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# Kosovo Beyond Nationalism

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The Influence and  
Responsibility of the  
International  
Community

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*On my honor as a student of the Diplomatic Academy of Vienna, I submit this work in good faith and  
pledge that I have neither given nor received unauthorized assistance on it.*

As much as this body of work is a representation of a year of research, of personal and academic enrichment, much collaboration – both formal and informal – went into making this thesis what it is. I would be remiss in not extending a word of heartfelt gratitude to those whose energy, insight and patience pushed me towards developing more nuanced and better articulated positions. It is the often un-credited work of mentors, professors, friends and family to inspire greatness in students of the world.

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## Abstract

In her Pulitzer Prize winning account of genocide, Samantha Power lays bare the very real threat of forsaking a people after catastrophic, widespread violence. She argues: “Citizens victimized by genocide or abandoned by the international community do not make good neighbors, as their thirst for vengeance, their irredentism, and their acceptance of violence as a means of generating change can turn them into future threats.”<sup>1</sup> To avoid this prediction, and in an effort to stabilize, democratize, and ensure the protection and promotion of human rights in Kosovo, the international community committed itself to an extended stay in the territory, to found a new institutional order based on the democratic principles of a free society. Yet, finding the balance between local group socialization, political administration in a ‘status-neutral’ setting, transparency and legitimacy within a ‘benevolent autocracy’, and the contradictions of protecting and promoting a human rights regime via ‘dictatorial’ reserved powers proved all but impossible for the Interim Administration Mission in Kosovo (UNMIK).

By analyzing the politics of ‘status’, implementation of democratic theory, and the promotion and protection of human rights, this study aims to highlight the historical, political and legal contexts and consequences of the policies, structure and competences of the UNMIK from 1999-2008. Furthermore, with the launch of the EU rule of law mission in Kosovo in early 2009 – by systematically appraising three major deficiencies of the UN administration, one can lay out the most urgent thematic and practical steps needed for the ultimate success of the mission as a whole; and in so doing, fulfill the UNSCR 1244(1999) mandate by achieving real stability and democracy in the region. Whatever the ultimate conclusion to the Kosovo question is – of which there is no detailed analysis or offer of a possible policy solution within the confines of this thesis – it must reflect the new reality of the systemic order. Kosovo, like many states before, has fallen victim to the perception that traditional state-sovereignty is the *only* solution. However, this paper posits a more nuanced approach, suggesting that perhaps what is necessary for a durable peace is a new perspective: one which emphasizes the benefits of trans-national ties and minimizes the need for strict traditional sovereignty. In this vein, it is the European Union which offers the best possible solution. Not only does it have the institutional knowledge acquired in the tenure of the UN administration, but it also has the rhetorical, political, and economic strength to bind both Priština and Belgrade towards a mutually beneficial future within the Union (in whatever State-form) precisely by reducing the emphasis on nationalist interests.

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<sup>1</sup> Power, Samantha. *A Problem from Hell*. (New York: Basic Books, 2002), pp. 513.

## Table of Abbreviations

EU	European Union
FRY	Federal Republic of Yugoslavia
KFOR	Kosovo Force, NATO-led troops in Kosovo
KLA	Kosovo Liberation Army
KPS	Kosovo Police Service
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
OSCE	Organization for Security and Cooperation in Europe
PISG	Provisional Institutions of Self-Government
SRSG	Special Representative of the Secretary General
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSCR	United Nations Security Council Resolution

## Introduction

Stability in the Balkans has long been an elusive goal for international actors, who have been intimately bound over the course of history to its internal and regional development. In his Nobel Prize winning novel, *The Bridge on the Drina* Ivo Andrić wrote about a small Bosnian village under Turkish rule asking “who could ever have dreamt that the affairs of the world were in such dependence upon one another and were linked together across so great a distance?”<sup>2</sup> Internationalism and regional, inter-ethnic conflict are the themes of his prolific novel and the truths he hints at are just as relevant today as they were under Ottoman rule. International actors and policy makers have taken it upon themselves to represent the interests of democracy and stability in the region – most recently in the Kosovo territory. The world witnessed the nightly news coverage of Operation Allied Force in 1999 and the atrocities reported about the respective ethnic-Serb and Albanian armies, but for all the effort put forward by the international community, what has the effect been? Ten years after the aerial bombings which secured the evacuation of Milosevic’s army, there is no durable peace in Kosovo – in fact the situation threatens to break at the center. What effect has the international community truly had in shaping a democratic and stable Kosovo? By analyzing the politics of ‘status’, implementation of democratic theory, and the promotion and protection of human rights, this study aims to highlight the historical, political and legal contexts and consequences of the policies, structure and competences of the United Nations Interim Administration in Kosovo (UNMIK) from 1999-2008. In addition, though the bulk of this analysis will focus on the actions taken under the UN administration, the outcomes of this examination have direct bearing on the future of the international presence in Kosovo.

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<sup>2</sup> Andrić, Ivo. *The Bridge on the Drina*. Translated by Lovett F. Edwards. (Chicago: University of Chicago Press, 1977); pp. 73.

By way of an introduction, it is necessary to define what is meant by 'international community' in this context. The overarching thread of this examination, namely that conflicting interests of international actors have had real and impacting consequences on the politics and stability of Kosovo, should be indication enough that any such 'international community' is a dangerously normative term. Something so diverse, with necessarily opposing interests, cannot form a unanimous position on something as complex as Kosovo; and to imply a unified action taken by the whole of international actors is paternalistic and misleading. Indeed, the politicking within the United Nations Security Council in general, which has long driven the debate on institutional reform, is further evidence that even this most influential body is unable to consistently define a unanimous position. Thus, for the purposes of clarity and succinctness, the term 'international community' as used in this examination refers to the United Nations Interim Administration in Kosovo (UNMIK) and its component structures.<sup>3</sup> There certainly is not a consolidated international position on Kosovo, but one can discern an international institutional agenda through the limited scope of UNMIK and its actions.

Organized in an overlapping structure, introducing themes and theory, followed by an evaluation of progress and consequences, the following discussion will focus on three systematic deficiencies institutionalized by the international community. By analyzing the politics of 'status', the institutionalization of democratic values under international tutelage, and the value of accountability as a standard of human rights promotion, a largely critical evaluation of the role the international community in Kosovo is offered here. The aim is not to ignore the important role the international community played in Kosovo, and continues to do so, but by choosing these three dimensions of transitional administration, and pointing out the flawed implementation of development, the desire

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<sup>3</sup> "In Somalia, Cambodia, Bosnia, Kosovo, East Timor, and now Afghanistan, the 'international community' ceased to be an abstraction and took on a palpable presence as the effective government of the country in question. In these countries, sovereignty had ceased to exist, and governance functions were displaced to the United Nations or other aid agencies and nongovernmental organizations." Fukuyama, Francis. *State Building: Governance and World Order in the 21<sup>st</sup> Century*. (Ithaca, New York: Cornell University Press, 2004), pp. 97-8.

here is to propose a renovated structure to the new, post-status process headed by the European Union.

The lessons learned over the past ten years of international administration must be effectively brought into the future governing structures, be they international or domestic, such that a lasting peace, stability and culture of human rights promotion can finally be achieved in Kosovo. “Today, finally we have a choice between nationalism and integration: balance or openness. Chaos is tamed by empire; empires are broken up by nationalism; nationalism gives way, we must hope, to internationalism. At the end of the process is the freedom of the individual; first protected by the state and later protected from the state.”<sup>4</sup> The global community and the European Union have the responsibility and the influence to usher in a system of governance and accountability, whereby the entire Kosovar populace – regardless of ethnic background – is protected, enfranchised, and secure.

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<sup>4</sup> Cooper, Robert. *The Breaking of Nations: Order and Chaos in the Twenty-First Century*. (London: Atlantic Books, 2004); pp. 76.

## It All Starts Somewhere

The 'Balkan Question' has long concerned international actors and affected regional stability. The explosive unrest evident in the region over time has earned it the title of the 'powder-keg of Europe;' and as this label implies the combustible nature of politics and social tensions in the Balkans continue to hold global attention. Time and again external powers have attempted to influence (for better or worse) the situation on the ground. The most recent of these interventions in the 1990s marked an important shift in both the history of the United Nations and in the Balkans. It is impossible to elaborate on the circumstances of a post-conflict region without understanding the conflict itself. Thus, the international community's interim administration and the Security Council resolution which empowered it must be placed in their proper historical and socio-political context leading up to 10 June 1999.

The Balkans have had a long and complicated history shaped alternatively by medieval kingdoms, imperial occupations, annexations, militarism, consolidation, the Cold War and violent dissolution. All of which have left their mark on the people and politics, which continue to influence the region today. In order to proceed, however, one must limit the scope to the most important elements informing the current situation, roughly sketching the milestones leading up to 1999. Much has been made of the emotional and religious position Kosovo represents in Serbian culture. Most notably, Slobodan Milosevic was successfully able to rouse Serbian nationalism by evoking mythology and the primacy of 'Kosovo' within the construct of Serbian identity.<sup>5</sup> Yet, Milosevic was hardly innovative in his famous call to militarism, in fact quite the opposite: the politicization of Kosovo by the Serbs was used as a nationalist rallying-call long before Slobodan Milosevic reinstated Serbian militant, expansionist

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<sup>5</sup> The complexity and unique nature of the Serbian national myth is outside the scope of this examination, other than to emphasize its importance as the foundation of the people's historical consciousness. For further information on the socio-historical influence of the Battle of Kosovo, 1389, and the subsequent legend/mythology see Judah, Tim. *History, Myth and the Destruction of Yugoslavia*. (New Haven, Conn: Yale University Press, 1997).

nationalism in the late-1980s. That being said, the maneuvering of Milosevic to secure his position atop the Serbian and Yugoslav political structures represents the necessary contextual background from which one must approach the current situation.

With the 1974 constitution, Tito ushered in a renovated political structure – complicated by the totalitarian nature of his regime – which enshrined the autonomous position of Kosovo within the Serbian Republic.<sup>6</sup> It did not constitute a full federal entity (i.e. a ‘Republic’), with the theoretical right to secession, but “it had its own national bank, parliament, government, and police, and thanks to the increasing Albanianization and the greater numbers of qualified Albanians able to do the jobs, Albanians were more or less in full control of Kosovo.”<sup>7</sup> Regardless of Serbian claims to the region, demographically speaking the territory had noticeably shifted out of its control. In 1981 the Yugoslav census reported that the total population of the province was 1.58 million people, of whom 77.4 percent were Albanian and 14.9 percent were Serbs and Montenegrins.<sup>8</sup> “It is important to recall that in the Socialist Federal Republic of Yugoslavia ethnic tension was institutionalized and played out within the state apparatus both during and after the communist period.”<sup>9</sup> Milosevic capably manipulated the inherent nature of Yugoslav politics, inadvertently imploding the Federation in the long-run.

Ethnic tensions between the Albanian majority and the Serbian minority in Kosovo were exploited to gain immense popular Serb support which propelled Milosevic to the presidency. “On March 23, 1989, Kosovo’s Assembly building was surrounded by police and tanks, and deputies voted in favor of constitutional amendments that would restore Serbia’s power over the province.”<sup>10</sup> This illegal

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<sup>6</sup> “[The 1974] constitution included a number of contradictory provisions: on the one hand it devolved power to six republics and two autonomous regions (including Kosovo); on the other hand, it was also predicated on the rule of the central Communist Party.” Blitz, Brad K. “War and Change” in *War and Change in the Balkans*. Brad K. Blitz, editor. (Cambridge: University Press, 2006), pp 1-12; pp. 3.

<sup>7</sup> Judah, Tim. *Kosovo: What Everybody Needs to Know*. (Oxford: University Press, 2008), pp. 57.

<sup>8</sup> *Ibid.*, pp. 1.

<sup>9</sup> Blitz, pp. 3.

<sup>10</sup> Judah, pp. 67.

act of political violence, forcibly reversing the autonomy of Kosovo enshrined in 1974, initiated the militarization of Serbian nationalism under Milosevic, launching a decade of bloody ethnic conflict throughout the Balkans. Srdja Popovic argues that “the whole prolonged affair boils down to a simple, single event: the moment Milosevic secured control of the army. From this moment on, all the republics (Slovenia, Croatia, Bosnia, [the autonomous region of] Kosovo, and even today, Montenegro and [the autonomous Vojvodina region]) just wanted to escape Milosevic’s jurisdiction and establish a firm international border between themselves and his aggressive, dangerous and unpredictable regime.”<sup>11</sup> The ensuing ethnic warfare defined the 1990s in the Balkans and forced the United Nations and NATO to intervene, sharply focusing domestic and international attention on the Federal Republic of Yugoslavia.

The politics of conflict resolution, as they played out in the Kosovar context, became the first instance in which international interests superseded the situation on the ground. In order to bring the Serbs to the table in Dayton and ensure their participation in the peace agreement on Bosnia, American policy-makers consciously ignored the issue of Kosovo. In doing so, Kosovar Albanians were taught that in order to influence their own position they must raise the price of ‘benign neglect’.<sup>12</sup> From 1997 onwards the presence of the Kosovo Liberation Army (KLA) became noticeable with an escalating interaction of retributive attacks between the ethnic Albanian guerillas and the Serbian Yugoslav Army. The disproportionate responses to violence, most notably as part of the Serbian strategy, had the effect of polarizing and militarizing Kosovar society along ethnic lines.<sup>13</sup>

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<sup>11</sup> Popovic, Srdja. “Milosevic’s Motiveless Malignancy” in *War and Change in the Balkans*. Brad K. Blitz, editor. (Cambridge: University Press, 2006), pp. 44-56; pp. 49.

<sup>12</sup> Banac, Ivo. “The Politics of National Homogeneity” in *War and Change in the Balkans*. Brad K. Blitz, editor. (Cambridge: University Press, 2006), pp. 30-43; pp. 41.

<sup>13</sup> “On 28 February 1999, after a fire-fight between Kosovar rebels and Serb police in which four policemen were shot dead, the Serbian authorities launched an attack on two Albanian villages, using military helicopters and armored personnel carriers. In one village, Likoshani, sixteen Albanians were killed; the police also looted the houses they raided there. A few days later a similar military assault against the village of Prekaz left fifty-one people dead; the main target of this attack was the family house of Adem Jashari, a local strongman who was said to be a commander of the KLA in that region. The Serbian forces killed not only Jashari but also most of his family;

On 6 February 1999, the six-nation Contact Group (comprised of the United States, United Kingdom, Germany, France, Italy and Russia) summoned the Serbs and Albanians to Rambouillet, outside Paris to come to a conclusion as to Kosovo's future status. Many atrocities were committed throughout the wars' duration on all sides; however, the massacre of some 8000 Bosniak men and boys in Srebrenica in the summer of 1995 left the most politically salient legacy – and perhaps more accurately an overwhelming sense of responsibility on the part of the United Nations. "The fact that this massacre happened in a zone that the UN Security Council had pledged to protect was seared into the consciousness of western leaders and goes a long way to explaining why, in 1999, they were prepared to move fast to bomb Serbia because of Kosovo, fearful that such a thing would happen again."<sup>14</sup> Thus, the failure of mediators to broker peace at Rambouillet between the Kosovo Albanians and the Federal Republic of Yugoslavia (FRY) prompted the successive 78-day NATO bombing known as Operation Allied Force.

The bombing campaign secured the withdrawal of not only Serbian troops from Kosovo, but also the abandonment of the governing infrastructure. It is clear that the Serbian army reaped havoc on social life and personal properties as they retreated across the border into Serbia-proper, but the Albanian Kosovar majority is equally guilty of destruction in recompense. "Many did not see, or overlooked, the dreadful reprisals that took place against Serbs in particular but also against Roma and other non-Albanians. NATO Troops were unprepared to deal with the murders and mayhem that accompanied their arrival in the province."<sup>15</sup> At the end of Operation Allied Force on 10 June 1999, the international community was presented with a territory in upheaval, lacking any functioning public administration.

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nearly half the victims were women, children and old men. This action turned Adem Jashari into a hero and Martyr in the eyes of local Albanians." Malcolm, Noel. "The War over Kosovo" in *War and Change in the Balkans: Nationalism, Conflict and Cooperation*. (Cambridge: University Press, 2006), pp. 143-55; pp. 145.

<sup>14</sup> Judah, pp. 68.

<sup>15</sup> Ibid., pp. 91.

Milosevic's militancy had reenergized the long-standing ethnic conflicts in the Balkans in general. Thus, his political and social legacy is the basis of the UNMIK's mandate. The Security Council recognized that the process of reconstruction, stabilization, and the normalization of relations both within Kosovo and between Priština and Belgrade would take time and hands-on action. To that end, on 10 June 1999 Security Council Resolution 1244 (1999) was adopted with the explicit mandate to "ensure conditions for a peaceful and normal life for all inhabitants of Kosovo."<sup>16</sup> This very condensed and selective history of the conflict is meant to highlight the socio-political inheritance of the international community in 1999. It is in no way a comprehensive analysis of the militarism or legality of intervention. What is important to take away from this background is the context in which the international community established its governing institutions.

The far reaching powers laid out in UNSCR 1244 (1999) represent a holistic approach to international administration, a scope unprecedented in the history of the UN up until that point. The resolution lays out the general mode of operations for the international community, providing "an interim administration... under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions."<sup>17</sup> Part-in-parcel of this obligation to democratize is the need for institutional development, economic recovery, the normalization of ethnic relations, the protection of minority and refugee rights, and the development of the rule of law. The seeds of action are laid out in this prescription: the international administration must not promote a deviation from Serbian sovereignty through its political actions in Kosovo, viable democratic institutions must be built, and the reduction of inter-ethnic conflict and tensions must be achieved towards the establishment of peaceful relations. Despite the lofty goals enshrined in 1999, the

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<sup>16</sup> S/RES/1244(1999).

<sup>17</sup> Ibid.

process by which successful democratization and stabilization is to be achieved is noticeably absent within the resolution.

Thus, at the start of mission, in order to fulfill its mandate the international community built its administration in Kosovo on four so-called pillars, coordinated under a broader UNMIK umbrella, the coordinating body established in UNSCR 1244 (1999). Each pillar was provided by a certain international actor responsible for a specific area of expertise. The UN High Commissioner for Refugees occupied the first pillar from June 1999 until June 2000, later replaced by a would-be ministry of justice and the interior. Pillar two, run by the UN represented civil administration and public affairs; and after 2000 it incorporated the first pillar such that the UN was now essentially responsible for all internal administration usually handled by a domestic government directly under the Special Representative of the Secretary General (SRSG)<sup>18</sup>. The Organization for Security and Co-operation in Europe (OSCE) headed-up the third pillar, responsible for institution building, occupying an important monitoring role. And finally, the European Union occupied the fourth, tasked with the economic reconstruction of Kosovo.<sup>19</sup> Finally, internal security was and is the purview of the NATO-led troops, KFOR.<sup>20</sup> This structure and its composite international actors make up the interim administration on the ground, empowered to fulfill the UN mandate.

Outside the trial-and-error process of institution building, which will be elaborated on later, this represents the basic lay-of-the-land in Kosovo as the international community took up its posts. This basic history reflects the major mile-stones progressing towards the period of international administration, but the Milosevic era was responsible for more than just inducing a policy response from

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<sup>18</sup> The role of the SRSG in Kosovo both within this governing structure and in the political/legal developments to follow is vastly important. The 'dictatorial' powers of the SRSG were ultimate in the UNMIK system of 1999-2008 to promulgate laws, even those democratically passed within the Kosovo Assembly.

<sup>19</sup> Knoll, Bernhard. *The Legal Status of Territories Subject to Administration by International Organizations*. (Cambridge: University Press, 2008); pp. 191.

<sup>20</sup> Judah, pp. 94.

the international community. It is impossible to deny the long-term effect of divergent nationalism in the region over time, nor that the politicking of ethnic groups resulted in wars and subjugation. Yet, it is important to emphasize the post-war demographic make-up of Kosovo in order to understand the upcoming frustrations and missteps that the international administration would encounter and have to deal with.

The numbers of Serbs remaining in Kosovo following the withdrawal of the FRY troops is difficult to pin down exactly; however, it is clear that a substantial number of ethnic Serbs continued to reside within the territory along with other, oft neglected non-Albanian groups including Bosniaks, Roma, Ashkali, and Egyptians. Following Operation Allied Force, French troops took control of Kosovo's northern territory of Mitrovica. "It had always been mixed but what happened now was that Serbs left the south and most, but not all Albanians, left [Mitrovica]... and so the town was... divided at the River Ibar."<sup>21</sup> The common assumption is that to the north of the river reside the Serbs and in the south are Albanians, but nothing is so simple. While there is certainly a Serbian majority north of the Ibar, homogeneity is relative. In 2004 the European Stability Initiative (ESI) published a report arguing that nearly 130,000 Serbs continued to reside within Kosovo, basing its estimate on school enrollment records and extrapolating out from there.<sup>22</sup> Of these remaining Serbs, nearly two-thirds (or 75,000 people) live in rural enclaves south of the Ibar. "The reality of Kosovo Serbs Today is small communities of subsistence farmers scattered widely across Kosovo."<sup>23</sup> Thus the misconception that the majority of Serbs are living in relative regional majorities (i.e. within the Mitrovica area) is false. While there is a certain truth inherent in the assumption, the reality is that the wars resulted in mass displacement, creating semi-isolated and disparate Serb enclaves throughout Albanian dominated Kosovo.

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<sup>21</sup> Ibid., pp. 100-1.

<sup>22</sup> According to their estimates, this number reflects nearly two-thirds of the pre-war Serbian population in Kosovo. European Stability Initiative. "The Lausanne Principle: Multiethnicity, Territory and the Future of Kosovo's Serbs." Berlin/Priština 7 June 2004. [http://www.esiweb.org/pdf/esj\\_document\\_id\\_53.pdf](http://www.esiweb.org/pdf/esj_document_id_53.pdf) (accessed 4 May 2009), pp. 2.

<sup>23</sup> Ibid., pp. 2.

The history, politics, and demographics of Kosovo, while vastly important, only go so far towards explaining the actions taken by the international community post-1999. Yet, without this basic breakdown of the events and results of the Milosevic era which prompted the NATO intervention, Security Council resolution, and resulting establishment of UNMIK's basic pillar structure the forthcoming critical analysis of successes, failures, and lessons-learned would be presented as in a vacuum devoid of influence or connection. For centuries International policy-makers have sought self-aggrandizement and to influence the Balkans, so too have those same internationals benevolently aimed policy goals at regional stability and growth. Perhaps there are elements of both in the international community's presence in Kosovo, but more importantly, without at least a base-understanding of the context that prompted intervention there is no basis for critique, nor room for improvement.

## The Politics of Law

The presence of the international community in Kosovo has had a tumultuous history. There certainly is no easy solution to the centuries-old conflict spurned on at one time or another by the Serb and Albanian ethnic groups of the territory. Yet, in 1999 the international community was tasked with the extraordinary responsibility of stabilization, democratization and finding a solution to Kosovo's nebulous future status. There are certainly legitimate concerns and consequences of a status-less region, and navigating a policy is certainly not a neutral process. How have national and international politics shaped the evolution of Kosovo's status throughout the period of international administration; and, furthermore, how can Kosovo (and its international supporters) reconcile the conflicting legal aspects of "substantial autonomy within the Federal Republic of Yugoslavia [now Serbia]"<sup>24</sup> and national sovereignty? By placing the February 2008 declaration of independence by the Kosovo Assembly in its proper historical and political context, it is clear that from start to finish (or at least until present) in Kosovo, the political interests and pressure of the international community have overshadowed the legal process. So, too, has this process highlighted the over-emphasis and pre-occupation of all actors on the narrowly defined, acceptable conclusion: a traditional nation-state.

In terms of territorial administration, UNSCR 1244 (1999) represents the governing principles as a foundational document for the international administration in Kosovo, but it is not a straight-forward constitution of-sorts, nor is it clear in its methodology. The resolution outlines the goals of the international presence in the territory, but it is seemingly ambivalent to the political outcomes. It both references adherence to the agreement proffered at Rambouillet – which stated that after three years a mechanism (most likely a referendum) would determine the future status of Kosovo based on the will of

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<sup>24</sup> S/RES/1244 (1999).

the people<sup>25</sup> – as well as committing Kosovo to “substantial autonomy” within Serbia.<sup>26</sup> Legally speaking, “even without the consent of a state, the [Security Council] might be empowered to *order a transfer* of effective control over territory to a ‘protecting entity’ based on Chapter VII of the UN Charter.”<sup>27</sup> This ‘transfer of effective control’ does not remove the sovereign claims of Serbia to the Kosovar province; rather it removes their rights to administer the territory directly and places it in the care of a ‘protecting entity’: in this case UNMIK.

As a Chapter VII resolution, UNSCR 1244 (1999) establishes a legally binding relationship between UNMIK, Kosovo, and the FRY (Serbia). The basis of the legal and political dispute that followed the 2008 declaration of independence resides in the conflicting allegiances noted above. In supporting both Rambouillet and ‘substantial autonomy’, UNSCR 1244 (1999) institutionalized the legal commitment to two conflicting final statuses. Already on 2 July 1990 the Kosovo provincial assembly declared itself a republic independent from Yugoslavia. Thus the final status ‘guaranteed’ by Rambouillet, based on the will of the people, by inference meant independence for Kosovo; while at the same time, ‘autonomy’ ensures the sovereign rights of Serbia. Simon Chesterman argues that UNSCR 1244 (1999) “authorized an international civil presence in Kosovo, but it was laced with compromise language necessary to achieve consensus in New York.”<sup>28</sup> By remaining quiet on the meaning of this contradiction, the Security Council bowed to international pressures, creating a muddled legal paradigm.

It is important to emphasize that the interim status of Kosovo imposed upon Serbia by the Security Council merely suspended the exercise of its right to rule directly. Its formal claims to sovereignty are technically unaffected, only reduced to a *nudum ius* (in name only) as long as UNSCR

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<sup>25</sup> Malcolm, pp. 150.

<sup>26</sup> S/RES/1244 (1999).

<sup>27</sup> Knoll, Bernhard. *The Legal Status of Territories Subject to Administration by International Organizations*. (Cambridge: University Press, 2008); pp. 43.

<sup>28</sup> Chesterman, Simon. *You, the People: The United Nations, Transitional Administration, and State-building*. (Oxford: University Press, 2004); pp. 132.

1244 (1999) is in effect. “While this arrangement does indeed, not ‘guarantee’ Serbian sovereignty over Kosovo until such time that the Security Council explicitly recognizes this as vested in another entity, unilateral recognition would still effectively violate S/RES/1244 and thus Art 25 of the Charter, which obliges member states *erga omnes* to carry out decisions of the Security Council.”<sup>29</sup> The legal structure set up by UNSCR 1244 (1999) opened itself up to an inevitable political fight and, as will be evident after February 2008, the *erga omnes* argument is the trap waiting for the international community to walk into. “International administration is a fundamentally political enterprise,” argues Richard Caplan; “to succeed a transitional authority cannot be indifferent to political outcomes.”<sup>30</sup> This legal and political conflict established within the mandate would resonate throughout the term of the interim administration, fueling and disappointing domestic and international expectations on both sides of this argument.

The political and legal tensions within the mandate do not reduce the legal imperative, demanding the processes of state-building be carried out. To that end, in 2001 Hans Haekkerup, the second SRSG, promulgated the Constitutional Framework in accordance with his responsibility to oversee the establishment of institutions of self-government. The process by which the Framework was founded is itself a demonstration of the political will of the international community being applied to the governing situation in Kosovo. The detailed gestation of the Framework document is an interesting example of the power the SRSG wields in Kosovo: where even though neither the Kosovar Albanians nor Serbs (and Roma) agreed on the final text, the need to fulfill the mandate, on paper if nowhere else, overwhelmed the domestic opposition and saddled Kosovo with an ineffective system in May 2001.<sup>31</sup>

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<sup>29</sup> Knoll, pp. 279-80.

<sup>30</sup> Caplan, Richard. *A New Trusteeship? The International Administration of War-torn Territories*. (Oxford: University Press for the International Institute for Strategic Studies, 2002); pp. 10.

<sup>31</sup> “The Serbian government [in Belgrade] declared the Framework ‘unacceptable’, denouncing it as a reward for Albanian separatist violence. UNMIK publicly declined to seek Belgrade’s approval of the Framework... [alienating] Kosovo Serbs.” Bull, Carolyn. *No Entry Without Strategy: Building the Rule of Law Under UN Transitional Administration*. (Tokyo, New York, Paris: United Nations University Press, 2008); pp. 129.

More important than the internal politicking necessary to push through the Framework is the provisions it calls for: it provided the legal framework governing the organization and exercise of public power through the establishment of Provisional Institutions of Self-Government (PISG), including a 120-seat Assembly (the Kosovar parliament), a president, government, and judiciary.<sup>32</sup>

This administrative history in conjunction with the legal and political conundrums laced into UNSCR 1244 (1999) make up the essential context in which the debate about the overarching status issue must be grounded. As hinted at above, the legal establishment of the international presence in Kosovo, based in the UN Charter and the 1999 mandate, was not without its political complications. Furthermore, the ‘compromise language’, to use Chesterman’s sentiment, had already impacted the political evolution of Kosovo by the establishment of the Framework in 2001. Over the course of the international administration (up until the 2008 declaration of independence and beyond) the very real impact of conflicting international pressures only escalated. The policy initiatives sponsored by the international community, namely the flawed ‘Standards before Status’ benchmarking regime, risked the life of the administration by engendering a violent opposition most notably in 2004.

The ‘benchmarking’ concept aimed at a future status solution has the feel of ‘benign neglect’ in that the international community set about establishing institutions of democratization in good faith but with little regard as to the social consequences, which will be elaborated upon in successive chapters. UNMIKs intentions, as will become evident, were a kind of triage to get the region under control before the dialogue on status could begin. Yet, the essence of post-conflict reconstruction is necessarily political, and this benchmarking policy sponsored in Kosovo by the international community from 2001-2006, ultimately came to epitomize the local interpretation that UNMIK was out of touch with the political reality in which it was attempting to operate.

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<sup>32</sup> Ibid., pp. 127.

“Speaking in June 2001, Haekkerup said that a decision on the future status of Kosovo required a level of ‘political maturity’ and readiness to compromise that the parties had not yet attained.”<sup>33</sup> Most certainly, the distance of a mere two years following Operation Allied Force was not enough time to responsibly transfer the onus of government to a society still very much steeped in ongoing ethnic tensions and the after-math of civil war. The ethnically-motivated skirmishes in Mitrovica in 2000 and 2001 were evidence enough up until that point that resorting to political violence still offered itself as a socially legitimate solution to disputes. Though denying complete political ownership was well-founded in 2001, the long-term suppression of the political will of the people is a precarious policy to follow. Rosa Ehrenreich Brooks contends that “statehood may be a non-negotiable demand of the local population, and an effort to make the society in question indefinitely forgo statehood may spark more instability.”<sup>34</sup> Though Brooks ultimately argues that the concept of the State is perhaps outdated, the point she drives home in relation to Kosovo, which echoes throughout the political status debate, is that the institutionalization of ‘limbo’ – as it were – has dangerous potential.

It is unfair to imply that the desire to initiate the status dialogue was ignored by the international community, but self-admittedly, UNMIK sought to establish itself and the rule of law in Kosovo before any serious devolution of power and the all-important determination of future status was granted. By way of formulating a systematic transfer of competencies from UNMIK to the PISG within a larger framework of responsible government, in 2001 the SRSB instituted a policy of ‘benchmarking’, whereby certain standards were defined as the necessary prerequisites to the status discussion.<sup>35</sup> Eight benchmark areas were identified, along with standards of achievement that would dictate the pace of devolution and the achievement of a status dialogue; those being: democratic institutions, rule of law,

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<sup>33</sup> Chesterman, pp. 134.

<sup>34</sup> Brooks, Rosa Ehrenreich. “Failed States, or the State as Failure?” in *The University of Chicago Law Review*, vol. 72, No. 4 (Autumn, 2005), pp 1159-1196; pp. 1190.

<sup>35</sup> Knoll, pp. 206.

freedom of movement, returns and reintegration, economy, property rights, dialogue with Belgrade and the Kosovo Protections Corps (KPC). ‘Standards before Status’ as the policy became known, set out a road-map not to the determination of territorial status, but rather it makes the fulfillment of standards the prerequisite for *initiating discussion*. More worryingly, given the structure and separation of powers between the Pillars and the local institutions, many of the tasks assigned within the policy regime fell outside the jurisdiction of the PISG making their fulfillment contingent upon the fleeting cooperation of, in some instances, UNMIK and Belgrade.<sup>36</sup>

“The ‘standards before status’ approach, so closely fashioned after policies of conditionality and the idea of ‘earned sovereignty’, operates in almost naïve denial of the continued relevance of self-reliant statehood.”<sup>37</sup> The operational elements of ‘earned sovereignty’, the Standards by which the international community judged the progress of Kosovo’s developing ‘political maturity’, were meant to be tangible indicators of the growth of good governance. In contrast however, the benchmarks merely represented mile-markers between intermediate phases with no end-destination in sight. In 2005 Knoll asserted that “the history of institution building over the past six years [in Kosovo] suggests that exhorting civil virtues of minority protection and good governance is, in the absence of real incentives, an inadequate means of engendering normative change in a post-conflict setting. It has reinforced a climate of heightened insecurity in which the conflict remains frozen rather than resolved.”<sup>38</sup> It would seem, given the actions of March 2004, that Kosovar Albanians agreed with Knoll’s assessment. The apparent ambivalence of the international community towards the status question in the eyes of the Albanian ethnic majority, evidenced by the evasive Standards roadmap, prompted a major blow to the international presence in Kosovo.

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<sup>36</sup> Knoll, Bernhard. “From Benchmarking to Final Status? Kosovo and the Problem of an International Administration’s Open-Ended Mandate” in *The European Journal of International Law* Vol. 16, No. 4 (2005); pp. 641.

<sup>37</sup> *Ibid.*, pp. 658.

<sup>38</sup> *Ibid.*, pp. 659.

Human Rights Watch reported in 2004 that on March 17 and 18 of that year, violent rioting by ethnic Albanians took place throughout Kosovo, apparently incited by sensationalist (and ultimately false) claims that a group of Serbs had been responsible for the drowning of three Albanian children in the Ibar River, the unofficial boundary between Serbian and Albanian communities in the northern province of Mitrovica.<sup>39</sup> Throughout the course of the March uprising, at least thirty-three different riots broke out across Kosovo, involving an estimated 51,000 participants, resulting in the almost complete loss of control by security forces – and in some cases, members of the locally-staffed Kosovo Police Service (KPS) participated in the upheaval. A report of the UN Secretary General following the incident confirmed that a total of 19 persons died in the violence, of whom eleven were ethnically Albanian and eight were Serb; two were seriously injured and died later, bringing the total number of deaths as a direct result of the March rioting to twenty-one. A total of 954 civilians were treated for injuries, as well as 65 international police officers and 58 KPS personnel. Public buildings and international property (belonging to UNMIK and KFOR) were attacked; and approximately 730 houses, 36 Orthodox churches, monasteries and other religious/cultural sites were damaged or destroyed.<sup>40</sup>

The March riots amounted to an indictment of the ‘Standards before Status’ policy undertaken by the international community, and the represented the consequences of UNMIK’s not-so-benign neglect of the social need for some resolution, or positive incentive, to gain Kosovar participation in the system (i.e. the status dialogue). 2004 represents the most egregious instance in which the international politics driving the interim administration failed to conceptualize the actual policy impact on development in Kosovo, which was a necessarily destabilizing agenda. “None of the [policy weaknesses] would have been insurmountable had the leading countries, particularly the Contact Group... mustered enough political will to overcome them... Instead, of addressing the weaknesses with which UNMIK

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<sup>39</sup> Human Rights Watch. *Failure to Protect: Anti-Minority Violence in Kosovo, Mar 2004*. Vol. 16. No. 6 (D) July 2004; pp. 1.

<sup>40</sup> S/2004/348.

began, the international community used these defects as excuses for failing to match brave rhetoric with equally brave action.”<sup>41</sup> The ‘political maturity’ that formed the basis for the benchmarking policy failed to evolve in time, and in fact the riots ultimately did more towards achieving access to the final status dialogue than the well-meaning Standards policy.

Following March 2004 a comprehensive review of policy initiatives was ordered on all levels, most noticeably by the appointment of Kai Eide as Special Envoy to Kosovo by the Secretary General. His reports, one in 2004 and a second in 2005, amounted to an overhaul of UNMIK objectives and in a certain way were the fruits of the March 2004 riots. “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... Kosovo having moved from stagnation to expectation, stagnation cannot again be allowed to take hold.”<sup>42</sup> Eide’s indication that the status question will continue to be a ‘highly sensitive political’ issue was the recognition that was necessary from the international community, which was absent from the benchmarking policy. Though there may not be a good time, remarks Eide, further frustrating the majority Albanian population with stagnation will lead to increased instability and thus volatility. A Western diplomat interviewed by King and Mason in 2005 warned that “if independence is delayed, or if it’s denied them, expect something much worse [than March 2004]. And again, we probably wouldn’t be able to stop it.”<sup>43</sup> The Eide Report, and the subsequent realization that the international community came to as a result, alleviated the strenuous benchmarks, such that the initiation of a dialogue on status would be achieved without ‘standards’; rather unrest brought about the next phase of the process.

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<sup>41</sup> King, Iain and Whit Mason. *Peace at any Price: How the World Failed Kosovo*. (London: Hurst & Company, 2006); pp. 253-4.

<sup>42</sup> S/2005/635.

<sup>43</sup> King, pp. 196-7.

In a change of behavior, the politics of the international community adjusted itself, in a limited way, to the realities on the ground. Instead of insisting upon standards being met before opening up discussion on the status issue, the international community following 2004 needed to save face. The prospect of Kosovo returning to a state of failure overwhelmed the previous policy goals, marking out a new road-map of expected achievement. "Six months after the riots, the Contact Group told [the SRS] to develop 'Standards Light', as Eide stipulated... Now only the most 'urgent priorities' needed to be met for Kosovo to qualify for status talks."<sup>44</sup> The expectation was not the elimination of non-'priority' standards, but rather that the process as a whole would be integrated into the European partnership program as the EU stepped up its political influence in the region. The abbreviated Standards were confirmation that the March riots had achieved their political goal of jump-starting the status-talks. The international community bowed to pressure: violence had apparently worked.

It is important to take a moment here to comment on the growth of the EU as an influential actor in Kosovo. Richard Caplan somewhat cynically argues that "the EU's failure to offer an effective response to the crisis in the Balkans from its early days has led the Union to seek a leadership position in the post-war rule and reconstruction of these territories, partly to strengthen its own credibility in foreign policy-making."<sup>45</sup> Whatever the driving force, it is clear that the participation of the European Union in Kosovo has grown more complex and involved. Beginning in 1999 as an integral pillar, the EU had a somewhat limited role over-all, restricted to economic recovery. Over the course of the proceeding five years, the EU stepped up its participation and influence. "Modeled after the Accession Partnership used for EU candidate countries, the 2006 [European Partnership Agreement] thus provided for a single framework for implementation and monitoring, and continues to serve as framework for the planning of future Community assistance through the new Instrument of Pre-Accession and its related

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<sup>44</sup> Ibid., pp. 211.

<sup>45</sup> Caplan, pp. 8.

Programs.”<sup>46</sup> Thus, the UNs benchmarking policy was disassociated from the final status-process and replaced by an inclusive European strategy. That being said, from the perspective of EU member states, especially following February 2008, there is no congruent common policy on Kosovo.

The consensus that the future of the Balkans lays within the European Union has been reinforced not only by an increased European presence throughout the region, but has been increasingly elaborated in the policy initiatives of the international community. The Eide Report supported accelerating the status dialogue, and to that end Martti Ahtisaari was appointed Special Envoy in 2005 to come up with a ‘Comprehensive Plan’ for the resolution of Kosovo’s international status. After two years of thorough investigation Ahtisaari echoed Eide’s sentiment that prolonging indecision on the issue was dangerous not only to the stability of Kosovo but also to the broader region. “Concluding this last episode in the dissolution of the former Yugoslavia will allow the region to begin a new chapter in its history – one that is based upon peace, stability, and prosperity for all.”<sup>47</sup> Like Eide, Ahtisaari took a practical approach to the future status – he recognized that, while the situation on the ground was not ideal for the full transfer of powers, there had been little alternative left to the international community. “A return of Serbian rule over [the province] would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy... is simply not tenable.”<sup>48</sup> Ahtisaari’s plan for the future status determination roughly outlines a practical and legal approach that could be taken, following the political notion (i.e. that independence is the only viable option) outlined in the previous statement.

Ahtisaari’s plan, presented to the Secretary General, and forwarded to the Security Council, detailed provisions on the establishment of a decentralized constitutional order, and elements of statehood; it prized supervised-independence for an interim duration, such that an International Civilian

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<sup>46</sup> Knoll (Legal Status), pp. 212.

<sup>47</sup> S/2007/168/add.1.

<sup>48</sup> Ibid.

Representative (ICR) could monitor the progress of standards. Most importantly in this construction, the ICR would be “double-hatted as the European Special Representative.”<sup>49</sup> Thus, as hoped for with the creation of ‘Status light’, the progress of Kosovo’s maturation would not be wholly abandoned for the sake of saving face, but rather a mechanism would be centrally located to monitor adherence based on European requirements. Such adherence to European standards as an operating methodology replacing the previous benchmarking practice was the justification for ‘standards lights’. Thus the perception would be one of evolving international policy, rather than the abandonment of an unpopular agenda, spurred on by domestic unrest. As an addendum, and the further institutionalization of European interests in Kosovo, an EU Security and Defense Policy rule of law mission would be launched to “monitor, mentor and advise on all areas related to the rule of law in Kosovo.”<sup>50</sup> This mission, EULEX Kosovo, would simultaneously herald the withdrawal of UNMIK, and the transfer of competences to the EU and the national government of Kosovo when the final status was declared.

As these things go, this is of course too simple. The Plan itself is not without its political drawbacks. Though it embraces the devolution of competences and the empowerment of the local government (overseen for an interim period by the EU/ICR), there is no so-called sun-set provision included in the document. As in, there is no specific ‘benchmark’ to be met, or time-frame laid out that would indicate without question that Haekkrup’s longed-for ‘political maturity’ had been achieved. Furthermore, in taking the practical approach that the Serbian government could not hope to peaceably reincorporate 2 million antagonistic Albanians back into the fold, Ahtisaari closes the door on the ‘substantial autonomy’ argument. Likewise, characterizing the Serbs as merely crestfallen in the removal of ‘their’ province does not take into account the power of their international allies – namely Russia (and China) in the Security Council. What would otherwise have remained a political conflict has the

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

additional complicating factor of the Chapter VII status of the UNMIK mandate. Paragraph 19 of UNSCR 1244 (1999) states that “the international civil and security presence are established for an initial period of twelve months, to continue thereafter unless the Security Council decides otherwise.”<sup>51</sup> Without a new resolution, replacing the international administration’s mandate, the original resolution cannot legally be phased out without an equally legally binding resolution taking its place. Thus, politics and law come into direct conflict, resting upon the successful passage of a new resolution to take the place of the 1999 mandate.

In 1999 the political power wielded by Russia in the Security Council, or really in world politics in general, was still recovering from the upheaval of the early-1990s and the domestic economic consequences of Yeltsin’s shock reforms. To a certain degree, the combination of the NATO bombardment campaign against the FRY and the following international administration was a blight on the Russian record, as they could not play the role of powerful world actor to protect their historical ally. The situation in 2007, when the Ahtisaari plan was presented to the Security Council as the basis of a new resolution, was much different. With a resurgent Russian foreign policy and confidence to assert itself in the Security Council, the political squabble between Serbia and Kosovo over Ahtisaari’s proposal could not be side-stepped by international actors as readily as had been the case in 1999. Russia could, and did, provide Serbia with the powerful backing it needed in order to continue to protect its political interests. As long as UNSCR 1244 (1999) remained in place the status quo was protected and the international community could do little to force the abandonment of Serbia’s national policy towards Kosovo.

It became clear after months of discussion that the Comprehensive Plan had stalemated. With their backing of Serbia, Russia (and China) were not only prohibiting a status determination but were

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<sup>51</sup> UN Doc. S/RES/1244 (1999).

simultaneously protecting their own internal interests. Both have regions that, given the precedent and the political will, would secede. Protecting national interests fit well into the political ideal proffered by Russia, and in fact it became the back-bone of their argument for preventing Kosovar independence through a Security Council resolution. A 120-day period of mediation was mandated by the six-nation Contact Group, called the Kosovo Troika, representing the major international actors invested in the status deliberations: The United States, European Union (represented by Germany), and Russia.<sup>52</sup> While the Troika negotiators were meant to maintain objectivity, the inherent political nature of the status determination required a level of investment outside the realm of neutrality.

“The belief that Serbia would be cooperative and come forward with ‘realistic proposals’ (diplomatic speak for agreeing to Kosovo’s sovereign statehood), encouraged by the promise of a strategic partnership – bilateral initiatives, Partnership for Peace-related activities and a concrete perspective for EU integration – was rooted more in the realm of wishful thinking than in a realistic appraisal of Serbian Politics.”<sup>53</sup> The West in this instance over-estimated its political leverage, counter-balanced by the unwavering support Serbia was receiving from Russia on the issue and its own domestic politics. The perspective of those powers in support of Ahtisaari’s proposal, in relation to Serbia is telling – a ‘realistic proposal’ coming out of Belgrade is only one in which the subjective political position of the ‘West’ is supported. The outcome, or non-outcome, of the Troika is easy to guess, with both sides of the argument fortifying themselves behind their ‘realistic’ positions. As politics is subjective, so to is the ‘realism’ applied to it. For those supporting independence, the rational idea that Serbia would want to risk regional stability by forcibly integrating its break-away territory makes no sense. On the other-side of this argument, militant Serbian nationalism peaked more than once because of Kosovo – what’s to say those sentiments are not laying dormant somewhere within the fringe movements of society. While

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<sup>52</sup> Knoll (Legal Status), pp. 264.

<sup>53</sup> Ibid., pp. 259.

the latter position seems slightly more hypothetical, both arguments are grounded in a specific historical narrative, and (perhaps more importantly) were backed by powerful international actors.

One must now return to the legal and political conflict already woven into the 1999 mandate. There are viable legal arguments supporting both sides of the final status. Between Rambouillet and 'substantial autonomy' both Kosovo and Serbia have kernels of truth supporting their positions, and by virtue of Chapter VII, UNSCR 1244 (1999) has the weight to support a legal battle within itself. Political stalemate, or the lack of a new resolution, has legal consequences. And as many expected would happen, on 17 February 2008, a (mere?) majority – 100 per cent of the Albanian representatives present at the historic vote – passed a resolution declaring the Republic of Kosovo officially independent from Serbian sovereignty. "Regretting that no mutually acceptable status outcome was possible, in spite of the good faith engagement of our leaders... we, the democratically elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state."<sup>54</sup> The conundrum realized by the declaration was exactly the problem always awaiting a unilateral declaration of independence. In order to effectively exercise its sovereignty on the international level, Kosovo would need recognition, which, to-date has been unevenly granted by 60 nations, including 22 EU member states.<sup>55</sup>

In declaring itself independent Kosovo committed itself to Ahtisaari's Comprehensive Proposal, including the provisions accounting for an EU-run rule of law mission (EULEX). Before the declaration by the Assembly, the Council of the European Union agreed on a Joint Action on 4 February 2008 regarding the Rule of Law Mission set to launch in order to transition control from the interim administration. The mission statement outlined in Article 2 provides for "[assisting] the Kosovo institutions judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and

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<sup>54</sup> Full text of the 17 February 2008 Kosovo declaration of independence, reported by BBC News. "Full Text: Kosovo Declaration" on February 17, 2008. Available at <http://news.bbc.co.uk/2/hi/europe/7249677.stm> (accessed 5 February 2009).

<sup>55</sup> Cyprus, Greece, Romania, Slovakia and Spain have declined recognition, representing an important rift within the European Union towards Kosovo.

in further developing and strengthening an independent and multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and European best practices.”<sup>56</sup> Furthermore, the Joint Action lays out in Article 5 that the “operational phase of EULEX Kosovo shall start upon the transfer of authority from the United Nations Mission in Kosovo, UNMIK.”<sup>57</sup> The legal launch of mission, then, is contingent on the transfer of powers of UNMIK to the European Union by the Secretary General. Thus, without the prerequisite amending resolution, EULEX has no legal basis to begin its work; but the Secretary General is under the pressure of Russia, China, and many other states, hence the failed transfer of powers.

The unilateral declaration of independence by the Kosovo Assembly not only complicates the politics of the status talks, but directly confronts the legal ambiguities and contradictions of UNSCR 1244 (1999). Furthermore, by recognizing the sovereignty of Kosovo and further launching the Rule of Law Mission the general consenting international actors and, more specifically, the European Union are in violation of international law. It is clear, however, that since a large and influential body of countries *did* recognize the validity of the declaration, and the EU mission eventually launched – albeit belatedly<sup>58</sup> - the role of law has been subverted by the influence of politics on the status issue. As stated above, strictly speaking, without a new resolution from the Security Council, any action taken which terminates the protectorate status of Kosovo is illegal. The UN General Assembly, at the request of the Serbian

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<sup>56</sup> “Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo” in *Official Journal of the European Union* L 42/92, February 16, 2008.

<sup>57</sup> Ibid.

<sup>58</sup> The BBC reported on 2 December 2008 that the “mission will start deploying on 9 December, including to Serb-controlled areas.” Peter, Laurence. “EU to operate ‘all over Kosovo’” BBC News, 2 December 2008. Available online at <http://news.bbc.co.uk/2/hi/europe/7761403.stm> (accessed 15 February 2009).

government has requested the ICJ give an advisory opinion on the overall legality of the secession, but in the meantime progress is already being made to transfer competences and increase the role of the EU.<sup>59</sup>

The declaration of independence by the Assembly was meant to solve the status issue, but in fact it has complicated it further. With conflicting internal and external recognition issues adding to the legal mess instituted by UNSCR 1244 (1999) and being steadily added to by the body of legal commitments the international community has undertaken, the Kosovo status issue is as embroiled as it ever was. The most recent agreements sought after would make UNMIK 'status neutral,' yet still present, side-stepping the obvious dubious nature of this political solution. Regardless, the point still remains: international pressures that require a success-story have prevailed over the course of legal action necessary for status to be conferred without legal controversy. Though UNSCR 1244 (1999) has an innate contradiction on the final determination woven into it, unilateral independence – and moreover the recognition of that act – are in direct violation of the legal order established in 1999 over the question of sovereignty.

From the beginning, the international community developed a nebulous benchmarking policy, seeking stability before approaching the all important status determination – avoiding the alternative of complete state failure. External pressure, not least from Belgrade, played a role in forming this policy to the detriment of domestic politics – evidenced by the 2004 rioting. The abandonment, or more accurately the adaptation of this policy to a less restrictive basis, in 2006 marked a shift in the growing influence of the European Union, which has continued to evolve its presence in Kosovo up until this point, where the EULEX mission is the most visible international presence in the territory. Politically, it is clear that the evolutionary trajectory of the Union in Kosovo represents the most viable option for stability and economic growth. Regardless, there is an inherent legal dilemma within Kosovo's February

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<sup>59</sup> UN Doc. A/63/PV.22 (the 22<sup>nd</sup> plenary meeting of the 63<sup>rd</sup> session of the UN General Assembly, is a record of the Serbian appeal for an ICJ hearing and the subsequent debate on the request).

2008 declaration. Unilateral independence is a direct contradiction to UNSCR 1244(1999), as the Ahtisaari plan failed to garner an amending resolution by the Security Council. Such a resolution replacing the previous decision would have pre-empted the legal dilemma now facing Kosovo and its international allies. There is much contention remaining concerning the legality of the declaration, not to mention lack of recognition both internally and externally, and in that vein Serbia is using the ICJ as a political tool to buy time. There are no easy answers unless the political spectrum of the permanent members in the Security Council radically changes. Without question, the way forward on this controversial issue has been the unequivocal establishment of the primacy of politics over law and the enshrinement of state-hood as the only acceptable solution to the Kosovo's final status.

## The Pitfalls of Democracy

Democratic principles are the basis of the international community's mandate, clearly dominating the 1999 resolution. Yet, to what extent has international involvement truly shaped a democratic Kosovo? The mutual relationship between stability and democracy was the goal of international policy-makers and institution-builders, but the politics of achieving democratic values are not as straight forward as simple 'institutionalization'. As the situation on the ground evolves with the passage of time it is important to assess the achievements under international tutelage vis-à-vis a viable democracy in order to finally build a democratic society that is both internally stable and locally governed. Keeping in mind the ethnic divisions solidified by the Yugoslav wars of the 1990s, and the political/legal confusion within the mandate, there must be an acknowledgement here of the efforts and uneven success of the democratization process undertaken from 1999 until 2008. By examining democratic theory in plural societies and assessing those concepts against the capacity built under UNMIK, international leaders with their Kosovar counterparts can apply lessons-learned to more effectively govern the so-called post-status order.

Democracy is a complex term which evokes layers of association from forms of government, morality, and politics itself. It is at once vague and nuanced, yet it is the hallmark of Western diplomacy and, as shown previously, the corner-stone to the UNMIK mandate. What then can 'democracy' entail? Democratic theory consists of a rich and layered debate, which will be discussed in part below, but one must first ground that debate in a more simplified definition of what democracy *is*. Assuming a multi-party system, Ronald Dworkin offers a two-fold interpretation of the term, arguing that "according to the *majoritarian* view, democracy is government by majority will, that is, in accordance with the will of the greatest number of people, expressed in elections with universal or near universal suffrage." He contrasts this with "the rival *partnership* view of democracy, [which] means that the people govern

themselves each as a full partner in a collective political enterprise so that a majority's decisions are democratic only when certain further conditions are met that protect the status and interests of each citizen as a full partner in that enterprise."<sup>60</sup> Dworkin's evaluation of pure majority versus what he defines as partnership democracy summarizes well the discourse concerning what democracy is – by pure numbers, majoritarian rule seems to have an innate fairness; in practice, on the other hand, a simple majority vote can easily infringe upon the rights of the minority. The point that Dworkin is driving at is essential in progressing an assessment of democracy in Kosovo, such that effective democracy cannot be devoid of a certain subjective political morality.<sup>61</sup>

Keeping this in mind, there are certain basic elements of what constitutes a democracy in practice. Since its establishment in 1941, the non-governmental organization, Freedom House has acted as “a catalyst for freedom, democracy and rule of law through its analysis, advocacy and action.”<sup>62</sup> One of its most important contributions has been the evaluation index it developed as a real-world assessment of democracy in action, grounding its methodology in culturally non-specific standards of basic political rights based largely on the Universal Declaration of Human Rights.<sup>63</sup> The criteria used by Freedom House in evaluating political rights – namely electoral processes, political plurality and participation, and the functioning of the government – represents the basic foundation upon which ‘democracy’ may be evaluated. It is important to note that, as indicated by the rating system used by Freedom House, the answer to the question of democracy is not a stagnant ‘yes/no’ response. Rather, ‘democracy’ must be viewed within the range of a spectrum wherein a threshold of basic democratic principles must exist.

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<sup>60</sup> Dworkin, Ronald. *Is Democracy Possible Here? Principles for a New Political Debate*. (Princeton, New Jersey: Princeton University Press, 2006), pp. 131.

<sup>61</sup> “We are therefore forced to an important conclusion. The majoritarian conception of democracy is defective because it cannot explain, on its own, what is good about democracy... We need a deeper and more elaborate account that tells us what conditions must be met and protected in a political community before majority rule is appropriate for that community.” Ibid., pp. 143.

<sup>62</sup> Freedom House. Mission Statement. <http://www.freedomhouse.org> (accessed 4 March 2009)

<sup>63</sup> Ibid. (accessed 4 March 2009).

The purpose of this discussion on what democracy constitutes is not meant to give a singularly correct answer to what the term means. As indicated above, it is an organic term with certain basic principles of political participation and influence by the governed. The process by which that influence is exerted on the political system, either by Dworkin's majoritarianism or partnership, in consultation with the output results (those indicators scored by Freedom House) determines the level of democracy represented by a given government. Francis Fukuyama asserts that "while there have historically been many forms of legitimacy, in today's world the only serious source of legitimacy is democracy."<sup>64</sup> Therefore, in this day and age, the legitimate claim of a government to represent a given polity is directly linked to its level of democratization.

Tying legitimacy to democracy is an important assumption to support when discussing the specifics of the international community in Kosovo. It is the necessary starting point, too, in attempting to determine an effective system by which democracy might express the will of the people. "The function of government is to govern. A weak government, a government which lacks authority, fails to perform its function."<sup>65</sup> This is a very basic statement, one that seems too obvious to be necessary, but what is inherent in this seemingly blatant explanation of function is a further assumption about the means. A government is only effective if it enjoys the authority, and thus legitimacy, awarded by the support of the people. But how does this authority manifest itself?

In his highly influential book on political order in changing societies, Samuel P. Huntington articulated a complex, symbiotic relationship between a polity and the institutions that represent its interests. He perceived this interaction as a universal norm which could be applied to any level of government in relation to its constituency, whereby political authority was supported by, and served the interests of society. "Institutions" he asserts "are the behavioral manifestation of the moral consensus

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<sup>64</sup> Fukuyama, pp. 26.

<sup>65</sup> Huntington, Samuel P. *Political Order in changing Societies*. (New Haven, Conn.: Yale University Press, 2006), pp. 28.

and mutual interest.”<sup>66</sup> In a bottom-up process, social forces in a society combine through mutual interest to establish organizations that work for, and reflect their political needs.

Furthermore, “the level of political community a society achieves reflects the relationship between its political institutions and the social forces which comprise it.”<sup>67</sup> Organizations, which have been formed by segments in society to represent their will acquire social and political value through a process of institutionalization. Institutional strength is measured by the extent to which that organization represents activity in society as a whole.<sup>68</sup> Therefore, organizations form, achieving influence via social support as political manifestations of social forces in a society. The value or extent of influence is directly related to the overall scope of mutual interest within the polity as a whole. Legitimacy, or political authority to use Huntington’s term, is achieved by institutions which are capable of giving substance to public interests.

Social forces in a given society represent the various ethnic, religious, territorial, or other identity groups which comprise that polity.<sup>69</sup> The mutual nature of the relationship between institutions and their composite social forces is necessary for the overall stability of the institutional structure. Some level of social divergence is inherent in any dynamic society, where opposing group interests come into conflict. It is within these situations where the institutional strength reflecting political will is meant to process conflict and achieve a sustainable solution. “In the total absence of social conflict, political institutions are unnecessary; in the total absence of social harmony, they are impossible.”<sup>70</sup> Achieving the balance between these two extremes is the foundation of Huntington’s theory on political institutionalization. More importantly, “the stability of any given polity depends upon the relationship

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<sup>66</sup> Ibid., pp. 10.

<sup>67</sup> Ibid., pp. 8.

<sup>68</sup> Ibid., pp. 12.

<sup>69</sup> Ibid., pp. 8.

<sup>70</sup> Ibid., pp. 9.

between the level of political participation and the level of political institutionalization.”<sup>71</sup> Thus as political participation increases, the organizations and procedures of the structure must likewise grow and adapt to reflect the new and more complex demands upon the system.

Huntington articulates here a complicated circular relationship, which assumes a certain level of social accord – a middle ground on the spectrum between complete conflict and social harmony. How can one approach this ideal of institutional representation by government in a polity where social cohesion is limited or non-existent? “Two groups which see each other only as arch enemies cannot form the basis of a community.”<sup>72</sup> It is within this context that Arend Lijphart elaborates a system of democracy that aims at preventing the collapse of the institutional structure, by not only identifying conflicting values but also institutionalizing potentially disruptive, divergent social forces. Lijphart employs the term ‘plural society’ to describe a polity incorporating vastly different – and sometimes militantly opposing – social forces, or ‘segmental cleavages’.<sup>73</sup> As before, these cleavages are responsible for the foundation of institutions aimed at supporting their political will. The fierce opposition that separates these social forces within the plural society is reflected in the organizations they support. Therefore, pluralism defines the system such that the various organizations do not constitute a coherent structure of social communication as proposed by Huntington. Rather, the structure represents social conflict and political friction. In a plural society the ability to establish an effective government is complicated by often seemingly incompatible cleavages. Indeed, a method of institutionalization is necessary in order to achieve a level of internal communication and political stability.

However, the effects of cleavages are not wholly negative in even the most divergent social orders. “Plural societies must be distinguished further on the basis of several aspects of their cleavage

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<sup>71</sup> Ibid., pp. 79.

<sup>72</sup> Ibid., pp. 9.

<sup>73</sup> “[Which] may be of a religious, ideological, linguistic, regional, cultural, racial, or ethnic nature.” Lijphart, Arend. *Democracy in Plural Societies: A Comparative Exploration*. New Haven: Yale University Press, 1977), pp. 3-4.

structures,” argues Lijphart. He continues, asserting the importance of “the number of cleavages and the degree of fragmentation that they cause, the extent to which different cleavages crosscut or coincide, the types and intensities of cleavages, the countervailing effects of overarching loyalties, and finally the manner in which segmental cleavages and party system cleavages are related.”<sup>74</sup> Approaching cleavages from only one angle, or from a single-issue perspective, often galvanizes and polarizes social-forces; if there is no mechanism to bridge the gap between the two groups, then the cross-pressures that are essential for compromise and communication will be absent and the stability of the system as a whole will be at risk.<sup>75</sup> The previous point that Lijphart is making, however, notes that memberships in social groups, when examined in greater depth often indicate multiple, mutually reinforcing interests. Though by nature these cleavages pull at the loose fabric which sews a plural society into a functioning polity, the structure may be reinforced by institutionalizing as many segments into a patchwork of overlapping loyalties. Thus, accounting for variegated social forces within the system may dull the effects of sharp cleavages and in the process increase the overall stability of the system.

“It is not the nature of consociational democracy, at least initially, to make plural societies more thoroughly plural. Its approach is not to abolish or weaken segmental cleavages but to recognize them explicitly and to turn the segments into constructive elements of a stable democracy.”<sup>76</sup> As noted above, by increasing the ties across segments and ensuring participation and representation in government, the consociational structure can approach the beginning of a solution towards the problem posed by plural societies in relation to Huntington’s ideal process of institutionalization. Consociational democracy allows for the transition of a minority into a majority through legitimate political activity, dampening the overall effects of the political process through enhanced association, assuming that in the long-run all

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<sup>74</sup> Ibid., pp. 71.

<sup>75</sup> Ibid., pp. 10.

<sup>76</sup> Ibid., pp. 42.

influential segments in society will be represented in government through a normative process of rotation.

Perception of involvement and actual influence in combination is the key to the success of consociational democracy in plural societies. It requires the identification and interaction of political elites, those who can legitimately represent the interests of a social force through the institutionalized structure. "Segmental leaders have the difficult task of, on the one hand, reaching political accommodations with and making concessions to the leaders of other segments and, on the other hand, maintaining the confidence of their own rank and file."<sup>77</sup> This tight-rope that political elites must walk within this structure is a symptom of plurality and the underlying instability which consociational democracy attempts to dampen and build upon. They must simultaneously compromise with other governing elites, while maintaining the faith and authority of their constituency. "In a consociational democracy, the centrifugal tendencies inherent in a plural society are counteracted by the cooperative attitudes and behavior of the leaders of the different segments."<sup>78</sup> Thus, it is the combination of representation and participation, both based on necessary principles of inclusion, and the interaction of the elites which institutionalizes social cleavages as well as creates overlapping membership in a unifying socio-political structure.

Consociational democracy is not without its pitfalls. To reiterate, a political community and its institutions are based on explicit and implied support offered by the social forces within it, as well as on the ability of elites to maintain the confidence of their constituency. However, this theory of political community through the institutionalization of plural cleavages is flawed in one very serious respect. Huntington argues that "a highly articulated class or caste structure means a highly developed system of norms regulating behavior between individuals of different status. These norms are enforced both by

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<sup>77</sup> Ibid., pp. 49-50.

<sup>78</sup> Ibid., pp. 1.

the individual's socialization into his own group and by the expectations and potential sanctions of other groups."<sup>79</sup> The implications of negative socialization are far-reaching especially concerning the driving theory of consociational democracy. By merging the terminology used by Lijphart and Huntington it is clear that the former's 'plural society' represents 'highly articulated' structures. The dilemma facing governing elites, when viewed through cultural socialization, becomes that much more intense. How can a political leader compromise with an opposing group if the fundamental cultural values between the two forbid reconciliation? Socialization, therefore, is an inherent political sanction which, in cases of severe and disconnected cleavages, can make a legitimate elite, properly endowed with constituent authorization, impossible to find. Without a recognized group leader, the consociational government fails to represent that segment of society; and by implication, it fails its stated function.

In addition, without legitimate representation in the organization, certain elements will not be evenly represented within the polity. "Political inequality is, by definition, almost an inherent aspect of political instability."<sup>80</sup> Again, by failing to incorporate sharp cleavages, certain segments are actively left out of the decision-making process either through neglect or negative socialization. Regardless of the consociational nature of the rest of the governing establishment, if an influential group is abandoned by the system, then an inherent inequality is built into the structure. Future institutionalization in this context has little if any hope of long-term democratic function. Thus, the ability of a given government to gain the support of its whole constituent polity is limited – potentially to the point that it is disqualified from completing its stated task: to govern.

Moving on to the practical application of Huntington and Lijphart's theories of institutionalization and democratization in plural societies, one must recall the complex historical and political background of the Kosovo situation. Passions run high on the topic of Kosovo and disentangling

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<sup>79</sup> Huntington, pp. 64-5.

<sup>80</sup> Ibid., pp. 56.

the mythology from the politics is practically impossible. Yet, keeping in mind the previous discussion on democracy in plural societies and the effects of the Milosevic era on the Balkans as a whole, certain basic inferences are readily apparent. The demographics reported in 2003 by the Statistical Offices of Kosovo, operating under the auspices of the United Nations, stated that 1.9 million people continued to reside in Kosovo, of whom 88 percent were ethnically Albanian and 7 percent Serb.<sup>81</sup> Taking the war-time socialization of the two groups (as well as other minorities in Kosovo) into consideration, one can assume that a deep and pervasive fragmentation is roughly represented by these demographic numbers, unequivocally qualifying Kosovo under international supervision as a distinctly plural society. Not only had social cleavages emerged with militarized radicalism representing a norm of interaction, but the absence of political elites (at least on the Kosovo Serb side) indicate that the pitfalls of consociational democracy – whereby certain groups remain outside the system, increasing overall instability – were present at the beginning of the United Nations Interim Administration in Kosovo.

If Fukuyama is correct and the only legitimate form of government is democracy, then it follows that in attempting to democratize, building necessary state structures is the only path to legitimacy. In fact, as Carolyn Bull explains, state-building is just that: “an intervention designed to create a stable, democratic and viable state, primarily through building the institutions of a state.”<sup>82</sup> However, as Huntington’s model shows in general, building the institutions of state is neither fast nor prototypical. In attempting to build successful democratic institutions, the international community, foreign by definition, is at a disadvantage when it comes to growing a local democracy from within.

This is complicated further by the fragmentation of Kosovar society borne out by the preceding ethnic tensions, war and destruction. The problem here is two-fold: first, tension between peoples; and more importantly in terms of state-building, conflict between state institutions and the governed. The

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<sup>81</sup> Ibid., pp. 2.

<sup>82</sup> Bull, Carolyn. *No Entry Without Strategy: Building the Rule of Law Under UN Transitional Administration*. (Tokyo, New York, Paris: United Nations University Press, 2008), pp. 3.

first of these was evident as KFOR entered Kosovo following intense interethnic violence at the end of Operation Allied Force; furthermore, as is evident by the uprising of 2004, the animosity between groups does not subside merely because of a new international presence. Effectively subduing outright conflict within the population goes hand-in-hand with winning over the good will of the polity to the new leadership. "In territories where state institutions themselves have been used as a tool of oppression, building trust in the *idea* of the state requires a transformation in the way in which such institutions are seen."<sup>83</sup> It is a testament to the interim administration in regards to this second task that they were able to garner popular support, at least initially.

From a practical standpoint, Fukuyama cautions against confusing state-building and nation-building. The point may be a semantic one at first glance, but in reality, on the ground, it has vast implications for the success or failure of the enterprise. "Formal rules can be readily changed as a matter of public policy; cultural rules cannot, and while they change over time, it is much harder to direct their development."<sup>84</sup> While it is necessary to gain the trust of the people, it is a process that must prove itself. Rather than an external force imposing new values, the international community can only affect institutional growth not the social sentiments that are gained by it. State building, or institutional growth and development, is associated by implication, but disconnected from nation-building, which is an indigenous process of identity formation. If successful, the institutionalization promoted by the international community is positively associated by the local population, leading to a growth in acceptance and a change in cultural values towards democratization.

Within this notion of positive cultural adaptation to new internationally sponsored institutions is the inherent assertion that the new or renovated organizations put down roots in the societies they are meant to govern. Simon Chesterman argues that "transitional administrations are generally created to

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<sup>83</sup> Chesterman, Simon. *You, The People: The United Nations, Transitional Administration, and State-Building*. (Oxford: University Press, 2004), pp. 154.

<sup>84</sup> Fukuyama, pp. 29.

help a population achieve some form of political transformation... In order to oversee such a transformation effectively and to ensure its durability it is essential that the local population have a stake in the creation of these structures and in the process by which power is transferred.”<sup>85</sup>

Democracy, by definition, is the rule of the people by the people, and an international administration sent to democratize a region without incorporating the indigenous population at least in part is a counter-intuitive endeavor. In order for governing institutions to endure in a democratic society, they must not only be established *for* the people, but also *by* the people.

The United Nations is correct in grounding its state-building efforts in the development of a rights-based rule of law.<sup>86</sup> It is a mutually reinforcing effort to combat the two previously mentioned hurdles that must be overcome in order to create a successful administration. By promoting rule of law institutions there is a level of accountability, transparency, and innate democracy inherent in all social interactions – be they interpersonal or between state institutions and the polity. Theoretically, state-building, and successful nation-building, leads in general to the democratization of a post-conflict society by establishing institutions which reflect policies of cohesion. Furthermore, this process can develop new cultural and institutional norms as a first step towards bridging gross social cleavages; and by gaining the trust and participation of the range of social forces in the polity, internationally supported institutionalization can approximate the ideal bottom-up development of Huntington’s organizational theory.

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<sup>85</sup> Chesterman, pp. 143.

<sup>86</sup> “An August 2004 report by the UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, [defined] the rule of law as ‘a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards it requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” Bull, pp. 45.

As stated above, no international organization can grab a formula off the shelf and apply it to real-situation state-building efforts. The realities on the ground can never fully fit into theoretical conceptions, and in practice the international administration in Kosovo has fallen victim to its own malfeasance. The most basic prerequisite for ultimate success, legitimate authority given by popular support, was never successfully gained by the international community. Though there was initial enthusiasm for the project on the ground, within a short time the politics of administration overwhelmed the situation. "The international community, including the vast numbers of NGOs that are an intimate part of it, comes so richly endowed and full of capabilities that it tends to crowd out rather than complement the extremely weak state capacities of the targeted countries."<sup>87</sup> Thus, even though state governing functions are being carried out, the local capacity stagnates or reduces, such that the primary 'stake' which is required for success is never localized.

The mandate given in UNSCR 1244 (1999) does not explicitly require the consultation of indigenous structures by the international body, and despite some early attempts to form contact groups with Albanian elites, the overall project failed to garner grassroots support.<sup>88</sup> Without improving local capacity the new governing structure failed to truly democratize. Instead, by endorsing institutionalization over legitimate local participation, the international community in Kosovo created a situation in which it established democratic institutions without necessarily representing the will of the people. From the get-go, UNMIK represented a benevolent authority attempting to produce democracy through institutionalization. Strikingly, it failed to adhere to its own intuitive purpose of gaining support, initiating a series of only nominally democratic institutions.

UNSCR 1244 (1999) was adopted on June 10, 1999 and a mere two days later the first civilians were deployed in the institution-building scheme. The short response-time made institutional

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<sup>87</sup> Fukuyama, pp. 103.

<sup>88</sup> Bull, pp. 160.

preparation a condensed process resulting in an overall lack of organization. A slow start can be forgiven, especially since, as stated above, there must be consultative time taken to evaluate the situation on the ground before embarking on a firm course of action. UNMIK, however, failed to incorporate the accepted Albanian parallel authority in Kosovo, which had been 'governing' outside the Serbian structures for some time. "In Kosovo, the first UNMIK strategic planning document was not produced until 5 December 1999, six months after the start of the mission. The second, a working draft issued on 18 March 2000, was so elaborate – a 'ceiling-to-floor laundry list', in the words of one UNMIK official – as to make it all but impossible to implement."<sup>89</sup> This slow start was overlooked to a certain extent as the novelty of the international presence had not yet worn thin, though the local communities were not without their suspicions.

Most importantly, by way of both establishing a most crucial step towards democratization as well as fulfilling an important criterion of the 1244 mandate, in May 2001 UNMIK adopted a Constitutional Framework, which sought to bring in local support. The Framework spelled out the requirements of a 120-seat Assembly based on consociational principles of proportional representation. Twenty seats were reserved for ethnic minorities, of whom four must be non-Serbs. On paper the establishment of this locally 'owned' governing body represents a major achievement towards building upon and dulling sharp social cleavages. Again, however, the system failed its task, and in fact isolated the Serb and Roma populations. "The Serbian government [in Belgrade] declared the Framework 'unacceptable', denouncing it as a reward for Albanian separatist violence. UNMIK publicly declined to seek Belgrade's approval of the Framework... [alienating] Kosovo Serbs."<sup>90</sup> This system was rejected by Belgrade as a political affront and only begrudgingly accepted at best by the Serb minority population in Kosovo. The result being that this new ruling 'constitution' never achieved the legitimate support of the

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<sup>89</sup> Caplan, Richard. *A New Trusteeship? The International Administration of War-torn Territories*. (Oxford: University Press for the International Institute for Strategic Studies, 2002), pp. 49.

<sup>90</sup> Bull, pp. 129.

full polity and was more-or-less imposed from above by UNMIK, thus solidifying an early opposition and an almost total Serb-Boycott of the Framework.

In its noble attempt to bring rule of law to Kosovo through a ‘foundational’ document, the international community was guilty of using its own influence to crowd out the possibility for indigenous capacity to be developed where it had previously lacked. “Quite apart from the implicit acceptance of ethnic politics, however, UNMIK’s stated hopes for inter- and intra-community compromise were not supported by the process that led to adoption of the framework. None of the local participants agreed to the text as finally adopted – a ‘compromise’ that had to be forced on them by [the SRS].”<sup>91</sup> Likewise, finding elites for this would-be disenfranchised social force who were simultaneously loyal to their constituency and the political structure proved near impossible.<sup>92</sup> Outside of finding Serb and Roma representatives who would act as their respective groups’ representation, the social aversion that was solidified by the Framework process created a situation in which the overarching minority communities saw those in government as appeasers to the cause. Instead of instituting a system of plural representation, by absencing Serbs and other non-Albanians the new governing structure institutionalized inequality and instability.

“The exercise of power by a transitional administration in a manner that contradicts principles intended to bind future local regimes – such as democratic principles, the rule of law, separation of powers, and respect for human rights – may actually harm the prospects of good governance in the longer term.”<sup>93</sup> The imposition of the framework bypassed the basic democratic principles of democracy – majoritarian *and* partnership. But what is more damning is the lack of power truly devolved to the

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<sup>91</sup> Chesterman, pp. 134.

<sup>92</sup> “UNMIK struggled to secure Serb appointments to the Judiciary and, by October [1999], all Serb members of the EJS had resigned as a result of intimidation and broader Serbian policy to boycott the UNMIK administration.” While this example does not come from the Kosovo Assembly, it represents a larger trend in elite participation. Bull, pp. 135.

<sup>93</sup> *Ibid.*, pp. 146.

people. In 2001 the then-SRSG, Hans Haekkerup declared a policy whereby the domestic institutions must prove a level of “political maturity” which they had not yet achieved in order to assume more power and influence within the structure.<sup>94</sup> Coming off of ten years of inter-ethnic conflict the underlying idea may be well founded, but following the principles of transparency and democratic participation by the people, the reserved powers maintained by the SRSG constitute a stifling of the political will of the polity. Crucial areas such as external relations, law enforcement and justice, the protection of minority communities and budgetary control remained under the direct authority of the SRSG. In addition to reserving certain competencies, he retained the power to correct any actions of the Provisional Institutions of Self-Government (PISG) that he deemed incompatible with UNSCR 1244 (1999). Furthermore, in holding Kosovo’s ultimate authority answerable to the international community rather than the local population – as indicated by the reserved powers listed above – it disengaged the populous from the process of developing civil order.<sup>95</sup>

Stabilization and democratization were the stated goals of the international community upon entering Kosovo in 1999. It attempted to mimic the bottom-up growth of institutional capacities and legitimacy proposed by Huntington by binding the Lijphart-ian cleavages through consociational representation. Unfortunately, by failing to gain the lasting support of the whole polity, as evidenced by the political pressure necessary to establish the seemingly democratic Framework Constitution, the international community actually institutionalized instability. Lijphart further explains that “the foremost characteristics of a stable democratic regime are that it has a high probability of remaining democratic and that it has a low level of actual and potential civil violence. These two dimensions are closely related; the latter can also be viewed as a prerequisite for, and as an indicator of, the former.”<sup>96</sup> As explained above, the level of actual democratization promulgated by the international community is

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<sup>94</sup> Chesterman, pp. 134.

<sup>95</sup> Ibid., pp. 152.

<sup>96</sup> Lijphart, pp 4.

limited at best. By using Lijphart's method, a lack of democracy can be shown by political violence, and in Kosovo just such an event prompted a change in the international agenda.

In March 2004, orchestrated attacks by Albanian extremists on Serb and other minorities broke out, following days of protests against UNMIK. The week long incident forced 4500 people or more from their homes and caused the destruction of minority-owned property and the disruption to essential public services.<sup>97</sup> The violence caught the attention of the international community at large, and jolted the interim administration into a change of action, but unfortunately the institutional culture had been well established by that time. And though overtures were made to further democratize, and attempt to evolve the cultural values in accordance with the institutional ones occurred too late. In 2008 Freedom House published that the political system in Kosovo "remains largely based on clan and regional ties, [complicating] the effort to create a stable democratic government."<sup>98</sup> It is clear that the international community did not go far enough to engage the whole polity, encouraging a governing culture of cooperation and mutual respect.

Richard Caplan asserts that international administrations "are not representative democracies; they are institutions created and sustained by international processes, which though themselves democratically deficient in certain respects, establish a legitimate basis and the parameters for the exercise of international authority."<sup>99</sup> This is in line with Haekkrup's assertion that a level of 'maturity' must be developed before recent combatants can be expected to treat each other fairly in domestic, democratic rule. True, a certain level of benevolent autocracy is necessary to create the situation in which a democracy might be formed, but nine years on perhaps this level of democratic dwarfism is too much. In its yearly report, Freedom House ranked Kosovo as 'Not Free' "given the large role played by

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<sup>97</sup> Bull, pp. 120.

<sup>98</sup> Freedomhouse, "2008 Country Report: Kosovo (Serbia)"

<http://www.freedomhouse.org/template.cfm?page=22&year=2008&country=7543> (accessed 19 February 2009).

<sup>99</sup> Caplan, pp. 77.

international officials... democratization remains low.”<sup>100</sup> While Kosovo has been pushed by the international community towards the development of democratic institutions and principles, there remains a disparity between the intended outcome and the actual level of democratization.

At what point does (or did) benevolent autocracy go too far? UNMIK attempted to impose from the top what in theory works best by organic growth. In essence there is nothing wrong with this interpretation of Huntington’s organizational theory, but it failed to recognize the pervasive cleavages of Lijphart’s pluralism. The democratic regime the international community was aiming at fell short specifically because it failed to do what otherwise happens naturally: gain legitimate authority to act as a representative for and insurance of the interests of the composite social forces. The international community is not meant to act as a wholly democratic regime, but also it cannot grow into a more ideal system if the cultural support necessary for indigenous ownership does not likewise evolve. It is a mistake, given this discrepancy, to dismiss the uneven participation across Kosovar society as merely a byproduct of ethnic tension. Rather, UNMIK crowded out the chance for indigenous capacity growth by prizing the internal need to fulfill a key aspect of UNSCR 1244 (1999) over gaining legitimacy from the people. In doing so, the international community confused democratization for institutionalization, and instead of building a stable polity, UNMIK created a surface-level stabilization even more susceptible to the cultural shocks of conflicting group interests.

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<sup>100</sup> Ibid.

## It's Paved with Good Intentions: Human Rights and Accountability

'Human rights', 'humanitarian intervention', and (many would argue) 'genocide' are terms intimately associated with the Balkan wars in general and Kosovo more specifically. In 1999 gross human rights violations by the Milosevic regime were cited by the West as legitimization to enter the region and restore respect for human dignity.<sup>101</sup> Article 1 of the United Nations Charter defines its purpose, in part, as the achievement of international cooperation "in promoting and encouraging respect for human rights and for fundamental freedoms for all."<sup>102</sup> As such, this paramount position within the Charter guides the UN in general and by extension the process of territorial administration in Kosovo. However, in an era when UN organs operate in total authority such as is the case in Kosovo, if the archetypal abuse of power by a government is the violation of human rights and that old adage – where there *can* be an abuse of power, there *will* be – is correct, then it must follow that territorial administrations are capable of violating the fundamental human rights which they are meant to protect.<sup>103</sup> Does the unrestrained authority of the international administration give way to human rights violations? To whom is the international community actually accountable? The situation between the various ethnic groups in Kosovo is a matter of complex socio-political analysis, amply discussed in volumes. What is lacking in this overall discourse is the discussion of responsibility and disenfranchisement woven into the UNMIK structure, and the infringement of socio-political rights of all Kosovars. To approach an answer, this examination will focus on the (flawed) development of human rights protection in Kosovo from

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<sup>101</sup> Tony Blair stated in 1998 that "we have to enter the new millennium making it known to dictatorships that ethnic cleansing will not be approved... We fight... for a new internationalism where the brutal repression of ethnic groups will not be tolerated." Cited in Cooper, Robert. *The Breaking of Nations: Order and Chaos in the Twenty-First Century*. (London: Atlantic Books, 2004), pp. 59-60.

<sup>102</sup> UN Charter Article 1.

<sup>103</sup> Verdirame, Guglielmo. "UN accountability for human rights violations in post-conflict situations" in *The UN, Human Rights and Post-Conflict Situation*. Nigel D. White and Dirk Klaasen, editors. (Manchester: Manchester University Press, 2005), pp. 81-97, pp. 83.

1999 to 2008, analyzing the power of the SRSG, the lack of official oversight, and finally, their consequences in terms of the protection and promotion of human rights.

Inter-ethnic relations did not systematically alter with the arrival of internationals inspired to affect change. Growing a new human rights culture, like political values and democratic institutions was a key area of development to be undertaken by the international community. Just as those other institutions of modern state-building were, so too is this most principled system of promotion and protection susceptible to politicking and cultural frustrations. To their credit, outright killings were curbed substantially in a relatively short time after the entrance of KFOR and the international community. Though heightened anxieties (especially on the part of the Serbs and other non-Albanian communities) and increased security measures for minority groups continued throughout the duration of the administration, UNMIK was able to achieve a surface level stabilization of ethnic-tensions. However, as will become apparent, no lasting stabilization of relations or meaningful reconciliation between the groups was ever actually achieved under international supervision.

As touched upon in the chapter on democratization, the living situation of Kosovo Serbs is less than free and independent. Tim Judah describes life in a Serb enclave outside the Mitrovica majority region, where “to move in and out of the village people had to wait for a twice-weekly escort of KFOR peacekeepers.”<sup>104</sup> There is an inherent battle between providing security and promoting the free-movement and expression of civil liberties in a post-conflict society, but the isolation of Serb (and other minority communities) into ghetto-ized compounds is one example, following the discussion in chapter three, where the international community institutionalized marginalization. The need to ‘stabilize’ has in fact built isolating structures around segments that make up the body-populace. Though this is an important factor to keep in mind as the discussion of human rights derogation/infringement progresses in regards to the international administration, the particular aspects of life within these isolated

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<sup>104</sup> Judah, Tim. *Kosovo: What Everyone Needs to Know*. (Oxford: University Press, 2008); pp. 103.

communities will not be a direct topic of further discussion. Rather, by focusing on the relatively unrestricted authority wielded by UNMIK (most notably the SRSG), and the complex structure of the international administration (including KFOR) which thwarts accountability, this chapter aims to highlight an issue affecting the entire Kosovar populace.

One must take a moment at the outset to discuss and introduce some of the overarching issues concerning the enforcement of human rights standards. In 2004, Human Rights Watch issued a report on enhancing the accountability of international actors in Kosovo in which it defined 'accountability' as "the extent to which an institution, and the officials within it, are held responsible for their actions," marking it as a key element of good governance.<sup>105</sup> Reaching a definition of clear responsibility for protection in a situation as complex as an international administration is complicated given the structure of its composite interacting institutions. It is no easy task to simply identify a right that has been violated, the perpetrator responsible and initiate action to bring that person or entity to justice. "As norms generated within a legal system in which states were the primary, almost exclusive, subjects of the law, the application of human rights, humanitarian and international criminal law is complicated by the virtual absence of traditional state actors in [internationally administered territories]."<sup>106</sup> The theories of legal responsibility as they apply to the UN in the realm of human rights protection will be discussed in greater detail below, but it is important to understand that, on top of it all, the precedent for this question of non-state responsibility is relatively new in the grander scheme, and is the focus to a certain extent of this overall work. As a qualifier, then, it is important to understand 'protection' as an interpretation of human rights treaties whereby a system of redress or provisions for reparations to victims is the measure of accountability.

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<sup>105</sup> Human Rights Watch. *Better Late than Never*. Number 2, June 2007, pp. 1.

<sup>106</sup> Cerone, John. "Reasonable measures in unreasonable circumstances: a legal responsibility framework for human rights violations in post-conflict territories under UN Administration" in *The UN, Human Rights and Post-Conflict Situation*. Nigel D. White and Dirk Klaasen, editors. (Manchester: Manchester University Press, 2005), pp. 42-80; pp. 42.

The legal norms established since the end of World War II do not take into account a situation where an inter-governmental organization such as the UN would exercise the privileges and responsibilities of a state in the international arena in a legal sense.<sup>107</sup> This lack of normative imagination, coupled with the structural approach of international administrations frustrates the seemingly straight-forward question of labeling responsibility. Accountability for action, a foremost principle in transparent, democratic society, in an atypical system brings up questions of not only bureaucratic practice but also of the possibility to inadvertently violate human rights in the effort to protect them. The UNMIK pillar structure has far reaching consequences when attempting to establish accountability measures regarding the protection and promotion of human rights.

To elaborate on the administrative structure introduced in previous chapters, and to further understand the complexity of the situation, it is important to recognize that the institutional map of UNMIK does not fit so easily into four clearly defined pillars. Furthermore, as will be demonstrated later, the politics of accountability are not the only complicating factor in attempting to create effective mechanisms of enforcement and responsibility. To add to the international pillars, for instance, the Joint Administrative Structures were created and partially staffed by internationals, employing local authorities, though technically outside of the 'mission'. To whom are they responsible? Add to the mix the Kosovo Protection Corps (KPC), yet another local group linked to the mission and capable of infringing upon or violating human rights. KFOR is itself highly complex: deployed by NATO, a composite of participating member states, where each national contingent is controlled to a substantial degree by their national authorities, thus influencing levels of responsibility.<sup>108</sup> Each new actor complicates the question of who is responsible. To what degree is the umbrella the central actor? Can NATO be held

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<sup>107</sup> Intergovernmental Organizations have enjoyed subjectivity in international law, but the legal framework established in the latter-half of the 20<sup>th</sup> century does not conceive of a situation in which an organization like the UN would hold the rights and responsibilities of a traditional state.

<sup>108</sup> Cerone, pp. 65.

responsible for the actions of a group of Romanian KFOR soldiers, or does the onus fall on the sender-state?

The issue of accountability is not only structurally complex, but also contextually. Achieving a balance within the mandate of stabilization and promotion of human rights is a tricky line to walk. For instance, in the summer of 1999 there were many claimants of legitimacy in Kosovo; none particularly willing to cooperate with the others; each establishing, with varying regional success, parallel structures of governance or influence. When the first internationals arrived in Kosovo to fulfill their mandate they were confronted on all sides – administration, politics, and security – by groups threatening to return to the violence and chaos of ethnic extremism. In that state, priorities must be weighed towards the overall success of the mission. “Accountability of international actors will necessarily be limited during the opening phases of an operation. Nevertheless, once the political trajectory towards normalization of the political environment has begun, creating mechanisms by which the international presence may be held accountable can... encourage the emergence of an indigenous human rights and rule of law culture.”<sup>109</sup> By establishing a so-called ‘benevolent autocracy’ within an implicit state of emergency, the international administration can neutralize conflict and begin to establish a rule of law based on the respect for human rights. The problem arises, though, when this state of autocracy outlasts the willingness of the people to be subjugated without redress.

UNSCR 1244(1999) calls on the interim administration to “[establish and oversee] the development of provisional democratic self-governing institutions.”<sup>110</sup> As previously stated, the process by which these democratic institutions were founded in Kosovo was necessarily undemocratic, largely being created by decree or influence of the SRSG. Thus in December of 1999 the SRSG brokered an agreement between the eminent Albanian political rivals, Hashim Thaçi and Ibrahim Rugova,

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<sup>109</sup> Chesterman, Simon. *You, The People: The United Nations, Transitional Administration, and State-Building*. (Oxford: University Press, 2004), pp. 153.

<sup>110</sup> S/Res/1244 (1999).

anticipating the creation of joint institutions, whereby they had to renounce all previous claims and dissolve parallel structures in exchange for 'provisional administrative management'.<sup>111</sup> The power wielded by the SRSG to neutralize these political tensions between the warring factions, in this instance used for the achievement of a certain level of stability, combines the structural and contextual difficulties frustrating accountability. This case demonstrates that, before the creation of democratic local institutions of governance (possible future structures of accountability), the office of the Special Representative had the power to manipulate the political scene – undeniably in this instance for the better – outside of any formal institutional avenues, which had yet to be created. It was clear in December 1999, and would crystallize in following years, that the legislative and ultimate authority in the territory would remain within the office of the SRSG.

Legally speaking, the Security Council empowered the SRSG to interpret UNSCR 1244(1999) and ensure that the interim administration, both the international and local institutions, adhered to its provisions through corrective powers. But at what point does protecting the integrity of UNSCR 1244 (1999) translate into the violation of human rights of the Kosovar populace? "While the Constitutional Framework established [certain] competencies to the institutions of self-government (the elected assembly, the president of Kosovo, the government, and so on) it reserves ultimate authority for UNMIK alone... Chapter 12 (Authority of the SRSG) provides a general clause with which the SRSG and UNMIK will be able to override practically every decision of the elected institutions."<sup>112</sup> Thus the Framework devolves certain competencies to the local administration, on paper establishing a more democratic regime; but much like the influence wielded in December 1999, the Framework continued to prize the

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<sup>111</sup> Taçi was set to become Prime Minister of the Provisional Government of Kosova, Rugova to be President of the Republic. Brand, Marcus. "Effective human rights protection when the UN 'becomes the state': lessons from UNMIK" in *The UN, Human Rights and Post-Conflict Situation*. Nigel D. White and Dirk Klaasen, editors. (Manchester: Manchester University Press, 2005), pp. 347-7; pp. 351.

<sup>112</sup> *Ibid.*, 353.

powers granted to the SRSG by UNSCR 1244 (1999) over the establishment of effective indigenous authority.

Taking a step back, UNSCR 1244 (1999) did not outline mechanisms by which enforcement would be guaranteed, nor indeed by which accountability would be ensured. The 'benevolent autocracy' necessary to launch the program towards democracy and stability necessitates a level of detachment, such that direct domestic accountability – the need on the part of the SRSG to *earn* legitimacy via the democratic process; it imposes a certain distance between the administration and the population. Emerging from an era of government-sponsored oppression and inter-ethnic violence, the international administration must be insulated from the political effects of group conflict in order to restore standards of living and security within the territory. International legitimacy stemming from the Security Council is sufficient in this state of governance. "It is clear that there are fundamental standards that are irreducible but... there must be a recognition that the circumstances of most [UN complex peace-keeping missions] equates to a state of emergency that would permit certain derogations under the various human rights conventions."<sup>113</sup> Therefore, UNMIK in general, and the SRSG more specifically have the authority and space to impose, to a certain degree, a new democratic regime whose aim is the protection and promotion of human rights by temporarily abbreviating political and civil rights to the needs of the mission and community.

The potential for this system to over-insulate itself is overwhelming, and unfortunately the symptoms are only recognizable in retrospect through positive or negative impact. "Although UNMIK's accountability to the Security Council provided an indirect check on its actions, these arrangements struck an uneasy balance between authority and accountability."<sup>114</sup> Leaving oversight to the parent

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<sup>113</sup> Kelly, Michael. "the UN, security and human rights: achieving a winning balance" in *The UN, Human Rights and Post-Conflict Situation*. Nigel D. White and Dirk Klaasen, editors. (Manchester: Manchester University Press, 2005), pp. 118-148; pp. 119.

<sup>114</sup> Bull, Carolyn. *No Entry Without Strategy: Building the Rule of Law under UN Transitional Administration*. (Tokyo, New York, Paris: United Nations University Press, 2008; pp. 128.

institutions of the field organs creates problems both on the ground and in relation to the UN as a whole. Oversight by proxy is unstable and inefficient, effectively granting free reign from above to the local administration except for in situations of security threats or gross violations, which would warrant due attention by the Security Council. Furthermore, and more practically important on the ground, it institutes a certain level of disrespect for human rights by consistently subordinating them to the needs of the mission.

Deciding when to transfer power (i.e. allowing for effective local accountability) is a complicated problem. Will local authorities abuse power for ethnically and politically motivated reasons – a phenomenon willingly demonstrated by both Serbian and Albanian ethnic groups in the past? It can certainly be argued that, even though the UNMIK regime was self-admittedly not wholly democratic, a system where the intent of the ‘autocrat’ is necessarily to do good based on the principles of the UN is a better system than the uncertainty of an indigenous political order where ethnic violence continues to represent a legitimate option for certain segments of society (the continuity of which was demonstrated in the 2000 and 2004 uprisings). “Should generally praiseworthy motivation or lack of intent to impact negatively on human rights immunize one from legal responsibility?”<sup>115</sup> Certainly, the latter of the two systemic options given above poses a greater threat to the protection of human rights. Furthermore, there is legal precedent for rights limitations.

“Human rights law does provide for derogation from particular norms... although this is generally limited to a time of ‘war or other public emergency threatening the life of the nation’ and there must be some form of official notification of this situation.”<sup>116</sup> It can of course be inferred by the necessity of the NATO bombing campaign, the UNSCR 1244 (1999) mandate, and the presence of

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<sup>115</sup> For examples in international treaties of derogations from particular norms, see Article 4 IICPR and Article 15 ECHR, which clarify instances in which derogations may occur.

Kenny, Karen. “UN accountability for its human rights impact: implementation through participation” in *The UN, Human Rights and Post-Conflict Situation*. Nigel D. White and Dirk Klaasen, editors. (Manchester: Manchester University Press, 2005), pp. 438-62; pp. 439.

<sup>116</sup> Chesterman, pp. 149.

UNMIK (et al) that a state of emergency was undeniable. Social unrest, evidenced by the 2000 and 2004 demonstrations, clearly persisted within the territory. So, does that state of emergency continue to hold precedence? The ambiguity of this certain situation stems from the fact that no such explicit, official notification on the state of operations was ever given in Kosovo. Thus, with no declaration there is no limit to its extent or duration, nor any defined body competent to lift or amend the declaration. This gets at the heart of the situation concerning the over-extension of the SRSGs official authority. To maintain an undeclared state of emergency, where rights are abbreviated to needs, over an extended period, goes beyond political caution into the realm of rights infringement.

Rather than taking this view, UNMIK interpreted their Chapter VII Resolution adopted by the Security Council as somehow absolving the operation as a whole from certain human rights obligations.<sup>117</sup> The reserved powers of the SRSG are a prime example of the over-extension of this guardianship mentality. UNSCR 1244 (1999) invested in the office of the SRSG the responsibility to ensure the implementation of the mandate, the execution of which is legally binding. The translation of this provision into the functioning administration enshrines the Special Representative as the highest office in Kosovo, with the ability to sign regulations into law, negate democratically promulgated initiatives by the PISG if he deems them contrary to the mandate, and the right to dismiss agents within the administration. A regulation signed by the SRSG has the force of law, even potentially retroactively, where there is no requirement for publication or proper dissemination to either the civilians or the judicial branch of the administration. "The absence of a constitutional court (or an equivalent body) means that there is no instance in the current system, which could check the legality or 'constitutionality' of legislative or executive acts by UNMIK."<sup>118</sup> Thus the hallmark of liberal democracy, namely an independent judiciary, is entirely absent and unable to provide a system of checks and balances on the use of power.

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<sup>117</sup> Ibid., pp. 149.

<sup>118</sup> Brand, pp. 354.

Thus far, this evaluation has been largely critical of the office of the Special Representative. The intention is not to suggest that the representative is a malicious politician abusing power at will, indeed quite the opposite. As the Special Representative, the office is meant to act as a surrogate for the Secretary General, taking action as he would if he could be situated himself in Kosovo. This office exactly personifies the flawed idea that good intentions and *de facto* accountability to the Secretariat and Security Council in distant New York is a sufficient balance of power. The situation on the ground suggests something quite different. There is plenty of room for an authority, unrestrained by effective and proximate institutions of accountability, to abuse local human rights by unintentional impact or sheer lack of action. The focus on human rights protection cannot just be a substantive declaration where the only mechanism of accountability is a notion of duty to pro-forma commitments to general human rights standards.<sup>119</sup>

Kosovo is not devoid of institutional mechanisms of accountability, in fact on the surface there appears to be a wealth of independent organizations whose purpose is the monitoring and enforcement of responsibility. "The province has an Ombudsperson Institution, a Human Rights Advisory Panel, and is monitored by the [OSCE], nongovernmental organizations (NGOs) and the media... In reality, however, these mechanisms are either weak, unable to investigate international institutions or limited in their impact."<sup>120</sup> There is a proliferation of institutions, both independent and within UNMIK that can put pressure on the administration and KFOR, but the over-all effectiveness and jurisdiction of these groups is limited and ultimately unable to provide effective accountability. Given the strength of its mandate the Ombudsperson Institution is probably the most prominent of these institutions, but even this group is limited by the politics of accountability and the long-arm of the SRSG.

As with the focus on the Special Representative's power to influence, so too will an analysis of the Ombudsperson Institution show that basic structures of accountability in Kosovo have been

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<sup>119</sup> Ibid., pp. 363.

<sup>120</sup> Human Rights Watch. *Better Late*, pp. 2.

bypassed for political or bureaucratic reasons. The eighth annual report of the Ombudsperson Institution in Kosovo was released in 2008, outlining its purpose and growth as an organization. “The institution is mandated to monitor the policies and laws adopted by local authorities to ensure that they respect human rights standards and the requirements of good governance.”<sup>121</sup> Furthermore, “if their investigations identify human rights violations, the leading representative of the Institution may seek remedies through a variety of channels. They may demand further information from local authorities, recommend actions to local authorities, issue public reports, or raise their concerns with the media.”<sup>122</sup> It is apparent that these redresses are loose at worst and barely influential at best. There is no legal mechanism by which the Ombudsperson may enforce accountability; only through recommendation or public pressure can the Institution seek redress.

UNMIK Regulations 2000/38 and 2006/06 constitute the framework of the Ombudsperson Institution, but the ‘emergency’ politics and bureaucratic insulation of UNMIK and KFOR throughout the life of the international administration played a large role in shaping the ultimate effectiveness and jurisdiction of the Institution. To its benefit, the Institution is formally independent and capable of investigating a complaint from anyone in Kosovo who believes their human rights have been violated. However independent the institution officially is, it is certainly not immune to the influence of the SRSG and KFOR command. For months in 2000, the UN, OCSE and KFOR quibbled over the precise wording and scope of powers. “The outcome was marred by compromise, and fell short of the expectations of many. Although the UN grudgingly accepted that complaints against UNMIK officials can be received by the Ombudsperson... it is disheartening that KFOR, upon insistence by NATO headquarters, would be exempt from... scrutiny.”<sup>123</sup> The result was the near castration of the institution: the UN gave in to demands that complaints against UNMIK could be heard by the Ombudsperson – the absence of which

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<sup>121</sup> Republic of Kosovo Ombudsperson Institution. *Eighth Annual Report, 2007-2008*. Available online at [www.ombudspersonkosovo.org](http://www.ombudspersonkosovo.org) (accessed 15 February, 2009).

<sup>122</sup> Ibid.

<sup>123</sup> Brand, pp. 371.

would make the institution completely impotent – but even with this compromise of sorts the most effective redress the Institution could provide a victim was to bring it to the attention of the SRSG and make a public statement; hardly the assertive counter-balance to the use of authority able to legitimately check the influence of the administration.

The limitations of independence were demonstrated in the second structural resolution of the Institution. In 2006 the UN limited the jurisdiction of the Ombudsperson to investigate its actions, opting for another ‘independent’ institution: the Human Rights Advisory Panel. This second institution was meant to bridge the gap of accountability in relation to the civilian presence, but as of the 2007 reporting period, Human Rights Watch noted that the body had yet to be officially constituted.<sup>124</sup> The reduced scope highlights two major interlinking problems, ‘independence’ and ‘immunity’. Both institutions in theory are meant to be independent, as a stop gap of accountability given the missing judicial body normally responsible for enforcement in liberal democracies. Although independence of action is formally guaranteed by the 2000 regulation (and likewise confirmed in 2006) the long arm of SRSG authority extends to the Ombudsperson Institution via the reserved powers. “The SRSG may remove [the sitting ombudsperson] from office whenever he considers that the ombudsperson has failed ‘in the execution of his functions’.”<sup>125</sup> Furthermore, even though there are defined mechanisms, limited though they are, the guaranteed immunity of internationals (for both UNMIK and especially KFOR operatives) poses a threat to the culture of good governance within the international administration and offers a loophole for sending-states to withdraw potential violators without reprisals.

“UNMIK police and KFOR personal are covered by immunity agreements that mean that action can only be taken by the sending country, generally after the accused personnel are sent home, making

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<sup>124</sup> Human Rights Watch. *Better Late*.

<sup>125</sup> Brand, pp. 373.

it virtually impossible for a complainant to learn of the outcome (if any) of an investigation.”<sup>126</sup> In addition to these immunity agreements, recall that the NATO force in Kosovo is, like its parent body, a composite of national groups. In terms of regulations, responsibility, and enforcement this diversity in troop demographics complicates the notion of overall accountability for action. If protecting human rights means that accountability is ensured, and avenues for victims to a redress of grievances are the measure of that accountability, then immunity for certain actors violates the core principles of respect and promotion. In criminal cases, for instance, an UNMIK police officer can only be prosecuted in Kosovar courts if his or her immunity is waived by the Secretary General or national government. Furthermore, should the accused be withdrawn, there is no mechanism enabling the UN to recall or monitor the case from abroad. “Effective investigation depends on the cooperation of national contingents.” These immunities, exacerbated by the lack of an effective body (like the Ombudsperson Institution) represent a glaring affront to standards of human rights protection.

The question was asked earlier whether good intentions negated the obvious gaps in accountability. “The trend of human rights law suggests that good intentions are not the issue when it comes to human rights – the impact and actual effects of actions are what matter.”<sup>127</sup> As demonstrated in the previous sections, there is obviously a disparity in the ideal promotion and protection concept and the actual mechanisms on the ground of accountability. So, noble intent aside, it is the *impact* of the use of power by UNMIK and KFOR, whether through a failure of prevention, contribution to their continuation or the lack of effective redress, which must signal who is responsible for violations. In March 2007, The Daily Telegraph reported that a confidential study commissioned by the German government in 2007 by the Berlin-based think-tank, Institute for European Politics, condemned the mismanagement of UNMIK and the overall performance of the civil administration and KFOR. It warned

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<sup>126</sup> Human Rights Watch. *Better Late*.

<sup>127</sup> Kenny, pp. 439.

that “Kosovo faces a violent and chaotic future after the failure of nation-building efforts by the international community.”<sup>128</sup>

The general evaluation put forward by the Institute for European Politics reflects a serious instability within the internationally administered territory. It is clear, in general, that the backlashes of 2000, 2004, and 2007 all represent violations of human rights, but more so are noticeable reactions to UNMIK’s over-stretching impact on the human rights culture. Without going too far into detail about each of the three events, there are common threads representing a long-term failure to protect and promote human rights on the part of the international administration. In February 2000 massive violence broke out in the northern Serb enclave of Mitrovica. Throughout the course of the ensuing conflicts the UNMIK police and KFOR outposts meant to secure the region failed to provide assistance or protection resulting in ethnically motivated murder and the destruction of property. Attacks on the security forces, likewise, compromised the situation further, resulting in an immobilization on the part of international security. “The primary failure would seem to be a failure on the part of the relevant authorities to ensure the rights of the victims... The Ombudsperson found that the competent authorities failed to... exercise due diligence in securing the right to life of the victims.”<sup>129</sup> In reaching this conclusion the Ombudsperson cited relevant jurisprudence of the European Court of Human rights, holding that a difficult or dangerous situation cannot be an excuse for the failure to ensure the right to life.

Then, in 2004, violent rioting by ethnic Albanians took place throughout Kosovo, sparked by ultimately false accusations that Serbs had been responsible for the drowning in the Ibar River of three young ethnic Albanians. From March 17 to 18 the security structures (KFOR, UNMIK police, and locally

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<sup>128</sup> Pancevski, Bojan. “Report Damns West’s Revival of Kosovo” The Daily Telegraph, 19 March 2007.  
<http://www.telegraph.co.uk/news/worldnews/1545918/Report-damns-Wests-revival-of-Kosovo.html>  
(accessed on 14 March 2009).

<sup>129</sup> Cerone, pp. 77-8.

recruited Kosovo Police) almost completely lost effective control of the territory.<sup>130</sup> After two days of rioting, the March violence forced out entire Serb, Roma and Ashkali populations from parts of Serbia, including the destruction and/or arson of homes, Orthodox churches and monasteries in a concentrated attempt to cleanse the population of non-Albanian ethnic enclaves. Once again, the failure of UNMIK police and KFOR to effectively respond to violence left a large proportion of security in the hands of the Kosovo Police Service (KPS). The protection of minorities' human rights clearly lapsed as even some KPS officers were accused of biases or active participation in the destruction of property.<sup>131</sup>

As a final marker of ongoing unrest, the 2007 protests against UN Special Envoy Martti Ahtisaari's proposal of supervised independence, most prominently by the Kosovo Albanian Self-Determination Movement (*Lëvizja Vetëvendosje*), led to yet another security based derogation from the respect for human rights. On 10 February 2007 a protest against the Special Envoy's plan in Priština turned violent, with "international police [responding with] teargas and rubber bullets, killing two demonstrators and injuring many more."<sup>132</sup> In this instance it is not the use of force by the international community which is of concern, but rather that the police officers responsible for the deaths of the two demonstrators were quickly withdrawn by their sending country, removing any possible follow-up investigation or recourse. The weeks following the initial violence brought further attacks on ethnic minorities and Orthodox holy sites, with no investigation or effective redress made available to the victims.

The events of 2000, 2004, and 2007 demonstrate a clear social reaction to the lack of a respect for human rights. Not only are the security forces (UNMIK police, KFOR, and KPS) directly implicated in the perpetuation of violations, either through inaction or direct participation, but the institutional lack

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<sup>130</sup> "At least thirty-three major riots broke out across Kosovo, involving an estimated 51,000 participants." Human Rights Watch. *Failure to Protect: Anti-Minority Violence in Kosovo, Mar 2004*. Vol. 16. No. 6 (D) July 2004; pp. 1.

<sup>131</sup> *Ibid.*, pp. 3.

<sup>132</sup> Human Rights Watch. *Better Late*, pp. 7.

of accountability represented by the powers of the SRSG and the impotence of the Ombudsperson not only failed to create an environment of protection but more seriously failed to promote an institutional respect for human rights through their own derogation of responsibility. “It should also be emphasized that a violation of human rights law remains a violation even though effective remedies against a UN ‘perpetrator’ may not be available – it is worth recalling that impunity is traditionally a hallmark of the most serious human rights crises involving states.”<sup>133</sup> Thus, violations of human rights are still possible (in fact probable) in situations, as in Kosovo, where there is no legal redress or effective remedy.

The situation on the ground, as demonstrated above, is complex especially in attempting to determine accountability. It would seem that the UN and NATO are operating in a consequence-free zone as the authority of the SRSG and the lack of jurisdiction of the Ombudsperson have combined to allow for the derogation of basic human rights standards. “Although the United Nations is clearly and actively engaged in promoting human rights in the territories under its governance, it does not appear to have made the mental leap to seeing its occasional shortcomings as more than merely ‘not doing enough to promote and protect.’ The idea, in particular, that these shortcomings might amount to ‘failures to guarantee’ or, in other words, to human rights violations, has hardly made its way into the official discourse.”<sup>134</sup> It continues to be standard practice to overlook the ‘shortcomings’, such as the long-lasting emergency powers of the SRSG to curtail rights, or the lack of effective accountability mechanisms. Accusing the United Nations of violations is a political taboo largely because nobody will conceive of a situation in which the UN would actively seek to do harm: it is contrary to the Charter. As

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<sup>133</sup> Kenny, pp. 455.

<sup>134</sup> Megret, Frederic and Florian Hoffmann. “the UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human rights Responsibilities” in *Human Rights Quarterly*, Vol. 25, No. 2 (May, 2003), pp 314-342; pp. 337.

stated above, the United Nations as a whole has declared human rights to be its *purpose*, and as such it has an obligation of result.<sup>135</sup>

The question of who is responsible for violations of human rights in internationally administered territories has multiple levels: the mandated administration, the security forces, the sponsoring states, and the parent body (i.e. the United Nations or NATO) to name some of the most prominent. As an organ of the United Nations the territorial administration is bound by the UN Charter, by its mandate, and by the Universal Declaration of Human Rights. There are certain instances where states of emergency constitute a derogation from the latter, but the overarching obligation to protect and promote human rights is laid out as a legal imperative of the UN and by implication its territorial organ, UNMIK. Thus the UN's human rights responsibility encompasses the spectrum of decisions taken, acts and omissions which violate international human rights law. In the case of Kosovo, the structural and contextual conflicts of accountability represent a failure on the whole of the institution to fulfill its own human rights mandate. However, the state structure which binds traditional subjects to human rights treaties does not explicitly encompass inter-governmental organizations, resulting in a gap of enforcement. Relying on the benevolent character of the United Nations, as is evident in Kosovo, is not only negligent but verging on illegal should the normative system catch up to the functional realities of international territorial administration. To answer the question of responsibility, therefore, is a hypothetical exercise at this point. However, even where no competent court exists to hear the claims of victims, violations can still occur by direct action or by consequence. Despite the inherently benevolent nature of the international administration in Kosovo, as an extension of the United Nations, the failure of the international community to secure and grow the human rights of minorities in Kosovo amounts to more than just insufficient institutionalization, democratization and stabilization.

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<sup>135</sup> "By Article 55 of the Charter the UN '*shall promote*', *inter alia*, '*universal respect for, and observation of*, human rights and fundamental freedoms for all... This is described as a *purpose* in Article 56 and the peremptory language ('*shall promote*') makes clear that human rights standards are a legal imperative for the UN." Kenny, pp. 442.

## Where to? A Durable Peace

In 2000, then Secretary General Kofi Anan wrote that “state sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation. The state is now widely understood to be the servant of its people, not vice versa.”<sup>136</sup> Yet the concept of the state, particularly the nation-state, has overwhelmed the delicate process of stabilization and democratization in Kosovo. The international community entered the conflict region in 1999 with the purpose of building an effective state-like system, yet nearly a decade later, the institutions of government, the rule of law, and the protection and promotion of human rights are all severely stunted in part because of the direct and indirect actions of the international community. By analyzing three key dimensions of international governance in Kosovo under the UNMIK administration, this paper has sought to demonstrate that the politics of status, the flawed institutionalization of democratic values, and the inherent contradiction in promoting the respect for human rights while simultaneously acting outside an effective system of accountability has undermined the process of state-building. These deficiencies are more than mere political lack of achievement; rather they attack the core values underpinning the international mandate. Furthermore, to return to the statement above, the government (the acting ‘state’) of Kosovo under the international leadership, at least up until 2008, did not truly represent the institutionalization of the people’s interests, rather those of international actors – the UN, the Contact Group, the Security Council, etc – and the instability present there, including the 2008 unilateral act of independence, reflects certain failures of institutionalization. A renewed effort is needed, one that represents the realities of the situation rather than over-emphasizing the politics of institutionalization.

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<sup>136</sup> Anan, Kofi. “Human Rights and Humanitarian Intervention in the Twenty-first Century” in *Realizing Human Rights: Moving from Inspiration to Impact*. Samantha Power and Graham Allison, editors. (New York: Pellgrave Macmillan, 2006), pp. 309-320; pp. 311.

To argue, as some have, that the international community failed its mission in Kosovo is overly simplistic and ignores the complexities of international administration in a post-conflict world. Certainly politics will always factor into important multi-national interests, a period of benevolent autocracy should be instituted to reign-in wild abuses of power towards the establishment of democratic processes in post-conflict regions, and within that context perhaps certain derogations from human rights norms are necessary even acceptable for the lasting good. These in themselves do not constitute failure, instead the success of the whole endeavor hinges on the institutionalization of lessons-learned, and the growth of effective systems. It is in this final regard that the international administration under United Nations guidance has harmed its own efforts. "In the end, durable and reliable peace depends on creating legitimacy. If peace is to last it must be acceptable to all."<sup>137</sup> By prizing politics over the legal process, allowing the disenfranchisement of Serbs and non-Albanian minority groups, and reserving overwhelming and unchecked authority as a corrective measure the international community confused democratization with institutionalization, created a surface-level stability without truly binding the various groups into one effective polity, and failed to lead by example to establish concepts and values relating to good governance and human rights.

The Milosevic era was dominated by the militarization of nationalist interests, which were demonstrated in 1989 with the reversal of Kosovo's autonomy within the Federation and followed by a decade of civil warfare. "In 1999, UNMIK scrambled to establish an Emergency Judicial System, a Joint Advisory Council composed of Kosovar and international representatives appointed a first batch of 55 judges and prosecutors. For lack of alternatives, these judges were chosen from a pool of judges that had served under the old system."<sup>138</sup> Thus, the situation in Kosovo in 1999 and thereafter to a certain

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<sup>137</sup> Cooper, Robert. *The Breaking of Nations: Order and Chaos in the Twenty-First Century*. (London: Atlantic Books, 2004).

<sup>138</sup> Kosovar Stability Initiative (IKS). "Image matters! Deconstructing Kosovo's Image Problem". Forum 2015, Editor. November 2008; pp. 37-8.

extent represented somewhat of a political Catch-22: who would the international community turn competences over to? In devolving powers to the constituency, thus improving 'democratic' credentials, the potential for misuse and abuse of political power, violence and exclusion would have increased, thus inherently reducing the level of 'democracy.' Corruption and political violence were pervasive in 1999, and continue to exist though in systematically less overt ways. No legitimate elites representing all segments of the polity stepped up to fill the void left by an abusive Serbian government in 1999. Perhaps, then, part of the answer is generational. Ideally, a new group of elites, properly socialized by new cultural values, would come of age in an era where corruption and the push towards the extremes are not considered viable means of expressing opposition.

With the passage of time, there has undoubtedly been an evolution in politics and social values, due at least in part to the presence of the international community in Kosovo. Perhaps what was missing in 1999 was the ten-year gap provided by the interim administration. New interests have risen to the surface, which have the potential to bind the region together in a common orientation. Janine Clark argues that perhaps the political values of Serbia have evolved in a way not wholly represented by the governing structures. In her analysis of the lasting presence of Milosevic on the body-populace, she argues that "[Prime Minister] Kostunica has repeatedly stated that retaining Kosovo is more important than Serbia becoming a member of the EU, underscoring that while membership of the EU requires meeting certain preconditions, 'none of these... include territorial concessions in favor of others...' It appears, however that on the issue of Kosovo and EU membership, Kostunica [was] not wholly in tune with Serbian public opinion."<sup>139</sup> In light of this growing popular position, the prospect of European integration is primed to offer a real incentive towards participation.

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<sup>139</sup> Clark, Janine N. *Serbia in the Shadow of Milosevic: The Legacy of Conflict in the Balkans*. (London: Tauris Academic Studies, 2008), pp. 132.

The preamble to the new Serbian constitution, which was adopted in 2006, reiterated the government's unwavering claim to the Kosovar province as an autonomous territory within Serbian sovereignty.<sup>140</sup> Yet, the political change in Serbia articulated by Clark points in a different direction, and perhaps that evolution – along with a degree of political maturation in Priština – represents the missing foundation in grounding an effective and lasting stability. If this proposition is true, and the importance of a generation of breathing-space was the necessary component to achieving regional stability, then in that sense, institutionalization as a method towards democratization is on the right track (i.e. state-building as a medium-term process of growth). However, as the situation on the ground has proven, the failure of the international community to achieve multi-ethnic support and the rule of law stunted the necessary maturation process. Missteps and mistakes were the necessary learning process of the international community, but the practical application of lessons-learned was hampered by politics. The international community was thus unable to develop and wield the political clout (internally within Kosovo or in Belgrade) to bind the region by a common goal or orientation.

The interim administration is not for naught, it has played a vastly important role in laying the ground-work to be built upon. Yet, unlike the United Nations in 1999, the European Union is in a unique position to effect change through mutually reinforcing benefits. Stability can only be achieved by simultaneously compromising with conflicting demands and maintaining the confidence of your own constituency. In the broader context of the Kosovar situation in relation to Belgrade under UNMIK, the lack of ability to balance the equally important aspects of stability and diplomacy have resulted in the current conundrum. Yet, the European Union has the ability, via the accession process to unite common benefits with common interests between Priština and Belgrade. Firstly, in order to do that, the primary role of the EU at this stage must be the amendment of UNMIK's short-comings, namely creating a

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<sup>140</sup> Constitution of the Republic of Serbia. Available at [http://www.srbija.gov.rs/cinjenice\\_o\\_srbiji/ustav.php?pf=1&url=%2Fcinjenice\\_o\\_srbiji%2Fustav.php%3Fpf%3D1%26](http://www.srbija.gov.rs/cinjenice_o_srbiji/ustav.php?pf=1&url=%2Fcinjenice_o_srbiji%2Fustav.php%3Fpf%3D1%26) (accessed 1 May 2009).

regime founded upon respect for the rule of law (the EULEX mandate), the proper inclusion of important elements of the Kosovar populace (which comes hand-in-hand with outreach to Belgrade), and the development of effective mechanisms of accountability in order to grow new cultural values and trust in the role of government.

The EULEX Kosovo mission as well as the Stabilization and Association Agreement(SAA) process represents important first steps in reversing those deficits, but they do not go far enough towards achieving a lasting stability within the region. However, the transition from UNMIK to EULEX (as hinted at in chapter two) is far from simple, and like the international community in 1999, there is a vested interest in a Kosovar success story. “In many respects, the credibility of the EU as a global player able to project its interests abroad hinges on the success of EULEX.”<sup>141</sup> Politics increasingly factors into the accession process, and the EU has yet to prove that its own need for success can be subjugated to the needs of regional development. “Nine months after the declaration of independence, Kosovo is governed by a myriad of competing authorities – UNMIK, ICO, EULEX, the Kosovo government and parallel Serbian institutions. Not much has changed for the better since February 17 [2008].”<sup>142</sup> The institutions on the ground, very different from the prospects in 1999, now represent an international bureaucratic mess of overlapping competences, similar to the chaos of parallel structures in the early days of UNMIK – not a promising start to what has the potential to be a powerful unifying force in the region.

What is needed from the new international presence, headed by the EU is a positive reversal of some of the more nebulous policies of UNMIK, especially those whose result was instability and social frustrations. Much like their predecessors, the EULEX mission is laced with competences which have the potential to manipulate the political process in Kosovo without due democratic legitimacy. For instance,

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<sup>141</sup> Kosovar Stability Initiative (IKS). “Who’s the Boss – Discussion Paper” 3 December 2008. [www.iksweb.org](http://www.iksweb.org) (accessed 26 April 2009); pp. 8.

<sup>142</sup> Ibid., pp. 1.

Article 3 (b) of the relevant Joint Action lays out similar (unchecked) authority to the reserved powers of the SRSG, stating that EULEX personnel may maintain adherence to the rule of law and public order “as necessary, in consultation with the relevant international civilian authorities in Kosovo through reversing or annulling operational decisions taken by the competent Kosovo Authorities.”<sup>143</sup> Furthermore, EULEX personnel will also enjoy immunities similar to those guaranteed to UNMIK and KFOR.<sup>144</sup> The combination of these two factors does not bode well for the new international presence in terms of correcting the downfalls of the previous administration; and as has been discussed before, the whole process is not without its political side-effects.

Frustrations aside, the role the EU is poised to play in this new so-called post-status environment has the potential to greatly alter the political scene both in Kosovo and between Priština and Belgrade. The Priština-based think tank, Kosovar Stability Initiative (IKS), argues that “the EU accession process is the EU’s main lever of pushing for reforms in the countries of the region. To maximize its political leverage, the different components making up the EU presence in Serbia and Kosovo must therefore speak in one, unified voice.”<sup>145</sup> The United Nations was unable to build internal trust within the territory, nor exercise persuasion in Belgrade for the sheer fact that little benefit was awarded for cooperation. In a reversal, then, the new EU presence is in the powerful position of being able to bind the two major groups towards a similar goal, and in that regard is capable of helping the two parties rise past the constriction of the nation-state ideal and look towards a more regional or at least broader identity politics.

At the opening of this chapter Kofi Anan was quoted, citing a ‘redefinition of state sovereignty’ as a transition from the relative freedom to pursue national policies unhindered by international

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<sup>143</sup> “Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo” in *Official Journal of the European Union* L 42/92, February 16, 2008.

<sup>144</sup> IKS, “Boss” pp. 15.

<sup>145</sup> *Ibid.*, pp. 19.

consequences (as in the Milosevic conception) and the justification (legitimization) for Operation Allied Force. Clearly internal practice is a dominant factor in creating a more stable, legitimate, and democratic regime in Kosovo, but the solution to the problem as a whole will not be achieved only through bureaucratic organization and institutional capacity building. Whatever that final solution is that will afford peace, stability and growth in the region it must reflect more than restrictive national interests and old power-politics in the international order.

In a broader context, since 1999, the future status of Kosovo has overwhelmed the development process. For Kosovar Albanians independence was the only acceptable answer, for Serbs substantial autonomy was as far as they were willing to go, and for the international community it became apparent that the only 'realistic' answer for the territory would be to follow the will of the majority. The new role of the European Union, on top of correcting the administrative deficiencies – building a better rule of law regime, protecting human rights, and incorporating the isolated minority communities – must be to foster an identity not based in the old balance-of-power and Cold War systems. Rather, the new course of action needs to downplay the divisive nationalisms and emphasis on state sovereignty which has dominated the course of development in Kosovo (and Serbia) in favor of a broader, European or trans-national identity which relies on multi-national cooperation and soft-power influence.

International political interests have exacerbated the tensions between Priština and Belgrade by siding with one status solution or another, but in order to move forward prizing the benefits of internationalism over the confinement of limiting nationalist interests is the unarticulated dimension of the EU presence in Kosovo – it needs to be reflected in the policies of the rule of law mission, the Stabilization and Association Agreement, and the future processes of accession offered to the region by the Union. The fetishization of the nation-state as a political and social value has overshadowed the discourse and state-building process and threatens to further constrict developmental mobility. The

end-result for Kosovo must reflect what Robert Cooper calls the 'post-modern', the growth of the international system as a whole away from a traditionally state-bound structure.<sup>146</sup> Cooper argues that "European states now define sovereignty differently from hitherto:... the emphasis has shifted from the control of territory and armies to the capacity to join international bodies and to make international agreements."<sup>147</sup> This emphasis away from militarism and towards association has been demonstrated implicitly through the process of evolution the European Union has already undergone, from the common market through to the enlarged Union of today.

This 'postmodern' identity is ideally suited to soften the warring nationalist ideologies of the conflicting parties in Kosovo (and Serbia) and orient them towards a broader goal – which must be the role of the European Union in the region. According to Cooper, as the 'state' loses its paramount position in the local and international political order, then nationalist interests lose their dominance, allowing for a freer flow of discourse and a wider array of acceptable conclusions.<sup>148</sup> The United Nations, on the other hand, was conceived and borne of a time dominated by the 'modern', by the balance of power and the hierarchy of nation-states. Thus, in its current structure the UN is not suited for the larger task of creating a legitimate and reliable peace where exactly those two foundational characteristics are in open conflict. "To find permanent solutions we may need to think in terms of redefining identity. Only if a wider identity can be developed will there be a chance of constructing the kind of international community that may enable us to live with each other without war."<sup>149</sup> The European Union, having begun the process of ushering in the next phase of internationalism through its own unification, has the rhetorical and political strength – should it effectively master its own political ideologies and the very real domestic instabilities in Kosovo – as well as the economic resources to bring about a solution to

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<sup>146</sup> "In a postmodern order... state sovereignty is no longer seen as absolute." Cooper, pp. 29.

<sup>147</sup> *Ibid.*, pp. 44.

<sup>148</sup> *Ibid.*, pp. 50.

<sup>149</sup> *Ibid.*, pp. 87.

Kosovo that steps away from the nationalist conflicts. By doing so, the region will finally be able to work towards the ideal at the core of UNSCR 1244 (1999) and the UN Charter: a stable, prosperous, and democratic order in Kosovo for *all* inhabitants regardless of ethnicity.

## Bibliography

- Anan, Kofi. "Human Rights and Humanitarian Intervention in the Twenty-first Century" in *Realizing Human Rights: Moving from Inspiration to Impact*. Samantha Power and Graham Allison, editors. (New York: Pellgrave Macmillan, 2006), pp. 309-320.
- Andrić, Ivo. *The Bridge on the Drina*. Translated by Lovett F. Edwards. (Chicago: University of Chicago Press, 1977).
- Banac, Ivo. "The Politics of National Homogeneity" in *War and Change in the Balkans*. Brad K. Blitz, editor. (Cambridge: University Press, 2006), pp. 30-43.
- BBC News. "Full Text: Kosovo Declaration" on February 17, 2008. Available at <http://news.bbc.co.uk/2/hi/europe/7249677.stm> (accessed 5 February 2009).
- Blitz, Brad K. "War and Change" in *War and Change in the Balkans*. Brad K. Blitz, editor. (Cambridge: University Press, 2006), pp 1-12.
- Brand, Marcus. "Effective human rights protection when the UN 'becomes the state': lessons from UNMIK" in *The UN, Human Rights and Post-Conflict Situation*. Nigel D. White and Dirk Klaasen, editors. (Manchester: Manchester University Press, 2005).
- Brooks, Rosa Ehrenreich. "Failed States, or the State as Failure?" in *The University of Chicago Law Review*, vol. 72, No. 4 (Autumn, 2005), pp 1159-1196.
- Bull, Carolyn. *No Entry Without Strategy: Building the Rule of Law Under UN Transitional Administration*. (Tokyo, New York, Paris: United Nations University Press, 2008).
- Caplan, Richard. *A New Trusteeship? The International Administration of War-torn Territories*. (Oxford: University Press for the International Institute for Strategic Studies, 2002).
- Cerone, John. "Reasonable measures in unreasonable circumstances: a legal responsibility framework for human rights violations in post-conflict territories under UN Administration" in *The UN, Human Rights and Post-Conflict Situation*. Nigel D. White and Dirk Klaasen, editors. (Manchester: Manchester University Press, 2005), pp. 42-80.
- Chesterman, Simon. *You, The People: The United Nations, Transitional Administration, and State-Building*. (Oxford: University Press, 2004).
- Clark, Janine N. *Serbia in the Shadow of Milosevic: The Legacy of Conflict in the Balkans*. (London: Tauris Academic Studies, 2008).

- Constitution of the Republic of Serbia. Available at [http://www.srbija.gov.rs/cinjenice\\_o\\_srbiji/ustav.php?pf=1&url=%2Fcinjenice\\_o\\_srbiji%2Fustav.php%3Fpf%3D1%26](http://www.srbija.gov.rs/cinjenice_o_srbiji/ustav.php?pf=1&url=%2Fcinjenice_o_srbiji%2Fustav.php%3Fpf%3D1%26) (accessed 1 May 2009)
- Cooper, Robert. *The Breaking of Nations: Order and Chaos in the Twenty-First Century*. (London: Atlantic Books, 2004).
- “Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo” in *Official Journal of the European Union L 42/92, February 16, 2008*.
- Dworkin, Ronald. *Is Democracy Possible Here? Principles for a New Political Debate*. (Princeton, New Jersey: Princeton University Press, 2006).
- European Stability Initiative. “The Lausanne Principle: Multiethnicity, Territory and the Future of Kosovo’s Serbs.” Berlin/Priština 7 June 2004. [http://www.esiweb.org/pdf/esi\\_document\\_id\\_53.pdf](http://www.esiweb.org/pdf/esi_document_id_53.pdf) (accessed 4 May 2009).
- Freedom House. Mission Statement. <http://www.freedomhouse.org> (accessed 4 March 2009).
- Fukuyama, Francis. *State-Building: Governance and World Order in the 21<sup>st</sup> Century*. (Ithaca, New York: Cornell University Press, 2004).
- Holohan, Anne. *Networks of Democracy: Lessons from Kosovo for Afghanistan, Iraq and Beyond*. (Stanford: University Press, 2005).
- Human Rights Watch. *Failure to Protect: Anti-Minority Violence in Kosovo, Mar 2004*. Vol. 16. No. 6 (D) July 2004.
- \_\_\_\_\_. *Better Late than Never*. Number 2, June 2007.
- Huntington, Samuel P. *Political Order in changing Societies*. (New Haven, Conn.: Yale University Press, 2006).
- Judah, Tim. *History, Myth and the Destruction of Yugoslavia*. (New Haven, Conn.: Yale University Press, 1997).
- \_\_\_\_\_. *Kosovo: What Everybody needs to Know*. (Oxford: University Press, 2008).
- Kelly, Michael. “The UN, security and human rights: achieving a winning balance” in *The UN, Human Rights and Post-Conflict Situation*. Nigel D. White and Dirk Klaasen, editors. (Manchester: Manchester University Press, 2005), pp. 118-148.
- Kenny, Karen. “UN accountability for its human rights impact: implementation through participation” in *The UN, Human Rights and Post-Conflict Situation*. Nigel D. White and Dirk Klaasen, editors. (Manchester: Manchester University Press, 2005).
- King, Iain and Whit Mason. *Peace at any Price: How the World Failed Kosovo*. (London: Hurst & Company, 2006).

Knoll, Bernhard. "From Benchmarking to Final Status? Kosovo and the Problem of an International Administration's Open-Ended Mandate" in *The European Journal of International Law* Vol. 16, No. 4 (2005).

\_\_\_\_\_. *The Legal Status of Territories Subject to Administration by International Organizations*. (Cambridge: University Press, 2008). Lijphart, Arend. *Democracy in Plural Societies: A Comparative Exploration*. New Haven: Yale University Press, 1977).

Kosovar Stability Initiative (IKS). "Who's the Boss – Discussion Paper" 3 December 2008. [www.iksweb.org](http://www.iksweb.org) (accessed 26 April 2009).

\_\_\_\_\_. "Image matters! Deconstructing Kosovo's Image Problem". Forum 2015, Editor. November 2008.

Malcolm, Noel. "The War over Kosovo" in *War and Change in the Balkans: Nationalism, Conflict and Cooperation*. (Cambridge: University Press, 2006), pp. 143-55.

Megret, Frederic and Florian Hoffmann. "the UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human rights Responsibilities" in *Human Rights Quarterly*, Vol. 25, No. 2 (May, 2003), pp 314-342.

Peter, Laurence. "EU to operate 'all over Kosovo'" BBC News, 2 December 2008. Available online at <http://news.bbc.co.uk/2/hi/europe/7761403.stm> (accessed 15 February 2009).

Popovic, Srdja. "Milosevic's Motiveless Malignancy" in *War and Change in the Balkans*. Brad K. Blitz, editor. (Cambridge: University Press, 2006), pp. 44-56.

Power, Samantha. *A Problem from Hell*. (New York: Basic Books, 2002).

Republic of Kosovo Ombudsperson Institution. *Eighth Annual Report, 2007-2008*. Available online at [www.ombudspersonkosovo.org](http://www.ombudspersonkosovo.org) (accessed 15 February, 2009).

UN Doc. A/63/PV. 22, available at [www.un.org](http://www.un.org) (accessed March 4, 2009).

UN Doc. S/RES/1244 (1999), available at [www.un.org](http://www.un.org) (accessed March 4, 2009).

UN Doc. S/2004/348, available at [www.un.org](http://www.un.org) (accessed March 4, 2009).

UN Doc. S/2005/635, available at [www.un.org](http://www.un.org) (accessed March 4, 2009).

UN Doc. S/2007/168/add.1, available at [www.un.org](http://www.un.org) (accessed March 4, 2009).

Verdirame, Guglielmo. "UN accountability for human rights violations in post-conflict situations" in *The UN, Human Rights and Post-Conflict Situation*. Nigel D. White and Dirk Klaasen, editors. (Manchester: Manchester University Press, 2005), pp. 81-97.