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Regulatory Frameworks in International Law

HILARY CHARLESWORTH and CHRISTINE CHINKIN

Introduction

The traditional framework for regulation by rules and principles of international law is unsophisticated in comparison with that of national legal systems. Indeed, the threshold question often posed in introducing international law to generations of law students is 'Is international law really law?' A regulatory regime comprises standard-setting, monitoring compliance with the standards, and enforcement of the standards.[1] International law delivers on each of these criteria in a different way from national legal systems. The international legal system has no centralized law-making power for primary legislation, nor any forms of delegated legislation. Standards are typically set directly by the primary objects of international law, sovereign states. This means that international legal norms are highly negotiated, allowing considerable leeway for differences among states. International law offers few schemes of compulsory jurisdiction and no centralized enforcement mechanisms. Monitoring compliance with standards generally allows states broad discretion. Enforcement of international law typically appears as weaker and more porous than domestic law enforcement. The fact that international law does not neatly fit the command and control model of regulation has led some realist scholars of international relations to assert that legal norms are a mere frippery in international politics, used only to decorate a decision reached for overtly political ends, or to be conspicuously discounted.

The realist rejection of the regulatory force of international law has been challenged by 'liberal' international relations scholars who resist the monolithic view of the state and state power that realism adopts. Liberals look instead to the actions of individuals in diverse sectors within the state to determine how their behaviour—and hence that of the state—is influenced by international norms and expectations. On the one hand, technical and sectoral experts work through transnational government networks that are the 'tangible manifestation of a new era of trans-governmental regulatory co-operation'.[2] On the other hand, civil society groups operate across borders both to develop international legal standards

[1] Introduction to this volume.

[2] A.-M. Slaughter, 'Governing through Government Networks', in M. Byers (ed.), *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000), 177.

Regulating Law. Christine Parker, Colin Scott, Nocola Lacey and John Braithwaite.

and to monitor compliance with those that exist.[3] Both government networks and non-state actors, notably non-governmental organizations (NGOs), work through the mass of global and regional, general and specialist intergovernmental organizations (INGOs) that have been established, especially since 1945. INGOs provide the space and facilities for intergovernmental negotiation, for the bringing-together of technical experts, and the services of a specialist secretariat for the creation of new rules. For their part, international lawyers comfort themselves that they can validly claim the mantle of law either by showing that many international legal norms are accepted as binding without controversy, or that the language of legal discourse is regularly invoked in international relations.[4] The evolutionary trajectory of international legal reasoning has been from a limited conception of law in the domestic image to the generation of institutions and techniques responsive to the heterogeneity of international society.

Contemporary international law has evolved through an ever-growing array of regulatory instruments and mechanisms for enforcement that make it quite distinct from the traditional inter-state regime. The classic sources of international law—treaties and customary international law[5]—are supplemented by a range of instruments and techniques. Many such instruments are concluded within INGOs, especially where cross-border transactions require detailed regulations or where the effectiveness of the regulatory regime depends upon wide participation and cooperation. This was the case with what might be described as the first international regulatory regime—the Universal Postal Union, created in 1874 by the Treaty of Bern, to organize and enhance global postal services. Today international regulatory regimes for *inter alia* the environment, the control of disease, disarmament and weapons control, human rights, aviation, and maritime pollution all operate within and are developed under the supervisory mechanisms of specialist international institutions. Such institutions have developed their own legal cultures and these come into conflict with each other. For example, there is considerable debate about whether the institutions of international trade regulation (the World Trade Organization) should incorporate the norms of the international human rights bodies. States have to internalize sometimes conflicting principles and account for their implementation to different international institutions. State compliance is no longer seen primarily in terms of sovereignty, but rather in terms of participation, expertise, bureaucracy, and efficiency.[6]

Contemporary regulatory techniques include framework treaties allowing for subsequent detailed protocols to which parties must opt in or out;[7] secondary

[3] M. Keck and K. Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998).

[4] e.g. L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edn. (New York: Columbia University Press, 1979).

[5] Arts. 38(1)(a) and (b) of the Statute of the International Court of Justice, 1945.

[6] A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, Mass.: Harvard University Press, 1995).

[7] e.g. United Nations Framework Convention on Climate Change, 9 May 1992; Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 Dec. 1997; UNIDROIT

mechanisms such as the compliance procedures under environmental treaties;[8] binding agreements in non-treaty form, such as memorandums of understanding adopted between a broader range of actors than states.[9] 'Hard' international law in treaty form is supplemented by 'soft' law—non-binding self-regulatory codes of conduct and commitments,[10] and institutional regulatory codes.[11] Such is the prevalence of non-binding instruments and the degree to which they are formally integrated into the international legal system that actors do not appear to differentiate between them in terms of compliance.[12] These instruments may not be directed solely at states—the traditional actors possessing legal personality in international law—but may include INGOs, NGOs, individuals, and multinational corporations. The number of specialist international tribunals has increased exponentially and their jurisdiction encompasses a broad range of substantive and technical issues that would not previously have been regarded as appropriate for international regulation.[13] Alongside judicial and quasi-judicial systems there are also inspection systems,[14] reporting mechanisms,[15] fact-finding machineries,[16] and expert working groups and commissions. Nevertheless, through both the traditional sources of international law and newer forms of law-making, the international legal system still relies primarily on self-regulation. But this self-regulatory regime operates primarily in a public sphere. International law relationships tend to be subject to public scrutiny that may affect the participants' understanding of their relationship. For example, public debate

Convention on Interests in Mobile Equipment, Cape Town, 16 Nov. 2001; Protocol to the Convention on Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Cape Town, 16 Nov. 2001.

[8] For example, compliance mechanisms for the Convention for the Protection of the Ozone Layer, Vienna, 1985, were adopted in the Protocol on Substances that Deplete the Ozone Layer, Montreal, 1987 (as amended). Compliance mechanisms provide a combination of 'carrots' and 'sticks' in regulating state behaviour. In problem-solving mode they allow for financial incentives and technical assistance, while allowing for sanction by the Meeting of the Parties.

[9] e.g. Framework for Collaboration among Participating Multilateral Development Banks on Financial Management Diagnostic Work, 18 Feb. 2003.

[10] e.g. the UN Global Compact, launched 26 July 2000, to which corporations may voluntarily adhere.

[11] Institutional regulatory codes, for example, codes of conduct for peacekeepers.

[12] D. Shelton, *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (New York: Oxford University Press, 2000).

[13] P. Sands, R. Mackenzie, and Y. Shany (eds.), *Manual on International Courts and Tribunals* (London: Butterworths, 1999).

[14] e.g. Inspection Panels of the World Bank, the Asian Development Bank, and the Inter-American Development Bank; the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Strasbourg, 26 Nov. 1987 (as amended, effective 1 Mar. 2002); Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 57/199, 18 Dec. 2002. In all these instances states accept international inspection of some aspect of their internal affairs.

[15] For example, states' obligations for initial and periodic reporting under the UN human rights treaties: P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000).

[16] e.g. Security Council Resolution 780, 6 Oct. 1992, authorizing the establishment of a Committee of Experts to investigate the commission of crimes in the Former Yugoslavia; Security Council Resolution 935, 1 July 1994, doing the same with respect to Rwanda.

about the meaning of controversial law-making instruments, such as Security Council resolutions, may alter the understanding of their meaning.

International regulation now goes far beyond inter-state behaviour. One of the largely unstudied revolutions in international law has been the shift from macro-level regulation of relations between states to considerable technical micro-management on numerous aspects of the internal affairs of states. An example is in the context of the 'war against terrorism' where international regulation of national affairs has been extended to extraordinary lengths for all states. The UN Counter-Terrorism Committee has taken on the role and function of a national regulator.[17] Its mandate is to 'monitor implementation' of Security Council Resolution 1373, adopted in the wake of the 11 September 2001 attacks on the United States. States must report on the steps they have taken to implement the Resolution, their actions are scrutinized by the Committee, and further measures may be demanded. By December 2002 the Committee had received 175 first-round reports and 101 second-round reports. Under Resolution 1373 states are required to freeze assets of any individual or group suspected of involvement in terrorism, not just those who have been placed on sanctions lists. Thus, international regulations determine state behaviour with respect to the banking activities of private individuals without any systems of scrutiny or due process protection.

Nowhere has this regulatory trend been more marked since the 1990s than in the international reaction to territorial entities that have come to be considered as outsiders in the international system. These entities may be politically designated as 'failed' or 'rogue' entities,[18] while legally they are perceived to constitute a threat to international peace and security. Such entities may be states where civil war has caused the collapse of governmental institutions (e.g. Somalia, Sierra Leone), or new states immersed in or emerging from conflict (Bosnia-Hercegovina, East Timor), or sub-state entities suffering oppressive rule (Kosovo). Designation as a failed or rogue state typically results in punitive measures being imposed on the whole or part of the entity that are supervised by the Security Council Sanctions Committee.[19] Military action to restore order may also be authorized.[20] In the aftermath of the crisis, attention becomes focused on rehabilitating the entity in the eyes of the international community, which may involve its placement under a form of international protection.

[17] Security Council Committee established pursuant to Security Council Resolution 1373, 28 Sept. 2001, concerning counter-terrorism.

[18] Which territories become subject to such treatment is of course a matter of political decision-making primarily within the Security Council. For the depiction of the US as a 'rogue' state, see W. Blum, *The Rogue State: A Guide to the World's Only Superpower* (Claremont, South Africa: Spearhead, 2002).

[19] e.g. Security Council Resolution 864, 15 Sept. 1993, authorizing the imposition of sanctions upon UNITA for its continued actions against the government of Angola. On sanctions generally, see V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law* (The Hague: Kluwer Law International, 2001).

[20] Under Art. 42, Charter of the United Nations, 1945. Economic sanctions and the use of military force are the two forms of collective coercive regulation provided for within the Charter.

International organizations have been given sweeping control over the internal affairs of such entities in order to rebuild political, social, legal, and economic institutions. For example, in Bosnia-Hercegovina the Office of the High Representative (OHR) has been given wide powers over civilian administration.[21] In Kosovo the Special Representative of the UN Secretary-General has the competence 'to control the implementation of the international civil presence'.[22] In East Timor the UN's Transitional Administration (UNTAET) was endowed with the overall responsibility for the administration of East Timor and empowered to exercise 'all legislative and executive authority, including the administration of justice'.[23]

Two aspects of these territorial regimes should be noted. Firstly, they are established in accordance with a specific ideology, that is, to provide a framework for the establishment of a stable democratic government committed to the rule of law, human rights, and the promotion of trade and free markets. Secondly, scores of NGOs, especially those in the fields of humanitarian assistance and human rights, enter the territory alongside the INGOs. Their close involvement with international governmental and institutional actors on the ground and their reliance upon funding agencies complicates their position.[24] In any event, NGOs must be seen as actors in the international regulation of territory.

Regulatory theory is concerned with how various forms of regulation, including law, govern social interaction. Much of the theoretical work on legal regulation has been developed in the context of domestic law. This chapter examines international law in the particular setting of regulation of outsider entities, such as failed and nascent states, that is where international regulation fills the vacuum caused by the collapse of domestic institutions and the rule of law. Through our brief examination of international regulation in Bosnia-Hercegovina and East Timor, we ask what light a regulatory lens sheds on international law. What are the intended and unintended effects of regulating behaviour through international law? Drawing on Hugh Collins's starting questions in *Regulating Contracts*,[25] we investigate whether the international law in this area conceives of relations in ways that are different from the frameworks in which they operate. We note especially that, although international law pays little attention to sex and gender, such relations are an important aspect of social reconstruction. We hope to identify what can usefully be achieved by legal regulation in a particular international context and how legal regulation may become ineffective and counter-productive.

[21] Art. VIII and Annex 10 of the General Framework Agreement for Peace in Bosnia and Hercegovina (GFA). Under Art. 1(2) of Annex 10, the parties requested the designation of the High Representative.

[22] Security Council Resolution 1244, 10 June 1999, para. 6, 10, and 11.

[23] Security Council Resolution 1272, 25 Oct. 1999, para. 1.

[24] D. Rieff, *A Bed for the Night: Humanitarianism in Crisis* (New York: Simon & Schuster, 2002); A. H. Henkin (ed.), *Honoring Human Rights under International Mandates* (Washington: Aspen Institute, 2003).

[25] H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999), preface.

BOSNIA-HERCEGOVINA

War in Bosnia-Hercegovina was legally brought to an end by the General Framework Agreement for Peace in Bosnia and Hercegovina (GFA), negotiated in Dayton, Ohio, in 1995.[26] As well as bringing peace, the objectives of the GFA were to create regional stability and to provide a constitutional framework for a democratic state that would be workable within the restraints of its ethnic composition. The GFA centred around three strategies: provision for democratic elections; international controls to ensure compliance with its vision; and international human rights guarantees. The extensive international regulation of all aspects of public life within Bosnia was allocated to a range of European and international institutions. Military responsibility was accorded to the NATO-led Implementation Force (IFOR, subsequently the Stabilization Force, SFOR), while the UN Mission had initial responsibility for the establishment and training of the civilian International Police Task Force (IPTF). The Office of the UN High Commissioner for Refugees was given responsibility over repatriation and relief of refugees and displaced persons,[27] and the Office of the UN High Commissioner for Human Rights (OHCHR) has established a field presence in Sarajevo. The Organization for Security and Cooperation in Europe (OSCE) has responsibility over elections. The European Bank for Reconstruction and Development appoints members of the Commission on Public Corporations.[28]

All these bodies work alongside the OHR. The OHR mandate does not appear particularly broad: to facilitate the parties' own efforts and to mobilize and to coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement.[29] In practice, the OHR has been affirmed as the 'final authority'[30] with a broad executive power in all civilian matters, including the right to overrule the governments of the Bosnian Federation and the Republika Srpska.[31]

It was unclear in 1995 how long the international presence would be required to stay in Bosnia-Hercegovina. Accordingly, the Peace Implementation Council (PIC), comprising the major Western powers and donor countries, was established. The PIC meets twice a year and monitors and updates the regulatory regime as it sees fit. For example, in 1997 the PIC extended the powers of the OHR, allowing him to make 'binding decisions as he judges necessary' on 'other measures to ensure . . . the smooth running of the common institutions'.[32] Yet another international presence since 1999 has been that of the Stability Pact for

[26] General Framework Agreement for Peace in Bosnia and Hercegovina with Annexes, 14 Dec. 14, 35 I.L.M. 75(1996).

[27] GFA, Art. III of Annex 7.

[28] GFA, Art. 1(2) of Annex 9.

[29] GFA, Annex 10.

[30] Security Council Resolution 1031, 15 Dec. 1995.

[31] M. Chossudovsky, 'Dismantling Former Yugoslavia, Recolonising Bosnia', in D. Eade (ed.), *From Conflict to Peace in a Changing World* (Oxford: Oxfam, 1998), 38, 42. Art. III of the GFA provides for the existence of the two Entities, the Federation of Bosnia and Hercegovina and the Republika Srpska.

[32] Bonn Peace Implementation Conference: Summary of Conclusions, Bonn, 10 Dec. 1997, see esp. XI, (2)(c) http://www.oscebih.org/essentials/pdf/bonn_peace_implementation_council_eng.pdf.

South East Europe, established on the initiative of the European Union on 10 June 1999 in the wake of the NATO bombing of Serbia with respect to Kosovo.

In 2003 the EU enhanced its engagement with Bosnia-Hercegovina as the UN lessened its role. The OHR became also the office of the EU Special Representative, and the IPTF was replaced by the EU Police Mission, whose function is to help the police forces in Bosnia-Hercegovina carry out their duties more professionally and effectively. Bosnia-Hercegovina is moving from post-conflict status to that of a country in transition, looking eventually towards EU accession. Core objectives have been identified in the Mission Implementation Plan as crucial to this transition: entrenching the rule of law; ensuring that extreme nationalists, war criminals, and organized criminal networks cannot reverse peace implementation; reforming the economy; strengthening the capacity of Bosnia-Hercegovina's governing institutions, especially at the state-level; establishing state-level civilian command and control over armed forces, reforming the security sector, and paving the way for integration into the Euro-Atlantic framework; and promoting the sustainable return of refugees and displaced persons.[33]

The GFA confirmed the link between internal state governance and international peace and security by incorporating a state constitution into an international agreement.[34] It therefore sets the legal standards and the competence of the international agencies, which have both law-making and monitoring roles. Enforcement is through a range of bodies, for example, the Constitutional Court and a Commission on Human Rights, comprising an Office of the Ombudsman and a Human Rights Chamber with jurisdiction over alleged or apparent violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[35] Internationals play an important role in enforcement: the Constitutional Court has three judges appointed by the president of the European Court of Human Rights, and eight members of the Human Rights Chamber are appointed by the Council of Ministers of the Council of Europe. In addition, those indicted for war crimes, crimes against humanity, or genocide are subject to the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia.[36]

Bosnia-Hercegovina is subject to an extraordinary level of international regulation rendering its sovereignty contingent and flexible. The international community is involved in the running of the internal affairs of a state to a greater extent than had ever previously occurred within a member of the UN. The structure is reminiscent of the UN trusteeship system where non-self-governing

[33] Office of the High Representative, 'Mission Implementation Plan', 30 Jan. 2003 http://www.ohr.int/ohr-info/ohr-mip/default.asp?content_id = 29145.

[34] GFA, Art. V and Annex 4.

[35] GFA, Art. 2 of Annex 6. In June 2003 the High Representative for Bosnia-Hercegovina, Paddy Ashdown, announced that the Human Rights Chamber would be disbanded on 31 December 2003 and its caseload transferred to the Constitutional Court.

[36] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 was established by Security Council Resolution 827, 25 May 1993.

entities were placed under international supervision for the supposed benefit of the territory's inhabitants until such time as they were deemed ready for self-rule.[37] In effect, what has been created is a new form of protectorate or trusteeship-type arrangement. Questions must be asked about how such a degree of international regulation has operated and the extent to which the expectations of those regulated have been met. The international intervention is far-reaching, but in examining the relationship between the international regulators and those subject to regulation, we focus on issues relating to electoral reform, human rights implementation, and an unintended condition within Bosnia, human trafficking.

The OSCE was given extensive control over the electoral process, including supervision of the preparation and conduct of elections.[38] Elections provide a dilemma for international regulators committed to the rule of law and democratization: failure to hold elections undermines the legitimacy of the international presence and causes local resentment, but premature elections may lead to unsatisfactory results by reinforcing the hardline political or nationalist factions that caused institutional collapse and conflict.[39] The GFA provided for elections in September 1996. Although elections were held, when they led to undesired results the OHR intervened, as, for example, in the dismissal in November 1999 of twenty-three elected officials on the grounds that they had pursued anti-Dayton agendas. Yet, it cannot be argued that their policies were unknown to the electorate that had voted them into power.[40] Elections held under a regime of international regulation are problematic in a number of ways. Questions that arise include: when does intervention or regulation in the name of institution consolidation deny the concept of democratization? To what extent can the international community in the name of democracy intervene to ensure election results and national institutions based on the 'morally right'[41] choices approved by the international community, rather than those of internal civil society? Does this mean in practice that no individual may make a 'morally wrong' choice by supporting the nationalist parties and if this is so what becomes of democratic plurality and individual citizenship choice?

The adoption of an Electoral Law in 2001, with input from an international advisory body, was highly controversial.[42] Electoral reform provides an opportunity for social engineering. For example, the Electoral Law has a quota system that provides for greater sex equality within Bosnian political institutions than is the case in the states playing major roles within Bosnia. At least one-third of the lists of all parties and coalitions participating in elections must comprise women candidates and women candidates must be fairly distributed on the lists.[43] The adoption of the Electoral Law was important, as it satisfied one of

[37] Art. 75 of the Charter of the United Nations. [38] GFA, Annex 3.

[39] Sumantra Bose argues that the first post-war elections should be significantly delayed to avoid this outcome: *Bosnia after Dayton, Nationalist Partition and International Intervention* (Oxford: Oxford University Press, 2002), 90. US pressure meant that elections in Bosnia were held only a year after Dayton. [40] Ibid. 276.

[41] D. Chandler, *Bosnia: Faking Democracy after Dayton*, 2nd edn. (London: Pluto Press, 2000), 28.

[42] Bose, *Bosnia after Dayton*, 215. [43] Ibid. 219, 225.

the conditions for Bosnia to be admitted to membership of the Council of Europe, ironically entailing still more international regulation by the institutions of the European Convention on Human Rights (ECHR). Since the adoption of the Electoral Law, the OSCE's democratization programme has moved its focus to capacity-building initiatives for newly elected officials and the institutions in which they work.

There is another aspect of democratization especially relevant to international regulation. While democratization is promoted through the holding of elections, the very presence of the international bodies that are responsible for policy-making undermines the concept of democracy. INGOs are neither democratic nor accountable. As the concept of democratic entitlement within national legal structures has gained force, there has been growing concern about the democratic deficit of international institutions themselves, including the EU and UN.[44] The OHR is answerable only to the PIC, not to the local population, and other international agencies operate with little restraint. The lack of accountability has become apparent in the context of human rights.

The GFA provided extensive protection for human rights within Bosnia-Hercegovina, again amounting to detailed domestic regulation based upon international standards and enforced through international mechanisms.[45] Sixteen human rights treaties are included in an Appendix to GFA Annex 6, and the ECHR is made directly applicable in Bosnia-Hercegovina with priority over all other law.[46]

This elaborate regulatory framework for human rights implementation within Bosnia has led to differences between the regulators and those subject to its provisions. The incoherence and inconsistent outcomes have caused cynicism about the international community's double standards and its willingness to go against the regulations it imposed until other imperatives intervened. This is evident in a case that arose before the Human Rights Chamber in early 2003. Post-11 September 2001 the security concerns of the United States caused its military forces based in Bosnia as part of SFOR to demand custody of four people of Algerian origin who had been arrested on the suspicion that they were preparing to commit terrorist activities. Three of them had been accorded Bosnian citizenship and the fourth had permanent residence status in Bosnia. The Bosnian Ministry of the Interior terminated their citizenship or residency status. When the investigative judge of the Bosnian Supreme Court held that there were no grounds to detain them longer, instead of being released they were handed to US military forces and transferred to the US military detention centre in Guantánamo Bay, Cuba.

The four appealed to the Human Rights Chamber on the basis that their rights under the ECHR had been violated. The Chamber, *inter alia*, asserted that the handover to US forces was a breach of the Bosnian government's

[44] E. Stein, 'International Integration and Democracy: No Love at First Sight', *American Journal of International Law*, 95 (2001), 489.

[45] GFA, Art. VII.

[46] GFA, Constitution (Annex 4), Art. II (2).

obligation to protect against arbitrary detention by foreign forces.[47] The GFA was intended to protect the Bosnian civilian population against the military forces responsible for the war. The assumption was that the international community through SFOR and the other agencies would act as protectors against further outbreaks of violence. The irony of the position of the Human Rights Chamber is that the acts of those subject to international regulation—the federal government of Bosnia-Hercegovina and the federation government—are subject to scrutiny for acts carried out at the behest of the regulators, SFOR, who are themselves outside such review. The changed role of the protectors–regulators could not be more stark.

International regulation of territory sets up a three-way relationship between the designated leaders, the population, and the international regulators. As war had broken out in Bosnia-Hercegovina immediately on its assertion of independence in 1992, there had been no opportunity for social planning except in the context of war. Peace in Bosnia-Hercegovina provided civil society with its first opportunity for setting local agendas and priorities. However, it also meant the immediate entry into Bosnia-Hercegovina of new military forces (IFOR and subsequently SFOR) and a range of European and international INGOs and NGOs. Such bodies occupied physical, communicative, and social space limiting that available to local bodies and preventing them from independent policy-making. Effective international regulation aimed at long-term stability requires establishing genuine partnerships between regulating agencies and local authorities and between local civil society groups and the regulating agencies. Open channels for communication are needed as well as involvement in local decision-making on the basis of locally set agendas, not those of the international community. Instead of such partnership, international agencies too often treat local people as 'cheap service providers'[48] and undermine their agency for transformation.

International regulators are assumed to be benevolent. This assumption is challenged, for example, when international personnel become involved in sexual abuse and trafficking. Since the adoption of the GFA in 1995, women have been subject to sexual abuse from members of the international agencies.[49] In other contexts sexual exploitation and violence against children by UN peacekeepers, international and local NGOs, and government humanitarian agencies have been exposed.[50] Women have been brought into Bosnia and sold

[47] *Boudellaa v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, Butterworths Human Rights Cases, 13 (2003), 297.

[48] J. Mertus, *War's Offensive on Women: The Humanitarian Challenge in Bosnia, Kosovo, and Afghanistan* (West Hartford, Conn.: Kumarian Press, 2000).

[49] S. Payne, 'Teenagers Used for Sex by UN in Bosnia', *Daily Telegraph*, 25 Apr. 2002. Kathryn Bolkovac, a former US policewoman, won an industrial tribunal action in Southampton, UK, for unfair dismissal in which she alleged she was dismissed for exposing the sexual abuse of women by her UN colleagues: S. Payne, 'Investigator Wins UN Sex Abuse Case', *Daily Telegraph*, 7 Aug. 2002.

[50] UNHCR and Save the Children–UK, *Note for Implementing and Operational Partners by UNHCR and Save the Children–UK on Sexual Violence and Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone*, 25 Feb. 2002 http://www.reliefweb.int/w/rwb.nsf/0/6010F9ED3C651C93C1256B6D00560FCA?OpenDocument.

as commodities. Trafficking is associated with the creation of a potential market for sexual services.[51] The presence of large numbers of international personnel, mostly men, creates just such a market. The obstacles that women face post-conflict in realizing economic security, such as discrimination in employment and in access to credit, enhance their vulnerability to the risk of being trafficked, while privatization as part of post-conflict economic reconstruction reduces the availability of social safety nets.[52]

The spread of trafficking could have been foreseen, especially in a state where women were dehumanized and targeted for sexual abuse throughout the conflict,[53] but the extent of what was happening and the involvement of the international community was not acknowledged until 1998. Since then a coordinated strategy has been developed to tackle trafficking on a long-term basis through the OHCHR, the Gender Task Force of the Stability Pact, and the OHR. The approach has been to bring together the international agencies, civil society (notably women's) groups, and national authorities. The agreement of a national action plan is a significant outcome of this process. An important factor for the development of a regulatory framework against trafficking in Bosnia that is shared by the local community and the international bodies was the appointment of an OHCHR field officer with a commitment to women's empowerment and experience in gender issues. The field officer promoted the collaboration of the various groups to ensure a consolidated and coherent approach to the problem. Her effectiveness was enhanced by a sufficiently long stay to implement proposals and to build up working relationships with both the governmental and non-governmental bodies within Bosnia-Hercegovina.

East Timor

Timor Lorosa'e, or East Timor, became independent on 20 May 2002. The creation of this new state was a long and painful process after the invasion of the former Portuguese colonial territory by Indonesia in 1975.[54] A UN-sponsored referendum to determine East Timor's future was held on 30 August 1999. The result was a vote of 78.5 per cent against a 'special autonomy' status within

[51] Madeleine Rees, OHCHR field officer in Sarajevo, states that an approximate calculation is that the international community constitutes 30 per cent of the customers of foreign women in Bosnia but provides 80 per cent of the revenue of the men who control them: M. Rees, 'International Intervention in Bosnia-Herzegovina: The Cost of Ignoring Gender', in C. Cockburn and D. Zarkov (eds.), *The Postwar Moment: Militaries, Masculinities and International Peacekeeping, Bosnia and the Netherlands* (London: Lawrence & Wishart, 2002), 63.

[52] *Situation of Human Rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia*, Report of the Special Rapporteur on Bosnia and Herzegovina, UN Doc. A/54/396, S/1999/1000, 24 Oct. 1999, para. 37.

[53] Rees, 'International Intervention in Bosnia-Herzegovina', 65.

[54] See W. Maley, 'The UN and East Timor', *Pacifica Review*, 12 (2000), 63; C. Chinkin, 'East Timor: A Failure of Decolonisation', *Australian Yearbook of International Law*, 20 (2000), 1.

Indonesia and 21.5 per cent in favour. The announcement of the referendum outcome was met with great violence by opponents of independence. At least 600 people died and many more were attacked in the violence. Local and foreign UN staff were killed. Most of the buildings and much of the infrastructure in Dili, the capital, were destroyed. Prior to the referendum there were 880,000 people living in East Timor. Seven hundred and fifty thousand people were displaced from their homes or became refugees in West Timor during the violence immediately after the independence vote.[55]

A UN force, International Force East Timor (INTERFET), was eventually deployed in September after Indonesia was pressured to agree, to prevent further violence.[56] The UN Security Council decided on 25 October 1999 to extend the peacekeeping role of the international community in East Timor to the formation and operation of a transitional government.[57] The Security Council created the United Nations Transitional Administration in East Timor (UNTAET), granting it 'overall responsibility for the administration of East Timor', which involved 'legislative and executive authority, including the administration of justice'.[58] UNTAET's mandate was, among other things, to 'provide security and maintain law and order' throughout East Timor; to 'support capacity for self-government'; and to 'assist in the establishment of conditions for sustainable development'.[59]

The Special Representative of the UN Secretary-General, also known as the Transitional Administrator, had plenary powers in the UNTAET era.[60] A Brazilian UN official, Sergio Viera de Mello, was appointed to this position. The Transitional Administrator established a fifteen-member National Consultative Council of East Timorese and UN officials to assist him. From August 2000 he delegated part of his executive power to an appointed nine-member Cabinet of East Timorese leaders and international experts.[61] He consulted on legislative matters with a thirty-three-member all-East Timorese legislative body called the National Council.[62] A transitional government was appointed by the Administrator. An eighty-eight-member Constituent Assembly was elected in August 2001 to draft a constitution, which was finally adopted on 22 March 2002 and entered into force on 20 May 2002. Presidential elections were held in April 2002 with Xanana Gusmão, the former leader of the resistance movement Fretilin, elected with a huge popular vote.

The international management of the transition of East Timor from ravaged territory to new state has been hailed as a great success story. The UN's role in East Timor illustrates, however, some of the tensions created by international regulation.

[55] J.-C. Cady, 'Building the New State of East Timor', lecture given on 18 May 2000 at the Centre for International and Public Law, Faculty of Law, Australian National University http://www.anu.edu.au/law/cipl. [56] Security Council Resolution 1264, 15 Sept. 1999.
[57] Security Council Resolution 1272, 25 Oct. 1999. [58] Ibid. [59] Ibid., para. 2.
[60] UNTAET/REG/1999/1. [61] UNTAET/REG/2000/23, 14 July 2000.
[62] UNTAET/REG/2000/22; UNTAET/REG/2000/24.

UNTAET was established under Chapter VII of the UN Charter as a response to threats to international peace and security. Although UNTAET was thus a peacekeeping mission, Resolution 1272 gave UNTAET very broad powers effectively to govern East Timor and to build a capacity for self-governance. Issues such as whether UNTAET personnel should be able to claim immunities from local laws, particularly criminal and taxation laws, caused problems.[63] There was also an inevitable tension in giving UNTAET virtually plenary power over the transition process when the object of that process was to hand governmental control to the East Timorese.[64] The task required a delicate balance between imposing international standards and acknowledging the local historical and political context.

A significant problem faced by the UN's regulatory activity in East Timor was the situation of women.[65] Women had suffered considerable harassment and violence during the Indonesian occupation. Fokupers, an East Timorese women's NGO established in 1998, has documented the sexual violence in September 1999. It found that most of the rapes that occurred in the twelve days between the vote and the arrival of INTERFET were committed by members of the anti-independence militia groups, which were largely composed of East Timorese men. There were also allegations that UN peacekeeping forces were responsible for sexual abuse inflicted on some women who live in isolation on the western borders of East Timor.[66] Responses to violence have dominated the agenda of most East Timorese women activists in the country's UNTAET era. Dealing with the psychological effects of violence remains the focus of most collective women's efforts.

At first sight, UNTAET is an example of women's rights-sensitive nation-building. In establishing UNTAET, the Security Council emphasized the 'importance of including in UNTAET personnel with appropriate training in international humanitarian, human rights and refugee law, including child and gender related provisions'.[67] This was the first such reference in the mandate of a comparable body and was consistent with the UN's commitment to 'mainstreaming' gender perspectives in peace operations.[68] The language of gender-mainstreaming has become prevalent within the UN system.[69] The UN

[63] J. Morrow and R. White, 'The United Nations in East Timor: International Standards and the Reality of Governance', *Australian Yearbook of International Law*, 22 (2002), 1. [64] Ibid.

[65] For a more detailed account of this issue, see H. Charlesworth and M. Wood, 'Women and Human Rights in the Rebuilding of East Timor', *Nordic Journal of International Law*, 71 (2002), 325. Much of the information used in this section is drawn from this paper.

[66] See M. O'Kane, 'Return of the Revolutionaries', *The Guardian*, 15 Jan. 2001.

[67] Security Council Resolution 1272, on the Situation in East Timor, UN Doc. S/RES/1272, 1999, para. 15.

[68] See 'The Namibia Plan of Action on "Mainstreaming a Gender Perspective in Multidimensional Peace Support Operations" ', Windhoek, Namibia, 31 May 2000 http://www.reliefweb.int/library/GHARkit/FilesFeb2001/windhoek_declaration.htm.

[69] e.g. Report of the Secretary-General, *Integration of the Human Rights of Women and the Gender Perspective*, UN Doc. E/CN.4/2000/67, 21 Dec. 1999.

Economic and Social Committee has defined the mainstreaming of a gender perspective as

> the process of assessing the implications for women and men of any planned action, including legislation, policies and programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.[70]

Field offices are now encouraged to address particular gender issues or to provide training. However, the United Nations Interim Administration Mission in Kosovo (UNMIK) was the first peacekeeping mission to have an administrative unit dedicated to gender issues.[71]

A proposal for an administrative unit devoted exclusively to gender issues was included in the original structure proposed for the UNTAET in November 1999 but it was not implemented because of budget priorities. The Gender Affairs Unit (GAU) was ultimately reinstated in April 2000 after pressure from senior women within the UN. The quest to establish a gender unit within the corporate structure of UNMIK and UNTAET was a difficult task in both cases. In addition to the absence of institutional precedents, the lack of consistent support for and interest in East Timorese women's concerns by senior UNTAET managers led to the formulation of the GAU's mandate in an ad hoc way and ineffective publicity was given to it.

The initial abandonment of the proposal for a gender unit, however, affected the type of GAU that was ultimately established. Funding that had been allocated for the payment of gender affairs officers was redistributed, and no programme or operational budget was created even when the GAU was reinstated.

The main changes sought by East Timorese women activists in the UNTAET era were relatively modest. They focused on the high rate of female illiteracy (85 per cent), the absence of women in public life, and the issue of violence against women. Advocacy of women's issues was within the context of a deeply Catholic society. Observers of women's participation in political and economic activities in the context of conflict and post-conflict societies suggest that traditional law and indigenous practices that disadvantage women find practical affirmation and reinforcement not only in religious conservatism but also in patriotic expressions of cultural pride by male leaders.[72] This phenomenon is

[70] UN Doc. E/1997/L.30, A/52/3/Rev.1, ch. 4.

[71] For an analysis of the successes and failures of UNMIK to enhance the lives and opportunities of Kosovar women up until June 2000, see C. Corrin, 'Gender Audit of Reconstruction Programmes in South Eastern Europe', June 2000 http://www.bndlg.de/~wplarre/GENDER-AUDIT-OF-RECONSTRUCTION-PROGRAMMES-ccGAudit.htm; Kvinna Till Kvinna, *Getting it Right? A Gender Approach to UNMIK Administration in Kosovo* (2002) http://www.iktk.se/english/index.html.

[72] See H. Wallace, 'Gender and the Reform Process in Vanuatu and Solomon Islands', *Development Bulletin*, 51 (2000), 23; S. Mitchell, 'Women in Leadership in Vietnam', *Development Bulletin*, 51 (2000), 30; A. Hellum, 'Human Rights and Gender Relations in Postcolonial Africa: Options and Limits for the Subjects of Legal Pluralism', *Law and Social Inquiry*, 25 (2000), 635.

evident in East Timor, and is mixed with an ambivalent attitude to the UN's presence, combining gratitude and resentment.[73] Thus, in his 2001 New Year's speech to the nation Xanana Gusmão criticized the

> obsessive acculturation to standards that hundreds of international experts try to convey to the East Timorese, who are hungry for values:
>
> - democracy (many of those who teach us never practised it in their own countries because they became UN staff members) . . .
> - gender (many of the women who attend the workshops know that in their countries this issue is no example for others).

He went on:

> It might sound as though I am speaking against these noble values of participation. I do not mind if it happens in the democratic minds of the people. What seems to be absurd is that we absorb standards just to pretend we look like a democratic society and please our masters of independence. What concerns me is the non-critical absorption of (universal) standards . . . [and] that the East Timorese may become detached from their reality and, above all, try to copy something which is not yet clearly understood by them.

Gusmão acknowledged that some of the 'standards' that UNTAET aspired to include in law and administrative practice in East Timor were universal in the sense that they are recognized as such in international law. However, he implied that the standards relating to the rights of women, particularly the right of women to determine their own lives, did not find natural affinity or reflection in East Timorese culture. Gusmão regarded these standards as difficult to absorb locally. He also suggested that the values and the process by which international standards, especially with respect to women's human rights, were being introduced into East Timorese society were beset by strong elements of colonial hypocrisy among the international workers, and unthinking receptiveness by some East Timorese.

There are, however, examples of traditional practices that have been specifically identified and rejected by East Timorese women. For instance, a report publishing the findings of a workshop in Dili organized by Fokupers and the Sahe Institute for Liberation in 2000 describes the institution of *barlaque* (bride price) as oppressive, at least in the current form that it is practised.[74] The report claims that what is now a range of discriminatory practices resulting in married women being

[73] One observer noted of East Timor in the UNTAET era: 'The UN presence is huge, like an army of occupation. Watch you don't get squashed by one of the countless UN vehicles while gawking at the massive floating hotel Olympia moored by the deck at the city's [Dili's] heart . . . At the weekend, all the *malai* (foreigners) head for the beach. There you can stand up to your neck in the tepid sea and engage Thai colonels, Swiss economists, globetrotting NGO adventurers, or activists from East Timor's gutsy Yayasan Hak human rights organisation in polite conversation about crocodiles. The locals avert their embarrassed eyes at white flesh in Speedos, and sell beers and Coke from pedicabs': P. Nicholson, 'Goodwill Hunting', *Weekend Australian*, 9–10 Dec. 2000, 28.

[74] Report of 'Women's Liberation in the Process of *Ukun Rasik An* (Self-Government)', workshop held in Dili, 10–11 Feb. 2000.

treated as chattels was once a simpler practice involving a reciprocal exchange of gifts between families.

Gusmão's approach can be contrasted with that of Milena Pires, deputy speaker of the National Council and an active member of the Timorese diaspora in London before she returned to East Timor in 2000. Pires described the common phenomenon whereby men's pride in traditional culture is combined with religiously based social conservatism:

> cultural discourse is invoked frequently to quash attempts to introduce discussions on women's rights into the East Timorese political equation. The incompatibility between East Timorese culture and what is popularly cited as a western feminist imposition is used to dismiss even the notion that Timorese women's rights may need to be nurtured and defended so as to become a reality. Undermining the importance of women's human rights because it only considers half of the East Timorese population is another argument put forward to prevent its elaboration.[75]

The arguments Pires describes have been invoked in the context of various proposals to boost the political representation of women in East Timor. For example, a public debate about quotas for women in political positions was ignited by a proposal emanating from a women's NGO, REDE, to entrench a requirement for political parties to field women in at least 30 per cent of their nominated representative positions for election to the Constituent Assembly. Some influential UNTAET officers were very negative about the proposal, arguing that quotas infringed the concept of free and fair elections.[76] The proposal was ultimately defeated in the National Council in March 2001, although in the end 27 per cent of the seats in the Constituent Assembly were held by women.

East Timorese women have expressed frustration at the preoccupation of international organizations and media with the prominence of certain East Timorese women in the various consultative bodies established by UNTAET. They argue that East Timorese women's leadership was conceived by foreigners and by some returned members of the diaspora in excessively narrow terms. The international community regarded leaders as women who were elected to parliament or appointed to decision-making bodies. Some East Timorese women did not see the *number* of women in representative or governmental positions as a significant indicator of women's empowerment, although the National Council rejection of REDE's quota proposal in elections for the Constituent Assembly was regarded with great disappointment.

Women's groups in East Timor were active in the constitution-making process. A Gender and Constitutional Working Group prepared a Charter for Women's Rights based on broad community consultation.[77] The Charter sought

[75] Paper presented to the CNRT (National Council of Timorese Resistance) Conference on a Strategic Development Plan for East Timor, Aug. 2000.

[76] Morrow and White, 'The United Nations in East Timor'.

[77] See M. A. Pereira, *Oxfam Community Aid Abroad, Gender and Constitution Working Group* http://www.caa.org.au/world/asia/east_timor/women.html. The Charter appears in *La'O Hamutuk Bulletin*, 2/5 (Aug. 2001) http://www.etan.org/lh/bulletins/bulletinv2n5.html.

the prohibition of all forms of discrimination and the adoption of positive measures to promote equality. It demanded the protection of women's right to live free from any form of violence, both public and private, and regulation of the dowry system to prevent violence against women. The Charter also sought a guarantee of women's participation in traditional decision-making processes.

The Constitution contains some traces of the Charter's provisions. For example, section 37 allows police to enter homes during the night, uninvited, if they believe that there is a serious threat to life or physical integrity. This provision responds to women's concern over the high incidence of domestic violence. The Constitution also refers to non-discrimination on the basis of gender in access to political positions.[78] Many East Timorese women, however, were disappointed with the minimal impact they had on drafting the Constitution and have been critical of UNTAET and the National Council for sidelining their concerns.

The GAU established by UNTAET made some useful initiatives. For example, it organized the collection of gender-sensitive data across East Timor and its collation into statistical form for evaluation; the analysis of regulations proposed by UNTAET for their responsiveness to women's needs and interests; the convening of a group of East Timorese women to discuss proposed UNTAET regulations and the gender issues they raise; the organization of activities in East Timor to commemorate the international observance of sixteen days of activism against gender violence; the publication and distribution of a 'Gender News' bulletin to different sections of UNTAET and to NGOs in Dili; and the establishment of Gender Focal Point officers in some districts of the country.

Overall, however, UNTAET's achievements relating to gender appear to be largely the product of uncoordinated pressures. Although there was implicit recognition in various public statements made by the Transitional Administrator that East Timorese men and women had quite different experiences under the Indonesian regime, and that gender is a significant factor affecting their opportunities in the transitional and independence eras, this was not reflected in resource or management terms.

In the UNTAET era violence against women by male family members was estimated to constitute 40 per cent of all offences committed in East Timor during the year 2000.[79] One explanation for this high rate of domestic violence was the unemployment rate of 80 per cent in urban areas. The long-term economic, social, and physical consequences of severe violence were largely ignored by UNTAET, whose major priority was the construction of public administration and governance units.

The employment of women in UNTAET also suggests a failure in planning and execution. A directive issued from the Transitional Administrator on

[78] S. 63. [79] See M. O'Kane, 'Return of the Revolutionaries', *The Guardian*, 15 Jan. 2001.

7 September 2000, after intense lobbying by REDE, stated that

> a minimum of all national and district hiring shall comprise 30% women within every classification/level of employment. Where there are two candidates (male and female) of equal merit, priority will be given to the female candidate; indeed, we shall set as a target gender balance within all hiring. Training shall be given to women on a priority basis.[80]

At 31 January 2001, 33 per cent of the international civilian officials working for UNTAET were women but women comprised only 11 per cent of the UNTAET East Timorese staff. Women were represented in even lower numbers in the civilian police and peacekeeping force in East Timor, composing 4 per cent and 2.4 per cent respectively. The majority of people employed by the GAU (a total of six) were foreigners, newcomers to East Timorese culture and social conditions.

Other criticisms of UNTAET and the GAU by East Timorese women include the failure to produce a clear definition of gender mainstreaming and its subjects. It was unclear whether gender mainstreaming was aimed at UNTAET international workers, or East Timorese women, or East Timorese people in general. This led to misunderstandings about the practical and ethical basis of sex equality rhetoric in the UNTAET mission. There was a gulf between the expectations of the transitional administration and East Timorese people. Many women thought the GAU should offer practical solutions such as counselling to alleviate women's emotional distress, anti-violence education seminars, and money to assist women's NGOs to implement their own agendas.

The UN officially endorses women's ability 'to take their rightful and equal place at the decision-making table in questions of peace and security'.[81] The case of East Timor in the UNTAET era illustrates, however, the complexity of translation of worthy public statements about the equality of women. UNTAET's GAU had an uncertain and little-known mandate. Its funding was constantly being renegotiated. It tended to be marginalized and was without proper institutional support. Language and cultural barriers arose between local women's groups and the GAU. There was little evidence of attention to gender issues outside the small GAU office.

A basic issue arising from the inclusion of gender as the basis for an administrative unit is how it should tackle culturally specific social constructions of gender. In East Timor gender roles assigning men to a public world of politics and employment and women to a private world of home and family pervade social and economic relations. They are supported by religious doctrine, low levels of education, and traditional practices. The most significant counter-pressure was the persistence of particular East Timorese women's groups and individuals within UNTAET in using international and local networks to pressure UNTAET to take East Timorese women's concerns seriously.

[80] UNTAET internal memo, 7 Sept. 2000, sent to all Cabinet ministers, heads of departments, district administrators, and Chair of the Public Service Commission.

[81] K. Annan, *Secretary-General Calls for Council Action to Ensure Women are Involved in Peace and Security Decisions*, statement at the 4208th meeting of the Security Council, UN Doc. SG/SM/7598, 24 Oct. 2000.

Concluding Comments

International regulation of societies in crisis, while a modest public relations success, has not been well designed from the perspective of regulatory theory. International law imagined its task as the transposition of international standards to transform local chaos, although in neither of the case studies has this been achieved. International regulation in Bosnia-Hercegovina and East Timor suggests a dissonance between the way that international agencies conceive their role as regulators and the experience of those roles by the local participants. Contrary to Hugh Collins's observations with respect to contract law, the apparent objects of the regulatory activity had little impact on the regulatory scheme.

The problems identified by Teubner's 'regulatory trilemma' (effectiveness, responsiveness, coherence[82]) are evident in the case studies, which also show the overlapping of these criteria. Firstly, post-conflict international regulation can be of limited effectiveness. One reason for this is inherent in the project of Western-influenced international institutions intervening in impoverished and chaotic local situations. International regulation is not ideologically neutral but is committed, at least rhetorically, to the supposed universal values of democracy, human rights, and the rule of law. These are considered the bases for a stable economic environment committed to free market principles and foreign investment. The essence of nation-building is the creation of a public and sustainable infrastructure of governance and local capacity-building. This requires micro-management by a range of international actors for an indeterminate period of time. There is likely to be tension between the goals of handing over to a local leadership as speedily as possible, and ensuring that that leadership has sufficient experience to ensure the long-term stability to achieve the prescribed objectives. International regulation in Bosnia-Hercegovina has now lasted for eight years, which has fostered dependency and created further problems for withdrawal. Unemployment is still high and economic and legal stability remain elusive. In East Timor the handover to the local but inexperienced leadership took place after less than three years. Institutional capacity-building—looking long-term—is not necessarily compatible with short-term regulation.

Secondly, international territorial administration of 'failed' territories can appear as a 'civilizing' mission to reconstruct those territories according to the practices and values of the international community, and thus is not always responsive to those of the targets of regulation.[83] This may have resonance in the context of law-making, as international norms have to be incorporated into domestic law and there may be conflict between the two. The Constitution of

[82] G. Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions', in Teubner (ed.), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust, and Social Welfare Law* (New York: Walter de Gruyter, 1987), 3.

[83] C. Parker and J. Braithwaite, 'Regulation', in P. Cane and M. Tushnet (eds.), *Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003), 128.

Bosnia-Hercegovina was negotiated at Dayton and was submitted to the national parliament for adoption. There was no consultation with or participation by local people, nor any examination as to how far the Constitution conformed with their values and expectations. It was not even written in the local language. It is, therefore, difficult to know what expectations local people had either of the international administration or of their new Constitution. The OHR has both made law and applied it, which has caused tension when it conflicts with the wishes of local authorities. Michael Chossudovsky has commented that 'One cannot sidestep the fundamental question: is the Bosnian Constitution formally agreed between heads of State at Dayton really a constitution? . . . There is no constitutional assembly, there are no consultations with citizens' organisations in Bosnia and Hercegovina, and there are to be no "constitutional amendments".'[84] In East Timor international practices ranging from the bureaucratic (such as the tax-free salaries of UN workers) to the normative (such as the commitment to international human rights standards) were at odds with the values of sections of the East Timorese leadership and community.[85] Much of the international regulation was not, in Cotterrell's words, 'deeply rooted in social and cultural life'.[86] This led to disagreement with the international regulators in drafting the Constitution. International regulators have to maintain a balance between becoming too distant from local concerns and becoming embroiled in local politics and disputes. It has been argued that UNTAET was most successful in negotiating the fine line between the imposition of international standards and recognizing the local context when it saw capacity-building as requiring a dialogue between international principles and East Timorese culture, rather than an imposition of international benchmarks.[87] However, this claim raises the question of the content of 'East Timorese culture' being invoked: whose culture was at stake?

Thirdly, the relationship between regulatory standards and local traditions can lead to an incoherent analytic framework. The international agencies' mandate rests upon the negotiated agreement (the GFA) or Security Council resolution (UNTAET). In both cases these top-down mandates cannot detail all aspects of regulation but, rather, set the ground rules for implementation by the relevant international agencies. Indeed, international standards are mediated through the designated international authorities, the international and national agencies responsible for implementation across diverse local communities. Local people—the supposed beneficiaries of all this regulatory activity—tend to be involved in the evolution of rules in only the most minimal way.

While these layers of regulation have the benefit of flexibility and allow for responsiveness to local conditions, in practice the mandates are open to diverse interpretations giving a great deal of discretion to those working on the ground.

[84] Chossudovsky, 'Dismantling Former Yugoslavia', 43.
[85] Morrow and White, 'The United Nations in East Timor'.
[86] Quoted in Parker and Braithwaite, 'Regulation', 128.
[87] Morrow and White, 'The United Nations in East Timor'.

For example, the East Timorese Constitution's broad promises of protection of human rights and freedoms were left for enforcement to a readily subverted bureaucratic procedure.[88] The range of international institutions with diverse agendas, working methods, and experience requires effective communication and coordination, which may not be forthcoming. Institutional 'turf protection' may also impede cooperation between agencies. Changed priorities among the regulators may cause shifting objectives. In Bosnia-Hercegovina the government has found itself caught between the internationally created institutions, such as the Human Rights Chamber, and the heightened security concerns of the United States represented through the international regulators. Further, each international agency comprises personnel from different backgrounds and levels of experience that may cause tension between them. For example, peacekeepers and civilian police forces from different countries are likely to have received differing levels of sex and gender awareness training, and may not all share the goals of women's equality and empowerment. This can lead to inconsistent observance of stated norms of behaviour.

There are other observations that can be made when looking at the case studies through the lens of international regulation. There is no template for international regulation of territory. There have been ad hoc responses to events in Cambodia, Bosnia-Hercegovina, Kosovo, and East Timor resulting in the imposition of international agencies in diverse circumstances. Major tensions emerge. On the one hand, there is the need to adjust the mandate to the particular context; on the other, there has been a tendency to replicate the model across all relevant situations. A cadre of international specialists in reconstruction has developed, moving quickly from one trouble spot to another. Short-term appointments are the norm and tasks are not always completed. This prevents the development of institutional memory and best practice. Ad hoc, personal precedents develop in the community of nation-building bureaucrats. The brevity of the contracts also impedes the formation of long-term relationships with the people of the territory and develops the impression of an impersonal international regulatory body only present in a territory until the next emergency requires them to move on. Where there is a longer-term commitment there can be greater coherence between the international agencies and local bodies as has occurred with the development of an integrated anti-trafficking strategy in Bosnia-Hercegovina. Another factor is the willingness of the international community properly to resource international regulation; grand plans agreed in New York acquire political capital but may be frustrated by lack of economic commitment, as illustrated by the delay in the establishment of the GAU in East Timor.

It may be argued that the context of the case studies—local crisis and state-building—is too particularized to draw any general conclusions about international legal regulation in more routine cases. Certainly, other areas of

[88] East Timor Constitution.

international regulation do not require the intensive 'hands-on' daily intervention of territorial regulation, but rely on such methods as periodic review and technical assistance. Nevertheless, a dichotomy between 'crisis' and 'routine' seems misplaced. International regulation of territory is itself becoming more regular and routine situations throw up crises and emergencies. For example, there is a detailed legal regime for the law of the sea.[89] This also requires the interplay between international regulation and application within domestic law involving a range of domestic and international agencies. Disputes over fishing, marine pollution, or overflight[90] belie any assumption of uncontested application of the international regulations, while at the same time much of the daily international administration of territory is routinely observed.

Typically, international regulatory regimes are created by a multilateral treaty that sets up an organizing and monitoring INGO. But other existing norms of international and national law interface with those of the regulatory framework, for example, the human rights objectives within the regulated territory may conflict with the perceived dictates of international and national security. Another type of interface is between international and domestic law. International norms must be incorporated into national law and are applied by a mix of international and national agencies. Multilateral regimes may also be supplemented by a network of bilateral agreements determining the operational standards as between two states.[91] Bilateral agreements may indeed undermine the international regime. For example, the United States has refused to participate in the International Criminal Court[92] and has entered into bilateral agreements under Article 98(2) of the Court's Statute to prevent surrender of its citizens to the Court. This situation highlights the current reality that effective international regulation is affected by the attitude of the United States.[93] The outcome of negotiations for an international regulatory regime may be largely dictated by US policy, but frustrated by its eventual unwillingness to participate.[94]

[89] UN Convention on the Law of the Sea, 10 Dec. 1982.

[90] e.g. 'The UN says more than a hundred countries are involved in fishing disputes . . .': F. Jonathan, 'Rivalries Grow for Global Fishers as Fleets Expand and Hauls Wane', *Wall Street Journal Interactive*, 25 Feb. 1997 http://zia.hss.cmu.edu/miller/eep/news/fish2.ext.txt; *The Mox Plant Case* (*Ireland v United Kingdom*, The Hague, 2003) illustrates an inter-state dispute about the national implementation of international environmental standards; available at http://www.pca-cpa.org/ENGLISH/RPC/#Ireland%20v.%20United%20Kingdom%20("MOX%20Plant%20Case").

[91] For example, the Chicago Convention on Civil Aviation, 7 Dec. 1944, has been supplemented by numerous bilateral air services agreements.

[92] The International Criminal Court was established under the Rome Statute of the International Criminal Court, Rome, 17 July 1998.

[93] For example, effective international regulation of climate change is undermined by the refusal of the United States (and Australia) to become parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 Dec. 1997.

[94] e.g. US participation in the negotiations for the United Nations Convention on the Law of the Sea, 1982. Attempts to facilitate the United States and other industrialized states becoming bound by the Convention resulted in the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 Dec. 1982, which significantly amended the original Convention. While other states then became parties, the United States has still failed to do so.

International regulation is conceived at the highest level, for example, through treaty-making or Security Council resolution. The legal framework is operationally dependent upon political decision-making. As we have seen, it is implemented by a range of international agencies, both governmental and non-governmental, and local personnel who are far from the original decision-making. Not surprisingly, international regulation can lead to some unintended consequences. For example, the import of large numbers of international personnel distorts the local economy and exacerbates local unemployment at a time when restructuring of the labour market is essential. Resentment can be caused by what appears excessive attention to the accommodation and well-being of the internationals, rather than to reconstruction of local services. The infusion of a large number of mainly unaccompanied men with hard currency has also fuelled sexual abuse and trafficking, as in Cambodia, Bosnia-Hercegovina, and Kosovo.

A final observation is that the public nature of international administrations has also allowed gaps to be identified and pressure for change to be generated at the international level. For example, sex and gender issues did not figure at all in the institutional arrangements in Bosnia-Hercegovina determined at Dayton, leaving particular committed individuals to fill this vacuum. The failure to address sex and gender in the Dayton mandate caused sufficient criticism that an administrative unit dedicated to gender issues was set up first in Kosovo and subsequently in East Timor. But the existence of a gender bureaucracy did not affect the resolution of concerns such as whether there should be quotas for women in political bodies: thus, the Bosnian Electoral Law provides a quota system for women electoral candidates while this could not be achieved in East Timor. At the same time, the larger issue of the sexed and gendered dimensions of structures of regulation remains: who are the regulators; who regulates the regulators? Does regulation affect women and men differently? What gendered patterns of life, work, and politics does regulation support?