

The Problems of 'Nation-Building': Imposing Bureaucratic 'Rule from Above'

David Chandler
University of Westminster

Abstract *With the problems of stabilising Iraq continuing under the 'fully sovereign' Iraqi interim government, which formally replaced the United-States-led transitional administrative authority on 28 June 2004, many critics have argued that the United Nations (UN) should play a much larger role in the transition process. This article suggests that while imposing an alternative set of external administrative 'advisers' might be popular with European powers, it is unlikely that greater UN involvement would make much difference to the people of Iraq. Using the example of the international protectorate of Bosnia, which is also a 'fully sovereign' state, where the UN plays a fully engaged role, it is clear that external enforcement can provide little legitimacy for Iraqi institutions. This article challenges the idea that the 'rule of law' can be imposed from outside by focusing on two areas of legal activism in Bosnia: constitutional change and property return. It suggests that the 'rule of law' approach sees legal or administrative solutions as a short cut to addressing political problems, fetishising the legal framework at the same time as marginalising the political sphere. Rather than more coercive external involvement in the form of pressures for more legislation and better law enforcement, the experience of Bosnia highlights the need for greater levels of political legitimacy, a need that runs counter to the logic of the 'rule of law' approach.*

From Bosnia to Iraq

Despite Iraq's formal sovereign status, the limited powers of the interim US-appointed government, headed by Prime Minister Ayad Allawi, are clear to all. The US administrator, Paul Bremer, has departed leaving a hundred edicts that will continue to bind the new regime, while former US Ambassador to the UN, John Negroponte, has been installed as the US Ambassador, presiding over the largest diplomatic mission in the world, with a staff of around a thousand policy advisors housed in Saddam Hussein's former palace compounds (Goldenberg 2004). Dependent on US special forces for security protection, with the policy framework being developed by US 'advisors', and with US and other foreign occupation forces and private contractors having been granted legal immunities, there is little possibility that the Iraqi interim government can develop the independent basis necessary for establishing its legitimacy in Iraqi society.

Prior to the handover of sovereignty, growing security problems under the United-States-led transitional administration, such as the August 2003 bombing of the United Nations (UN) headquarters in Baghdad which caused the death of UN special representative Sergio Vieira de Mello, coupled with continuing

problems in the repair of basic infrastructure, led to questions increasingly being raised about the coalition's post-war governance of Iraq. *The Observer*, for example, argued that 'Paul Bremer, America's proconsul in Iraq, should go. His autocratic rule has become a symbol of all that is wrong with the administration of the country' (*The Observer* 2003). According to many commentators in the UK and Europe, the alternative, or 'Plan B', was to replace Bremer with a UN appointee 'who has the backing of the international community' (*The Observer* 2003). However, in September 2003 talks in the UN Security Council aimed at ensuring broader support for post-war administration tasks broke down over the issue of whether the US would be willing to cede political authority to the UN.

There is little doubt that Bremer's legislative 'orders' increased instability and uncertainty in Iraq. Coalition Provisional Authority (CPA) Order No. 1, the 'de-Ba'athification' decree that was issued on 15 May 2003, has had the unintended effect of threatening tens of thousands of public sector Iraqi professionals in the education and health service sector with dismissal from their jobs because of their membership in the Ba'ath Party (CPA 2003a). Given that belonging to the Ba'athist movement was a precondition for getting anywhere in Saddam Hussein's Iraq, Bremer's order reached far beyond the senior Ba'athist elite. Most skilled professionals are under threat of losing their livelihoods, which contributes little to reconstruction or to winning over support from the Iraqi middle classes (Steele 2003). Coalition Provisional Authority Order No. 2, issued one week later on 23 May, dissolved the Iraqi army, making thousands of militarily trained men unemployed and penniless, creating unrest and removing the one force best equipped for taking on the majority of security tasks (CPA 2003b; Whitaker 2003).

While an Iraqi regime administered and 'advised' by the UN might be more popular with European governments, it is unlikely that greater UN involvement would make much difference to the Iraqi people. United States administrators have a monopoly neither on autocratic rule nor on imposing counter-productive measures. This much is clear from the 'internationally backed' external regimes imposed on Bosnia and Kosovo, where the UN has been fully supportive of the autocratic rule of unelected and unaccountable international mandarins, like Lord Paddy Ashdown, the High Representative of Bosnia.

Whether the US Ambassador runs Iraq indirectly from Washington with token aid from countries like Britain or whether the UN plays a more substantial role in preparing legislation, there remains the problem that the 'rule of law' cannot be imposed in the manner advocated by some. For certain theorists, whether of liberal internationalist or neoconservative beliefs, it seems obvious that international bureaucrats can develop better laws than the people who live in post-conflict countries or their representatives. After all, they argue, these domestic elites caused the misrule that forced the internationals to take over, and the people did themselves few favours by voting such elites in or accepting their rule.

This understanding of the 'rule of law' as a set of solutions that can be drawn up in Brussels, New York or Washington and then imposed with the help of NATO troops, UN peacekeepers or EU pen-pushers is a bureaucratic fantasy, which causes more problems than it solves. As will be highlighted in the examples below, law that is disassociated from the political process of consen-

Building and genuine social need is more a rhetorical statement of policy intent than a law of the land. It will be suggested that the gap between law and reality reflects the gap between imperial power and political legitimacy. It is easy to issue laws and edicts, particularly when there is no need to gain the consent of elected or appointed representatives. For example, in 2003 Ashdown's office in Bosnia issued nearly a hundred laws going against the will of elected representatives at state, entity and local levels—and this, remember, was eight years after the Bosnian conflict ended and seven years after the first internationally ratified elections were held (OHR 2003).

Not only does there appear to be no immediate connection between the number of laws developed and implemented by these external authorities and any transition to self-government but, it seems, the opposite relationship is in play. Bosnia is caught in a vicious circle of growing unaccountable power. The Bosnian experience indicates that legal solutions with little relationship to the political context can be worse than not meddling at all. While passing laws makes the international administrators and advisors look as if they are doing something useful, appearances can be deceptive. Similarly, the high-handed approach of the US-led administrators and advisors in Iraq, that of addressing political problems through a reliance on legal edicts, has already showed signs of failure.

The 'Rule of Law'

In Bosnia, international High Representative Ashdown argues that his administration has 'the overriding priority ... of establishing the rule of law' (Ashdown 2003b; see also 2003a). In the Office of the High Representative (OHR) 2002 mission statement, *Jobs and Justice Our Agenda*, the OHR lays out the mission of the 'rule of law' as being the creation of a system of justice that operates in an equal, impartial and consistent manner across the whole of Bosnia, supported by a modernised system of governance and public administration and an efficient, effective and integrated law enforcement system capable of fighting crime and terrorism (2002a). Ashdown attributes the slow progress made in Bosnia to the fact that, initially, the international administration focused on working with political representatives rather than on imposing a comprehensive legal framework: 'This, above all was the mistake we made in Bosnia ... It is much more important to establish the rule of law quickly than to establish democracy quickly. Because without the former, the latter is soon undermined. In Bosnia, we got these priorities the wrong way round' (Ashdown 2003b). According to Ashdown, the international administrators were slow to learn that when it comes to nation-building, 'the process is sequential'; a 'bitter price' was paid in failing to understand 'the paramount importance of establishing the rule of law as the foundation of democratic development' (Ashdown 2003b). The argument for sequencing the rule of law before rolling back the authority of the international transitional administration is at the heart of calls for nation-building reforms. The influential 2000 Brahimi panel report on UN peace operations suggested that 'These missions' tasks would have been much easier if a common United Nations justice package had allowed them to apply an interim legal code to which mission personnel could have been pre-trained while the final answer to the "applicable law" question was being worked out' (UN 2000; see also

Chandler 2001). Since then, other reports have concurred with the need for a rapid introduction of a judicial package supported by effective military forces that can quickly subdue armed opposition, perform basic constabulary tasks and ensure that civilian law enforcement officers and administrative officials can perform their functions in an atmosphere of relative security (see International Peace Academy [IPA] 2002; ROP 2003).

There now appears to be a consensus among international policy-makers that post-conflict nation-building should be 'sequenced' with 'the rule of law' establishing the basis for reconstruction and democratic elections. This 'more muscular' approach to nation-building, held to be necessary to deal with criminalised or fragile states where social democratic forces have been marginalised through authoritarian rule, conflict and the privatisation or fragmentation of social networks, has been applied to Bosnia under Ashdown's administration (*Washington Post* 2002). This perspective would suggest that the US administrators and advisors in Iraq should concentrate on militarily imposing the government's control over the territory and ensuring the success of 'an exercise in state building from outside on a scale that has never been attempted before' rather than handing over power 'prematurely' to Iraqi representatives (Hutton 2003). In fact, the 'Iraqisation' of Iraqi governance—putting Iraqi faces in token positions of authority—has been a way of delaying the handover of any real authority.

It is feared that transition to direct and accountable Iraqi rule, prior to establishing the framework of the 'rule of law', would, in this scenario, leave the path open for power to be consolidated by elites with no interest in peace-building, for example, those with links to the previous Ba'athist regime or to fundamentalist religious groupings with support from neighbouring states. In this context, it seems likely that the promise of free elections by the end of January 2005 will be withdrawn (CPA 2004a). Current opinion polls show that most Iraqis want foreign troops out and would support parties calling for the withdrawal of US troops (Milne 2004). The outgoing US administrator has already made an edict banning any political parties that can be 'linked' to armed forces or militias (CPA 2004b). If the US supports the interim government in banning parties that articulate popular resistance to the current regime, then the political process will become increasingly irrelevant to ordinary Iraqis.

This article suggests that the approach of prioritising the 'rule of law' could have the unintended consequence of creating further instability and fragmentation in Iraq by delaying a political framework capable of giving Iraqi people a say in the running of their country. 'Rule of law' regulation through the prioritisation of law above the political sphere cannot compensate for, or overcome, the political problems involved in peace-building and post-war reconstruction. In Bosnia, international policy that has sought to marginalise the sphere of politics has institutionalised the current ethnic and regional divides rather than seeking to overcome them. Progress in the 'rule of law' has been promoted by the OHR as demonstrating the major improvements made under international administration, despite the continued political division of the small Bosnian state. Here it is suggested that the gap between the internationally imposed laws and the politically expressed will of Bosnian society, at the heart of the justification for externally imposed legislation, creates a 'rule of law' paradox. This paradox is drawn out below, in examples that illustrate that the

attempt to privilege law above politics in fact weakens and discredits the 'rule of law' rather than strengthening it. First, while the new laws may appear to be very impressive achievements on paper, they do not necessarily reflect or encourage an improvement in practice. Second, and more importantly, the development of the 'rule of law' through the external imposition of legislation undermines the process of consensus-building necessary to give post-conflict populations a stake in the peace-building or nation-building process.

The following sections consider briefly two areas of legislation publicly justified as necessary to undermine the power of political forces held to oppose post-war reconstruction. In each of these cases the 'rule of law' was developed and imposed over the opposition of Bosnian political representatives. The areas have been selected on the basis of their prominence in international reports on progress in the region. They are, firstly, the imposition of new constitutional changes that have sought to marginalise the governing influence of the main nationalist political parties and, secondly, the imposition of housing legislation allowing refugees and displaced people to return to their pre-war homes.

'The Rule of Law' and Political Representation

In September 2000 the constitutional court of Bosnia ruled that the general principle of political equality of the three constituent peoples should hold throughout Bosnia and with regard to both political entities, the Bosniak–Croat Federation and the Serb-dominated Republika Srpska (RS). This decision, which affected each entity's constitution, was pushed through by the three non-Bosnian, internationally appointed judges but with the support of only the two Bosniak judges. The two Serb and two Croat judges opposed the ruling.

Already clearly politically divisive, this general ruling on principle was then used by the international administration to radically reshape the political framework. In January 2001 the High Representative issued a decree creating two constitutional commissions, which met to discuss specific textual proposals for constitutional change, already drawn up by an international taskforce (OHR 2001a; European Stability Initiative [ESI] 2002a, 2). The Mrakovica–Sarajevo 'Agreement on the Implementation of the Constituent Peoples' Decision of the Constitutional Court of Bosnia and Herzegovina' was finally imposed by the OHR in March 2002 (OHR 2002b). Although it was signed by representatives of the United States and the European Union, the Agreement was not supported by Bosnian representatives despite its perceived constitutional importance as 'an addendum to the Dayton Agreement' (Bisenić 2002). The new constitution was imposed by three decrees requiring constitutional changes in the two entities and reforming the election laws. According to the then High Representative, Wolfgang Petritsch, imposition was necessary: 'I'm not going to allow ... nationalist parties ... to prevent them from taking effect. As a guarantor of the Mrakovica–Sarajevo Agreement, I simply cannot accept the continuing obstruction on the side of these nationalistic dinosaurs. I cannot allow the prospect that these ... parties could hold the citizens of this country hostage' (OHR 2002c)

The implications for the governments of both political entities were extensive. Section II of the Agreement on Implementation of the Constituent Peoples' Decision, covering the distribution of key political posts, declares,

PM and Deputy Prime Ministers may not come from the same constituent people. Out of the following positions not more than 2 may be filled by representatives of any one constituent people or of the group of Others: 1) Prime Minister 2) Speaker of the House of Representatives/Republika Srpska National Assembly 3) Speaker of the House of Peoples/Council of Peoples 4) President of Supreme Court 5) President of Constitutional Court 6) Public Prosecutors. Presidents of Entities—the President shall have two Vice-Presidents coming from different constituent peoples. (OHR 2002b)

Of the six most important positions in the RS only two, or one-third, could be held by Bosnian Serbs. This was hailed as a major step forward for democratising the Serb entity because the governing representatives would be dominated by non-Serbs. This, despite the fact that by far the majority of the current population are Serbian.

Section III of the Agreement covered in greater detail the 'minimum representation in the government of the Federation of Bosnia and Herzegovina and of the Republika Srpska', stating,

The RS Government (Prime Minister and 16 ministers) shall be composed of 8 Serb, 5 Bosniak and 3 Croat ministers. One 'Other' may be nominated by the Prime Minister from the quota of the largest constituent people. There shall be additionally a Prime Minister who shall have two Deputy Prime Ministers from different constituent peoples selected from among the Ministers; and the Federation Government (Prime Minister and 16 ministers) shall be composed of 8 Bosniak, 5 Croat and 3 Serb ministers. One "Other" may be nominated by the Prime Minister from the quota of the largest constituent people. There shall be additionally a Prime Minister who shall have two Deputy Prime Ministers from different constituent peoples selected from among the Ministers. (OHR 2002b)

The new framework radically transformed the governments of Bosnia, particularly in the RS. For Petritsch, the use of the law to implement drastic reforms of the peace settlement was immensely pleasing. He stressed 'that never ever in the three years of my mandate in Bosnia and Herzegovina have I experienced a feeling of such profound relief and satisfaction' (OHR 2002c). On paper the three main nationalist parties lost their power and control; governments at both the entity and state level are based on multi-ethnicity rather than votes. The October 2002 elections demonstrated the apparent necessity of adopting this strategy of using the law to reshape Bosnian politics. Representatives of the three main nationalist parties, the SDA (*Stranka Demokratska Akcija*—Party of Democratic Action), SDS (*Srpska Demokratska Stranka*—Serbian Democratic Party) and the HDZ (*Hrvatska Demokratska Zajednica*—Croatian Democratic Community), won the Bosniak, Serb and Croat seats in the three-member Bosnian Presidency. At the state level, and in the elections for the entity parliaments, the HDZ, SDS and SDA were the leading parties in their respective ethnic constituencies, yet are restricted to minority positions in ruling authorities.

The manipulation of election and constitutional laws, however, has produced a situation where the results of the elections have no relationship to the expressed will of Bosnia's citizens at the ballot box. Furthermore, it is not just at the level of entity governments that multi-ethnic political representation has been imposed from above, irrespective of the ethnic composition of the electorate. At the local level of municipal government and at cantonal level in the Federation, the constitutional amendments have been used to break the hold of

majority political parties elected to power where there is a clear ethnic majority. Representation on the basis of the population census of 1991, rather than on the basis of today's constituents, has meant that in some towns the representatives of the leading political party or even the town mayor may live not just outside the town, but in some cases many miles away, or even in another entity (International Crisis Group [ICG] 2002, 26). This has heightened political tensions and raised questions about the legitimacy of policy made by people who do not have to live with the consequences of their decisions.

The imposition of these new constitutional arrangements that have sought to ameliorate the influence of nationalist political parties has done little to strengthen the Bosnian political framework. Institutions that are run by politicians elected on few votes and having little connection to the people whose lives they are regulating have little political legitimacy and are unable to secure wider support for the political settlement (see further Chandler 2002). While the constitutional changes may produce governments that look good on paper, they institutionalise and perpetuate the problems that they seek to address. The fact that these institutions are dependent on international administrators to appoint them and oversee their operation means they perpetuate divisions and external dependencies. As long as the political settlement is dependent on external regulation, the questions of ethnic insecurity and uncertainty over the future remain. Rather than the nationalist parties losing credibility it would appear that their support is cemented by international manipulation of the political process (see, for example, Bieber 2001; ICG 2001). The use of the 'rule of law' to reform the political process has merely resulted in the undermining of Bosnia's political institutions. With growing cynicism about the political process, there was little surprise that only just over half the population wished to vote in the elections of October 2002 (OHR 2002e).

The Law on Property Return

Annex 7 of the Dayton Peace Agreement, Article 1(1), states that

All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. (General Framework Agreement [GFA] 1995)

The issue of property return to displaced people and refugees has been held to be a central part of the struggle to enforce the 'rule of law' against the sectional interests of the main political parties. According to many international policy-makers, refugees and displaced people are up against the self-interest of political elites in two ways:

Bosnians wishing to return to areas where they will be a minority population face a double barrier. Nationalists in their former hometowns work to impede their return through administrative obstruction, intimidation and violence, more often than not with the connivance of local (and higher) authorities. Furthermore, the nationalist elites who rely on these de-racinated populations as reservoirs of support also work to prevent their return. (Democratization Policy Institute [DPI] 2002, 12)

For the international community, imposing the 'rule of law' would mean 'squeezing' the 'opaque corrupt political and criminal networks' and 'help uproot the deadwood that has no interest in Bosnia functioning for its citizens—of any ethnicity'(DPI 2002, 12). In November 1998 the international community acted to impose legislation in the Federation insisting that the right to repossess pre-war property took precedence over any rights that local authorities had granted to the current occupant. In April 1999 similar laws were imposed in the RS (OHR 1998; 1999a). These laws were later strengthened and harmonised by the High Representative and in 1999 no less than 38 separate acts of legislation were imposed by the High Representative in the field of Property Laws, Return of Displaced Persons and Refugees and Reconciliation (see OHR 1999b). The implementation of property legislation met with resistance throughout Bosnia and entailed detailed regulation and enforcement by international agencies, including the UN High Commission for Refugees, the OHR, the Organisation for Security and Co-operation in Europe and the UN Mission in Bosnia. The UN International Police Task Force has supervised local police to ensure that evictions take place and international officials have taken over the running of reluctant local housing offices, setting quotas to be resolved and overseeing the management on a day-by-day basis (ICG 2002, 9; OHR 2002d). The High Representative has also used his 1997 Bonn–Petersburg powers, to dismiss elected representatives and public employees, to sack over thirty mayors and other municipal officials held to have obstructed the implementation of property laws and the exercise of the right to return. Even with the international community effectively running local housing authorities and removing any scope for discretion the solution is not straightforward. This is because property return is a political not a purely legal question.

Studies of the return situation and the imposition of the property legislation suggest that the imposition of law is not the same as refugee return itself. On paper the more coercive international policy seems to be paying dividends. By the end of September 2002 it was reported that 150,000 (62% of applicants) had been successful in reclaiming their property (ICG 2002). However, forcing through property returns in a situation of uncertainty has merely resulted in the 'legally dubious but increasingly common practice of selling off property claims before they have been realised' or in the legally fine but politically counterproductive selling of the property, often to the family that were the former occupants (Heimerl 2002).

Although the imposition of property legislation against the will of local authorities is promoted as a key example of where 'rule of law' human rights protections and equal treatment have taken precedence over Bosnian political will, there is little accounting for the success of this policy on the ground. According to the International Crisis Group (ICG),

No international organisation or government agency has precise figures on how many Bosnians, after reclaiming their houses or flats—or receiving reconstruction assistance—then decide to sell or exchange them and relocate elsewhere. Both anecdotal evidence and classified advertisements in the newspapers suggest that the practice is widespread. (ICG 2002, 11)

In fact, the OHR has been happy to connive in the artificial conflation of 'law' and 'reality' in order to give the impression of progress. In July 2001 the High

Representative decreed an end to the two-year moratorium on resale in the Federation (OHR 2001b). After the decree, applications for repossession from refugees shot up, the motivation being for sales rather than return (ICG 2002, 11). Along with not keeping figures distinguishing permanent return from selling or exchanging property, the High Representative seems willing to compromise on permanent return in order to boost the success of property law implementation.

The majority of the property law returns have been implemented for socially owned apartments in urban areas rather than private property in rural areas. This gives a misleading impression, since it is precisely urban municipal properties which are most likely to be exchanged or sold. Permanent return is most often centred on villages because in the towns economic opportunities are scarce, while in the rural areas economic survival is helped through a reliance on subsistence agriculture (ICG 2002). Even if property sold or exchanged is excluded, many of the properties returned are not occupied by their legal owners and either left vacant or rented out. Media in Sarajevo report that as many as 10,000 reposessed apartments in Sarajevo canton remain empty, representing half the properties reposessed in the canton (ICG 2002). In Dvar about 500 Serb owners of reposessed and privatised flats have signed rental agreements allowing displaced Croats to stay on. Similar arrangements exist in Foca where Bosniaks have reposessed their flats but have rented them out to displaced Serbs.

Often, even where property figures do represent actual returns, the level of return is only a partial one, and does not represent a return to pre-war patterns of integration. In many cases where there is return to pre-war housing, the figures are misleading, since as only part of the family returns, particularly older family members. Meanwhile, school-age children are likely to remain in or be sent back to their majority areas (ICG 2002). In cities such as Prijedor and Sarajevo, survey results indicate that many people who have returned continue to commute to work in the places to where they were formerly displaced (ICG 2002).

The 'rule of law' perspective, as imposed by international administrators, attempts to impose a return to the pre-war situation. After four years of war and eight years of living apart, many people have naturally made new lives for themselves in Western states, neighbouring states or other parts of Bosnia. There have also been major demographic shifts brought about by the war and economic transformation which have little connection to concerns of being in a position of an ethnic minority. While the international community has provided support for the return of refugees, it has been left to municipal authorities to look after the needs of displaced persons who do not want to return to their pre-war housing. This section of society is the most vulnerable group in society, with only tenuous rights to welfare and housing. The imposition of property laws has contributed to these social and economic tensions, causing a secondary displacement of people on a large scale with more than 150,000 families vacating claimed property and another 100,000 facing eviction. Their care then falls to local authorities who are already under tremendous financial strains (ESI 2002b).

However, from the perspective of the international administrators, any attempt to respond to the new needs created by population changes brought about by the war and economic and social transition is problematised and seen

as preventing a return to the 1991 ethnic balance. Local authority attempts to address the needs of displaced people living within their area are perceived to be criminal actions designed to shore up the gains of ethnic cleansing. The distribution of building plots, construction materials, business premises and commercial estate to displaced persons is seen as problematic, since this 'cements' ethnic cleansing, as does the provision of employment. This approach, whereby post-conflict legislators attempt to compensate victims and not perpetrators, forgets, as Rama Mani's comparative study notes, two crucial facts: first, that these two groups overlap each other, and second, that post-conflict solutions depend not on the perpetuation of divisions but rather on the development of forward-looking approaches that focus on the 'community of survivors' (Mani 2002).

Many local authorities have been building new housing, something that would normally be seen as positive in the post-war situation. However, new construction is often seen as questionable because it inevitably reinforces the post-war status quo. In Pale, Sokolac, Srpska Ilidza and Srpsko Novo Sarajevo thousands of new houses and flats have been built to meet the needs of Serbs displaced from the Federation. Republika Srpska municipalities previously linked to Sarajevo have been particularly active in building commercial enterprises—hotels, cafes and other businesses on socially owned land. Those involved in authorising and supplying these projects have been investigated by OHR staff. In April 2000 the OHR issued an edict banning the use of socially owned land without explicit OHR permission. In order to build on free land the authorities must petition the OHR for a waiver on the grounds that its use is 'non-discriminatory and in the best interests of the public' (OHR 2000). A year later, the OHR wrote to all municipal authorities informing them that the waiver system also applied retrospectively to all transactions since 6 April 1992, throwing into question 96% of land transactions made since that time (ESI 2002b, 3–9).

Petritsch and his successor Ashdown have sacked town mayors and other municipal officials for the crime of making land allocations without adequate permission (ICG 2002). Yet the OHR was ill-equipped to deal with the enormity of the new powers of decision-making it had awarded itself. It now covered 53% of the country's territory, since all urban land, 90% of forests and 10% of agricultural land is socially-owned (ESI 2002b, 3). Even welfare policies, such as giving low-interest loans to war veterans and the families of those killed in order to purchase flats in new blocks, have been criticised. All these policies are held by Bosnia's unaccountable rulers to perpetuate current ethnic imbalances rather than encouraging a return to pre-war housing allocations (ICG 2002).

The gap between the Bosnia of 1991 and the Bosnia of 2004 continually brings out the problematic nature of international 'rule of law' enforcement. When elected representatives respond to the wishes of the electorate they are held to be pursuing criminal interests or to be 'cementing ethnic cleansing'. The biggest problem with the imposition of the 'rule of law' and the focus on the imposed policy aims of the international administrators rather than political solutions negotiated by Bosnians themselves is that it is very difficult for society to move forward. There is an open threat that opposition to international regulation will be criminalised along with solutions aimed at enabling people to look forward and establish new lives. Ashdown argues that 'we've invented a new human right here, the right to return after a war', by which he means not post-war return to one's country but to reclaim and return to one's own home (ICG 2002,

39). The 'human right' to put the pieces back together to the pre-war status-quo is not one that has been decided upon by the people of post-war Bosnia. Nor is it one insisted upon by the Dayton Agreement itself, which, under the constitutional rules of Annex 4, explicitly guarantees the 'right to liberty of movement and residence' (GFA 1995). Across the political parties, regardless of ethnicity, there is a recognition that land allocation policies for displaced people are essential to facilitate returns and restore a sense of security to all ethnic groups (ESI 2002b). To date, arguments for the rule of politics on behalf of those living in Bosnia rather than the 'rule of law' on behalf of the international bureaucracy have been rejected by the international administration, and Bosnian calls for a new census to be held have been condemned as seeking to legitimise post-war population shifts.

The 'Rule of Law'?

Even the advocates of the 'rule of law' realise that the external imposition of 'law' has been problematic in Bosnia. For example, the Democratization Policy Institute (DPI) suggest,

International experts are poorly poised to craft such sets of laws. The track record of internationals drafting laws for Bosnia is abysmal. Legal experts who parachute into Sarajevo on six-month contracts, have little grasp of the Bosnian context, no understanding of the language, and who don't have to live with the results of their work, have made a mess of attempts to reform Bosnian statutes ... The muddle resulting from internationals drafting detailed statutes leaves the Bosnian people understandably feeling like guinea pigs. (DPI 2002, 15)

For the DPI and other policy think-tanks the problem is a technical rather than a political one. Internationals involved in the drawing up of laws are too often more focused on 'high salaries, low expenses and a "per-diem rich environment' resulting in bad laws (DPI 2002, 15).

The DPI recognises the gap between the laws imposed and the needs and sensitivities of the society in which they are meant to take effect and argues that this gap can be closed by giving selected Bosnians a larger role in the law-making process. They suggest that these Bosnians should be selected by international officials rather than by political representatives: 'Because the Bosnian political system is broken, OHR should not defer to it ... instead selecting the small group of Bosnians itself' (DPI 2002, 15). For this influential policy institute, laws should be drawn up by international experts and the OHR, after considerable consultation with local experts. But they stress forcibly that 'politicians should be excluded' (DPI 2002, 15). For the Institute the problem with external imposition of the law in the 'public interest' is a technical, not a political one. It is precisely this narrow understanding of both law and politics which is problematic for international administrations such as the one in Bosnia. No better is promised in Iraq. The US hand-picked the Iraqi 'representatives' who formed the initial Governing Council and their successors in the interim government, but few of these appointed members represent substantial domestic constituencies and their roles have been largely consultative rather than legislative (CPA 2003c; Clover 2003; al-Khafaji 2003).

The narrow understanding of both politics, which is dismissed as irrelevant to public needs, and of law, which is seen as an off-the-peg external solution, has

little in common with the traditional liberal-democratic meaning of the 'rule of law'. The 'rule of law' has historically been understood in relation to the modern democratic framework and in contrast to the rule of bureaucratic regulation or authoritarian repression (Dicey 1959, 202–3). The 'rule of law' did not mean merely that there was a set of rules and regulations or laws, backed up by the military, police and courts. It also meant that this framework was predicated on consent, the equality of rights and the autonomy of individuals. It is important to stress the qualitative difference between the liberal democratic approach, which derives rights from self-governing human subjects, and the current 'rule of law' approach of externally imposing a rights framework outside of the political process of debate and consensus-building.

The 'rule of law' approach used by international administrators in Bosnia attaches little importance to the political sphere and state institutions. The essence of the 'bureaucratic gaze' is the belief that the 'rule of law' can be developed and implemented separately from, and counterpoised to, the political process. However, as E.H. Carr noted in his landmark study of international relations, the derivation of modern law from rights-bearing individuals is not merely of historical or philosophical importance:

law is a function of a given political order, whose existence alone can make it binding ... Law cannot be self-contained; for the obligation to obey it must always rest on something outside itself. It is neither self-creating nor self-applying. 'There are men who govern,' says a Chinese philosopher, 'but there are no laws that govern.' (Carr 2001, 165)

While for Carr 'the ultimate authority of law derives from politics', it is precisely the attempt to separate the sphere of law from that of politics which is the *sine qua non* of the 'rule of law' approach in Bosnia (Carr 2001, 166). The attempt to externally impose the 'public interest' through imposing the 'rule of law' from the top down in fact undermines the creation of any genuine public consensus from the bottom up through the political process. Removing the process of engagement and participation in the political and legal process gives citizens no sense of ownership of these 'rights' granted by the international administration. The people of Bosnia may have a legal framework that institutionalises their rights, but these imposed rights appear as an oppressive, alien and artificial creation. In the same way, the 'rights' of Iraqi citizens, declared by the US–UK administration, do not appear as rights but as alien impositions and are unlikely to bind society.

If there is any lesson from eight years of international rule over Bosnia, it is that high-handed intervention to give priority to the 'rule of law' over the political sphere has done little to help overcome insecurities and divisions, while undermining collective political bodies in which Serb, Croat and Bosniak representatives can negotiate solutions. The consequences for Iraq could be even more destabilising, since security depends on isolating support for terrorist resistance, which will be difficult as long as ruling institutions are seen as an illegitimate foreign imposition.

Conclusion

The traditional understanding of the 'rule of law' was the rule of constitutionality (see, for example, Jackson 1990, 95–98). Law and justice were seen to result

from autonomy and self-government. The focus on the 'rule of law' by today's nation-building administrators is very different from the post-1945 approach, when the importance of state sovereignty vis-à-vis external rule was universally acknowledged. Today, the problematisation of the political process in many sovereign states and the concomitant demand for international legislative action in the name of sustainable peace-building would seem to reflect the opposite trends, involving the reversal of decolonisation (International Commission on Intervention and State Sovereignty [ICISS] 2001, 199).

The current doctrine of nation-building posits the 'rule of law' in opposition to self-government. Through viewing the political process as problematic, law then appears as an external apolitical solution. In the areas considered above, the law has been imposed against the will of the population in the belief that the legal framework is the basis on which post-conflict reconstruction and nation-building can be shaped and guided. The experience of Bosnia would suggest that this legal idealism undermines the political process, the standing of the law and the transition to self-government.

As briefly described above, the imposition of the 'rule of law' in order to enforce political consensus has merely served to discredit the political process rather than to give it greater authority as intended. The lesson for Iraq is clear in the lack of popular support behind the Iraqis hand-picked to consult with the US and British administration, and the lack of any possibility for locally accountable representatives to take responsibility for reconstruction. Similar unintended consequences have occurred with regard to the imposition of specific legalisation, which allegedly could not be left to Bosnian politicians. The advocates of the 'rule of law' have criticised the slowness of political reform in Bosnia for producing 'façade democracy' but the edicts of the OHR demonstrate that the top-down imposition of the 'rule of law' can be equally artificial, creating a legal façade of universality while in practice institutionalising ethnic division.

Finally, the danger of prioritising the 'rule of law' above the political process is the risk of unregulated and arbitrary power. This danger is all too apparent in Iraq under US and British administration, where there is no constitutional process of appeal for wrongful detention and no capacity to challenge the rule of international administrators. Once the rule of law is separated from the democratic process it becomes the rule of tyranny rather than the rule of justice. To escape the hubris brought on by their military power, the Washington administrators would do well to heed the warning of the late Hans Morgenthau, the founder of 'realism' in international relations. It was he who argued that while hubris was brought to ground through the political pressures of domestic politics, it was in the international field 'that the belief in the limitless power' of political doctrinaires was particularly dangerous, for here 'the panaceas engendered by this belief have no connection whatsoever with the forces which determine the actual course of events' (Morgenthau 1993, 49).

References

- Aal-Khafaji, I. (2003) 'I Did Not Want to Be a Collaborator', *The Guardian*, 28 July.
Ashdown, P. (2003a) 'What Baghdad Can Learn from Bosnia', *The Guardian*, 22 April.

- Ashdown, P. (2003b) 'Broken Communities, Shattered Lives; Winning the Savage War of Peace', Speech to the International Rescue Committee, London, 19 June, <http://intranet.theirc.org/docs/ashdown_lecture.pdf>.
- Bieber, F. (2001) *Croat Self-Government in Bosnia—A Challenge for Dayton* (Flensburg, European Centre for Minority Issues).
- Bisenić, D. (2002) 'Interview: Wolfgang Petritsch, the High Representative in Bosnia: "New Solutions Are Not Emergency Measures for Balkans"', *Danas*, 10 April, <www.ohr.int/ohr-dept/preso/pressi/default.asp?content_id=7387>.
- Carr, E.H. (2001) *The Twenty Years Crisis, 1919—1939: An Introduction to the Study of International Relations* (Basingstoke, England, Palgrave-Macmillan).
- Chandler, D. (2001) 'The People-Centred Approach to Peace Operations: The New UN Agenda', *International Peacekeeping*, 8(1), pp. 1–19.
- Chandler, D. (2002) 'Anti-corruption Strategies and Democratization in Bosnia-Herzegovina', *Democratization*, 9(2), pp. 101–20.
- Clover, C. (2003) 'Row Mars First Meeting of Iraq Interim Council', *Financial Times*, 14 July.
- Coalition Provisional Authority (2003a) Order No. 1, 'De-Baathification of Iraqi Society', 15 May, <www.cpa-iraq.org/regulations/CPAORD1.pdf>.
- Coalition Provisional Authority (2003b) Order No. 2, 'Dissolution of Entities', 23 May, <<http://www.cpa-iraq.org/regulations/CPAORD2.pdf>>.
- Coalition Provisional Authority (2003c) Regulation No. 6, 'Governing Council of Iraq', 13 July, <www.cpa-iraq.org/regulations/REG6.pdf>.
- Coalition Provisional Authority (2004a) Order No. 96, 'The Electoral Law', 15 June, <http://www.cpa-iraq.org/regulations/20040615_CPAORD_96_The_Electoral_Law.pdf>.
- Coalition Provisional Authority (2004b) Order No. 97, 'Political Parties and Entities Law', 15 June, <http://www.cpa-iraq.org/regulations/20040615_CPAORD_97_Political_Parties_and_Entities_Law.pdf>.
- Dicey, A.V. (1959) *Introduction to the Study of the Law of the Constitution* (London, Macmillan).
- Democratization Policy Institute (2002) 'An Agenda for Bosnia's Next High Representative', 1 May, <www.anonime.com/dpinstitute/europe/balkans/Bosnia_and_herzegovina/20020501_Bosnia_agenda.pdf>.
- European Stability Initiative (2002a) *Imposing Constitutional Reform? The Case for Ownership: A Discussion Paper* (Berlin and Sarajevo).
- European Stability Initiative (2002b), 'From Dayton to Europe: Land, Development and the Future of Democratic Planning', *draft version for circulation to OHR only, Berlin and Sarajevo*, 12 December.
- General Framework Agreement (1995) Annex 7, 'Agreement on Refugees and Displaced Persons', <www.ohr.int/dpa/default.asp?content_id=375>.
- Goldenberg, S. (2004) 'Experienced and Tough. But Bush's Man Will Still Have to Work Miracles', *The Guardian*, 30 June.
- Heimerl, D. (2002) 'The Return of the Refugees: Fiction and Reality', paper presented at Fifth International Seminar, 'Democracy and Human Rights in Multiethnic Societies', Institute for Strengthening Democracy in Bosnia, Konjic, Bosnia, 8–12 July.
- Hutton, W. (2003) 'Alone the US Will Fall', *The Observer*, 24 August.
- International Commission on Intervention and State Sovereignty (2001) *The Responsibility to Protect: Research, Bibliography, Background* (Ottawa, International Development Research Centre).
- International Crisis Group (2001) *Turning Strife to Advantage. A Blueprint to Integrate the Croats in Bosnia and Herzegovina* (Sarajevo and Brussels).
- International Crisis Group (2002) *The Continuing Challenge of Refugee Return in Bosnia and Herzegovina* (Sarajevo and Brussels).
- International Peace Academy (2002) *You, the People: Transitional Administration, State-Building and the United Nations* (New York).
- Jackson, R.H. (1990) *Quasi-states: Sovereignty, International Relations and the Third World* (Cambridge, Cambridge University Press).
- Mani, R. (2002) *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge, Polity).

- Milne, S. (2004) 'The Resistance Campaign Is Iraq's Real War of Liberation', *The Guardian*, 1 July.
- Morgenthau, H.J. (1993) *Politics among Nations: The Struggle for Power and Peace* (New York, McGraw Hill).
- The Observer* (2003) 'Four Steps to Peace in Iraq', 7 September.
- Office of the High Representative (1998) 'Decision Suspending Decision-Making on Claims to Apartments in the Federation for Which a Permanent Occupancy Right Was Issued after 30 April 1991, and Imposing a Moratorium on Sale of Apartments to Persons Who Acquired Their Occupancy Right after 30 April', 5 November, < www.ohr.int/decisions/plipdec/default.asp?content_id=151 >.
- Office of the High Representative (1999) 'Decision Cancelling All Permanent Occupancy Rights Issued in the RS during and after the War in Bosnia and Converting Them into Temporary Occupancy Rights', 14 April, < www.ohr.int/decisions/plipdec/default.asp?content_id=161 >.
- Office of the High Representative (1999b) 'High Representative's Decisions: Property Laws and Return, Displaced Persons and Refugees, 1999', < www.ohr.int/decisions/plipdec/archive.asp?m=&yr=1999 >.
- Office of the High Representative (2000) 'Decision on Re-allocation of Socially Owned Land, Superseding the 26 May 1999 and 30 December 1999 Decisions', 27 April, < www.ohr.int/decisions/plipdec/default.asp?content_id=213 >.
- Office of the High Representative (2001a) 'Decision Establishing Interim Procedures to Protect Vital Interests of Constituent Peoples and Others, Including Freedom from Discrimination', 11 January, < www.ohr.int/decisions/statemattersdec/default.asp?content_id=365 >.
- Office of the High Representative (2001b) 'Decision Amending the Law on Sale of Apartments with Occupancy Rights', 17 July, < www.ohr.int/decisions/plipdec/default.asp?content_id=129 >.
- Office of the High Representative (2002a) *Jobs and Justice our Agenda*, < <http://www.ohr.int/pic/econ-rol-targets/pdf/jobs-and-justice.pdf> >.
- Office of the High Representative (2002b) 'Agreement on the Implementation of the Constituent Peoples' Decision of the Constitutional Court of Bosnia and Herzegovina', 27 March, < www.ohr.int/ohr-dept/legal/const/default.asp?content_id=7274 >.
- Office of the High Representative (2002c) 'Press Conference of the High Representative, Wolfgang Petritsch, on the Completion of the Constitutional Reform Process in Bosnia and Herzegovina's Entities', 19 April, < www.ohr.int/ohr-dept/presso/pressb/default.asp?content_id=7503 >.
- Office of the High Representative (2002d) 'A New Strategic Direction: Proposed Ways Ahead for Property Law Implementation in a Time of Decreasing IC Resources', Property Law Implementation Plan, 12 September, < www.ohr.int/plip/key-doc/default.asp?content_id=27904 >.
- Office of the High Representative (2002e) 'Report to the European Parliament by the OHR and EU Special Representative for Bosnia, July–December 2002', 23 December, < www.ohr.int/archive/rep-eur-parl/default.asp?content_id=30140 >.
- Office of the High Representative (2003) 'High Representative's Decisions, 2003', < <http://www.ohr.int/decisions/archive.asp?m=&yr=2003> >.
- ROP (2003) *A Review of Peace Operations: A Case for Change* (London, Kings College and International Policy Institute).
- Steele, J. (2003) 'US Decree Strips Thousands of Their Jobs', *The Guardian*, 30 August.
- United Nations (2000) *Report of the Panel on UN Peace Operations*, A/55/305–S/2000/809, < www.un.org/peace/reports/peace_operations >.
- Washington Post* (2002) 'After the War', editorial, 24 November.
- Whitaker, B. (2003) 'Iraq's Fresh Start May Be Another False Dawn', *The Guardian*, 5 September.

