Introduction

The United Nations is, for good reasons, reluctant to assume responsibility for maintaining law and order, nor can it impose a new political structure or new state institutions.[3]

What we are involved in is nothing else than building up the whole state from scratch.[4]

The study *The Legal Status of Territories Subject to Administration by International Organisations* is the result of three years of research at the European University Institute in Florence, including one semester which I spent at Madison Law School. The idea of writing this book was conceived in Prishtina, Kosovo, in the winter of 2001. My daily professional exposure led me to apply to the EUI, thus responding to an urge to reflect more profoundly upon some of the legal implications of 'political trusteeship', and particularly on the assumption of temporary *imperium* over territory by the United Nations. In the hectic environment of the Office of the Chef de Cabinet of the resident OSCE Mission, I came to realise that a background theory for institution-building had to be found somewhere out there. Only a strong conceptual grounding, I believed, could provide a recipe for good practice, whether in Kosovo or in Afghanistan.

Ensuing conversations with friends and colleagues gravitated around some of the concepts that emerge and recur throughout this book: standards, status, sovereignty, representation of territory, self-determination, internationalism, rule of law, legitimacy, fiduciary obligation, sacred trust, accountability, legal personality and so forth. All these key terms turned out to appear in the writing of scholars who pronounced, eight

[3] Boutros Boutros-Ghali, *Supplement to an Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. A/50/60-S/1995/1 (3 January 1995), §14.

[4] Kosovo-based OSCE official, cited in Patrick Smyth, 'In Kosovo Everything from Teachers to Power Workers Must Be Provided', *Irish Times* (9 November 1999), at 14.

decades ago, on the 'experimentalism' with which the League of Nations had pursued its internationalisation projects. From this historical perspective, the idea of a re-emergence of trusteeships in the context of countering threats to international peace and security provided encouragement to probe deeper into the underlying assumptions of the concept of 'internationalisation'.

Yet, in fact, there is nothing resembling a 'grand theory' out there, nor do institution-building models wait on shelves, ready to be picked up on demand. Rather, as Senada Šelo correctly observes in her thesis on international institution-building in Bosnia, such models are 'crafted through trial and error process, sculpted by a long succession of moves, deadlocks, and breakthroughs'.[5] However, back in that long harsh winter of 2001 in Kosovo – a terrain shaped in the form of a diamond, yet utterly unglamorous – I decided to analyse aspects of the evolution of international law and the ways in which it shaped various models of international administration.

The following thematical preface introduces the reader to the discursive fields in which the issues under consideration currently undergo academic treatment. One concerns the ways in which generic tools and models for reconstructing societies can be assembled and applied across the board; the other relates to the exercise of new competencies by the international community and the use of terminology to describe some of its excesses.

I.1 International administrations and the discourse of empire

Since the mid-1990s, the UN and other multilateral bodies have asserted authority for the administration of war-torn territories and shouldered the responsibility of placing them on the trajectory of political change. The far-reaching engagement of the UN in the process of state- and institution-building was the result of an increased multilateral effort to create democratic institutions and market economies as a basis for sustainable peace in societies exiting conflict. As such, these efforts were facilitated by a changed architecture of security in the post-Cold War era[6]

[5] Senada Šelo Šabić, *State-Building Under Foreign Supervision: Bosnia-Herzegovina 1996–2003* (PhD thesis, on file with the EUI, 2003), at 121.

[6] Cf., generally, Richard Haass, *Intervention. The Use of American Military Force in the Post-Cold War World* (Washington, DC: Carnegie Endowment, 1999), 16; Karin von Hippel, *Democracy by Force. US Military Intervention in the Post-Cold War World* (New York:

and the redefinition of the notion of 'threat to the peace' in Art. 39 of the UN Charter, resulting in an extension of the Security Council's enforcement powers to internal armed conflicts and grave humanitarian crises.[7] The authorisation of peace-building operations, characterised by a growing use of powers under Chapter VII of the UN Charter, and at the same time by an increasing willingness to apply diverse enforcement measures under Art. 41, has grown both quantitatively and qualitatively.[8] This development occurred as chronic political instability, or even the outright implosion of states, posed a challenge to the international legal order.

The growing number of international organisations involved in 'state-building', and the scope of authority they exercise, raises a number of important questions under international law – as to the status of UN-administered territories, the nature of UN authority, its legal basis in the UN Charter and its limitations, for example. Among scholars, these new approaches to conflict management have ignited a debate over the fundamental purposes of such practice and the extent to which policy-making towards those ends can be improved. In this discourse, it has become commonplace to observe that in the life-cycle of an international territorial administration, there comes a time when the domestic political system has developed to the point where local politicians become critical and suspicious of the continued discharge of public authority by the international organ. Their ensuing calls for an end to foreign dominance generates vastly different responses. They may be addressed by a continuous devolution of power (as in East Timor under international tutelage), or by a renewed assertion of international power (as exemplified in Bosnia in its twelfth year under close international supervision).

A cursory review of relevant literature indicates that the 'rule by decree' approach to international institution-building has lost much of its appeal. Critics have compared the international community's assertion of authority in Bosnia to the British Raj in early nineteenth-century

Cambridge University Press, 2000); and James Dobbins *et al.*, *The UN's Role in Nation-Building. From the Congo to Iraq* (Santa Monica, CA: RAND Corporation, 2005).

[7] For a general discussion, cf. Danesh Sarooshi, *The United Nations and the Development of Collective Security. The Delegation by the Security Council of Chapter VII Powers* (Oxford: Oxford University Press, 1999).

[8] For enforcement measures, cf. David Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter. Legal Limits and the Role of the International Court of Justice* (The Hague: Kluwer Law International, 2001), at 51.

India, likening the international High Representative to an 'uncomfortable caricature of a Utilitarian despot'.[9] There, the ongoing imposition of legislation is seen to deprive local political institutions of any responsibility and reduces elected assemblies to toothless bodies rubberstamping legislation not of their own making. Referring to its transitional administration of East Timor, Jarat Chopra analogised the competences of the Special Representative of the UN Secretary-General to those of 'a pre-constitutional monarch in a sovereign kingdom'[10] where models of good governance are developed through the discharge of 'benevolent despotism'. Likewise, Justice Goldstone concluded that an over-broad international authority in Kosovo would be 'a mistake of the colonial mentality'.[11] From this vantage point, the internationally supervised political reconstruction of Kosovo and Bosnia appears evocative of the 'White Man's Burden' that proved a powerful justification of nineteenth-century empires.[12]

Recent criticisms of the international administration of territory follow a thread of thought that can be traced back to Edmund Burke's eloquent formulation of the fiduciary duties of a colonial power, and the notions of accountability to which the latter must be subject.[13] Following Burke, present writing on the topic is mostly concerned with elaborating the argument that progress towards developing democratic structures is, through a process of local mimicry, bound to remain slow and incomplete if the means employed towards that end resemble

[9] For a 'neo-Burkean' critique of the interventionist paradigm interpreted as imperialist concept in disguise, see Gerald Knaus and Felix Martin, 'Travails of the European Raj: Lessons from Bosnia and Herzegovina', 14:3 *Journal of Democracy* 60–74 (2003), 66–67. Cf. also European Stability Initiative, *Reshaping International Priorities in Bosnia and Herzegovina. Part 2. International Power in Bosnia* (March 2000).

[10] Jarat Chopra, 'The UN's Kingdom of East Timor', 42:3 *Survival* 27–36 (2000), at 27–28.

[11] Goldstone, quoted by Jacob Kreilkamp, 'UN Postconflict Reconstruction', 35 *NYUJILP* 619–670 (2003), at 668.

[12] For BiH, cf. David Chandler, *Bosnia: Faking Democracy After Dayton* (London: Pluto Press, 1999), at 64. Accordingly, Europe is regularly charged with 'postcolonial imperialism' in its neighbourhood. Cf., e.g., Ian Johnstone, *UN Peacebuilding: Consent, Coercion and the Crisis of State Failure. From Territorial Sovereignty to Human Security* 186 (*Proceedings of the Annual Conference of the Canadian Council of International Law*, 2000), at 196. A similarly stereotypical image of peace-building is painted by Roland Paris, 'International Peacebuilding and the "*Mission Civilisatrice*"', 28 *RIS* 637–656 (2002).

[13] Cf. his celebrated speech in the House of Commons in support of Charles Fox's motion to abolish the East India Company's dominion in India (1 December 1783), 'The Writing and Speeches of Edmund Burke', in *India: Madras and Bengal* (vol. V ed. P. J. Marshall, Oxford: Clarendon Press, 1981), at 385. See also Mark Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, 1926), at 330.

authoritarian administration.[14] Simon Chesterman phrases what he believes to be the central policy dilemma facing international administrations in the following way: 'how does one help a population prepare for democratic governance and the rule of law by imposing a form of benevolent autocracy?'[15]

'Participatory' models that include both in-built provisions for establishing a partnership with local institutions and constitutional structures tying international authority into the long-term interest of the governed population are frequently recommended as potentially more successful in the medium term and more sustainable in the long run.[16] Recent treatments of this subject matter emphasise the importance of good governance, accountability and legitimacy in the context of the international community's transitional administration of territory. In what appears to be an onslaught on the prevalent peacebuilding orthodoxy, Michael Ignatieff critiques what he terms the 'neocolonialist' aspects of international territorial administration and the tendency of international agents to 'perennialise' their stronghold over key competencies:

> The United Nations once oversaw discrete development projects. Now it takes over political and administrative infrastructure of entire nations and rebuilds them from scratch . . . [T]here is an imperial premise at work here: Wealthy strangers are taking upon themselves the right to rule over those too poor, too conflict-ridden, to rule themselves. If it is . . . imperialism, is it benign? Only if it succeeds: if [the territory] learns to rule itself, then these well-paid agents of the international conscience do themselves

[14] Cf. Richard Caplan, *A New Trusteeship? The International Administration of War-Torn Territories* (Oxford: Oxford University Press, 2004), at 54–55.

[15] Simon Chesterman, *You, the People. The United Nations, Transitional Administration and State-Building* (Oxford: Oxford University Press, 2004), at 127. Cf. also the Report by the CoE Political Affairs Committee, *Strengthening of Democratic Institutions in Bosnia and Herzegovina* (Doc. 10196, 4 June 2004), §35. The report is an example of the excessive tone with which the CoE launches its diatribes against the HR. Referring to the HR's continuing authority to dismiss public officials that he finds in breach of the Dayton Agreements, the Rapporteur believed that 'such powers . . . are *reminiscent of a totalitarian régime*' (§39, emphasis supplied).

[16] Cf., generally, Ian Smillie (ed.), *Patronage or Partnership: Local Capacity Building in Humanitarian Crises* (Westport, CT: Kumarian Press, 2001); Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, DC: Carnegie Endowment for International Peace, 1999); UNDP, *Development Dimensions of Conflict Prevention and Peace-Building* (study prepared by Bernard Wood for the Emergency Response Division, New York: UNDP, 2001).

> out of a job. But no one knows if it will succeed. And the omens are not auspicious.[17]

These associations – 'benign imperialism', 'autocracy' reminiscent of a 'totalitarian régime', 'sovereign kingdom', 'absolutist monarchy', 'dictatorship of virtue' – and the authorities that rule them – 'benevolent despot', 'pre-constitutional monarch', 'neo-colonial administration'[18] – have considerable appeal. Not only are they easily comprehensible, they also gnaw away at internationalist legitimacy. Under closer scrutiny they do, however, harbour distinct and mutually exclusive identities. The fiduciary exercise of administrative powers with the authorisation of the UN Security Council differs significantly from imperial or colonial rule where tasks were carried out in the interest of the metropolitan power. Detached from the context of decolonisation, references to the alleged resurrection of the UN's Trusteeship system will also not suffice to capture the most important features of the phenomenon of internationalisation. As William Bain observes, it is impossible to confirm the 'reality' of a resurrected practice of trusteeship on account of the extraordinary executive and legislative powers exhibited in cases that are in fact constitutionally different. The attempt to 'trade on the paternal discourse of empire, which embraced trusteeship in a righteous mission of civilisation ordained by divine providence is, in this particular context misleading'.[19] One of the underlying themes of this study is that such metaphorical extensions and attempts to transpose, in a wholesale fashion, aspects of national democratic accountability, are indeed ill suited to capture the elusive phenomenon of international territorial administration and the peculiar ways in which it temporarily configures public life.

In a second, related discourse, it has become *en vogue* to proceed from Bosnia via Kosovo to East Timor (and extend the trajectory to Afghanistan

[17] Michael Ignatieff, *The Warrior's Honor. Ethnic War and Modern Conscience* (New York: Henry Holt, 1997), at 79–80.

[18] All previous characterisations mentioned here appear in the literature quoted above, except 'dictatorship of virtue' (in Robert Hayden, 'Why Political Union Cannot be Imposed by Foreign Powers. Bosnia: The Contradictions of "Democracy" Without Consent', 7:2 *EECR* (1998)), 'absolutist monarchy' (in Markus Benzing, 'Midwifing a New State: The United Nations in East Timor', 9 *Max Planck YUNL* 295–372 (2005), at 343), and 'benevolent despot' (in Gerald Knaus and Felix Martin, 'Wohlwollende Despoten', *FAZ*, 25 July 2003 (p. 9).

[19] William Bain, *Between Anarchy and Society. Trusteeship and the Obligations of Power* (Oxford: Oxford University Press, 2003), at 148 and 149.

and Iraq). The framework of international authority set up by the Dayton Peace Agreement for Bosnia and Herzegovina is regularly juxtaposed with that of UN Security Council Resolutions 1244 (1999) and 1272 (1999) that have mandated UNMIK and UNTAET, respectively. Contrasting scopes of authority, operational aims, bureaucratic organisation and endeavouring to cross-evaluate performance and measure the pace of devolution of competencies have become stalwart features of comparative studies of international institution-building. Yet, finding reliable ways to gauge these elements and analysing how they cluster at the level of whole polities usually proves difficult.[20] Comparing evidence of a policy's impact in one institution-building context with policies that are pursued under different local conditions is a tricky occupation indeed. The overwhelming number of items that would have to be correlated suggests that comparative studies can explain the impact of only a segment of institution-building policies. Further, attributing a variance in a situation to the operation of an institutional arrangement becomes more difficult the more one expands the observation timeframe. Take, for instance, the UN's transitional authority in East Timor, widely held up by the international community as a rare example of a UN success in nation-building: the breakdown of civil order, in spring 2006, forced it to reflect more critically upon the early closure of the UNTAET mission in 2002 and the impact of its efforts to build a self-sufficient nation.

Notwithstanding such methodological difficulties, proponents of comparative studies in international institutions and peace-building are eager to move rapidly from the realm of theory and disputation to the task of 'getting on with reality'. Those who 'model' international administration have allowed themselves in a number of instances to over-promise and to arouse expectations that will not be fulfilled in the immediate future. Operating in a world over-eager for prompt results,

[20] As Philippe Schmitter aptly remarked in what amounts to a substantial self-critique of his quality-of-democracy research, 'one type of organisation for which there exists data – whether it is trade unions or bowling societies – can be quite unrepresentative of collective actions that are occurring elsewhere in society' ('The Ambiguous Virtues of Democracy', 15:4 *Journal of Democracy* 47–60 (2004), at 50). For one of the few examples of a useful analysis comparing such administrations' activities within sector-specific competencies, see, however, Richard Caplan, *International Governance of War-Torn Territories. Rule and Reconstruction* (Oxford: Oxford University Press, 2005), at 45 *et seq*.

they frame sweeping recommendations concerning 'ingredients' for successful peace-building by suggesting standardised socio-economic 'tool-kits' – or even 'standard operating procedures' – that should aid the development of liberal democracy in internationalised territories.[21] In short, the elaboration of a generic framework for multilateral intervention – very much aimed at conceiving modules for a 'Government out of the Box' – has undoubtedly become an academic growth discipline in which its exponents make passionate assessments of the impact of 'models' of international territorial governance, yet refrain from examining its normative underpinnings.[22]

Passion is, however, a distortive lens that makes it hard to perceive the precise shape of things. By looking solely at 'output' variables, studies of international missions tend to ignore crucial aspects and dispositive issues that would contribute to a macro-performance analysis. As Noah Feldman remarked, the assumption that successful institutions can be built on the basis of a menu of options in which the nation-builder chooses a 'parliamentary system from column A, judicial review from column B, and a type of federalism from column C' is highly problematic.[23] The relative stability of the contents of such a tool-box over the twentieth century may represent a source of blindness for internationalists as it tempts them to place different conflicts in similar conceptual frames.[24] While broad organisational templates may be transferable, a state-building project is sensitive to the nature of the recipient and the local body politic.

Second, proponents of 'justice' and 'framework packages' for post-conflict administrative efforts have proven to pay scant attention to a

[21] For an example of such scattered analysis, see Outi Korhonen and Jutta Gras, *International Governance in Post-Conflict Situations* (Helsinki: Forum Juris, 2001), at 145 *et seq*. For further examples of sweeping generalisations on the legitimacy of models of 'proxy governance', see, e.g., Fen O. Hampson, 'Can Peacebuilding Work?', 30 *Cornell ILJ* 701–716 (1997), at 707 *et seq*.

[22] Cf. the report of the high-level workshop organised by the Crisis Management Initiative, *State-Building and Strengthening of Civilian Administration in Post-Conflict Societies and Failed States* (Helsinki, September 2004), at 22 *et seq*. Regarding further suggestions to the UN to put together model legislation in 'framework packages' for an emergency legal system, see also the recommendations in *Honoring Human Rights under International Mandates: Lessons from Bosnia, Kosovo, and East Timor* (Washington, DC: Aspen Institute, 2003), at 19.

[23] Noah Feldman, *What We Owe Iraq. War and the Ethics of Nation Building* (Princeton, NJ and Oxford: Princeton University Press, 2004), at 143, n. 23.

[24] Nathaniel Berman, 'Intervention in a "Divided World": Axes of Legitimacy', 19:4 *EJIL* 743–769 (2006), at 754.

much wider problem: following a Chapter VII authorisation, a coherent body of meta-rules applicable to the organisation of local justice and the review of international normative acts is sorely missing, as is the willingness of transitional administrators to swiftly correct those shortcomings. In short, while the 'rule of law' has gained widespread recognition as a panacea for problems associated with the aftermath of war, technocrats of peace-building have showered less attention on the issue of how, concretely, an international administration can be made subject to it. Advocates of prefab emergency constitutions spend even less time on conceiving an alternative legal design of mandates governing the process of long-term reconstruction, or on ways in which a polycentric institutional arrangement in which spheres of competence are divided between local and international institutions can provide favourable conditions for collective democratic action.

I.2 Methodological frames and structure

The task I have set myself in writing this book is decidedly more modest. Its objective consists in interrogating the idiosyncratic character of trusteeship and the multifarious ways in which it became subjected to legal appropriation by the international community in the twentieth century. In other words, this study is an exercise in exploring the legal background assumptions and frames that inform theories of international institution-building under temporary trustee administration. Its underlying objective is to rescue public international law from its abduction by pragmatic management. This seems particularly appropriate as the international system is rapidly developing, and experimenting with, new forms of political authority which enable it to effectively respond and directly participate in the governance of such territories with a view to restructuring their domestic constitutional order.[25] A discussion of the spatial response of the international community, namely its imposition of a temporary international 'trusteeship', will form the outer margins of the present study. However, the legal frameworks discussed cannot be analysed *in vacuo*. They are naturally related to the realm of *Vorstellungen*, ideas of how international society should be designed. In short, these conceptions are predicated upon two assumptions. The method of 'internationalisation' is informed by a

[25] Marcus Cox, *The Making of a Bosnian State: International Law and the Authority of the International Community* (PhD on file with the University of Cambridge, 2001), at 2.

substantive belief in the universality and rationality of international authority. As a corollary, internationalisation projects appear to be based on a paradigm that has its intellectual roots in what has been labelled 'liberal internationalism'.[26]

Being concerned with internationalisation of territory, this book is primarily a legal analysis, yet it is also a historical study to the extent that the League's Mandate system, through the evolution of fiduciary bonds as means of international governance, has structured the legal instruments available to international society today. The discussion does not purport to reflect upon the multiplicity of specific historic situations in which internationalisation was utilised, but merely intends to enable us to determine the typological locus of a historical and legal phenomenon. I thus aim to first approximate and then delineate some particular traits of an 'ideal type' of territorial internationalisation. At the same time, this study strikes at the heart of the current debate over the powers that the UN exercise both within an internationalised territory and from outside. Its supreme organ, the Security Council, is increasingly called upon to balance the sovereign's weight of the inviolable and static borders against indigenous bids at determining the dynamic 'self' in a people.

There are several different methods available to academic lawyers in order to carry out their pursuits. By looking at the ways through which international authority carries out internationalisation projects, I aim to explain how legal instruments have been designed in order to respond to a spatio-temporal need of the international community. I have adopted a broad topological style which interrogates where and how to 'locate' the background assumptions guiding the idea of international fiduciary administration, in legal and philosophical space. At the outset it is appropriate to caution the reader that the analysis presented here is, so to speak, 'undisciplined' in that it transgresses the academic boundaries between traditional international law, sociological jurisprudence and legal history. Accordingly, it strays in and out of the two academic territories of international law and the social sciences.

The study uses at least three 'archetypical' forms of propositions in classical international law method: the empirical form ('this is the practice of states'); the deductive or analytical form ('given a rule of

[26] Cf. Nathaniel Berman, 'Legalizing Jerusalem or, Of Law, Fantasy, and Faith', 45 *Catholic University LR* 823–835 (1995–1996), at 826, as well as Roland Paris, 'Peacebuilding and the Limits of Liberal Internationalism', 22:2 *International Security* 54–89 (1997), at 55.