed top-down by UNTAET as if 'there were no strong concepts and ideas existing on the local level, and that the population just had to be "taught" democracy'.<sup>242</sup>

In East Timorese society, strong ancestors, kinship and family ties legitimize political authority. Initially, when UNTAET assumed power, Falintil/CNRT built on its clandestine structure to appoint sub-district chiefs or village chiefs with consent of village elders. In line with East Timorese perceptions, such appointments were based on kinship, ancestry, descent and family relations. To implement its policies, UNTAET worked mainly with these village chiefs, though not officially. With the establishment of ETTA in mid-2000, new administrative structures were imposed top-down. To fill the positions in this new bureaucracy, UNTAET recruited people with certain qualifications like education and working experience. Usually, these new administrators were younger people, who in the eyes of the East Timorese lacked legitimacy because they had not the right qualities that conferred authority on someone. Without ancestral legitimation, seniority and 'right' descent, they lacked the necessary qualities to effectively rule. Moreover, East Timorese people regretted that the appointments were not based on deeds during the resistance fight. Consequently, the new administrators of UNTAET's governance structure came in opposition to village chiefs, who enjoyed considerable wider legitimacy among the population. In fact, these village chiefs were far more important than administrators appointed by UNTAET, taking a key position as interlocutors between CNRT, UNTAET and East Timorese people. Yet, when the CNRT dissolved in 2001, these village chiefs lost their 'legal' basis for rule. As a result, traditional power structures broke down, without new forms of rule effectively replacing them.<sup>243</sup>

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<sup>240</sup> S/PV.4057, 25 October 1999, 10; S/PV.4191, 29 August 2000, 10, 21; S/PV.4203, 29 September 2000, 11; S/PV.4308, 5 April 2001, 17; S/PV.4462 (Resumption 1), 30 January 2002, 5; S/PV.4537, 20 May 2002, 7.

<sup>241</sup> Chesterman, 'East Timor in transition', 64; Chopra, 'Building State Failure in East Timor', 998; Geoffrey C. Gunn and Reyko Huang, *New Nation. United Nations Peace-Building in East Timor* (Macau: Geoffrey C. Gunn, second edition, 2006) 182.

<sup>242</sup> T. Hohe, 'The Clash of Paradigms: International Administration and Local Political Legitimacy in East Timor', *Contemporary Southeast Asia* 24 (3) (2002), 569-589 (570).

<sup>243</sup> Hohe, 'The Clash of Paradigms'.

The UN attached great importance and high hopes to elections for the Constituent Assembly, especially as instrument for legitimizing power. As De Mello stated in November 2000, the 'final phase of transition' was 'the democratic election of a legitimate East Timorese Government,' which as 'elected constituent assembly will carry full democratic legitimacy'.<sup>244</sup> This was reiterated in Timor's Constitution, which stated that 'the Members of the Constituent Assembly [are] legitimate representatives of the People elected on the 30th of August 2001'.<sup>245</sup> In this reasoning, elections thus conferred the necessary legitimacy on the new holders of power.

Again, Hohe makes clear that elections were not so much a democratic exercise or an introduction of new legitimizing principles, but rather a continuation of local paradigms. Basing her arguments on extensive research, interviews with villagers throughout East Timor, she explains that most people did not know what the elections stood for. They joined and voted for political parties based on personal relationships, historical connections, and existing village factions. Fretilin mobilized this network, especially by emphasizing their resistance struggle, claiming 'ownership' of the resistance heroes. Ancestors who died during the resistance struggle had most respect and honor. By voting for Fretilin, people thus paid their respect to their ancestors. In addition, people were frightened to vote for a party other than Fretilin, since 'culturally the backer of a loser "loses face"'.<sup>246</sup> Hohe also clarifies that the high turnout during the elections is a result of the hierarchical social structure in East Timor in which orders from above are not doubted or rejected. In this hierarchical social structure, equality and individuality are absent. Instead, the decision-making process is one of agreement and discussion by everyone, to make sure that no one loses face. Hence, the idea of a multiparty system, of parties competing with each other on an abstract and non-violent level, was also entirely alien to Timorese culture. Not opposition, but unity was essential to create peace, which led to such statements as 'we are all Fretilin'. In fact, the elections confirmed that local ideas of leadership and power were still in place. Thus, Hohe concludes that 'the exercise [elections] was rather a totem poll, in which voters expressed their honour and respect towards their history and cultural values'.<sup>247</sup>

In a recent article, two scholars argued that in East Timor there is 'co-existence of introduced Western (generally liberal institutional) models of governance and local governance practices, rooted in place and culture, and enjoying widespread social legitimacy'.<sup>248</sup> New, liberal norms were

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<sup>244</sup> S/PV.4236, 28 November 2000, 5.

<sup>245</sup> *Constitution of the Democratic Republic of Timor-Leste*, via: <http://timor-leste.gov.tl/?cat=37&lang=en>, Government of Timor Leste, last visit: 24 May 2011.

<sup>246</sup> T. Hohe, "'Totem Polls': Indigenous Concepts and "Free and Fair" Elections in East Timor', *International Peacekeeping* 9 (4) (2002), 69-88 (76).

<sup>247</sup> Hohe, "'Totem Polls'", 83.

<sup>248</sup> Brown, M. Anne and Alex Freitas Gusmao, 'Peacebuilding and Political Hybridity in East Timor', *Peace review. A Journal of Social Justice* 21 (1) (2009), 61-69 (62).

introduced without any attention for local practices or values underpinning order. These new norms lacked substance or meaning. People of East Timor identified democracy with conflict and experienced it as 'top-down' imposition of values. They were especially concerned about their culture, their identity, community, and traditional practices for which they fought so long. Yet, the people of East Timor did not reject democracy in principle. Rather, they asked for 'democratic governance processes to recognize and interact with the values, norms, and practices widespread across the population'.<sup>249</sup>

The perseverance of local practices, values and norms was equally visible concerning the judicial infrastructure and justice. Similar to the political institutions for governance, the judicial infrastructure that UNTAET created was based on Western and international concepts, without rethinking how such concepts might be received in Timorese society.<sup>250</sup> Apart from that, 'capacity-building' of the legal system fell behind. This has resulted in a lack of prosecution and trials, fuelling a sense of impunity and lawlessness. A reading of the annual reports on East Timor of the renowned Freedom House showed this clearly. From 2003 on, these reports consequently mentioned the injustice being done to women. As stated in 2010:

Equal rights for women are constitutionally guaranteed, yet domestic violence remains a persistent problem. It is estimated that half of all women were victims of gender-based crimes in 2008, while only a marginal fraction of cases of abuse were reported to the police. The country's weak legal system, coupled with the prevalence of customary law at the local level, means that abuse is rarely prosecuted.<sup>251</sup>

Equally, it was reported that East Timorese felt there was a 'culture of violence' in society, with a lack of prosecution and trial. Hence, 'alternative methods of dispute resolution and customary law are widely used'.<sup>252</sup> The Australian scholar Rodney Nixon reiterated the troubling observations of Freedom House in his dissertation of 2008.<sup>253</sup> Based on interviews, he argued that East Timorese rather saw their conflicts over land resolved by village chiefs (*chefs de sucos*) than government officials. They considered such jurisdiction cheaper, quicker, less corrupt, and easier to understand:

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<sup>249</sup> Brown and Gusmao, 'Peacebuilding and Political Hybridity in East Timor', 67; Volker Boege, Anne Brown, Kevin Clements, and Anna Nolan, 'Building Peace and Political Community in Hybrid Political Orders', *International Peacekeeping* 16 (5) (2009), 599-615.

<sup>250</sup> Erica Harper, 'United Nations Transitional Administration: Missions in State or Nation-Building?', 33-53, in: Horst Fischer and Noëlle Quénivet eds, *Post-Conflict Reconstruction: Nation- and/or State Building* (Berlin: Berliner Wissenschafts-Verlag 2005).

<sup>251</sup> Freedom House Country Report East Timor 2010.

<sup>252</sup> Freedom House Country Report East Timor 2009.

<sup>253</sup> Rodney Stafford Nixon, *Integrating Indigenous Approaches into a 'New Subsistence State': The Case of Justice and Conflict Resolution in East Timor* (PhD-Thesis: Charles Darwin University 2008).

‘suco justice and conflict resolution mechanisms continue to be highly regarded throughout the country’.<sup>254</sup>

With the benefit of hindsight, one can further reflect on the developments in East Timor after UNTAET’s withdrawal. Already in 2005, Freedom House reported that ‘neither the police (PNTL) nor the military (FDLT) are perceived to have the trust of the population or the capacity to provide adequate security and order’.<sup>255</sup> Matters came to a head in 2006 when about a third (594 soldiers) of the Timorese National Defense Forces (F-FDTL) was sacked after they had petitioned against discrimination in the army. Being sacked, they started a demonstration in Dili in late April, which led to widespread rioting, violent clashes, 37 deaths and 15,000 internally displaced persons. Eventually, the F-FDTL also came into conflict with the national police forces, the PNTL, resulting in the killing of eight PNTL officers. The government was at the brink of collapse and called on foreign powers to restore order. An Australian-led International Stabilization Force of 1,000 military troops was sent. This 2006 crisis had multiple reasons, such as an incompetent and faction-ridden government incapable of engaging with people, high youth unemployment and deep poverty.<sup>256</sup> Upon allegations of involvement in the riots, Prime Minister Alkatiri was forced to resign after being pressured by Gusmão, but the Prosecutor-General dropped the charges against Alkatiri later. Similarly, former interior minister Rogerio Lobato was found guilty of arming a hit squad in the run-up to the 2006 violence. While sentenced to 7.5 years in jail, he was pardoned in 2008. Such acts of course contributed to the sense of impunity and lawlessness.

The presidential and parliamentary elections of 2007, 9 April and 30 June respectively, confirmed once more the importance of the independence struggle and its symbolism. Gusmão’s political ally Ramos-Horta won the presidential elections. Early in 2007, Gusmão had established a new party as counterbalance to Fretilin, where Alkatiri’s position was still strong. Gusmão named his new party the National Congress for Timorese Reconstruction, drawing on symbolism of the resistance and using its acronym CNRT. Just like in 2001, political parties based their campaigns on symbolism, personalities, kinship and family ties. They ‘promoted heroic images of the respective leaders, their contributions to the national struggle for independence and their capacity to reclaim the much sought after Unidade Nacional (National Unity)’.<sup>257</sup> Still being able to draw on his past, Gusmão secured 18 of the 65 seats. As main symbol of the resistance struggle, Fretilin was able to gain 21 seats. As two Australian scholars explain: ‘For the many who endured the long years of the resistance struggle, Fretilin stands as a symbol of their shared suffering and eventual victory. In their

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<sup>254</sup> Nixon, *Integrating Indigenous Approaches into a ‘New Subsistence State’*, 348-349.

<sup>255</sup> Freedom House Country Report East Timor 2005.

<sup>256</sup> Ishizuka, *The history of peace-building in East Timor*, 161.

<sup>257</sup> Andrew McWilliam and Angie Bexley, ‘Performing Politics: The 2007 Parliamentary Elections in Timor Leste’, *The Asia Pacific Journal of Anthropology* 9 (1) (2008), 66-82 (69).

minds, to vote against Fretilin would be an act of disloyalty no matter how unsatisfactory or delayed the wider restoration of social services and economic benefits'.<sup>258</sup> With no absolute winner, the parties had to form a coalition government. Eventually, Gusmão was able to make such a coalition without Fretilin. After the new government was sworn in on 8 August 2007, Fretilin decided to boycott it, while former Prime Minister Alkatiri called for a campaign of 'civil disobedience'. The result was rioting, burning houses and an attack on a UN convoy. After this short wave of violence, Fretilin returned to parliament.<sup>259</sup>

While hoping for a return to normalcy, East Timor was once again struck by violence when former army major and rebel leader Alfred Reinado assaulted the Prime Minister and the President in February 2008. Luckily, both Ramos-Horta and Gusmão survived. Yet, it was a clear sign of the unstable state of the country. A leaked UN report of December 2008 warned that East Timor was at the risk of political collapse. Similarly, Freedom House reported in 2010 that the country's future stability was in jeopardy, especially since the PNTL and F-FDTL still lacked trust and confidence from the population. In addition, while substantial improvements had been made since independence of East Timor, there was in 2010 still a 50 percent unemployment rate, 40 percent of the population living under the poverty line, and approximately 15,000 internally displaced persons: 'East Timor remains the poorest country in Southeast Asia'.<sup>260</sup>

### 3.4 Conclusion

Since its popular consultation in 1999, East Timor surely has come a long way. Being subject to foreign rule for most of its history and witnessing an independence struggle for almost a quarter of a century, it is a remarkable achievement that this small island now is a democracy with a constitution guaranteeing human rights and equality of men and women. Yet, after nine years of independence, the country still lacks a functioning judicial infrastructure and is one of the poorest nations. Considering government, the high turnout at voting and different election results might indicate that East Timorese people have learnt to practice democracy. However, closer inspection shows that something else is explanatory for these results, that is, East Timorese views on authority and legitimacy. A democracy with elections as the main legitimizing principle might have been established in theory, in practice not so much. Equally, while favoring a process of 'Timorization', participation, consultation, and 'ownership', UNTAET's efforts seem more in line with 'top-down' imposition of specifically Western concepts of rule and accompanying norms and values. The

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<sup>258</sup> McWilliam and Bexley, 'Performing Politics: The 2007 Parliamentary Elections in Timor Leste', 76.

<sup>259</sup> Michael Leach, 'The 2007 Presidential and Parliamentary Elections in Timor-Leste' *Australian Journal of Politics and History* 55 (2) (2009), 219-232.

<sup>260</sup> Freedom House Country Report East Timor 2010.



international community acted as if East Timor was a *tabula rasa*. Research has shown how the introduction of such a Western rational-legal template ruptured East Timorese society at the local level, pitting village chiefs against administrators of the new government. Moreover, the government has been challenged violently on multiple occasions. Even Fretilin as one of the main political parties at first denied the legitimacy of the new government after the elections of 2007.

In less than three years, UNTAET succeeded in establishing a new governance structure with consent of the main parties, who were all committed to this goal. However, the underlying principles of this specific governmental structure have not taken root. Instead, the East Timorese paradigm of authority and legitimating power has shown its perseverance, when considering the voting pattern at elections, allegiance to political parties and leaders, and justice. To conclude, one might argue that the new government demonstrated its legitimacy since 2002, given the fact that this government structure is still in place, the high voter turnout and different political parties in power. Yet, closer inspection of East Timorese politics and society shows that continued existence of the government is rather a consequence of resilience the local level, where new power structures have been cast in specific East Timorese paradigms of authority and political legitimacy.

## Chapter 4: United Nations Interim Administration in Kosovo

Just a few months before the UN started its mission in East Timor, it had already engaged itself in another ambitious operation, the United Nations Interim Administration in Kosovo (UNMIK). UNMIK commenced its activities on 10 June 1999, and is now, more than 12 years later, still officially operational. This chapter will deal with this UN interim administration, focusing on the period from start until 17 February 2008, when Kosovo declared its independence. This declaration of independence, and hence the legal status of Kosovo, is still contested, yet, does serve as a good benchmark to assess the UN's efforts and its achievements.

The analysis below is structured similar to the previous chapter on UNTAET. First, Kosovo's history and the developments leading to deployment of UNMIK will be discussed. In the next section, the subject is UNMIK's policies in the sphere of setting up an administration and creating a government. What kind of reconstruction package was being implemented; what were the goals and the means? As in the previous chapter, UNSC documents will be a major source of information. A particular dimension in the case of Kosovo is its significance for great power politics. In general, Russia backed Serbia in the UNSC, sometimes with support of China as well, while the other powers were more pro-Kosovo.<sup>261</sup> These great power politics are not the subject of analysis here, but had a major influence on Kosovo's developments and current unclear legal status. Third, an analysis of UNMIK's policies will follow by assessing its achievements, looking at issues of establishing authority and interaction between top-down enforcement and bottom-up aspirations. In the Conclusion then, a final answer will be given to the question of UNMIK's accomplishments with respect to creating a legitimate government.

### 4.1 History of Kosovo: 'the soul of Serbian national being'.

Like East Timor's history, Kosovo's could be written as one of continuous subjugation. In the Middle Ages, a Serbian Kingdom was being established throughout the central Balkan region, where both Albanians and Serbs lived. In 1389, this Serbian Kingdom was defeated by invading Ottoman Turks at the Battle of Kosovo (Polje), or the Field of the Blackbirds, which led to centuries of Ottoman rule. Though the battle was a defeat for the Serbs, it would become a central myth in its history as a

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<sup>261</sup> 'Serbia' is being used to refer to the Republic of Serbia (2006-present), as legal successor to Serbia and Montenegro (1992-2006), which was formed after the disintegration of the Socialist Federal Republic of Yugoslavia (SFRY) (1943-1992) and was formerly also known as the Federal Republic of Yugoslavia (1992-2003) and the State Union of Serbia and Montenegro (2003-2006).

people, and even 'came to be seen as the birth of (modern) Serbia'.<sup>262</sup> The hill of Kosovo Polje gained immense symbolism and was constituted in the Serbian national history as a 'holy' place where the roots of the Serbian nation and identity could be found. A Yugoslav Ambassador to the UN, Vladislav Jovanovic, at one point even considered Kosovo to be 'the soul of Serbian national being'.<sup>263</sup>

The Serbs gained independence in the 19<sup>th</sup> century, which led to the establishment of the Serbian Kingdom in 1882. Despite various insurgencies and rebellions inspired by Albanian nationalism, the Ottomans ruled Kosovo until shortly before the First World War. During the Balkan wars (1912-1913), 'the sick man of Europe' was ousted from this region and Serbia instituted its rule in Kosovo. The ensuing First World War resulted in the Yugoslav Kingdom of the Serbs, Croats and Slovenes, including Kosovo. During the Second World War, Josip Broz Tito was able to take control and renamed the country to Socialist Federal Republic of Yugoslavia. In this federation, Serbia was one of the republics next to Bosnia and Herzegovina, Croatia, Macedonia, Montenegro and Slovenia. Kosovo obtained considerable autonomy within Serbia, enhanced by a new constitution of 1974, which gave it a republic status 'in all but name'.<sup>264</sup> Nevertheless, Kosovo was officially still subject to Serbian rule, which, arguably, it still is today. Despite UNMIK and Kosovo's declaration of independence, Serbia has always stuck to its legal rights as a sovereign nation, which includes the province of Kosovo.

Instead of viewing Kosovo's history as one of foreign rule, the focus is usually on Kosovo's struggle for independence, particularly paying attention to the fight between Albanians and Serbs. Already during Tito's reign, an ethnic Kosovo Albanian administration was established, leading to an exodus of Serbs. The Kosovo Albanian claim and fight for independence became even stronger after Tito's death in 1980, and especially in reaction to Milosevic, who rose to power in the second half of the 1980s. Building his support largely on Serbian nationalism, Milosevic decided in 1989 to strip Kosovo of its autonomy. He pursued a policy of 'Serbanization' of Kosovo.<sup>265</sup> In reaction, an Albanian resistance movement emerged under the leadership of Ibrahim Rugova and his Democratic League of Kosovo (LDK; *Lidhja Demokratike e Kosovës*). Rugova advocated a peaceful resistance and effectively built a shadow state throughout Kosovo, including taxation, health care and education systems, and an underground economy. In 1991, the population of Kosovo voted for independence in a referendum, organized by the LDK. A year later, there were even presidential elections, leading

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<sup>262</sup> Lene Kühle and Carsten Bagge Lautsen, 'The Kosovo myth: nationalism and revenge', 19-36 (20), in: Tony Brems Knudsen and Carsten Bagge Lautsen (eds.), *Kosovo between War and Peace. Nationalism, Peacebuilding and International Trusteeship* (London and New York: Routledge 2006).

<sup>263</sup> S/PV.3989, 26 March 1999, 11.

<sup>264</sup> Marc Weller, *Contested statehood: Kosovo's struggle for independence* (Oxford: Oxford University Press 2009) 28.

<sup>265</sup> Klejda Mulaj, 'The Kosovo Liberation Army and the Intricacies of Legitimacy', 93-113 (98), in: idem (ed.), *Violent non-state actors in world politics* (New York: Columbia University Press 2010).

to the presidency of Rugova and a government in exile based in Bonn. Only Albania recognized this Kosovar government.<sup>266</sup>

The disintegration of Yugoslavia in the first half of the 1990s and bloody civil wars were eventually settled in 1995 with the Dayton Agreement. Unfortunately, for the people of Kosovo, the international community neglected their cause. Rugova thus failed to gain international legitimacy. Consequently, a much more violent movement started to gain support, the Kosovo Liberation Army (KLA). When state authority collapsed in Albania in 1997, the KLA seized the opportunity. They looted Albanian army depots and transformed into a guerilla army. Effectively fighting the Serbian army and its security forces, the KLA controlled 40 percent of Kosovo's territory by March 1998.<sup>267</sup> By that time, the conflict in Kosovo also gained the much-needed international attention. As political scientist Klejda Mulaj argues, it was the 'Serbian counterinsurgency offensive [which] held the seeds of its very own defeat by strengthening KLA's resolve and outraging the international community with appallingly high levels of violations of humanitarian and human rights law'.<sup>268</sup>

On 31 March 1998, the UNSC discussed the situation in Kosovo and decided to issue a resolution in which both KLA's violence and Milosevic' brutal and ruthless suppression of the rebellion were condemned.<sup>269</sup> This resolution had little effect and fighting continued. By the late summer of 1998, international concern was growing. In a UNSC meeting on 23 September 1998, the United Kingdom (UK) already spoke of 'scorched earth tactics' of Serbian security forces. Equally, an ensuing report noted 'appalling atrocities', 'wanton killing and destruction' and the 'threat of a humanitarian catastrophe', especially condemning Yugoslavia.<sup>270</sup> Milosevic eventually complied with Resolution 1203 that provided for the Kosovo Verification Mission (KVM) of the OSCE to observe cessation of hostilities.<sup>271</sup> Despite KVM's presence, reports on armed clashes, killings, abductions and kidnappings continued. When on 15 January 1999 the dead bodies of 45 Albanians were found, the so-called Racak Massacre, especially the Western countries changed its position to open opponent of Milosevic, thereby further crediting the KLA.<sup>272</sup>

A Contact Group of the US, UK, France, Germany and Russia assembled two diplomatic conferences at Rambouillet and Paris in February and March 1999 respectively, to negotiate an

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<sup>266</sup> Tansey, *Regime-building*, 110; Daniel Sven Smyrek, *International Administered Territories – International Protectorates?* (Berlin: Duncker and Humblot 2005) 174.

<sup>267</sup> Mulaj, 'The Kosovo Liberation Army and the Intricacies of Legitimacy', 101.

<sup>268</sup> Klejda Mulaj, 'Resisting an Oppressive Regime: The Case of Kosovo Liberation Army', *Studies in Conflict & Terrorism*, 31 (12) (2008), 1103-1119 (1112).

<sup>269</sup> S/PV.3868, 31 March 1998; RES 1160, 31 March 1998.

<sup>270</sup> S/1998/912, 3 October 1998.

<sup>271</sup> S/PV.3930, 23 September 1998, 4; S/1998/912, 3 October 1998, 8, 11; S/PV.3937, 24 October 1998; S/RES/1203, 24 October 1998.

<sup>272</sup> Spyros Economides, 'Kosovo', 217-245 (226), in: Berdal and Economides (eds.), *United Nations Interventionism 1991-2004*; Mulaj, 'The Kosovo Liberation Army and the Intricacies of Legitimacy', 105.

accommodation between the Albanians and Serbs. A settlement was reached in which there was considerable autonomy for Kosovo, though technically still under Serbian sovereignty. The delegation of Kosovo signed on 18 March, but Milosevic refused with 'tens of thousands Serbian forces massing on the border'.<sup>273</sup> On 17 March, the UNSC was informed that civilians were targeted, and that 'further fighting has rendered the October 1998 ceasefire agreement almost meaningless'.<sup>274</sup> Still, the UNSC was divided about intervention with Russia and China defending the rights of Serbia as a sovereign nation. In the end, the Western powers decided to act on their own. KVM was withdrawn on 20 March, and on 24 March, NATO launched Operation Allied Force, a 78-days long aerial campaign targeting Serbia.

The same day NATO started their air campaign, a UNSC meeting was summoned in which Russia declared to be 'outraged' about this unilateral use of force, while China called it a 'blatant violation of the UN Charter'. In response, the UK reiterated its argument of 'Serb scorched-earth tactics', while the Netherlands argued that at times when diplomacy fails 'the use of force may be legitimate in the pursuit of peace'. Jovanovic simply uttered that 'NATO has become the air force and mercenary of the terrorist Kosovo Liberation Army (KLA)'.<sup>275</sup> This observation was actually quite right. During their aerial campaign, NATO cooperated intensely with KLA to defeat the Serbian army. Though eventually victorious and ending the Serb-Albanian war, NATO's intervention in particular intensified the level of violence and destruction, the number of refugees, and the humanitarian catastrophe. Because in response to NATO's attack, Milosevic stepped up his own campaign and unleashed Operation Horseshoe, aiming 'to eradicate the KLA and permanently change the ethnic composition of Kosovo by expelling her Albanian inhabitants'.<sup>276</sup>

Meanwhile, the UNSC hotly debated NATO's intervention. The Netherlands condemned Russia by arguing that 'at every critical juncture Russia has somehow succeeded in making the pressure less credible, so that in the end NATO had no choice but to make good on its threat'. The US mainly criticized Serbia and stated that 'by rejecting a peace settlement (...) Belgrade chose the path of war'.<sup>277</sup> Early in May, NATO's bombardment hit the Chinese Embassy in Belgrade. Though NATO's members regretted this act and apologized for it, the US remarked quite insolently that 'we in this Council must keep our eye on the big picture', further adding 'the big picture is this: that one man alone is responsible for this crisis in the Federal Republic of Yugoslavia, and his name is Slobodan

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<sup>273</sup> Michael J. Dziedzic and Sasha Kishinchand, 'The Historical Context of Conflict in Kosovo', 23-36 (28), in: Jock Covey, Michael J. Dziedzic, and Leonard R. Hawley (eds.), *The Quest for Viable Peace. International Intervention and Strategies for Conflict Transformation* (Washington, DC: United States Institute of Peace Press 2005).

<sup>274</sup> S/1999/293, 17 March 1999, 8.

<sup>275</sup> S/PV.3988, 24 March 1999, 2, 8, 11, 12, 13.

<sup>276</sup> Mulaj, 'Resisting an Oppressive Regime', 1114; Cf. Economides, 'Kosovo', 229-230.

<sup>277</sup> S/PV.3989, 26 March 1999, 4.

Milosevic'.<sup>278</sup> The accusations from both sides only got worse. While numerous countries accused Serbia and Milosevic of ethnic cleansing, China replied that NATO unleashed a war that 'has created the largest humanitarian disaster since the Second World War', whereas Russia called upon 'the NATO strategists immediately to halt this insanity'.<sup>279</sup>

NATO's campaign of destruction finally brought Milosevic to the negotiating table. The Military Technical Agreement of 9 June 1999 stipulated Serbia's withdrawal from Kosovo and allowed a NATO stabilization force, the Kosovo Force (KFOR). The next day, despite China's abstention from voting, the UNSC adopted Resolution 1244. This resolution provided for a UN civil presence with the goal of promoting 'substantial autonomy and self-government in Kosovo' including 'the development of provisional institutions for democratic and autonomous self-government pending a political settlement', and 'transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions'.<sup>280</sup>

Interestingly, despite Serbia's immediate withdrawal, fighting continued. In the absence of a common enemy and without KFOR fully deployed yet, local factions of the KLA fought each other for dominance. The law and order vacuum was exploited by organized crime, often in concert with the KLA who by means of coercion tried to rule. Due to a lack of administrative authority, the parallel structures of the Kosovo Albanians were reinforced as well, while the Serbs set up their own organization in their municipalities.<sup>281</sup> The mission got off to a bad start anyway. Once deployed, it was discovered that *anmik* in the Kosovo Albanian dialect means 'enemy'. Hence, the UN had to teach people to pronounce it as 'oon-mik'.<sup>282</sup> The next section will provide more detail on UNMIK and its goals and implementation of the mandate, leading to yet another period of foreign rule, this time by the international community.

#### 4.2 UNMIK 1999-2008: 'substantial autonomy and self-government'

Since the future status of Kosovo was unsure, so was Resolution 1244 that stipulated UNMIK's goals and responsibilities. It has been said that the SRSG for Kosovo, Bernard Kouchner, acting as UNMIK's head, 'read the text of resolution 1244 twice every morning and still had no idea what "substantial autonomy" meant'.<sup>283</sup> UNMIK's main goal was to develop local institutions and provide an interim

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<sup>278</sup> S/PV.4000, 8 May 1999, 3.

<sup>279</sup> S/PV.4003, 14 May 1999.

<sup>280</sup> S/PV.4011, 10 June 1999; S/RES/1244, 10 June 1999.

<sup>281</sup> Niels van Willigen, *Building sustainable institutions? The results of international administration in Bosnia & Herzegovina and Kosovo: 1995-2008* (PhD-Thesis: Leiden University 2009) 206; Ben Lovelock, 'Securing a Viable Peace: Defeating Militant Extremists – Fourth-Generation Peace Implementation', 123-156 (124), in: Covey, Dziedzic and Hawley (eds.), *The Quest for Viable Peace*.

<sup>282</sup> Chesterman, *You, The People*, 236.

<sup>283</sup> *Ibidem*, 132. On the SRSG for Kosovo, the following people succeeded each other since June 1999: Sergio Vieira de Mello (June-July 1999), Bernard Kouchner (July 1999 - January 2001), Hans Hækkerup (January 2001 –

administration. Therefore, the tasks were divided along four pillars that each had its own international organization taking the lead role. The United Nations High Commissioner for Refugees took care of the first pillar, humanitarian assistance. Pillar II was civil administration, including police, civil affairs and the judiciary, headed by the UN. OSCE dealt with the third pillar of institution building, meaning capacity-building, democratization and governance, human rights, and elections. The EU was tasked with the fourth pillar of economic reconstruction, specifically aiming at the creation of a market economy. By May 2001, the tasks of the UNHCR were largely completed and Pillar I was changed to police and judicial affairs to be realized by the UN. Similar to the SRSG's position in East Timor, the SRSG in Kosovo had overall authority.<sup>284</sup>

In July 1999, UNMIK set out a 'general strategy' of five phases. The first task was 'the establishment and consolidation of UNMIK's authority and the creation of interim UNMIK-managed administrative structures' including local consultative bodies to 'ensure participation from the outset'. Second was to build up provisional self-governing institutions in Kosovo, while at the same time seeking 'revival of broadly representative political activity and political expression'. The third phase was elections upon which responsibilities could be transferred to these provisional institutions. In the fourth phase, UNMIK had a more assisting role while the provisional institutions would incrementally gain more responsibility and authority. The fifth and final phase was to achieve a settlement on Kosovo's future status upon which full authority could be vested into the local self-governing institutions.<sup>285</sup>

The strategy was thus a gradual transfer of power from UNMIK to newly created institutions while seeking participations from the people of Kosovo during this process. Hence, UNMIK established the Kosovo Transitional Council (KTC) in which 35 members took seat, representatives of the main political parties, religious communities and ethnic groups. UNMIK argued that this KTC gave 'Kosovo residents an opportunity to have direct input into UNMIK decision-making process (...) thereby creating a climate where participation in democratic processes is the norm'.<sup>286</sup> Yet, the KTC's role was merely consultative. Moreover, due to slow deployment of UNMIK, local governing structures of the KLA and the Serbs were providing basic tasks of government. These parallel structures ran health services and education, appointed their own mayors in municipalities and sometimes even collected taxes.<sup>287</sup> The UN considered these structures to be 'illegal', but it became

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February 2002), Michael Steiner (February 2002 – July 2003), Harri Holkeri (July 2003– August 2004), Søren Jessen-Petersen (August 2004 - August 2006), Joachim Rucker (September 2006 –June 2008), and Lamberto Zannier (June 2008 – present).

<sup>284</sup> S/1999/672, 12 June 1999.

<sup>285</sup> S/1999/779, 12 July 1999.

<sup>286</sup> S/1999/987, 16 September 1999, 2.

<sup>287</sup> Dominik Zaum, *The Sovereignty Paradox. The Norms and Politics of International Statebuilding* (Oxford: Oxford University Press 2007) 135.

clear by the end of 1999 that cooptation was a more viable strategy than neglecting them. Therefore, UNMIK set up a Kosovo-UNMIK 'Joint Interim Administrative Structure' (JIAS) in December 1999. JIAS provided for several administrative departments, charged with the daily business of governing Kosovo. An Interim Administrative Council (IAC), in which four UNMIK officials and four Kosovar representatives took seat, headed the JIAS. Still, the IAC was merely consultative and had little authority. As the British political scientist Oisín Tansey notes rightly, it seems as if these interim bodies 'served the purpose of providing legitimacy for UNMIK in its initial stages, rather than paving the way for democratic politics at the local level'.<sup>288</sup> Nevertheless, the UN reported that integration of the parallel administrative bodies into the JIAS went smooth, and on 31 January 2000 the Kosovo Albanians officially dissolved their parallel structures by declaring they had ceased to exist.<sup>289</sup>

The most pressing problem in Kosovo was the hostility between the different ethnic communities. In fact, this issue dominated all other problems. From the beginning, UNMIK's efforts aimed at stimulating multi-ethnicity and reconciliation between the Kosovo Albanians, about 90 percent of the population, and other ethnic minorities (Kosovo Serbs about 5 percent, and Roma, Turks, Bosniaks, and Ashkali). Following Milosevic's withdrawal the Kosovo Albanian majority regularly attacked these minorities. Abductions, killings, threats, beatings, discrimination, and property damaging against those minorities were reported regularly.<sup>290</sup> Meanwhile, the KLA was demobilized and reformed into the Kosovo Protection Corps (KPC). Equally, UNMIK created a Kosovo Police Service (KPS). UNMIK continuously sought to integrate ethnic minorities into the new security and administrative structures. Yet, this integration largely failed since especially the Kosovo Serbs resisted and boycotted most of these governing institutions. Moreover, they found it hard to work with former KLA-members now in the KPC and KPS, which had been targeting Serbs since the early 1990s. In addition, the new security structures, law enforcement and the judicial system had a slow start, leading to a 'culture of impunity', as noted by members of the UNSC.<sup>291</sup> It was that bad, that in late June 2000 the Secretary's-General Special Envoy for the Balkans Carl Bildt in the UNSC spoke of a 'climate of terror against minorities in Kosovo'.<sup>292</sup>

Still, UNMIK continued its efforts of building up governing structures by establishing municipal bodies and recruiting Kosovars for the administrative departments of JIAS. To increase local participation and give 'democratic legitimacy' to the municipal administrations, there were

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<sup>288</sup> Tansey, *Regime-building*, 124.

<sup>289</sup> S/2000/177, 3 March 2000, 4.

<sup>290</sup> S/1999/987, 16 September 1999; S/1999/1250, 23 December 1999; S/2000/177, 3 March 2000; S/2000/363, 29 April 2000; S/2000/538, 6 June 2000.

<sup>291</sup> S/PV.4138, 11 May 2000, 19; S/PV.4153, 9 June 2000, 28; S/PV.4171, 13 July 2000, 8.

<sup>292</sup> S/PV.4164, 23 June 2000, 7.



municipal elections on 28 October 2000.<sup>293</sup> Out of demobilization of KLA two political parties were formed. Former KLA-leader Hashim Thaci had set up the Democratic Party of Kosovo (PDK; *Partia Demokratike e Kosovës*), while former KLA commander Ramush Haradinaj established his own party, the Alliance for Future of Kosovo (AAK; *Aleanca për Ardhmërinë e Kosovës*). There was luckily a peaceful atmosphere during the elections, in which about 79 percent of the eligible voters showed up. Unfortunately, ethnic minorities' turnout was 'low to negligible'.<sup>294</sup> Hence, UNMIK decided to appoint assemblies in the Serb municipalities. Nevertheless, in March 2001 it was reported that Serbs, who reigned in northern Kosovo, still used their own parallel structures, supported by Belgrade. While UNMIK would continuously put effort in dismantling these structures, especially in the city Mitrovica, they never really succeeded. Up until 2006, these officials in the Serb municipalities received salary from both Belgrade and the government in Kosovo. Once Belgrade issued an ultimatum to these officials whether to choose between salary from Serbia or Kosovo, most of them opted for money from Belgrade.<sup>295</sup> This shows the severe lack of power and authority of UNMIK and Kosovo's government in the Serb community, unable to enforce their rule.

In March 2001, a working group was composed that 'aimed at developing a legal framework for provisional institutions for democratic and autonomous self-government' to replace JIAS.<sup>296</sup> This working group came up with the so-called 'Constitutional Framework for Provisional Self-Government', its peculiar name being the product of a compromise between domestic actors who favored 'constitution' and international actors vying for 'legal framework'.<sup>297</sup> This Constitutional Framework provided for a 120-seat Assembly based on proportional representation with the first 100 seats going to all registered parties in Kosovo, while 10 seats were reserved for Kosovo Serbs and 10 more were earmarked for other ethnic minorities. A seven-member Presidency of Assembly guided the Assembly's work. The Assembly elected the President, who in turn nominated a Prime Minister.

With those governing structures in place, UNMIK aimed for a policy of further 'Kosovarization', meaning devolution of authority from UNMIK to local self-governing institutions.<sup>298</sup> The elections for the Assembly on 17 November 2001 were a clear victory for the LDK, gaining about 45 percent of the votes. LDK formed a governing coalition with PDK and Rugova was installed as President. It took however until March 2002 before this process was completed and UNMIK started its incremental transfer of authority.<sup>299</sup> The turnout at these elections was approximately 65 percent and it was encouraging that the minorities also went to the poll, though Kosovo Serb participation

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<sup>293</sup> S/PV.4200, 27 September 2000, 22.

<sup>294</sup> S/2000/1196, 15 December 2000.

<sup>295</sup> S/2006/707, 1 September 2006, 10; S/2007/768, 3 January 2008, 8.

<sup>296</sup> S/PRST/2001/8, 16 March 2001, 1.

<sup>297</sup> Tansey, *Regime-building*, 129.

<sup>298</sup> S/2001/926, 2 October 2001, 4, 6.

<sup>299</sup> S/PV/4498, 27 March 2002; S/2004/71, 26 January 2004.

was 'patchy'. In addition, once in power the Kosovo Serb delegation in the Assembly continuously challenged the government's authority, frequently walking out or simply boycotting it, backed by Serbia. Consequently, it was often reported that Serb participation at the central level was low to marginal.<sup>300</sup> Moreover, the moderate Kosovo Serbs who did participate in the Provisional Institution of Self-Government (PISG) had little following among their fellow Serbs.<sup>301</sup>

In February 2002, a new SRSB had entered the scene, Michael Steiner, who issued a new 'road-map' for Kosovo by introducing a set of benchmarks to be achieved.<sup>302</sup> This policy was eventually recast as 'Standards before Status', meaning that only after certain standards had been met, status talks could commence. As Steiner explained: 'You first have to create a functioning, respectable society and functioning institutions. Then it makes sense to talk about the status'.<sup>303</sup> In the meantime, the Kosovo Serbs once more boycotted another round of municipal elections in October 2002, while overall turnout had dropped to 54 percent, indicating a 'trend of voter fatigue'.<sup>304</sup> Next to 'Standards before Status', UNMIK aimed for decentralization in this period, to 'ensure that participation brings tangible benefits to all communities, which has not yet been demonstrated', 'bring Government close to the people', and increase a sense of 'ownership'.<sup>305</sup> Similarly, it was argued that such a decentralization strategy 'would build consensus from grassroots'.<sup>306</sup> However, this bottom-up approach is hard to reconcile with the top-down nature of the Standards before Status-policy. UNMIK's standards (or benchmarks) determined the priorities for Kosovo's leaders and its people, not so much deliberations at the local level. In December 2003, UNMIK presented the eight main standards to be realized by the people of Kosovo. In short, these were functioning democratic institutions, including the dismantling or integration of (Kosovo Serb) parallel structures, rule of law, freedom of movement, returns and reintegration, economy (including privatization), property rights, dialogue with Belgrade, and the KPC. The implementation of these Standards would be reviewed by mid-2005.<sup>307</sup> Thus while UNMIK had transferred political authority to the PISG, a new policy of Standards was issued to further postpone the tricky situation of Kosovo's status.

A massive outburst of violence in March 2004, targeting ethnic minorities, KFOR, and UNMIK, roused the international community. During the riots, 20 people were killed, 800 homes and 30

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<sup>300</sup> S/2005/335, 23 May 2005, 2; S/2006/361, 5 June 2006, 3. S/2006/707, 1 September 2006, 3; S/2006/906, 20 November 2006, 2.

<sup>301</sup> Tansey, *Regime-building*, 119; Freedom House Country Report Kosovo 2008.

<sup>302</sup> S/PV.4518, 24 April 2002, 4.

<sup>303</sup> S/PV.4592, 30 July 2002, 27.

<sup>304</sup> S/PV.4643, 6 November 2002, 4.

<sup>305</sup> S/2002/1126, 9 October 2002, 10; S/PV.4643, 6 November 2002, 5; S/2002/1376, 19 December 2002, 14.

<sup>306</sup> S/2003/113, 29 January 2003, 6.

<sup>307</sup> UNMIK/PR/1078, 10 December 2003, Standards for Kosovo; S/PRST/2003/26, 12 December 2003;

churches destroyed, and more than 4,000 Serbs and other non-Albanians left homeless.<sup>308</sup> Though the UN quickly noted the ethnically motivated character of the violence and the systematic campaign behind it, the violence was as much the consequence of UNMIK's failures to effectively deal with the issue of future status.<sup>309</sup> While the Secretary-General of the UN pointed to their own failure, arguing that 'we have not come far enough', UNMIK also blamed the leaders of the PISG whose reaction was said to be 'ambivalent'.<sup>310</sup> Moreover, instead of seriously addressing the frustration that gave rise to the violence, UNMIK dismissed such accusations and further pushed its standards-policy, re-issued as the 'Kosovo Standards Implementation Plan'.<sup>311</sup> Yet, from July 2004 on there was another round of 'devolution of responsibilities to the local level', accompanied by restructuring UNMIK's role to an advisory and monitoring body.<sup>312</sup> Nevertheless, the SRSG still had overall authority, while at the same time dictating Kosovo's politics by enforcing the Standards-policy. Elections for the Kosovo Assembly on 23 October 2004 confirmed once again marginalization of the Kosovo Serb population, whose participation was negligible (0.3 percent). Voter turnout was approximately 54 percent, and the result almost similar to the previous province-wide elections.<sup>313</sup>

As scheduled, Kosovo's situation was reviewed in mid-2005 by the Norwegian diplomat Kai Eide. In his rather concise and straightforward report, he made some strong statements on Kosovo's condition. Though noting some progress here and there, Eide stated that the current economic situation was bleak with a high unemployment rate and widespread poverty. The rule of law was inadequately entrenched, hampered by a lack of ability and readiness to enforce legislation, hindered by family or clan solidarity and intimidation of witnesses, law enforcement officials and judicial authorities. Hence, he concluded that 'the Kosovo police and judiciary are fragile institutions'. He also noted a 'grim situation (...) with regard to the foundation for a multi-ethnic society', arguing that the security situation was 'stable, but fragile', while 'the overall return process has virtually come to a halt'. Ultimately, he argued:

There will not be any good moment for addressing Kosovo's future status. It will continue to be a highly sensitive political issue. Nevertheless, an overall assessment leads to the conclusion that the time has come to commence this process. The political process, which is now under way, must

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<sup>308</sup> Freedom House Country Report Kosovo 2005.

<sup>309</sup> Jürgen Friedrich, 'UNMIK in Kosovo: Struggling with Uncertainty', *Max Planck Yearbook of United Nations Law* 9 (2005), 225-294 (261); Rasmus Abildgaard Kristensen, 'Administering membership of international society: the role and function of UNMIK', 135-155 (148), in: Knudsen and Lautsen (eds.), *Kosovo between War and Peace*.

<sup>310</sup> S/PV.4928, 18 March 2004, 2; S/2004/348, 30 April 2004, 3.

<sup>311</sup> S/PV.4942, 13 April 2004; S/2004/348, 30 April 2004; S/PRST/2004/13, 30 April 2004; S/PV.4967, 11 May 2004, 4.

<sup>312</sup> S/PV.5017, 5 August 2004.

<sup>313</sup> S/2004/907, 17 November 2004; S/2004/932, 30 November 2004.

continue. Based on a comprehensive strategy, it has provided Kosovo with a political perspective. Kosovo having moved from stagnation to expectation, stagnation cannot again be allowed to take hold.<sup>314</sup>

After appointing Martti Ahtisaari as the Special Envoy for the Kosovo Status process, negotiations over Kosovo's future status could begin.

These negotiations are too long and too complicated to deal with here in detail.<sup>315</sup> Basically, it came down to the issue of finding an agreement that would be supported by the Kosovo Albanians on the one side, and the Kosovo Serb population and Serbia itself on the other. Here, great power politics played a big role. Whereas Russia and China supported Serbia's stance, who refused to give up its sovereignty, Western powers, most notably the US and Germany, supported Kosovo's claim for independence. Then, there was also the fear of creating a precedent. If independence was granted to Kosovo, many countries feared that this would inspire movements within their countries who wanted independence.<sup>316</sup>

In March 2007, Ahtisaari finally presented his Comprehensive Proposal for the Kosovo Status Settlement.<sup>317</sup> He argued that the people in Kosovo would not accept a return to Serbian rule. Continued international administration was neither a viable option. Moreover, Kosovo's uncertain political status seriously hampered its development, especially in terms of economic reconstruction. It could for example not lend from international financial institutions, nor was it able to enter into regional or global organizations in which it could enjoy the benefits of (economic) cooperation. Ahtisaari concluded that independence supervised by the international community was the only viable option: 'only in an independent Kosovo will its democratic institutions be fully responsible and accountable for their actions. This will be crucial to ensure respect for the rule of law and the effective protection of minorities'.<sup>318</sup> However, since its political and legal institutions were still underdeveloped, he considered international supervision with final authority necessary.

As expected, Serbia and Russia firmly rejected the proposal and a new round of negotiations started in August 2007. Supervised by a troika of the EU, US, and Russia, Belgrade and Pristina were encouraged to 'a new period of engagement'. After 120 days, this troika had to report that they had been unsuccessful as well. They discussed almost every possible solution, 'such as full independence, supervised independence, territorial partition, substantial autonomy, confederal arrangements and

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<sup>314</sup> S/2005/635, 7 October 2005, 2-4.

<sup>315</sup> Good reconstructions of the negotiation process can be found in: Ker-Lindsay, James, *Kosovo: the path to contested statehood in the Balkans* (London: Tauris 2009); H. H. Perritt, *The Road to Independence for Kosovo. A Chronicle of the Ahtisaari Plan* (Cambridge: Cambridge University Press 2010).

<sup>316</sup> Like the ETA in Spain, Abkhazia and South Ossetia in Georgia, and North Cyprus.

<sup>317</sup> S/2007/168/, 26 March 2007; S/2007/168/Add.1, 26 March 2007.

<sup>318</sup> S/2007/168/, 26 March 2007, 4.

even a status silent “agreement to disagree”. However, ‘neither party was willing to cede its position on the fundamental question of sovereignty over Kosovo’, with the Kosovo Albanians demanding full independence and the Serbs clinging to their sovereignty, only willing to grant substantial autonomy to Kosovo within Serbia.<sup>319</sup>

With negotiations in total deadlock, Kosovo eventually decided to act on its own. On 17 February 2008, its Assembly adopted a declaration of independence. Many Western countries quickly recognized the new state, giving arguments like it being ‘a logical, legitimate and legal response to the situation at hand’.<sup>320</sup> Yet, up until today, only 76 of the 192 UN members have officially recognized Kosovo.<sup>321</sup> Since this declaration, Kosovo legal status is still unresolved, with UNMIK still active and the UNSC unable to reach a settlement or a new Resolution replacing the one of 10 June 1999. While Russia and Serbia have fiercely contested Kosovo’s act, their appeals to international law have not worked for them. In August 2008, Serbia called on the International Court of Justice (ICJ) to decide whether the declaration breached international law. Unfortunately for the Serbs, the ICJ’s advisory opinion, thus without any legal consequences, was that ‘the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law’.<sup>322</sup>

While most attention since October 2005 went to the future status talks, UNMIK continued its activities. About every three months, it reported its achievements on the different standards and the ‘challenges ahead’. With the formal institutions established, focus shifted to the rule of law, good governance, democratization, human rights and minority issues, and economic and fiscal issues, as outlined in January 2006.<sup>323</sup> In fact, in all these specific fields, the results of the international community’s efforts have been marginal at best. Kai Eide noted already in 2005 that clan and family solidarity triumphed principles of rule and law and reinforced corruption, reiterated by Serbia in a UNSC meeting in September 2006: ‘The true leaders of Kosovo society are the individuals of undisputed authority within their communities: the clan leaders. The decisions are made by them, not by the judiciary. (...) In Kosovo, justice is being taken into people’s own hands; tribal laws and blood feuds still rule there’.<sup>324</sup> Likewise, violent attacks on and discrimination of minority communities continued to be reported. Even two years after Kosovo’s independence, the United Nations Development Programme (UNDP) for Kosovo gave figures of a ‘48 percent unemployment rate, a poverty rate stagnating at 45 percent, Europe’s highest fertility rate and ongoing

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<sup>319</sup> S/2007/723, 10 December 2007, 2.

<sup>320</sup> S/PV.5839, 18 February 2008, 18.

<sup>321</sup> <http://www.kosovothankyou.com/>, Who recognized Kosovo as an independent state?, last visit: 14 June 2011.

<sup>322</sup> International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 22 July General List, No. 141, 22 July 2010.

<sup>323</sup> S/2006/45, 25 January 2006, 6.

<sup>324</sup> S/PV.5522, 13 September 2006, 6. Cf: S/2005/635, 7 October 2005, 2, 3, 9, 13.

discrimination between ethnicities, as well as against women'.<sup>325</sup> According to a Norwegian scholar, 'these figures are in the same order as what Kosovo faced at the end of the 1990s after a decade of oppression under the Serbian regime'.<sup>326</sup>

In May 2007, members of the UNSC visited Kosovo to see the 'situation on the ground', concluding that '[ethnic] communities remain divided and live to a large extent separately from each other'.<sup>327</sup> UNMIK's goal then of creating a multi-ethnic society was neither realized. Indeed, the Kosovo Serbs continued their boycott of the PISG, instead relying on their 'parallel structures' supported and paid by Serbia. This became clear once more during the elections for the Kosovo Assembly and the municipal assemblies on 17 November 2007. This time voter turnout was a mere 42.8 percent with hardly any participation of the Serbs. Hashim Thaci's PDK won the province-wide elections, taking 37 seats and leading to his presidency. After this new government declared independence, the Kosovo Assembly adopted a new Constitution that entered into force on 15 June 2008. The UN was confronted with a *fait accompli*. It noted that the new Constitution not only posed 'significant challenges to the Mission's ability to exercise its administrative authority', but that the SRS was in fact 'unable to enforce his authority'.<sup>328</sup> Closing down UNMIK down was impossible with Resolution 1244 still in force. Instead, UNMIK's presence was reduced drastically and a new foreign ruler appeared on the scene, the EU.

As already envisaged in the Ahtisaari proposal, an International Civilian Office (ICO) was set up, headed by an International Civilian Representative (ICR) who simultaneously was the EU Special Representative for Kosovo (EUSR). The ICO and ICR/EUSR were charged with 'ensuring implementation by the Government of Kosovo of the Comprehensive Proposal for Kosovo's Status Settlement'. At the same time, an EU Rule of Law Mission (EULEX) was deployed in Kosovo.<sup>329</sup> Although EULEX Kosovo is officially working under UNMIK and derives its legal authority from Resolution 1244, the ICO lacks such a UNSC authorization. In July 2009, Kosovo was accepted to the World Bank and the IMF. It might be clear that not only Kosovo's status, but also the international community's handling of the issue is a legal mess. Further adding to the mess is the fact that the ICR formally recognizes Kosovo, but the EU, and hence the EUSR, does not: a 'schizophrenic situation'.<sup>330</sup> Apart from that, there is an interesting parallel between UNMIK and UNTAET. Just as the UN

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<sup>325</sup> UNDP, *Kosovo Human Development Report 2010: Social Inclusion* (March 2010), 11; via: [http://www.ks.undp.org/repository/docs/HDR\\_2010\\_English.pdf](http://www.ks.undp.org/repository/docs/HDR_2010_English.pdf), last visit: 14 June 2011.

<sup>326</sup> Rita Augestad Knudsen, *Privatization in Kosovo: The International Project 1999-2008* (Norwegian Institute of International Affairs 2010) 14.

<sup>327</sup> S/2007/256, 4 May 2007, 11.

<sup>328</sup> S/2008/354, 12 June 2008, 3; S/2008/692, 24 November 2008, 7.

<sup>329</sup> <http://www.ico-kos.org/ico/?id=8>, International Civilian Office Kosovo, last visit: 14 June 2011; <http://www.eulex-kosovo.eu/en/front/>, European Union Rule of Law Mission, last visit: 14 June 2011.

<sup>330</sup> Wolfgang Koeth, 'State building without a state', *European Foreign Affairs Review* 15 (2) (2010), 227-247 (235).

continued its efforts in East Timor after UNTAET's completion, the international community continued meddling into Kosovo's internal affairs, setting guidelines, and proposing policies after its declaration of independence. After more than twelve years of international tutelage, Kosovo is apparently neither ready for self-government.

#### 4.3 Analysis of UN involvement: top-down 'standards before status'

For the case of East Timor, it was concluded that the main problem of creating a legitimate government was the UN's assumption of creating a nation from scratch, coupled to implementing an alien political concept of democracy. This last issue certainly did not apply for Kosovo, since the Kosovo Albanians had already voted on independence in a referendum in 1991, and even organized democratic elections in 1992. In addition, 'none of the parties in Kosovo have been explicitly opposed to democratic development, or have actively and openly sought to undermine democratic institutions that have been established over time'. Nevertheless, democratic practices and norms were regularly eschewed 'in favour of ethnic-based and exclusionary politics'.<sup>331</sup> This observation points to the two most pressing problems in UNMIK's efforts of creating legitimate government. The first was the goal of creating multi-ethnicity in circumstances where those ethnic communities were diametrically opposed to each other. Second, there was the issue of developing local institutions of self-government without clearly defining the future status of these institutions, their responsibilities and their authority.

UNMIK tried to integrate all ethnic minorities into the governmental institutions of Kosovo from the start of the mission. They have been especially unsuccessful in this goal with regard to the Kosovo Serbs, since this ethnic community has continuously boycotted Kosovo's institutions. After having relied for years on their own parallel structures financed and supported by Belgrade, they formally established a Kosovo Serb Assembly in mid-2008.<sup>332</sup> This Assembly is the governing authority for the Kosovo Serbs, thereby seriously undermining and challenging the authority and legitimacy of Kosovo's government. In addition, UNMIK continuously emphasized the need for multi-ethnic governing structures, judiciary, police etc. They specified detailed rules and quotas for minority representation. Just like in Afghanistan and BiH, this in fact led to institutionalizing ethnicity into both the political system and social life.<sup>333</sup> Moreover, even today low-level violence against minority communities and their property is quite common.<sup>334</sup> A quite recent, alarming report by the UNDP

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<sup>331</sup> Tansey, *Regime-building*, 116.

<sup>332</sup> S/2008/458, 15 July 2008, 3.

<sup>333</sup> Van Willigen, *Building Sustainable Institutions*, 169; Jens Narten, 'Dilemmas of promoting "local ownership". The case of postwar Kosovo', 252-283 (273), in: Paris and Sisk (eds.), *The Dilemmas of Statebuilding*.

<sup>334</sup> Tansey, *Regime-building*, 147; S/2011/281, 3 May 2011, 6, 10.

concluded a 'sheer scale of exclusion' across Kosovo's society, experienced by many disadvantaged social groups, including ethnic minorities like the Roma, Ashkali and Egyptian communities.<sup>335</sup>

The problem of ethnic rivalry also had repercussions in terms of security. The British political scientist B. J. Ryan showed that the KPS is 'subject to the moral authority of the majoritarian ethnic Albanian national will'. Despite its design as a multi-ethnic force and as 'vanguard of policies that strove to bring political homogeneity', its practice such as participation in the March 2004 violence showed the KPS' deeply ethnic nature in favor of the Kosovo Albanians.<sup>336</sup> This was underscored by the fact that people feel a 'rampant impunity for crime' due to an underdeveloped justice sector, which lead to 'the reemergence of familial blood feuds in some areas'.<sup>337</sup> Recently, Kosovo Albanians were more satisfied with the security institutions, but not even 20 percent of the Kosovo Serbs felt that way.<sup>338</sup> Hence, feelings of lack of freedom of movement and insecurity impeded returns of Serbs and other ethnic minorities.<sup>339</sup> In addition, the KPS' inability to enforce the rule of law in northern Kosovo and its continuous subservient position to outside powers bringing and guaranteeing security (KFOR, UNMIK, EULEX), seriously undermined its status as a legitimate security provider in Kosovo.

The problem between the different ethnic communities in Kosovo also influenced the status process of Kosovo, and vice-versa. The Serb boycott of the PISG was largely motivated by a fear that it would 'create facts on the ground', meaning that supporting those institutions might increase developments towards independence.<sup>340</sup> The Swedish political scientist D. Silander argued that it was the uncertain status of Kosovo that 'caused ongoing hostilities between Serbs and Albanians and undermined any chance of ethnic and political reconciliation'. It has reinforced the tendency towards mono-ethnic political parties, focusing on status negotiations instead of policies for Kosovo.<sup>341</sup> Similar to the UNSC's observation that ethnic communities lived separate from each other in Kosovo, it has been argued that there are 'serious problems of cohesion' in Kosovo. illustrated by 'social segregation, parallel structures, political boycotts and a mono-ethnic political party system'.<sup>342</sup>

Next to its impossibility of creating a multi-ethnic society, UNMIK showed a clear preference for imposing government top-down at the expense of meaningful local participation or bottom-up initiatives. Initially, the UN officials did facilitate the development of local structures of self-

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<sup>335</sup> UNDP, *Kosovo Human Development Report 2010: Social Inclusion*, 12.

<sup>336</sup> Barry J. Ryan, 'Policing the state of exception in Kosovo', 114-131, in: Aidan Hehir, (ed.), *Kosovo, intervention and statebuilding: the international community and the transition to independence* (London and New York: Routledge 2010).

<sup>337</sup> Freedom House Country Report Kosovo 2008.

<sup>338</sup> UNDP, *Public Pulse Report 2010* (Pristina: March 2011) 29; via: <http://www.ks.undp.org/?cid=2,26,1031>, last visit: 14 June 2011.

<sup>339</sup> S/2011/281, 3 May 2011, 6-8.

<sup>340</sup> Friedrich, 'UNMIK in Kosovo', 283.

<sup>341</sup> Silander, 'The United Nations and Peace Building', 27.

<sup>342</sup> Tansey, *Regime-building*, 148; cf. S/2007/256, 4 May 2007, 11.



government by empowering municipalities to regulate and manage a substantial share of public affairs. However, before the PISG were in place, there was hardly any meaningful participation of local actors, who were only allowed to take seat in institutions with a mere consultative role like the KTC. In addition, even after establishment of the PISG executive authority was vested in UNMIK, which it did not hesitate to show. For example, some legislative initiatives adopted by the Kosovo Assembly were nullified by the SRSB when considered too controversial. As Tansey concludes, 'UNMIK did not shy away from frustrating the desire of local elites and imposing its will when it came to key political issues'.<sup>343</sup>

Development of the Standards before Status-policy also gave evidence of UNMIK's preference for setting the rules of the game top-down. The specific standards were developed without consulting the PISG. Hence, so it has been argued, 'the approach has never been accepted by the leaders of Kosovo as they have never considered the standards their own goals'.<sup>344</sup> While this might be true, it seems more likely that implementation of the standards was lacking because of an undecided future status. While the standards were clear, there was a real lack of incentives to implement them without any clear goal.<sup>345</sup> After the riots in March 2004, more authority was transferred to the PISG while simultaneously seeking for a more participatory approach, amongst other by starting a process of decentralization. Yet, the standards were still enforced top-down with UNMIK holding on to its prerogatives. This policy of UNMIK eventually eroded its own legitimacy. By postponing status talks for so long that lead to an absence of incentives for meaningful participation, 'the international presence became seen as oppressive, postponing independence and limiting Kosovo's right to determine its own political and economic future. The unresolved status of Kosovo undermined the prospects for future international aid and led to decreased legitimacy of the international community in Kosovo'.<sup>346</sup> Currently, the EU copes with a similar problem. In August 2009, it faced violent anti-EULEX demonstrations after conducting agreement over cooperation with Serbia without involving Kosovo authorities.<sup>347</sup>

Because UNMIK retained authority for such a long time and was rather slow in transferring responsibilities, the PISG acquired no real sense of accountability or meaningful ownership. While the Kosovar representatives were democratically chosen, they were hardly responsive to the electorate, being possible to shift responsibility onto UNMIK. Equally, having no decision on future status there was little incentive to develop such responsibility or actual commitment to implement standards. As the German researcher Jens Narten concludes, 'in sum, UNMIK missed the critical point

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<sup>343</sup> Tansey, *Regime-building*, 138.

<sup>344</sup> Friedrich, 'UNMIK in Kosovo', 261.

<sup>345</sup> Narten, 'Dilemmas of promoting "local ownership"', 276; Friedrich, 'UNMIK in Kosovo', 291-292.

<sup>346</sup> Silander, 'The United Nations and Peace Building', 26-27; cf. Friedrich, 'UNMIK in Kosovo', 283.

<sup>347</sup> Koeth, 'State building without a state', 235.

for a well-balanced identification and strengthening of local partners through a consistent transfer of powers, and by not setting transparent, fair, and realistically achievable benchmarks with clearly defined indicators of achievement for local counterparts'.<sup>348</sup>

Besides the identified troubles of creating multi-ethnicity and setting up security and governing structures, people's perceptions on the Kosovo government and its governance in practice show some severe deficiencies of the current administration. While having experienced democratic procedures before, Kosovo's administration is often accused of corruption and nepotism.<sup>349</sup> Appointments in the civil service depend more on party connection, clan or regional ties, than on personal qualifications or competence, while patronage systems are still strong as well.<sup>350</sup> Kosovo currently ranks on 110<sup>th</sup> place in the Corruption Index of Transparency International, not that far from East Timor which is on 127<sup>th</sup> place.<sup>351</sup> Coupled with the dire economic situation, this has led to a 'general decline in people's satisfaction with the work of Kosovo's key executive, legislative, and judicial institutions'.<sup>352</sup> The practice of voting in Kosovo is equally missing the democratic principles that are often attached to it. True, it is reasonable to argue and discuss to what extent voting is a rational act. However, in Kosovo there is widespread practice of 'family voting (...) in which the male head of a household casts ballots for the entire family'.<sup>353</sup> This practice seems seriously at odds with the democratic principle of election in which each citizen gets a vote and a chance to cast his or her ballot to express his or her will. The general low turnout at elections, 47.5 percent for the latest elections for the Kosovo Assembly on 12 December 2010, are neither encouraging. Even more troubling, whereas young people are 'usually the most politically active of all age groups', Kosovo's large young population is increasingly becoming disconnected from the political process with their participation rates falling fast.<sup>354</sup>

Considering the numerous problems of Kosovo mentioned above, the argument of the Dutch political scientist Niels van Willigen that Kosovo's institutions are not entrenched in society and that UNMIK failed in creating autonomous institutions seems correct.<sup>355</sup> With weak economic development, high unemployment, corruption, nepotism and deferring responsibility to international

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<sup>348</sup> Narten, 'Dilemmas of promoting "local ownership"', 276; cf. Friedrich, 'UNMIK in Kosovo', 291-292; Tansey, *Regime-building*, 134, 148.

<sup>349</sup> Van Willigen, *Building Sustainable Institutions*, 213; Freedom House Country Report Kosovo 2008; Koeth, 'State building without a state', 244.

<sup>350</sup> Freedom House Country Report Kosovo 2006, 2007, 2008; Stephanie A. Blair et. al., 'Forging a Viable Peace: Developing a Legitimate Political Economy', 205-244 (213), in: Covey, Dziedzic and Hawley (eds.), *The Quest for Viable Peace*.

<sup>351</sup> [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2010/results](http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results), Corruption Perceptions Index 2010 Results, last visit: 14 June 2010.

<sup>352</sup> UNDP, *Public Pulse Report 2010*, 9.

<sup>353</sup> Freedom House Country Report Kosovo 2004-2010.

<sup>354</sup> UNDP, *Kosovo Human Development Report 2010: Social Inclusion*, 12, 83-84.

<sup>355</sup> Van Willigen, *Building Sustainable Institutions*, 245.

actors, Kosovo's government is ultimately failing in providing its citizens the necessary services. As the UNDP rightly notes in its report on social inclusion, the most important reason for this failure is the overwhelming and continuous investment of the international community:

This investment, albeit well-intentioned and important for Kosovo's future, has limited *an essential process of "natural selection" that would normally allow the gradual emergence of internally sustained and locally-valued social policies, networks and organizations*. As a result, Kosovo has a great number of social policies and development agents without any true sense of ownership or any consistent means of distinguishing the genuinely useful and relevant from those whose existence relies entirely on external support.<sup>356</sup>

#### 4.4 Conclusion

Kosovo's history was characterized by foreign rule on the one hand, and ethnic rivalry on the other. Those two features saw their culmination in Milosevic's rule, who in the 1990s tried to ethnically cleanse the province and expel the Kosovo Albanians. When the international community finally gained attention for the horrible situation in Kosovo, they proved to be unable to reach agreement about appropriate measures. Eventually, the Western powers decided to act on their own and NATO started a 78-days long aerial bombardment on Serbia, thereby adding to the humanitarian catastrophe. They were however victorious in the end, leading to UNMIK taking over rule in Kosovo on 10 June 1999, authorized by Resolution 1244. In subsequent years, the UN administration focused its efforts on creating a multi-ethnic society, establishing a democratic government, setting up a civil administration and security structures, and implementing a market economy. Today, after more than twelve years since Resolution 1244, the international community is still engaged in Kosovo. Apparently, the people of Kosovo are still not ready for self-government.

What has been achieved in those years with respect to creating legitimate government? To be fair, the people of Kosovo do look to their government for basic services, a task in which it is still faltering. Equally, Kosovo's society is still fractured between different ethnic communities, with a substantial part of the population denying the government's legitimacy by default. The Kosovo Serbs have their own governing structures, supported and financed by Serbia. The problems of parallel structures and different hostile ethnic communities have continuously frustrated UNMIK's efforts. It hindered the standards-before-status process with Kosovo Albanians demanding more autonomy and Kosovo Serbs boycotting the PISG. It also hindered efforts of creating legitimate security structures that could guarantee security to each Kosovo citizen. Instead, external security actors like KFOR and EULEX are still active today for this task. Similarly, it has delayed economic reconstruction

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<sup>356</sup> UNDP, *Kosovo Human Development Report 2010: Social Inclusion*, 12-13; my emphasis.

since Kosovo was long unable to get badly needed loans from international financial institutions. The impossibility of obtaining a clear legal status seriously undermined Kosovo's government. In other words, a lack of international legitimacy, meaning recognition as a sovereign entity, has been detrimental to its internal legitimacy. Nevertheless, one could argue that given the regular elections and stability of the government, it has proven its legitimacy.

However, the answer to UNMIK's achievements of creating legitimate government is not that unambiguous. Just like UNTAET, UNMIK opted for top-down enforcement of Western norms and standards like multi-ethnicity, equality and democratic principles. The consequence of this policy preference for setting top-down guidelines is absence of meaningful local participation. Moreover, without clear prospects for the future and continuous engagement of the international community, Kosovo's governmental structures have acquired little sense of accountability, responsibility or ownership. In addition, practice of voting, governance and administration appointments show that Western norms and standards have not taken root. Instead, 'family voting', corruption, nepotism and clan or regional ties are the fashion in Kosovo's 'democratic processes'. This does not necessarily mean that government is not working at all or wholly rejected by its citizens. It does mean that it has not adopted the Western standards in a situation where economic prospects are weak and social networks are more important than rational measures of quality and competence. In the end, Kosovo's government demonstrates a deficiency of 'internally sustained and locally-valued policies, networks and organizations', as observed by the UNDP.

## Chapter 5: Analysis: combining theory and practice

The goal of this final chapter is to analyze the UN administrations in East Timor and Kosovo in light of the theory on (creating) legitimacy. This theory gives some clear insights why relations of power are legitimate. Equally, some mechanisms were identified in the process of legitimation, the process of making rule legitimate. Such mechanisms were the provision of carrots, employing sticks, good governance, elections and cooperation between ruler and ruled for their mutual benefit. In this chapter, the practice of UNTAET and UNMIK will be reviewed once more, considering these mechanisms. The aim here is thus a final analysis of theory and practice. First, I will go into UNTAET and UNMIK separately. Next, the two case-studies will be compared to each other. Lastly, an answer can be given to the question of the results of the UN administrations in creating legitimate government.

### 5.1 The UN administrations and creating legitimacy

#### 5.1.1 UNTAET

The UN administration in East Timor established a route to independence. Following Fretilin's 24-year long resistance struggle against brutal, ruthless rule by Indonesia, the international community finally decided to take over late in 1999 to turn East Timor into 'a beacon of democracy'. UNTAET then had quite a clear goal to its activities, as stipulated in Resolution 1272. In Wilde's terminology, UNTAET was responding to both a sovereignty problem and a governance problem. On the sovereignty problem, there was no governing authority left in East Timor when the UN decided to take control. The region was neither part of Indonesia, nor of Portugal and 'pending the final settlement of the territorial status', East Timor came under the authority of the UN, both *de jure* and *de facto*.<sup>357</sup> On the governance problem, the approach of UNTAET is described best as the assumption of a political vacuum, a clean sheet to be written by the international administrators. In fact, there was a widespread assumption of building a nation from scratch. While the East Timorese certainly had their own forms of power-sharing, conceptions of legitimate authority, justice etc., the focus of UNTAET was to build a democratic state in Western rational-legal fashion in a region where this template was completely alien. Though the elites were committed to this goal, the people hardly had any idea what democracy meant or what it stood for, as even acknowledged by de Mello.<sup>358</sup> Nevertheless, the UN officials were positive that the East Timorese could be educated in democracy.

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<sup>357</sup> Carsten Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis', *Max Planck Yearbook of United Nations Law* 5 (2001), 105-183 (121).

<sup>358</sup> S/PV.4351 (Resumption 1), 30 July 2001, 26.

Yet, also 'the United Nations has almost everything to learn at the same time as it is trying to build and manage a country'.<sup>359</sup>

Indeed, when UNTAET arrived there was acute security and administrative vacuum following the withdrawal of Indonesian officials. However, Fretilin had established extensive networks throughout the country during its long struggle for resistance, 'a clandestine parallel system of governance to support the resistance fight'.<sup>360</sup> These governance structures were still in place, while UNTAET was establishing its administration throughout the country. Initially, UNTAET worked with the village chiefs at the local level who were appointed by the CNRT. Once the new administration was in place, these leaders were replaced with officials locally recruited by the UN. Those officials however lacked the necessary qualities conferring power on someone in the view of the East Timorese. They did not have the respect, the right family, kin, or ancestors that legitimize political authority. As a result, the locally legitimized rulers at the district level came to oppose the new administrators of the UN. Similarly, consultative mechanisms were instituted early from the start. However, these mechanisms seem to have been created more for UNTAET's good than for the East Timorese. The NCC/NC had no real authority, but was merely there for consultation and to approve or sanction the administration's policies. However, the East Timorese were seriously dissatisfied with their subordinate role, leading to a crisis of legitimacy of UNTAET by early 2000.<sup>361</sup> The UN was thus actively engaging itself in legitimizing its rule, in making claims. Yet, for such claims to be accepted there must be some sense of shared values, of reciprocity or identification between ruler and ruled.<sup>362</sup> On top of that, Gilley and supporters of the 'good governance' approach argued that rational interests need to be met as well.

In January 2000, it was stated that it would be 'a high priority in the next three months to produce tangible results for the people of East Timor by creating employment and providing a range of public services (...) [to] meet the needs of the East Timorese people'.<sup>363</sup> This approach comes down to providing carrots, to get consent from the population and enhance legitimacy in exchange for supplying services. Yet, in the same year, Chopra already argued that 'UNTAET's inability to deliver basic services or tangible reconstruction and its failure to reduce unemployment (exceeding 80%) cost it the confidence of the people – perhaps the critical ingredient in any transitional administration'.<sup>364</sup> By the end of UNTAET in May 2002, the situation was still bad with widespread unemployment and absolute poverty. UNTAET then was ultimately failing in providing these carrots.

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<sup>359</sup> S/PV.4165, 27 June 2000, 2.

<sup>360</sup> Hohe, 'Clash of Paradigms', 578.

<sup>361</sup> Tansey, *Regime-building*, 78.

<sup>362</sup> Barker, *Legitimizing identities*, 32-33, 138-139; Coicaud, *Legitimacy and Politics*, 35.

<sup>363</sup> S/2000/53, 26 January 2000, 16.

<sup>364</sup> Chopra, 'The UN's Kingdom of East Timor', 34.

On top of that, there was neither much success in employing the stick, in using the means of coercion. Though new security structures were created, the violence of 2006 shows their fragile state. Only after international forces arrived, order could be restored. The precarious security situation is evidenced by the lack of trust in the PNTL and F-FDTL, and the sense of a culture of violence, impunity and lawlessness.<sup>365</sup> This is also the result of a lack of functioning judiciary. Therefore, people have reverted to alternative methods of dispute resolution using customary law.

It is questionable whether more carrots and sticks would have increased the government's legitimacy. While East Timorese leaders had given the UN a detailed proposal a mixed-Timorese U.N. administration before UNTAET was deployed, this proposal was completely ignored. Instead, UNTAET opted for top-down implementation of its reconstruction program, with final authority in hand of the SRSG and the East Timorese in their subordinate role of consultation. Once the UN administration was in place, power was decentralized. Nevertheless, the 'rules of the game', the policies to be implemented, were still set at the upper level by UN officials. This practice demonstrates a real lack of 'ownership' of East Timorese. They were 'passive bystanders', subjects or even objects, instead of the active agents they should be. In the words of Lake, the East Timorese had no incentive to vest interest into the government created by external actors, thereby failing to become vested in the new social order. It is this investment, or ownership, that is essential for people to uphold new patterns of authority, which was ultimately lacking in East Timor.

In addition, the new government created by the UN was based on democratic principles, disseminating values like equality, liberty and justice. Yet, by taking control and exercising power like a 'pre-constitutional monarch in a sovereign kingdom', the UN's behavior did not match up with its propagated ideals.<sup>366</sup> Moreover, the new norms and values failed to take root. The practice and principles of democratic government forced upon the East Timorese have not been 'internalized'. Instead, local views on power, justice, women rights etc. proved to be resilient towards the values disseminated by the international community. Considering voting, Hohe concluded that the elections were a 'totem poll', in which the people showed their respect for their ancestors, their culture, and their values. Though one might doubt the rationality of voting in principle, the practice in East Timor of voting on basis of personal relationships, historical connections, and existing village factions in a hierarchical culture rather point to patterns of patrimonialism.<sup>367</sup> Considering justice, apart from the absence of functioning judiciary, recent research has shown people's preference for 'suco' justice at the local level, where the village chief is the ultimate arbiter.<sup>368</sup> Moreover, the frequent practice of

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<sup>365</sup> Freedom House Country Reports East Timor 2005-2010.

<sup>366</sup> Chopra, 'The UN's Kingdom of East Timor', 29.

<sup>367</sup> Isabelle Duyvesteyn and William P. Murphy, 'Interventie in staatsvormingsprocessen: dictatuur versus democratie?', *Internationale Spectator* 64 (4) (2010), 220-224.

<sup>368</sup> Nixon, *Integrating Indigenous Approaches into a 'New Subsistence State'*.

pardoning high-level suspects such as former Prime Minister Alkatiri and former interior minister Roberto Lugato, contribute to the sense of impunity and lawlessness. Considering equality, the hierarchical social structure still seems to be in place, evidenced also by the troubling situation of women who suffer much (domestic) violence that lacks prosecution. As two scholars have argued:

The rapid introduction of liberal governance norms, with scant attention to their interaction with local practices, has contributed to the erosion of local processes and values underpinning order, and led to the adoption of often poorly understood liberal norms, particularly in towns. Little underpins these new norms, however, nor have they been clearly embedded in Timorese life experience and understanding. In this context, many people's experience of "democracy" has become identified with conflict and "top down" imposition of values.<sup>369</sup>

In other words, UNTAET has been unable to transform people's norms, their justifiability of the rules or shared beliefs that are the foundation of legitimacy, to speak with Beetham. Or, in Gilley's terms, UNTAET has been unable to reconfigure the evaluative norms that underlie legitimacy. While the formal institutions of a (democratic) government have been established, they have been recast in local paradigms.

### 5.1.2 UNMIK

UNMIK was deployed to end the humanitarian catastrophe in Kosovo. With Kosovo Albanians fighting for independence and Serbia fiercely suppressing them for over 10 years, NATO decided to intervene against Serbia without any UN authorization. Upon NATO's and KLA's victory, a UN administration followed that was devised to temporarily administer Kosovo and prepare them for self-government. Yet, since Kosovo's future status was unclear, so was the goal of UNMIK. While officially in charge of preparing the province of Serbia for 'substantial autonomy and self-government', it was rather ambiguous what this exactly meant in practice.

Nevertheless, UNMIK was also responding to a sovereignty and a governance problem. On the first, it can be argued that the war in Kosovo was a direct result of a conflict over Kosovo's status. While the Kosovo Albanians demanded and fought for independence, Serbia always held on to its right as a sovereign, legal entity that included the province Kosovo. It was only willing to grant the region substantial autonomy. The Kosovo Albanians were substantially helped by powerful actors like the US, UK and Germany who supported Kosovo's independence. Ahtisaari's plan in 2007 further advanced the cause, since it officially stated that independence was the only viable option. Due to Serbia's obstruction, supported by China and Russia, Kosovo's status was never formally resolved.

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<sup>369</sup> Brown and Gusmao, 'Peacebuilding and Political Hybridity in East Timor', 64-65.



Instead, Kosovo eventually decided to act on its own and declared independence. This has led to an unclear legal status of Kosovo, recognized by 72 UN members, acceded to international organizations like the IMF and World Bank, though not officially by the EU, while a EUSR has taken control. In fact, during its time of administration, UNMIK exercised political authority, vested in the SRSG. As a result of Kosovo's unilateral declaration of independence, UNMIK is actually still the supreme authority in Kosovo and recognized accordingly by Serbia, though it is in no position to enforce this authority.

Considering the governance problem, UNMIK was less outspoken in its assumption of building a nation from scratch, yet its practice does give evidence of such an approach. Indeed, following Serbia's defeat there was an administrative and security vacuum in Kosovo. The different ethnic communities exploited this lack of government at the central level. They provided for their own structures in their own respective municipalities. In fact, the Kosovo Albanians had been doing this since the early 1990s, when Rugova created a parallel governance structure with his peaceful resistance movement LDK. Already in early 2000, it was reported that the Kosovo Albanian parallel structures had been dissolved. The parallel structures of the Kosovo Serb community however continued to exist, up until today, even formalized in the Kosovo Serb Assembly in mid-2008. The Kosovo Serbs have always denied the legitimacy of the new government of Kosovo. Out of fear that supporting the PISG would give further incentive to independence, they frequently chose to boycott them. Serbia not simply supported this strategy, but often actively promoted it. The Kosovo Serbs then have never been adequately represented in the PISG. Those Kosovo Serbs who did participate lacked their community's support.

Just like in East Timor, the elites in Kosovo were committed to establishing democracy. Here, the concept was less alien, since the Kosovo Albanians had already voted on independence in 1991 and elected Rugova to president a year later. Yet, the practice of voting shows that democracy's principles have been inadequately entrenched in Kosovo as well. First of all, voting was based on ethnicity. Second, there was the widespread practice of family voting in which the male head of the household casted ballots for the entire family. Third, election campaigns often exclusively focused on future status and the issue of independence, hardly on policies or programs. Fourth, the Kosovo Serb part of the population mostly boycotted the elections, and participation of other ethnic minorities was usually low to negligible. In the Kosovo Assembly, seats were reserved for all these ethnic minorities to ensure their representation. Equally, UNMIK decided to appoint administrators in the Serb municipalities when elections there did not yield suitable candidates. UNMIK thus enforced a vision of multi-ethnicity by setting quotas for representation. Even more troubling was the trend of 'voter fatigue' with overall participation rates falling below 50 percent from 2007 onwards. In

addition, especially young people are not politically active, feeling ignored by decision-makers, with only 46.5 percent believing that voting is effective.<sup>370</sup>

The mechanism of carrots and sticks in order to increase the administration's legitimacy was also employed by UNMIK. The members of the UNSC noted after a visit to Kosovo in 2000 that it was 'cognizant of the imperative for UNMIK to foster economic recovery as a means of underpinning confidence-building and reconciliation efforts at the local level'.<sup>371</sup> In the subsequent discussion on this visit, it was equally argued that 'adequate social, economic and, most importantly, physical security is crucial to building a functioning and pluralistic society'.<sup>372</sup> However, by October 2002 it was clearly admitted it had not yet been demonstrated that 'participation brings tangible benefits to all communities'.<sup>373</sup> Similarly, Eide reported in mid-2005 the bleak economic situation, high unemployment levels, and widespread poverty.<sup>374</sup> Since Kosovo's declaration of independence, the situation has not really improved. In 2010, unemployment rate stood at 48 percent, while the poverty rate was stagnating at 45 percent.<sup>375</sup>

The means of coercion have neither been effectively built-up. To be fair, in June 2008 the KPS employed 7,076 people, of which 9.92 percent was Kosovo Serb, 5.57 percent of other ethnic minorities, and 13.52 percent women.<sup>376</sup> Nevertheless, the UNMIK police force also still had over 2,000 officers. Equally, EULEX deployed a police mission in 2008, which is still active and has currently about 2,850 staff of which 1,670 is international.<sup>377</sup> After KLA's demobilization, many former KLA-members joined the new KPC. This force had 2,876 active members in June 2008, of which 6.2 percent belonged to an ethnic minority.<sup>378</sup> Equally, KFOR has been active since 1999 and still is, with currently almost 6,000 troops.<sup>379</sup> Kosovo's internal security then is still largely dependent on external actors.

Those external security providers undermine the government's legitimacy. As shown by Kalyvas' research and the history of Western state formation, the security provider in a territory gets consent from the people and their compliance. By failing in this essential task, the government in Kosovo is failing in creating a necessary link to its constituency. Nevertheless, recent research shows that about 80 percent of the Kosovo Albanians are satisfied with the current security structures,

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<sup>370</sup> UNDP, *Kosovo Human Development Report 2010: Social Inclusion*, 84.

<sup>371</sup> S/2000/363, 29 April 2000, 7.

<sup>372</sup> S/PV.4138, 11 May 2000, 5.

<sup>373</sup> S/2002/1126, 9 October 2002, 10.

<sup>374</sup> S/2005/635, 7 October 2005, 2.

<sup>375</sup> UNDP, *Kosovo Human Development Report 2010: Social Inclusion*, 11.

<sup>376</sup> S/2008/458, 15 July 2008, 19.

<sup>377</sup> S/2011/281, 3 May 2011, 13.

<sup>378</sup> S/2008/458, 15 July 2008, 19. The KPC was disbanded early in 2009, following the creation of the Kosovo Security Force in January 2009, which currently has about 2,500 troops.

<sup>379</sup> [http://www.nato.int/kfor/structur/nations/placemap/kfor\\_placemat.pdf](http://www.nato.int/kfor/structur/nations/placemap/kfor_placemat.pdf), NATO Kosovo Force, 5,927 troops as of 4 June 2011; last visit: 21 June 2011.

though not more than 20 percent of the Kosovo Serbs are.<sup>380</sup> This can be explained by the fact that Kosovo Serbs since Serbia's withdrawal always were prone to violent attacks, which has been reported continuously since UNMIK's deployment, up until today.<sup>381</sup> Hence, the Serb have never put much trust in the security structures. This is quite reasonable, when one considers that the KPC participated in the March 2004 riots targeting, amongst others, ethnic minorities. Similarly, the judiciary has failed to assert itself, mainly due to a lack of capacity. This has led to widespread organized crime, 'with criminal networks extending into various economic sectors and politics'.<sup>382</sup> Consequently, people have a sense of impunity and lawlessness, which has led them to take the law in their own hands.

Next to these faltering reconstruction efforts, UNMIK was also a clear case of implementing policies top-down, in the process neglecting input from the bottom-up. Consultative mechanisms such as the KTC were established, but these hardly had any influence on policies. In Kosovo too, those consultative mechanisms mainly served to give some sort of legitimacy to the UN.<sup>383</sup> The strategy of decentralization and incremental transfer of power to the PISG was thwarted by the standards-for-status policy. Though municipal assemblies gained decision-making power, the policies to be implemented were set at the central level by UNMIK. Ultimately, the standards-for-status policy disgruntled the people in Kosovo, feeling that they were not the owners or drivers of the transition process, let alone of the standards to be implemented. Frustration with UNMIK grew, exemplified best by the March 2004 riots. Thus, in Kosovo too there was little incentive for people to vest interest into the new governmental structures created by external actors. On top of that, because UNMIK set quotas for minority representation in the administration and security structures, ethnicity was reinforced as the defining social characteristic in Kosovo's society, ultimately leading to institutionalization of ethnicity. In fact, after nine years of 'UNMIK-rule', Kosovo ended up with a deeply segregated political and social life, instead of a multi-ethnic society. This segregation has been aggravated by the complicated legal status of Kosovo. The Kosovo government is unable to enforce its authority in northern Kosovo where most Kosovo Serbs live. Supported by Serbia, the Kosovo Serbs have established a clandestine government within a territory with a contested judicial status where the legal authority is rather unclear. Therefore, Kosovo's government will probably continue to be unable to enforce its authority in that specific region in the near future.

The legitimacy of Kosovo's government has further been undermined because the principles underlying it have not taken root. Democratic values like equality, liberty, and justice are not

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<sup>380</sup> UNDP, *Public Pulse Report 2010*, 29.

<sup>381</sup> S/2011/281, 3 May 2011, 6.

<sup>382</sup> Freedom House Country Report Kosovo 2010.

<sup>383</sup> Nicolas Lemay-Hébert, 'State-Building From the Outside-In: UNMIK and its Paradox', *Journal of Public and International Affairs* 20 (2009), 65-86 (75).

safeguarded in Kosovo. It has been frequently reported that ethnic minorities are not able to move freely, and that they are discriminated and treated badly, often even violently. This has impeded returns. Likewise, the lack of a functioning judiciary, of upholding women's rights, of preserving the principle of a vote for each citizen, all point out that while the formal institutions may be in place, the norms underpinning them are not. Instead, Kosovo's government is characterized by corruption, nepotism and a lack of accountability. Connections matter more than anything else in appointment for the administration. On the basis of this observation, coupled to the common practice of family-voting, one can conclude for Kosovo as well that a patrimonial system is still in place.

## 5.2 Comparing the two case studies

UNTAET and UNMIK had quite a lot in common considering the implementation of the goal of providing temporary administration to create a functioning, democratic government. At the start of the administration, there was the assumption of some sort of vacuum that could be filled by building new governmental structures. Both administrations quickly set up consultative mechanisms, which seems to have been mainly to give some legitimacy to the UN administrations itself. Equally, there was a gradual transfer of power to the local level, a process of Timorization and Kosovarization respectively, though final authority was still vested in the SRSG. Yet, UNMIK and UNTAET failed to generate economic recovery, to create a functioning judiciary or security structures. In East Timor as well as in Kosovo, this led to a sense of impunity or lawlessness amongst the people. The two UN administrations thus ultimately failed to deliver the necessary services to get consent from the constituency, thus to effectively provide carrots and employ sticks.

Both UN administrations aimed at building democratic government since the general conception was that elections would confer the necessary legitimacy on local powers. In creating a government in Western fashion, there was no room for leaders with legitimacy based on tradition or charisma. Instead, there was a focus on elections as the main legitimizing principle, as in accordance with a rational-legal interpretation of legitimacy. UNTAET and UNMIK confirmed 'the tendency to overwhelmingly rely on political structures and institutions that are in many ways alien to the societies that they are expected to govern to deliver peace and development'.<sup>384</sup> Yet, as argued by scholars like Wrong, Beetham and Thornhill, for power to be legitimate, or for legitimate authority, there must be a convergence of norms and beliefs underlying that power. Legitimacy has a contextualized validity, and, rather than content, it is the source of a command that endows it with legitimacy.<sup>385</sup> Thus, to quote Richmond and Tadjbaksh once more, 'if the core of statebuilding is

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<sup>384</sup> Boege et. al., 'Building Peace and Political Community in Hybrid Political Orders', 600.

<sup>385</sup> Thornhill, 'Towards a historical sociology of constitutional legitimacy'; Wrong, *Power. Its Forms, Bases and Uses*, 49.

legitimacy, history and local circumstances create that legitimacy and not cosmopolitan ideals, no matter how justified in the eyes of some.<sup>386</sup> Hence, it is very reasonable to argue for 'greater attention to the cultural and societal context of political community and to the actual operation of political life and order in the states in question'.<sup>387</sup>

Apart from the similarity between UNMIK and UNTAET of a failure in disseminating new values and norms, the other most important one is that in both UN administrations, there was a clear focus on top-down enforcement of particular 'blueprints' with hardly any involvement of local actors. The SRSB had overall, executive authority, even when new governing structures were in place. While there eventually was an incremental transfer of power, still policies were dictated by the upper level and UN officials. The history of state formation has shown that the eventual emergence of states, institutions and governmental structures was a process in which ruler and ruled cooperated to their mutual benefit. As long as an external actor is trying to build a government without involving the essential input bottom-up, the newly created structures will never get the crucial consent. In Lake's theory, if people have no incentive to vest interest into a new order, they will never be interested to uphold or participate in that order.

In recent literature on interventions and statebuilding the need of creating legitimate government is acknowledged increasingly. Moreover, it seems that policymakers are also getting greater understanding of this, though it remains to be seen whether these insights are actually transformed into policies.<sup>388</sup> To be fair, much of this policy literature only reluctantly admits that government and its institutions need to be made legitimate.<sup>389</sup> However, at least one study seriously considers state legitimacy. In a recent report of the OECD, it is acknowledged that the Western idea of statehood, its institutions, and its legitimacy are unique, which 'cannot be reproduced simply by transferring the same institutional models into different social and political contexts'.<sup>390</sup> At the same time, the OECD recognizes that in non-Western settings, there are fundamentally different forms of political authority. Consequently, it is argued that 'donors need to recognize that trying to strengthen state capacity and legitimacy in very fragile environments by imposing or supporting the creation of rational-legal political institutions will not work. They should take much more account of local perceptions and beliefs about what constitutes legitimate political authority and practice'.<sup>391</sup>

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<sup>386</sup> Tadjbakhsh and Richmond, 'Conclusion', 237.

<sup>387</sup> Boege et. al., 'Building Peace and Political Community in Hybrid Political Orders', 600.

<sup>388</sup> Roland Paris, 'Ordering the World: Academic Research and Policymaking on Fragile States', *International Studies Review* 13 (2011), 58-71 (64-65).

<sup>389</sup> USIP, *Guiding Principles for Stabilization and Reconstruction*; FM 3-24, MCWP 3-33.5, *Counterinsurgency*, 1-22.

<sup>390</sup> OECD, *The State's Legitimacy in Fragile Situations*, 7.

<sup>391</sup> *Ibidem*, 11.

Two Danish political scientists argued similarly in 2006 that 'it is imperative that the Western world gives up the idea that war-torn societies, failed states and contested territories must necessarily be reconstructed in its own image'.<sup>392</sup> This specific critique in fact has quite a history, as shown by comments of critics on the Trusteeship System shortly after its establishment, and the critiques of James C. Scott and Beate Jahn, all elucidated in the first chapter. The recent study of the OECD at least responds to this advice, explicitly stating not to 'advance a state-building agenda based on a Western state model'.<sup>393</sup> Yet, after the cautionary notes, several recommendations follow to improve the work of external actors (donors). Examples are to take the local context as starting-point and not the 'donor-agenda', be more aware of the consequences of aid modalities on state-society relations, to be less ambitious what can be achieved concerning reducing or even eliminating corruption, etc. Despite these nuances, such recommendations give evidence of a confidence that usefulness of 'donors' to engage in statebuilding and putative benefits of these exercises are still beyond dispute.

Indeed, the case studies of UNMIK and UNTAET show that there might be some room for 'piecemeal social engineering', for incremental improvement. For example, in East Timor the benefits might have been greater when UNTAET had not decided to replace village chiefs with 'young potential' recruited on basis of education that lacked authority among their fellow Timorese. Similarly, UNMIK might have achieved more results if it could have found a way to cooperate with the Kosovo Serb and their parallel structures instead of trying to force them to work within the PISG. Yet, what the case studies of UNMIK and UNTAET show above all is that creating legitimacy is a process that simply cannot be enforced by outside actors. Instead, partnerships, networks, and organizations of political authority need to be bear and realized by the population itself. It is an endogenous process, a give-and-take between ruler and ruled where interference from external actors is rather detrimental than beneficial.

Such a conclusion might be quite disappointing for policy makers, for academics, think-thanks, NGO's and others who champion the benefits of humanitarian intervention, peacebuilding, and democratization by outside actors, trying to come up with 'best practices'. Yet, the cases of state formation in Somaliland (in Somalia) and the island of Bougainville (in Papua New Guinea) confirm this conclusion. In both regions, 'a functioning, effective and legitimate political order has emerged' with hardly any external assistance. The new political order in these two territories rest upon a combination of customary, traditional institutions with modern (Western) state institutions like an

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<sup>392</sup> Tony Brems Knudsen and Carsten Bagge Lautsen, 'The future of international trusteeship: conclusive reflections', 187-193 (192), in: idem (eds.), *Kosovo between War and Peace*.

<sup>393</sup> OECD, *The State's Legitimacy in Fragile Situations*, 58.

elected parliament and president.<sup>394</sup> The good news is that these two cases suggest that democracy is not necessarily unfeasible in other systems of political authority. Indeed, as demonstrated by Tadjbakhsh's research, even in Afghanistan democracy is still valued, though not all its aspects.<sup>395</sup> However, already in 2006, two renowned political scientists argued upon statistical analysis that 'intervention does little to promote democracy and often leads to its erosion and the substitution of largely symbolic reforms'.<sup>396</sup> The findings on UNMIK and UNTAET presented here give further leverage to the view that external intervention is not a suitable instrument. In these two cases, the act of temporarily administering a territory has not achieved the goal of creating a functioning, stable and legitimate government.

### 5.3 Conclusion

With only a few months between the start of the two operations, the concepts of UNMIK and UNTAET showed a remarkable number of similarities. Both were devised as interim administrations to take care of setting up a new, democratic government. In East Timor and Kosovo, the UN temporarily seized control, exercising supreme authority, with the goal of establishing new state structures for the benefit of the constituency. Yet, whereas UNTAET was to establish a route to independence for East Timor, it was rather unsure in which direction Kosovo was heading. Nevertheless, both administrations assumed there was a political vacuum to be filled, which led to an approach of implementing a specific governmental structure regardless of existing systems of power-sharing, society's structure and local values and norms.

When taking into account the theory on creating legitimacy and the mechanisms to do so, analysis showed that UNTAET and UNMIK failed in providing carrots and establishing the means of coercion. Yet, closer inspection demonstrated that there are two other important reasons for the disappointing results of these two UN administrations in creating a legitimate government. First, the approach taken was top-down implementation without meaningful participation from the constituency. This has resulted in new political orders that lack the critical interest of the population to uphold it. In both countries, the population was not the driver or owner of the transition process, but merely bystanders. This has led to formal institutions of which they not feel part. Second, UNTAET and UNMIK showed a clear preference for a government in Western rational-legal fashion where power is legitimized on the basis of elections. Yet, the new values or norms that accompany this specific template have failed to take root in East Timor and Kosovo. In other words, the governmental structures lack legitimacy because they lack justifiability. The new rulers and

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<sup>394</sup> Boege et. al., 'Building Peace and Political Community in Hybrid Political Orders', 609-611.

<sup>395</sup> Tadjbakhsh, 'Liberal peace and the dialogue of the deaf in Afghanistan'.

<sup>396</sup> Bruce Bueno de Mesquita and George W. Downs, 'Intervention and Democracy', *International Organization* 60 (3) (2006), 627-649 (647).

accompanying institutions cope with legitimation of their power because its constituency has not adopted the norms and values that should legitimize it.

To be true, INTERFET was able to stop the bloodshed in East Timor, upon which UNTAET followed to fill the administrative and security vacuum. Equally, NATO ended Milosevic' persecution of Kosovo Albanians, though it initially increased the level of destruction and humanitarian catastrophe by radicalizing the war. After NATO's victory, KFOR and UNMIK tried to provide security and administration. As Doyle and Sambanis argued, the UN was indeed good in making peace. Equally, both UNTAET and UNMIK have been successful in establishing the official institutions of government, such as parliament, president and ministries. However, by neglecting existing forms of rule, society's institutions, and local values and norms, they have failed in endowing the new government with legitimacy. In the end, the analysis of UNMIK and UNTAET shows that gaining legitimacy for rule is an endogenous process, unable to be enforced by external actors.



## Conclusion

‘Historians will be able to tell us with hindsight how much better they would have done in our place’ remarked Sergio Vieira de Mello quite mockingly in a meeting on UNTAET in the UNSC.<sup>397</sup> Well, it has not been the goal here to tell what should or could have been done better. Rather, this research aimed for a critical analysis of two particular UN transitional administrations and their efforts and success in creating legitimate government. As noted in the first chapter, the instrument of temporary providing administration by the international community had quite a history. Already shortly after the First World War, the League of Nations took over in several territories and devised a Mandate System and Governing Commission. This trend continued after the Second World War, with the UN’s activities on Non-Self Governing Territories and its Trusteeship Council. The UN’s involvement in conflicts and post-conflict reconstruction has increased particularly after the Cold War, leading to several ‘generations’ of peacekeeping. Nowadays, there is a big debate on almost all aspects of such interventions and peacebuilding efforts. This research contributed to this debate by focusing specifically on transitional administrations, adding the theory of (creating) legitimacy. As shown, it is crucial for a government to be legitimate in order to function effectively, especially once the intervening power leaves.

Hence, in the second chapter the theory on legitimacy and legitimation has been analyzed. These concepts also proved to be big academic discussions, stretching across numerous disciplines. The main conclusion drawn with regards to the concept of legitimacy was that it has contextualized validity, meaning that it is subject to space and time. In other words, a legitimate relation of power, of domination, is legitimate because of the values and norms underpinning it. Rules in society are accepted because they can be justified on shared beliefs. In addition, analysis and reconsideration of state formation showed that for rule to become legitimate, interaction between ruler and ruled is crucial. The constituency, the ruled, need to have some sort of ownership of the created structures of power. They need to vest their interest into those structures in order to participate and uphold them. Hence, several authors pointed to the mutual transformative relationship and interaction between state and society, between the central and the local level, forces top-down and bottom-up. It was thus concluded that creating political legitimacy, or rather legitimate government, was an exchange process between ruler and ruled, taking into account context, that is, historical and cultural factors, and people’s interests.

In the third and fourth chapter, description and analysis of the activities of the UN in East Timor and Kosovo followed. Especially remarkable was the top-down nature of implementing the

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<sup>397</sup> S/PV.4351, 30 July 2001, 6-7.

new governmental structures, without agency of the people in those countries, meaning without significant local participation. Equally, both administrations favored a Western rational-legal governmental structure. In fact, democracy was implemented with elections as the main legitimizing principle, thereby neglecting existing structures of governance, power-sharing, and local values and norms. In the last chapter, it was concluded that those newly created governments are not legitimate, since the values and norms underpinning them have failed to take root. The principles that should legitimize the new power structures are absent. Equally, the constituencies were often mere bystanders, indicating severe deficiency of interaction between ruler and ruled. As a result, those people have not invested in these new governmental structures, and thus have no interest in upholding or participating in them.

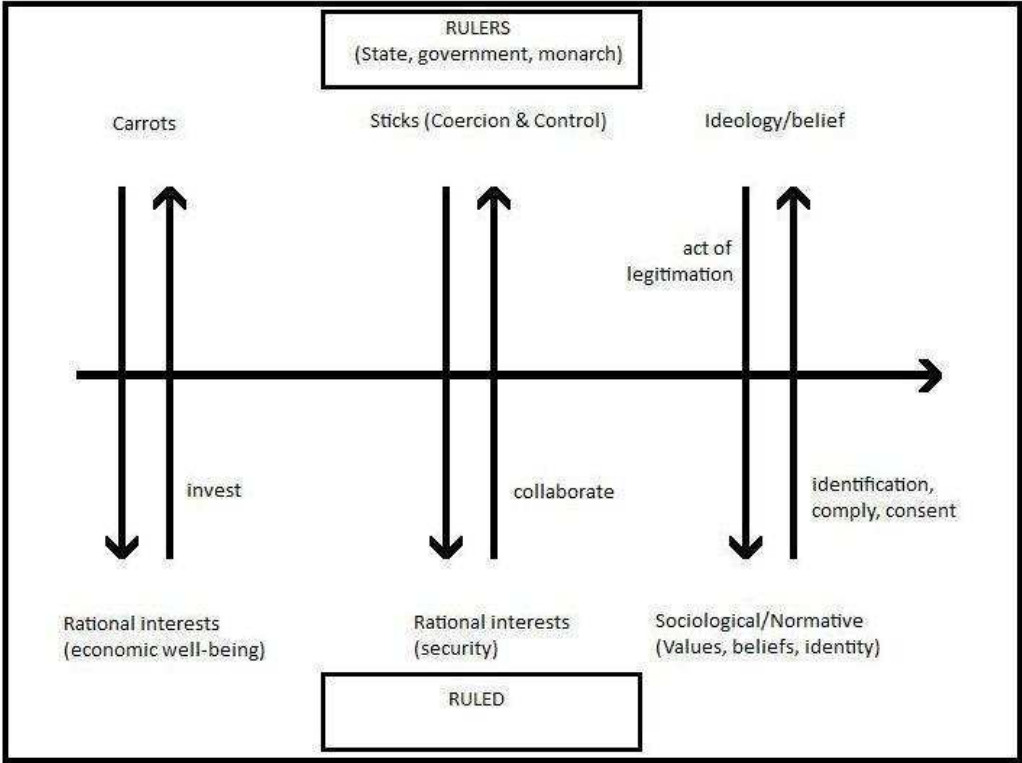
UNTAET and UNMIK were too little aware of the fact that they were agents of change, disseminating new norms, values and institutions that threatened existing societal and political structure. Recently, there is more attention for the issue of creating legitimacy in academic literature, and even in some policy circles. Yet, they still favor continued international assistance. However, the analysis presented here has shown that temporarily acting as government, the instrument of transitional administration, does not create legitimate government. This fundamental contradiction noted in the first chapter, cannot be resolved. Based on the cases of UNMIK and UNTAET, the conclusion must be that gaining legitimacy is an endogenous process, in which external interference hardly has positive effects. This is evidenced by the fact that after twelve years of the start of the UN's efforts in East Timor and Kosovo, both countries still need international tutelage. Kosovo still relies on external security providers and international assistance, whereas UNMIT is still active in East Timor, providing police, and policy on governance and administration.

As said, the goal of this research has not been simply to criticize UNTAET and UNMIK for some of its failures. Instead, the instrument of transitional administration has been analyzed critically in view of the goal of creating legitimate government. This was to contribute to a major debate on interventions and statebuilding. By offering an innovative approach, it has been shown (once more) that the international community should rid itself of the 'global governance norm' to intervene into (post-conflict) countries with the goal of building democracies and stable governments. This does not produce desired results.

**Appendix A: Extended social contract**

How to gain legitimacy?

Below, an extended 'social contract', combining top-down and bottom-up approaches, constituting three 'mechanisms' for creating legitimacy, leading to an intersection, the middle-level, where interests of ruler and ruled meet.



→ = intersection of interests between ruler and ruled from which institutions can develop, such as police, judiciary, law etc.

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