Introduction

State autonomy is said to be a fundamental principle of international law.[1] At the heart of the autonomy principle lies a guarantee that nations will enjoy self-government – the capacity to make political, social, economic and other policy decisions without external interference.[2] In order for a state even to come into existence it must have the means to exercise autonomy, namely a government.[3] Autonomy was the great

[1] See Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int'l L. 529, 530 (1993) ("State autonomy continues to serve the international system well in traditional spheres of international relations. The freedom of states to control their own destinies and policies has substantial value: it permits diversity and the choice by each state of its own social priorities."). "Autonomy" is a compound idea, encompassing principles of state juridical equality, freedom from external intervention and a state's discretion to take decisions affecting territory over which it exercises jurisdiction. See UN Charter, art. 2(1) (juridical equality of all member states); *ibid.* art. 2(4) (prohibition of use of force against "the territorial integrity of political independence of any State"); *ibid.* art. 2(7) (except when Security Council acts under collective security provisions, UN shall not "intervene in matters which are essentially with the domestic jurisdiction of any State"). These various rights create the conditions necessary for autonomous decision-making.

[2] See *Military and Paramilitary Activities (Nic.* v. *US) (Merits)* 1986 ICJ Rep. 14, at 131 ("A state's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligation of international law. Every State possesses a fundamental right to choose and implement its own political, economic and social systems."); Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law 383-4 (9th edn, 1992) ("In consequence of its internal independence and territorial authority, a state can adopt any constitution it likes, arrange its administration in any way it thinks fit, enact such laws as it pleases. . .subject always, of course, to restrictions imposed by rules of customary international law or by treaties binding upon it.").

[3] See James Crawford, The Creation of States in International Law 56 (2d edn, 2006) (stating because "territorial sovereignty is not ownership of but governing power with respect to, territory," there is "a good case for regarding government as the most important single criterion of statehood, since all the others depend upon it").

rallying cry of the decolonization movement of the 1950s and 60s; in the words of a landmark General Assembly resolution, it was the belief in the "inalienable right" of all peoples "to complete freedom, the exercise of their sovereignty and the integrity of their national territory."[4]

Of course, autonomy is by no means absolute. For one, legal protection of human rights circumscribes state discretion when individual freedoms are at stake. Some have also written of a right to democratic government, calling into question states' freedom to select their leaders in any way they choose.[5] And in the post-Cold War era, a concern with destructive civil wars has led the international community to address a wide variety of domestic political questions when assisting in post-war reconstruction efforts.[6] But despite the decreasing number of *issues* subject to exclusive domestic jurisdiction, international law has generally not been understood to reach a state's *capacity* for self-government.

That assumption is now under challenge. In Kosovo, Bosnia, East Timor and Eastern Slavonia, with important variations in each case, international actors have effectively *become* national governments. Moving beyond condemnation of particular policies or practices, and well beyond mediation between parties to civil wars, beginning in the mid-1990s, the United Nations and other international bodies entirely replaced the legal authority of national governments in these territories. The veil of state sovereignty was fully pierced. No national governing authorities stood between the legal power of international actors and the individual citizens over whom they ruled.

The first of these missions was to Bosnia-Herzegovina, whose civil war ended with the 1995 Dayton Accords.[7] The Accords created an international High Representative as the supreme and final legal authority in the state.[8] The Representative's powers came to include the ability to remove elected leaders from office as well as to impose and veto national legislation.[9] The second occupation was in Eastern Slavonia

[4] GA Res. 1514 (XV) (Dec. 14, 1960).
[5] See Democratic Governance and International Law 123 (Gregory H. Fox and Brad R. Roth eds., 2000).
[6] See Ending Civil Wars (Stephen John Stedman, Donald Rothchild and Elizabeth M. Cousens eds., 2002); Peacebuilding as Politics: Cultivating Peace in Fragile Societies (Elizabeth M. Cousens and Chetan Kumar eds., 2001).
[7] General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 75 (1995).
[8] *Ibid.* Annex 10.
[9] See International Crisis Group, Bosnia's Nationalist Governments: Paddy Ashdown and the Paradoxes of State Building (2003).

and surrounding areas of Croatia, where, in 1996, the UN supervised the return of a largely Serbian area to Croatian government control.[10] The third occupation was in Kosovo, a province of the Federal Republic of Yugoslavia. In 1999, a brutal campaign against the local Albanian population led to bombing by NATO forces and ultimate agreement by the Yugoslav authorities to surrender control over the territory to an "interim international administration."[11] Yugoslavia thereby lost all legal authority to act against the Kosovars: virtually all its military, police and administrative officials were withdrawn; UN officials acquired the power to preempt Yugoslav law as well as restructure Kosovo's judicial system; and Kosovo's borders came under the control of NATO troops.

Finally, in East Timor in 1999, following rampages by Indonesian-backed militias opposed to Timorese independence, the UN assumed full governmental control over the territory.[12] Its authority lasted until East Timor became independent on May 20, 2002.[13] The UN's capacity to act on behalf of East Timor was so complete that UN officials convened war crimes tribunals to try militia leaders and signed a treaty on East Timor's behalf.[14]

This book examines these remarkable initiatives. They represent a phenomenon I will call "humanitarian occupation." Others use terms such as "international territorial administration," "internationalized territory" and "neo-trusteeship." "Humanitarian occupation" is an effort to capture more precisely two salient characteristics of the missions. First, their purpose has been to end human rights abuses, reform governmental institutions and restore peaceful coexistence among groups that had recently been engaged in vicious armed conflict. In this sense, they are "humanitarian." The missions are social engineering projects that

[10] See Basic Agreement on the Region of Eastern Slavonia, Baranja, and Western Sirmium, Nov. 12, 1995, available at www.usip.org/library/pa/croatia/croatia_erdut_11121995.html; SC Res. 1037 (Jan. 15, 1996) (approving transitional administration for Eastern Slavonia as outlined in the Basic Agreement).

[11] See SC Res. 1244 (June 10, 1999). See generally KOSOVO AND THE INTERNATIONAL COMMUNITY (Christian Tomuschat ed., 2002).

[12] See SC Res. 1264 (Sept. 15, 1999) (creating UN mission); IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR (2001).

[13] See SC Res. 1392 (Jan. 31, 2002) (stating UN mission to terminate upon Timorese independence).

[14] See UNTAET Regulation No. 2000/15 (creating East Timorese courts with jurisdiction over genocide, war crimes, crimes against humanity, murder, sexual offenses and torture committed between January 1 and October 25, 1999); Memorandum of Understanding between East Timor and Australia - Timor Sea Arrangement (July 5, 2001) (governing petroleum activities in seabed between East Timor and Australia).

take international standards of human rights and governance as their blueprints. They may indeed be seen as the most far-reaching efforts at implementing those and other norms of social relations the international community has ever mounted. Second, the governing authority assumed by the international administrators is quite similar to the de facto authority of traditional belligerent occupiers. Both are outsiders to the territory they control, both assume ultimate legal authority and both are avowedly temporary. Just as occupiers under humanitarian law do not assume "sovereign" powers over territory, the Security Council has consistently affirmed the sovereignty of the host state in creating humanitarian occupation missions. "Humanitarian occupation," then, may be defined as the assumption of governing authority over a state or a portion thereof, by an international actor for the express purpose of creating a liberal, democratic order. In all the cases except Bosnia, the international actor has been the United Nations.

I. Why humanitarian occupation?

The phenomenon of humanitarian occupation poses two fundamental questions. The first is why the international community would take the remarkable step of effectively inverting accepted notions of state sovereignty. Most international lawyers accept a clear division between the international and the domestic. Traditionally, the division was territorial: virtually everything done within national borders was a matter of domestic jurisdiction.[15] Today there are few such clear distinctions, as international law has come to regulate extensively within states on a range of topics that defies neat categorization. But the idea still remains that national governments are responsible, first and foremost, for prescribing and enforcing law for inhabitants in their territories. Even the most extensive international regulatory schemes oversee acts of states,

[15] As Charles Evans Hughes wrote in the Island of Palmas arbitration:

> Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state. The development of the national organization of states during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the state in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.

The Island of Palmas (US-Neth.) (April 4, 1928) (Hughes, sole arbitrator), reprinted in 22 Am. J. Int'l L. 867, 875 (1928).

and compliance is achieved when state institutions act in accord with international standards.

Humanitarian occupation fundamentally rejects the division of competences between the domestic and the international spheres. When international actors become national governments, legislate new rules for citizens, engage in law enforcement, stamp passports, enter into international agreements and in other ways act on behalf of the state, there is little meaningful distinction between the national and the international. For three of the four territories under humanitarian occupation, the supreme national legislature was the United Nations Security Council, whose Chapter VII resolutions shaped the mandate of the missions exercising control. In Bosnia, the Security Council commended the work of the international High Representative, who regularly rejected laws passed by national and provincial legislatures, imposed laws those bodies refused to pass and removed elected leaders from office deemed to be obstructing implementation of the Dayton Accords. While the Council also affirmed the sovereignty and territorial integrity of the states under humanitarian occupation, these statements were legal fictions having little relation to the reality that final governmental authority had been internationalized.

What could account for this remarkable step? A number of answers suggest themselves. First, all of the missions have been to states in which brutal internal conflicts had just ended. Civil wars became the dominant security concern of the United Nations in the 1990s, and for good reason. Fifty-seven armed conflicts were fought from 1990–2005, only four of which were between states (Eritrea-Ethiopia; India-Pakistan; Iraq-Kuwait; Iraq-US and allies). The other fifty-three occurred within states and concerned either control of government (thirty conflicts) or control over territory (twenty-three conflicts).[16] While the Cold War stalemate effectively prevented the United Nations from addressing civil wars in any meaningful fashion, the opening of the early 1990s created opportunities for genuine efforts at their resolution. Thus, part of the explanation for humanitarian occupation is simply that vastly more opportunities arose after 1989. Societies in which political and social institutions had collapsed and sub-state groups demonized each other quickly came to preoccupy the Security Council. One could argue that where lesser

[16] Lotta Harbom & Peter Wallensteen, *Patterns of Major Armed Conflicts, 1990-2005,* in Stockholm International Peace Research Institute (SIPRI) Yearbook 2006: Armaments, Disarmament and International Security 108 (2006).

forms of intervention were inadequate to remedy the absence of moderating political authority in post-conflict states, humanitarian occupation became the logical next step.

But an enhanced opportunity to intervene in civil wars does not explain why intervention took place. So a second explanation is that the nature of civil wars prompted humanitarian occupation. International law substantially predating the end of the Cold War addressed virtually all the tactics typical of group-based struggles for power. Dominant groups have sought to exterminate their opponents, place them in a permanent subordinate status (such as in apartheid South Africa), forcibly expel minority populations and enter into population exchange agreements with other states. Human rights law has now taken all of these tactics off the table as possible "solutions" to group-based conflict. While one cannot empirically demonstrate a cause and effect relationship between these well-established norms and humanitarian occupation, states supporting the occupations repeatedly justified their votes in the Security Council on the grounds that these tactics were unacceptable. Efforts to homogenize a state population had become sufficiently odious that, at the very least, a compelling case for intervention arose when those efforts were employed.

There is yet another piece missing in this explanation. States can be homogenized by the tactics described above, or by simply dismantling the state altogether. Several of the conflicts to which humanitarian occupation was directed – Bosnia and Kosovo – involved secessionist movements. If secession were an acceptable means of dividing groups that appear unable to coexist within a single state, outside intervention would be unnecessary in order to make the state a viable whole. Groups finding no home for their interests in the existing state would simply leave. Alternatively, the competing groups might negotiate a partition to accomplish the same end. But this tactic has not been acceptable. Even prior to the interventions in Bosnia and Kosovo, the Security Council repeatedly affirmed the territorial integrity of the states concerned and the missions themselves worked on many fronts to dampen secessionist impulses.[17] This dedication to existing borders, like the rejection of

[17] After eight years of international administration, a Special Envoy of the UN Secretary-General proposed a form of supervised independence for Kosovo in March 2007. *Report of the Special Envoy of the Secretary-General on Kosovo's Future Status*, UN Doc. S/2007/168 (2007). But as of this writing, innumerable obstacles stand in the way of realizing his proposal, most notably a Russian veto in the Security Council and Serbian opposition. And the legal effect of Kosovar independence, even if it came to

homogenization tactics, is now well-grounded in international law. A legal entitlement to secession has little, if any normative support and secessionist groups have found virtually no support from multinational institutions.

Taken together, these three factors suggest humanitarian occupation is a profound expression of support for maintaining existing borders and demographic profiles. The international community could have followed countless episodes in history and allowed groups to dominate their rivals or permitted the states to fragment or even disappear. That the Security Council took the exceptional step of assuming governing control over these territories suggests a deep commitment to preserving existing states, but equally to a model of the state embodied in the human rights and territorial integrity norms. Quite simply, it is a vision of existing states made viable through liberal democratic efforts.

Apart from skepticism over the particulars of this conclusion, there is likely to be reaction to its more general implication: that international law is interested in preserving the state at all. Reports of the demise of a state-centric international legal system are by now old news to international lawyers and international relations theorists. Since the end of the Cold War, as one study quotes, authors have "pictured sovereignty as perforated, defiled, cornered, eroded, extinct, anachronistic, bothersome, even interrogated."[18] But the central objective of humanitarian occupation is the rehabilitation of a state. Indeed, the territories subject to humanitarian occupation are the most dysfunctional contemporary examples of statehood. Their breakdown has generally involved vast human suffering. If any states were candidates for a normative shift away from state-centrism it is the occupied states discussed here. Yet the missions are instead projects of state-building. Seen in this light, I will argue in later chapters, and contrary to much recent literature, humanitarian occupation represents an important affirmation of the state's centrality to the international legal order.

The norms supporting the continuity of existing states thereby create an essential role for humanitarian occupation. In essence, the norms prescribe only one solution for states imploding in group-based violence: a

fruition, is far from clear, as the Special Envoy himself stated repeatedly that Kosovo was not a precedent for permitting secessions elsewhere. See e.g., *ibid.* at 4 ("Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts.")

[18] Michael Ross Fowler and Julie Marie Bunck, Law, Power and the Sovereign State 2 (1995) (citations omitted).

cooperative political system that both allows participation by all factions and protects discrete ethnic, religious or other minority groups from persecution.[19] Standing on its own, this would seem a recipe for continued mayhem. A "democratic" solution to internal conflict can only be proposed seriously if the international community also commits to constructing inclusive and egalitarian governing institutions for the state as well as serving, at least initially, as an on-site guarantor of their functioning.[20] As Michael Ignatieff has written, "It is still necessary to protect individuals from tyrannously strong states; but there is now the additional need to create states strong enough to protect their citizens."[21] Most of the rejected alternatives to heterogeneity (secession, partition, mass expulsion, etc.) could be largely self-implementing. Creating a pluralist democracy in societies brimming with group hatreds cannot. As Doyle and Sambanis observe, "deep hostility, multiple factions, or lack of coherent leadership may complicate the achievement of self-enforcing cooperation. Conscious direction by an impartial agent to guarantee the functions of effective sovereignty becomes necessary."[22]

II. Legal Justifications

The second question concerns the legal basis for humanitarian occupation. Each of the missions to date has been justified on two grounds: an agreement with the host state and a resolution of the United Nations Security Council under Chapter VII of the Charter. Neither has been closely examined, and perhaps for good reason. Ordinarily, there is nothing controversial about a state consenting to foreign forces on its territory. Nor is there legal objection to states voluntarily ceding functions

[19] Such systems are not monolithic and have come in many varieties, such as federal and consociational. See RUTH LAPIDOTH, AUTONOMY: FLEXIBLE SOLUTIONS TO ETHNIC CONFLICTS (1997); David Wippman, *Practical and Legal Constraints on Internal Powersharing*, in INTERNATIONAL LAW AND ETHNIC CONFLICT 211–41 (David Wippman ed., 1998).

[20] As Thomas Friedman wrote in the midst of the Kosovo crisis:

> NATO says it wants three things in Kosovo - multi-ethnicity, democracy and a very small NATO/U.S. presence. But when you have two intermingled populations that fear and loathe each other, as you do in Kosovo, you can only have two out of three. You can have multi-ethnicity and democracy, but only with a large NATO presence that puts a policeman on every corner.

Thomas L. Friedman, *Kosovo's Three Wars*, NY TIMES, Aug. 6, 1999, at A19.

[21] Michael Ignatieff, *The Rights Stuff*, NY REV. BKS, June 13, 2002, at 18, 20.

[22] Michael W. Doyle and Nicholas Sambanis, *International Peacebuilding: A Theoretical and Quantitative Analysis*, 94 AM. POL. SCI. REV. 779, 781 (2000).

of government to outsiders, as Liechtenstein and San Marino have done with their foreign policies.[23] And most commentators find few, if any, legal limits on the Security Council's Chapter VII authority. But significant questions arise for both justifications.

First, the "consent" to humanitarian occupation occurs in an unusual setting. All of the missions have been designed to move beyond mere conflict resolution and address the root causes of political dysfunction in states. They seek to create institutions designed to redirect group hostilities into democratic processes. This effort to replace war with politics gave rise to the term "peace-building," now widely used in UN circles.[24] Yet new democratic institutions create potent mechanisms for citizens to confront the very regimes consenting to the missions. In particular, democratic elections may oust the regimes entirely or lead to declarations of illegitimacy should they lose an election but refuse to leave office. Henry Steiner describes how rights regimes can become progressively more threatening to those agreeing to their creation:

> The stakes for power rise as we move further along the spectrum of human rights. The major human rights instruments empower citizens to "take part" in government and to vote in secrecy in genuine, periodic, and nondiscriminatory elections. In given circumstances, an authoritarian government can stop torturing and arresting without surrendering its monopoly of power. As events in Eastern Europe illustrate, however, such a government cannot grant the right to political participation without signing its death warrant. "Throw out the rascals" speaks the more dramatically after decades of unchosen and oppressive regimes.[25]

As Steiner suggests, the further one moves along this spectrum, the less the incentive exists for governments to consent to intervention. Adept diplomats, of course, have other options at their disposal.[26] But creative diplomacy has its limits. Especially when a conflict is ongoing

[23] See Jorri C. Duursma, Fragmentation and the International Relations of Micro-States 160-63, 222-3 (1996).

[24] See Hugh Miall, Oliver Ramsbotham and Tom Woodhouse, Contemporary Conflict Resolution 185-237 (1999).

[25] Henry J. Steiner, *Book Review, The Youth of Rights*, 104 Harv. L. Rev. 917, 930 (1991), reviewing Louis Henkin, The Age of Rights (1990).

[26] Peace agreements may establish power-sharing arrangements or particular electoral systems that guarantee all players a stake in the immediate post-war government. And human rights enforcement may be put in the hands of international or quasi-international bodies that are perceived by the government to be sufficiently neutral that they are as likely to constrain opposition groups as they are the government. These tactics may successfully reassure governments that they are not consenting to their own demise in agreeing to UN reconstruction missions.

and the government believes it has a good chance of prevailing, only the threat or use of military force may suffice. If all governance missions carry the potential to threaten the continued authority of the parties granting consent, even if the threat can be artfully mitigated in some cases, there is cause to be suspicious about the legitimacy of consent.

And indeed, elements of coercion surround the consent given for each of the humanitarian occupation missions. In Kosovo and Bosnia agreement was secured by NATO bombing campaigns. In the other cases, different forms of pressure were applied. The international law of treaties renders coerced agreements void ab initio.[27] Is this fatal to the consent rationale? Peace agreements are generally understood to stand outside the anti-coercion rule, since they are often coercive by their very nature. But that exception has only been applied to inter-state agreements, not agreements involving sub-state actors whose status as "treaties" is far from clear. Moreover, the peace agreement exception is limited to coercion by lawful force.[28] The force used to secure consent to humanitarian occupations has usually been authorized by the Security Council, and would likely be considered unlawful if undertaken without Council approval.[29] This means the "lawfulness" of the force is dependent on the lawfulness of the Council's actions, an entirely separate legal question.

The second justification is such a Chapter VII resolution. Since the end of the Cold War, the Council has vastly expanded its Chapter VII powers, to the point where few, if any, legal limits can be discerned. But the Council cannot have unlimited powers, for example, to order genocide, apply economic sanctions to the point of starving a civilian population or ordering forces under UN command to execute prisoners of war. Like all international organizations, the UN enjoys powers commensurate with the goals envisioned by its founders, and such violations of fundamental principles were not among those goals. If limits exist, the question becomes how they are to be defined and whether they are exceeded by the Council divesting a state of all control over some or all of its territory.

This inquiry takes several paths, but most usefully focuses on *jus cogens* norms – foundational international legal principles that cannot be

[27] Vienna Convention on the Law of Treaties, art. 52, May 23, 1969, 1155 U.N.T.S. 311.
[28] *Ibid.*
[29] The exception is Kosovo, where the Council did not approve the force that brought about agreement to the international presence. But because the Council approved the agreement itself in Resolution 1244 (June 10, 1999), the same goal was accomplished.