

# Privatization in Kosovo: The International Project 1999–2008

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# Glossary of Acronyms

BSPK	Union of Independent Trade Unions of Kosova ( <i>Bashkimit të Sindikatave të Pavarura të Kosovës</i> )
DTI	Department of Trade and Industries
EC	European Commission
ECHR	European Convention on Human Rights
ESI	European Stability Initiative
EULEX	European Union Rule of Law Mission in Kosovo
HRCUP	Human Rights Centre of the University of Prishtina
ICO	International Civilian Office
ICR	International Civilian Representative
ICJ	International Court of Justice
IMF	International Monetary Fond
KEK	Kosovo Energy Corporation ( <i>Korporata Energjetike e Kosovës</i> )
KIPRED	Kosovar Institute for Policy Research and Development
KLA	Kosovo Liberation Army
KTA	Kosovo Trust Agency
LDK	Democratic League of Kosovo ( <i>Lidhja Demokratike e Kosovës</i> )
LLA	Lessons Learned and Analysis Unit of ESI and the EU Pillar of UNMIK in Kosovo
OLA	UNMIK's Office of Legal Affairs
OSCE	Organization for Security and Co-operation in Europe
PAK	Privatisation Agency of Kosovo
PDK	Democratic Party of Kosovo ( <i>Partia Demokratike e Kosovës</i> )
PISG	Provisional Institutions of Self-Government

POE	Publically Owned Enterprise
PTK	Post and Telecom of Kosovo ( <i>Posta dhe Telekomunikacioni i Kosovës</i> )
SFRY	Socialist Federal Republic of Yugoslavia
SOE	Socially Owned Enterprise
SRSB	Special Representative of the UN Secretary-General
UNDP	United Nations Development Programme
UNHCR	United Nations Office of the High Commissioner for Refugees
UNHQ	United Nations Headquarters
UNMIK	United Nations Interim Administration Mission in Kosovo
USAID	United States Agency for International Development

# Introduction

This report focuses on the international involvement in privatization in Kosovo as an example of international statebuilding.<sup>1</sup> It concentrates on the period from 1999 to 2008, when privatization was planned and implemented under formal international management. As well as describing the background and debates that have shaped internationally led privatization in Kosovo, explaining the aims and concerns that have influenced the process,<sup>2</sup> and outlining some of its consequences, the report will also indicate what this case may say about the nature of international statebuilding. It would appear that internationally led privatization in Kosovo expresses a predetermined and automatized international statebuilding agenda, rather than a primarily development-oriented or context-specific one.

Internationally managed statebuilding has emerged as a key Western security strategy as a manifestation of the *liberal peace thesis*. In its simplest form, the liberal (sometimes called ‘democratic’ or ‘Western’) peace thesis holds that – for reasons of norms, institutional structures and interconnectedness – liberal democracies are unlikely to be involved in violent conflict.<sup>3</sup> On the basis of this assumption, international statebuilding projects aim to ‘build’ liberal democracies in places defined as a security risk.<sup>4</sup> As a rule, statebuilding operations are initiated because weak states with vulnerable institutions are seen to compromise the security of their neighbours – and even more significantly, the security of the states and institutions spearheading the statebuilding operations.

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<sup>1</sup> Although the international operation in Kosovo was always formally called ‘peacebuilding’ rather than ‘statebuilding’ the latter term more accurately reflects its aims and orientation. See UNSC Resolution 1244 (1999), p. 4. For the concept of ‘international statebuilding’, see the next part of this report.

<sup>2</sup> ‘The process’ is here used to refer to privatization in Kosovo, as prepared and implemented from 1999 onwards.

<sup>3</sup> See e.g. Michael W. Doyle: ‘Kant, liberal legacies, and foreign affairs’, *Philosophy and Public Affairs*, 12 (3), 1983; and ‘Kant, liberal legacies, and foreign affairs, Part 2’, *Philosophy and Public Affairs*, 12 (4), 1983; Bruce M. Russett: *Grasping the democratic peace: principles for a post-Cold War world* (1993); Henry Farber and Joanne Gowa: ‘Common interests or common polities: Reinterpreting the democratic peace’, *Journal of Politics*, 58 (2), 1997.

<sup>4</sup> For a summary, see Michael Doyle: ‘Three pillars of the liberal peace’, *American Political Science Review*, 99 (3), 2005.

Privatization, a ‘fundamentally political [...] issue which in democratic contexts is typically subject to ideological and political party choice’,<sup>5</sup> has become *the* economic strategy of choice for international statebuilding projects, advancing it throughout the world as a self-evident part of the liberal peace thesis.<sup>6</sup> While policy areas such as economic resource management and the respective roles of the state and the private sector in the economy tend to be core features of democratic political contestation, the liberal statebuilding model removes such issues from the democratic arena and into international hands, promoting liberal economic policies with seemingly non-political, mechanical and managerial rhetoric.<sup>7</sup> This de-politicization of liberal economic reform ‘glosses over its political and its social character’ and ignores or hides the fact that it is not a technical exercise, but a ‘highly controversial political endeavour.’<sup>8</sup>

The international statebuilding project in Kosovo may well be the most comprehensive ever, in terms of per capita international investment as well as the range and depth of formal international powers.<sup>9</sup> The UN Interim Administration Mission in Kosovo (UNMIK) ‘assumed sole responsibility for all duties and responsibilities commonly borne by a territory’s national government’.<sup>10</sup> According to its first Regulation, of 25 July 1999, ‘all legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General’ (the SRSG).<sup>11</sup> UNMIK was to function with four ‘Pillars’: Pillar I was initially managed by the UN Office of the High Commissioner for Refugees (UNHCR) and responsible for

<sup>5</sup> Jens Stilloff Sørensen: *State collapse and reconstruction in the periphery: political economy, ethnicity and development in Yugoslavia, Serbia and Kosovo* (2009), p. 33. See also Shahar Hameiri: ‘Capacity and its fallacies: International state building as state transformation’, *Millennium: Journal of International Studies*, 38 (1), 2009, pp. 57 and 60.

<sup>6</sup> Although outside the scope of this report, it could be mentioned that privatization has been promoted globally by Western-liberal officials and institutions also outside the narrowly defined statebuilding context, including in the 1990s framework of the ‘Washington consensus’ – a reform standard strongly emphasizing neoliberal economic models. The term was originally attributed to economist John Williamson; see ‘Democracy and the “Washington consensus”’, *World Development*, 21 (8), 1993 – where he explains the model and refutes the label ‘neoliberal’ (p.1334). For a critique, see Naomi Klein: *The shock doctrine: The rise of disaster capitalism* (2008).

<sup>7</sup> Sørensen 2009, p. 33.

<sup>8</sup> Volker Boege et al.: ‘On hybrid political orders and emerging states: What is failing – states in the global South or research and politics in the West?’ in Martina Fischer and Beatrix Schmelzle (eds): *Building peace in the absence of states: Challenging the discourse on state failure* (2009), p. 30.

<sup>9</sup> Ibid. For the former measurement, see Iain King and Whit Mason: *Peace at any price: How the world failed Kosovo* (2006) – a book written by former international statebuilders in Kosovo, illustrative of their outlook and frame of reference.

<sup>10</sup> Hans Fabian Kiderlen: ‘From Trieste to East Timor’, *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, 196, 2008, p. 443.

<sup>11</sup> UNMIK Regulation 1999/1.



humanitarian assistance, but in 2000 became a UN-led police and justice Pillar.<sup>12</sup> Pillar II, also under the UN, was tasked with civil administration, while Pillar III was led by the Organization for Security and Co-operation in Europe (OSCE) and worked on democratization and institution-building. Pillar IV was managed by the European Union (EU) and tasked with economic reconstruction and development.<sup>13</sup> At the same time as international officials assumed governance responsibility, Kosovo formally remained a province of Serbia (which, however, had no role in Kosovo's daily affairs). This made the international project in Kosovo one of 'statebuilding without [formal] statehood'.<sup>14</sup>

That UNMIK never formally was labelled a 'statebuilding' mission might have reflected sensitivity towards a term that could connote a particularly intrusive form of interference with local sovereignty and self-determination – which would have been exacerbated by Kosovo's unresolved status. Kosovo had been a largely self-governed 'autonomous province' in the Socialist Federal Republic of Yugoslavia (SFRY, hereafter: Yugoslavia), with a large Albanian majority.<sup>15</sup> Since its occupation by Serbia in 1912,<sup>16</sup> Kosovo had insisted on its right to self-determination in the form of either independence or republic status within Yugoslavia.<sup>17</sup> In 1998, the Kosovo war escalated when the Belgrade regime's repression of Albanians increased, and the Kosovo Liberation Army (KLA), fighting for secession, responded

<sup>12</sup> UNMIK: 'Pillar I: Police and Justice', June 2004, [http://www.unmikonline.org/justice/documents/PillarI\\_Report\\_June04.pdf](http://www.unmikonline.org/justice/documents/PillarI_Report_June04.pdf), accessed 1 June 2010.

<sup>13</sup> Official information on Pillar IV has been harder to come by after it stopped operations in 2008, but an official summary may still be found at: [http://webcache.googleusercontent.com/search?q=cache:MPxn24laz8EJ:www.unmikonline.org/archives/EUinKosovo/uk/about/about\\_pillar.php+pillar+IV+kosovo+eu&cd=4&hl=en&ct=clnk&gl=uk](http://webcache.googleusercontent.com/search?q=cache:MPxn24laz8EJ:www.unmikonline.org/archives/EUinKosovo/uk/about/about_pillar.php+pillar+IV+kosovo+eu&cd=4&hl=en&ct=clnk&gl=uk), accessed 2 May 2010. Information on Pillar IV's Kosovo Trust Agency (KTA), which concluded its mandate 30 June 2008 but legally continues to exist, may be found at: <http://kta-kosovo.org/html/>, accessed 2 May 2010.

<sup>14</sup> Dominik Zaum: *The sovereignty paradox: The norms and politics of international statebuilding* (2007), p. 127.

<sup>15</sup> The latest official census in Kosovo, conducted in 1981, showed 77.5% Albanians, 13% Serbs, 3.5% Muslims, 2% Montenegrins, 3% 'other', and the remainder composed of Montenegrins and Croats. Quoted in Thomas S. Szayna: *Identifying potential ethnic conflict: application of a process model. The Yugoslav retrospective case*, Annex: 'Demographic characteristics of Yugoslavia in the late 1980s' (2000), p. 130. The Albanian population, with a much higher population growth rate than Serbs, boycotted the 1991 census, but UN Economic and Social Council ('Kosovo', 1996, p. 31) cites 90% Albanians for 1995. Today, Kosovo's statistical office estimates that 92% of Kosovo's population is Albanian, 5.7% Serb and 2.3% Roma, Ashkali, Egyptian, Bosniak, Turkish and Gorani: see [www.ks-gov.net/ESK/eng/](http://www.ks-gov.net/ESK/eng/).

<sup>16</sup> Noel Malcolm: *Kosovo: A short history* (1998), pp. 252; 262–65. See also mention in James Gow: *Triumph of the lack of will: International diplomacy and the Yugoslav war* (1997), pp. 75–76, note 26.

<sup>17</sup> In 1991, for example, Kosovo had voted overwhelmingly for independence in a referendum ignored by the international community as well as by Serbia.

with attacks against Belgrade's police and military. The post-1999 international project in Kosovo was grounded in Chapter VII of the UN Charter,<sup>18</sup> rendering the legal need for consent on the part of the 'host' state, Serbia, unnecessary.<sup>19</sup> In legal terms therefore, the statebuilding project's infringement of Serbia's sovereignty might have been on more solid grounds than its interference with the right to self-determination of Kosovo's population, from whom it did not seem concerned with receiving formal approval.<sup>20</sup>

Economic reconstruction and development, the responsibility of the EU-led Pillar in Kosovo, was a daunting task at the start of the international statebuilding project. By the summer of 1999, Kosovo's economy lay in tatters after decades of economic and political crisis, mismanagement, lack of investment, destruction, and war. International officials quickly made it clear that large-scale privatization of Kosovo's enterprises would be the main economic strategy of the statebuilding operation. Accordingly, from 1999 to 2008 (when Kosovo declared its independence from Serbia), a massive privatization programme was inceptioned, shaped and managed in Kosovo by international statebuilders.

Kosovo's internationally led privatization played out in a manner that resulted from the interplay between statebuilding's 'template'<sup>21</sup> of stabilization and liberalization, and the specific Kosovo environment. Although the EU Pillar assumed responsibility for Kosovo's Socially Owned Enterprises (SOEs) as well as its Publicly Owned

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<sup>18</sup> Chapter VII opens for the Security Council mandating operations interfering with a country's sovereignty, including military operations, in situations defined as a threat to international peace and security. See 'Charter of the United Nations: Chapter VII: Action with respect to threats to the peace, breaches of the peace, and acts of aggression' accessed on 5 July 2010 at <http://www.un.org/en/documents/charter/chapter7.shtml>

<sup>19</sup> Rebecca Everly: *The regulation of International Territorial Administration in Bosnia and Herzegovina and Kosovo* (2006), p. 43.

<sup>20</sup> For a few recent analyses of Kosovo's right to self-determination, see transcripts from the International Court of Justice (ICJ) advisory proceedings on Kosovo's declaration of independence, particularly statements from Germany, Finland and Jordan, accessed 10 May 2010 at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=kos&case=141&k=21>. See also International Crisis Group: 'Intermediate sovereignty as a basis for resolving the Kosovo crisis' (1998) and Enver Hasani: *Self-determination, territorial integrity and international stability: The case of Yugoslavia* (2005). For different approaches to the concept of self-determination, see Hurst Hannum: *Autonomy, sovereignty and self-determination: the accommodation of conflicting rights* (1996); Antonio Cassese: *Self-determination of peoples: A legal reappraisal* (1995); Charles Tilly: 'National self-determination as a problem for all of us', *Daedalus*, 122, 3, 1993; UNESCO: 'The Implementation of the Right to Self-determination as a Contribution to conflict prevention' (1999); Thomas Musgrave: *Self-determination and national minorities* (1997).

<sup>21</sup> Susan Woodward: 'Do the root causes of civil war matter? On using knowledge to improve peacebuilding interventions', in David Chandler (ed.): *Statebuilding and intervention: Policies, practices and paradigms* (2009), at p. 59.

Enterprises (POEs), the period of formal international leadership of privatization came to concentrate on SOEs.<sup>22</sup> Kosovo's SOEs operated within a wide range of sectors, including mining, agriculture, food production, metal processing, construction materials and other industry, trade, construction, tourism, transportation, and services.<sup>23</sup> 'Social ownership' had been a uniquely Yugoslav concept, 'highly ambiguous' and legally undefined,<sup>24</sup> and the focus here is on the legal and practical implications of this concept for internationally led privatization in Kosovo. The workers at enterprises, as well as municipalities, the state, and in some cases other claimants were all seen to have attributes of ownership of Kosovo's SOEs,<sup>25</sup> complicating international attempts to proceed swiftly with privatizing them.

Kosovo's unresolved status only added to the problem, and the period of internationally managed privatization in Kosovo was influenced by its status at the time being internationally controversial and undefined.<sup>26</sup> In the framework of this report, the most significant reflection of this status controversy was that the possibility of objections from Serbia – which claimed Kosovo and property there as its own – was always a concern for international privatization officials.

Massive privatization of Kosovo's SOEs might not have been possible without the comprehensive powers of the international statebuilding project. It also can serve to shed light on the limits to these powers. In particular, two closely related questions gave rise to legal, political, and practical distress among international officials set on privatization: How could international officials proceed with privatization without risking being held liable for the process?<sup>27</sup> And who was the

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22 The process of privatizing POEs commenced properly in 2010, under the authority of the local Privatisation Agency of Kosovo (PAK), established in 2008. As the focus of this report is on the *international* involvement in Kosovo's privatization process, SOEs are what will be discussed below. For a few recent perspectives on the privatization of POEs in Kosovo, see Forum 2015: 'Dilemmas and backwards in a fast track: Privatization of POEs in Kosovo' (2009); COHU: 'Privatizimi dhe koncesionimi i ndërmarrjeve publike', Prishtina, 2010, accessed on 10 July 2010 at [http://cohu.org/index.php?option=com\\_content&view=article&id=158:privatizimi-dhe-koncesionimi-i-ndermarrjeve-publike&catid=2:raporte&Itemid=4](http://cohu.org/index.php?option=com_content&view=article&id=158:privatizimi-dhe-koncesionimi-i-ndermarrjeve-publike&catid=2:raporte&Itemid=4); BSPK: 'Reasons why Should not Privatized PTK' [sic], 2010.

23 RIINVEST: 'SOEs and their privatisation/transformation', in cooperation with Center for International Private Enterprise, Washington, DC, supported by USAID (2001), at p. 9.

24 Henry H. Perrit, Jr: 'Resolving claims when countries disintegrate: the challenge of Kosovo', *Chicago-Kent Law Review*, 80 (119), 2005, at p. 160.

25 Ibid; see also Isa Mulaj: 'Redefining property rights with specific reference to social ownership in the successor states of the Former Yugoslavia: Did it matter for economic efficiency?', *CEU Political Science Journal*, 3, 2007, pp. 234–36.

26 For a recent perspective among the large body of literature concerned with the Kosovo status issue, see Marc Weller: *Contested statehood: Kosovo's struggle for independence* (2009).

27 While former UNMIK legal officials interviewed by the author claim that liability was never a concern due to the wide-ranging immunity of UN staff, the vast majority of the

ultimate title-holder – who *owned* Kosovo's enterprises? The attempts of international officials to deal with these issues were to impact heavily on the development of privatization in Kosovo. This also delayed the process: while the decision to privatize had been clear to UNMIK and the EU Pillar from the start, privatization did not actually commence until 2002.

The fact that the international statebuilding project immediately decided on a massive privatization programme for Kosovo – despite the huge legal and political hurdles – has been subject to little analysis. Commentators have tended to emerge from parts of the international statebuilding project or local and international NGOs, united in their interest in *improving the practice* of privatization – for instance, by freeing it from allegations of corruption. As a result, the question of *why* internationally managed privatization was initiated has been left unanswered, the *manner in which it was carried out* remains unexplained, and its *overall level of success* as per Pillar IV's stated aim of reconstruction and development has escaped analysis.

Meanwhile, the nine years of internationally managed privatization as the main economic strategy of the comprehensive international statebuilding project in Kosovo has not improved the situation for the 44% living in poverty, the 14% living in extreme poverty,<sup>28</sup> or the 58% of women and 30% of men without employment.<sup>29</sup> These figures are in the same order as what Kosovo faced at the end of the 1990s after a decade of oppression under the Serbian regime.<sup>30</sup> Moreover, Kosovo's infrastructure, roads, health and education systems are still very weak.

This report will show that the process of internationally managed privatization in Kosovo is both unique and crystallizes central tensions of contemporary international statebuilding. These include international aversion to accountability in statebuilding operations intended to build liberal democracies – and the limited local involvement in statebuilding decision-making supposedly aimed at capacity building and local ownership. Internationally led privatization in Kosovo gives rise to questions as to the legitimacy and legality of statebuilding when it interferes with the target's sovereignty and right to self-determination, as well as calling into question the appropriateness of statebuilding's economically liberal template. Drawing as it has upon legal

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source materials – including a substantial UNMIK interoffice memorandum dated 28 February 2001 and in the possession of the author – indicate that liability indeed was key factor shaping international privatization in Kosovo.

<sup>28</sup> United Nations Kosovo Team, <http://www.unkt.org/?cid=2,24>, accessed on 9 July 2010.

<sup>29</sup> Ibid.

<sup>30</sup> World Bank: 'Kosovo Poverty Assessment: Promoting Opportunity, Security, and Participation for All' Report No. 32378-XK, 16 June 2005), p. i.

mechanisms to realize what seems to have been a predetermined liberal standard, the process of international privatization in Kosovo also shows the tangling of law and politics of contemporary international statebuilding operations.

The first part of this report provides a brief conceptual context for the notion of international statebuilding, before turning to the recent historical background to the internationally managed privatization of Kosovo's SOEs. Particular attention will be paid to the economic setting in which the statebuilding project was established, the Yugoslav concept of social ownership and its implications for privatization, and major debates among international officials leading up to the commencement of the process in 2002. The second part focuses on the period of actual internationally led privatization, outlining the start of the process and its legal, political and operational framework, as well as taking a closer look at the debates on avoiding liability for international officials and institutions in connection with privatization. The period between 2002 and 2005 will be emphasized, but the part will also look at the period from 2005 to 2008, when formal international leadership of privatization in Kosovo came to an end. The conclusions summarize some consequences of the internationally led privatization in Kosovo, and indicate its overall success in terms of the statebuilding project's declared criteria of economic reconstruction and development.

For the sake of simplicity, non-local staff employed as part of the statebuilding project in Kosovo will be described as 'international statebuilders'. The focus will be on their actions and discussions when preparing and implementing privatization in Kosovo. Local actors, perspectives and actions will be taken into account where relevant to the role of the international statebuilders. It makes sense to concentrate on international officials, since the period of formal international leadership of Kosovo's privatization proceeded with only minimal levels of local influence, and because this report considers the process as an example of international statebuilding. Here it could be noted that even when international statebuilding operations include non-Western officials, as in Kosovo, implementation is carried out within the framework of the liberal-Western template of stabilization and liberalization. In the case of Kosovo, most if not all the international statebuilders involved in privatization have been from the West, mainly from the USA and the EU countries, working in relevant sectors of the UN and EU, donor organizations and embassies.

The limited scope of this report necessitates mentioning some of its limitations. Space will not allow for a detailed discussion of Kosovo's status; nor of the disputed origins, mandate in international law or

international political setting of the international statebuilding project. The emphasis is on issues related to privatization *in Kosovo* under formal international leadership. Furthermore, the concern is here with the international involvement in *privatization* in Kosovo, with primary reference to UNMIK's Pillar IV and its Kosovo Trust Agency (KTA). Evaluating the overall role of the international presence, funds spent, and impact across the economic field would go well beyond the scope of this report. Moreover, while comparative cases of privatization – also from elsewhere in Yugoslavia – might be illuminating, space does not allow for such comparisons here. And while the question of possible *alternatives* to international privatization may arise, it will not be analysed in depth. The focus is on the actual actions and debates of international statebuilders when privatizing in Kosovo, whereas the development or legacy of non-realized alternatives would be impossible to establish. On the other hand, this report is concerned about the low level of *discussion* or *study* of possible alternatives before international officials went ahead with large-scale privatization as their main economic policy in Kosovo.

Open sources on the international involvement in privatization in Kosovo are scarce. This report draws upon what is available, including facts and analyses compiled by local and international NGOs and institutions, scholarly work – as well as observation, media monitoring, and document collection from fieldwork in Kosovo, mostly undertaken between January and July 2010. In addition, more than fifty interviews with actors directly or indirectly involved in the internationally led privatization in Kosovo have been conducted by the author, and four additional interviews by Rudina Hasimja, who helped as a research assistant on a part of the project. Interviewees were selected on the basis of criteria concerning *depth* and *range* – that is, according to their level of insight into the international involvement in privatization in Kosovo, and with view to obtaining a sample from across the spectrum of local and international knowledge and analysis of the process. Those interviewed include former and current international statebuilding officials, local government representatives, opposition politicians, union representatives, and workers, local and international analysts and observers, as well as other relevant stakeholders, actors and witnesses. Requests for anonymity have been respected. The interviews were semi-structured and in-depth, with a set outline of issues as well as specific questions added according to each interviewee's area of expertise.

# 1. Background and Context

The international involvement in privatization in Kosovo was shaped by the unique setting in which it took place – in particular, by Kosovo being both post-socialist and post-conflict. Recent history came to influence the key discussions that took place prior to and during the international management of privatization – as well as the concerns and interests dominating these discussions, and the methods for privatization that were proposed, tested, and eventually decided on by international statebuilders. In this part, focus is on the historical background to internationally led privatization in Kosovo, how the international statebuilding project determined the framework for privatization as its core economic strategy, and a brief chronology of early efforts. First of all, however, ‘international statebuilding’ will be situated in a conceptual context.

## Conceptualizing international statebuilding

When UNMIK was established, ‘statebuilding’ might have been seen as a contentious term; since then, it has become part of conventional terminology, even among international statebuilders.<sup>31</sup> Today, scholars assert that ‘peacebuilding is statebuilding’,<sup>32</sup> and the two terms are used interchangeably or in overlapping ways, with no clear, agreed distinction between them. Since ‘statebuilding’ is understood in a range of ways, ‘as the rubric for a wide range of interventionist mechanisms – from military engagement to World Bank poverty reduction mechanisms’,<sup>33</sup> the definitions and conceptual emphasis will depend on theoretical and ideological orientation as well as the general level of support.

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<sup>31</sup> See e.g. UN diplomat Lakhdar Brahimi: ‘State building in crisis and post-conflict countries’, 7<sup>th</sup> Global Forum on Reinventing Government, Vienna, June 2007. International statebuilders do not, however, seem to relate actively to the academic or theoretical literature on statebuilding.

<sup>32</sup> Michael Barnett and Christoph Zürcher: ‘The peacebuilder’s contract. How external statebuilding reinforces weak statehood’, in Paris and Sisk (eds): *The dilemmas of statebuilding: Confronting the contradictions of Postwar Peace Operations* (2009), at p. 25.

<sup>33</sup> David Chandler: ‘Introduction’ in David Chandler (ed.): *Statebuilding and intervention: Policies, practices and paradigms* (2009), at p. 2. For an overview of a few of the many recent discussions on statebuilding, suggested definitions, and the security framework within which it functions, see the same volume, as well as e.g. Paris and Sisk (eds) 2009; and Charles T. Call with Vanessa Wyeth (eds): *Building states to build peace* (2008).

Statebuilding proponents, including international officials themselves, describe the concept along the lines of the ‘creating or strengthening of effective and legitimate governmental institutions within a bounded territory’.<sup>34</sup> Their interest is mainly in evaluating the success of statebuilding, narrowly defined – measured according to statebuilders’ own stated objectives – and in terms of the technical modalities of the transfer of sovereignty and capacities between local and international actors. The scope and speed of this transfer as well as its ‘paradoxical’ nature have also been subjected to analysis.<sup>35</sup> Common suggestions for improvement include various operational adjustments as well as greater ‘local ownership’.<sup>36</sup>

Critics of statebuilding ask whether establishing market liberal democracies throughout the world really is an appropriate, legitimate or effective security strategy.<sup>37</sup> Opponents emphasize the self-interest of statebuilders, seeing the endeavour as ‘an instrument of liberal global governance’,<sup>38</sup> a ‘tool for economic expansion’,<sup>39</sup> and describe it as a form of neo-imperialism where targets may be independent on paper but function as protectorates of powerful donors.<sup>40</sup> Questions have been raised as to whether the security focus of statebuilding could come at the expense of development for those targeted.<sup>41</sup> Statebuilding has also been associated with other forms of external intrusion into

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<sup>34</sup> This definition was used by Roland Paris’ Research Partnership on Post-war Statebuilding; see Christopher Cramer: ‘Trajectories of accumulation through war and peace’, in Paris and Sisk 2009, n.1, p. 146.

<sup>35</sup> See Zaum 2007, as well as Francis Fukuyama: *State building: Governance and world order in the 21<sup>st</sup> century* (2004), and Erik G. Jensen: ‘Justice and the rule of law’, in Call/Wyeth 2008, expressing the volume’s aim of ‘improving the practice of statebuilding’, p. 119.

<sup>36</sup> For ‘ownership’ in the Kosovo context, see e.g. Jens Narten: ‘Dilemmas of promoting “local ownership”: The case of postwar Kosovo’, in Paris and Sisk 2009. On romanticizing ‘indigenous peace-making’, see Roger Mac Ginty: ‘Indigenous peace-making versus the liberal peace’, *Cooperation and Conflict*, 43 (2) (2008).

<sup>37</sup> See e.g. *International Peacekeeping*, Special Issue ‘Liberal peacebuilding reconstructed’, 16 (5), 2009; Eli Starnes: ‘Values, context and hybridity’ (2010); Pugh et al. 2008; John Heathershaw, ‘Unpacking the liberal peace: the dividing and merging of peacebuilding discourses’, *Millennium* 36 (3), 2008; Roland Paris ‘International peacebuilding and the “mission civilisatrice”’, *Review of International Studies*, 28 (4), 2002.

<sup>38</sup> Eric Herring: ‘Neoliberalism versus peacebuilding in Iraq’ in Pugh et al. 2008, p. 48.

<sup>39</sup> Sørensen 2009, p. 43.

<sup>40</sup> For discussions see David Chandler: *Empire in denial: The politics of state-building* (2006); Mark Duffield: *Development, security and unending war: Governing the world of peoples* (2007); Robert H. Jackson: *Quasi-states: Sovereignty, international relations and the Third World* (1993); Michael Ignatieff: *Empire lite: Nation-building in Bosnia, Kosovo and Afghanistan* (2003); and Andrew Claphan: *Human rights obligations of non-state actors* (2005).

<sup>41</sup> See discussion in Mark Duffield and John Prendergast: ‘Sovereignty and intervention after the Cold War: Lessons from the emergency relief desk’, *Middle East Report*, 187 and 188, 1994. How to measure development, and development policies are matters well beyond the scope of this paper; for one discussion, see Amartya Sen: ‘Development: Which way now?’, *Economic Journal*, 93 (372), 1983.



sovereignty and self-determination, such as trusteeship,<sup>42</sup> Cold War modernization,<sup>43</sup> the Marshall Plan,<sup>44</sup> and the ‘Wilsonian assumption of peacebuilding – that rapid liberalization would foster a stable and lasting peace in countries that are just emerging from civil wars’.<sup>45</sup>

The security framework within which international statebuilding is undertaken and its rooting in the liberal peace thesis seem undisputable. International security is the point of reference in arguments for interventionist statebuilding operations, all aimed at ‘stability and liberalization’.<sup>46</sup> In contrast to the West’s Cold War security paradigm with its focus on direct, territorial threats represented by hostile states, the current orientation is towards the risks emerging from (often non-state actors) within countries characterized by the breakdown in law and order, weak capacity to respond to citizens’ needs, and/or no credible international representation.<sup>47</sup> Statebuilding refers to the dangers associated with such fragile, weak, or failed states and to international endeavours to stabilize them.<sup>48</sup> Development and the ‘sustainable development’ of such states have become ‘securitized’,<sup>49</sup> presented as urgent for the security of international statebuilders as well.

The importance of specific countries’ development seems determined by the risk they are deemed to pose to cross-border security, in particular as regards the security of international statebuilders’ own states and institutions. The comprehensive nature of international operations in Bosnia and Kosovo, for instance, is probably connected to the

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<sup>42</sup> See e.g. William Bain: *Between anarchy and society: Trusteeship and the obligations of power* (2003); William Bain: ‘For love of order and abstract nouns: International administration and the discourse of ability’, *Journal of Intervention and Statebuilding*, 3 (2), 2009.

<sup>43</sup> Beate Jahn: ‘The tragedy of liberal diplomacy: Democratization, intervention, statebuilding (Part I)’, *Journal of Intervention and Statebuilding*, 1 (1), 2007 and ‘The tragedy of liberal diplomacy: Democratization, intervention, statebuilding (Part II)’, *Journal of Intervention and Statebuilding*, 1, (2), 2007.

<sup>44</sup> Sørensen 2009, pp. 30 and 37–38.

<sup>45</sup> Roland Paris: *At war’s end: Building peace after civil conflict* (2004), pp. 40–41.

<sup>46</sup> Barnett and Zürcher 2009, pp. 24, 31.

<sup>47</sup> This summary is partly taken from Derick W. Brinkerhoff: ‘Rebuilding governance in failed states and post-conflict societies: Core concepts and cross-cutting themes’, *Public Administration & Development*, 25 (1), 2005, p. 4. For another of many attempts to explain the concept of weak and failed states, see Stewart Patrick: ‘Weak states and global threats: Fact or fiction?’, *Washington Quarterly*, Spring 2006, and Stewart Patrick and Susan Rice’s work at the Brookings Institution, including ‘Index of weak states in the developing world’, accessed at [http://www.brookings.edu/reports/2008/02\\_weak\\_states\\_index.aspx](http://www.brookings.edu/reports/2008/02_weak_states_index.aspx) on 4 July 2010.

<sup>48</sup> David Chandler: ‘Post-conflict statebuilding: Governance without government’ in Pugh et al. 2008, p. 337; Boege et al. 2009, p. 17.

<sup>49</sup> See Duffield 2007; also his ‘Getting savages to fight barbarians: Development, security and the colonial present’, *Conflict, security and development*, 5 (2), 2005; and Boege et al. 2009, p. 18.

location of the Balkans ‘at Western Europe’s doorstep’.<sup>50</sup> States tend to be labelled as fragile and brought onto the international agenda – often as a precursor to legitimize interference with targets’ sovereignty and self-determination – when this is in the interest of powerful states.<sup>51</sup> Why states ‘fail’ is beyond the scope of this report, but international statebuilding’s perspective on the origins of state fragility generally contrasts with its preferred remedy. While statebuilders insist on ‘reparation’ through liberalizing and opening up to liberal, Western, values and markets, the *reasons* for failure are identified as internal: corrupt elites, unhealthy traditions and violent cultures.<sup>52</sup> Whether international economic and security developments – to which state collapse is seen as posing a risk – might have contributed to failure in the first place is not a point of analysis.<sup>53</sup>

Due to the security umbrella encompassing contemporary development and statebuilding policies, aid tends to be made conditional on recipients undertaking the sort of reform seen to contribute to international security,<sup>54</sup> and gets channelled ‘directly into strengthening governing capacity’ rather than being used ‘to support discrete projects concerned with sectoral improvements in areas such as health and social welfare, economic sustainability or security reform’.<sup>55</sup> Funding goes to capacities seen as necessary to the international economic and security order, like repayment of foreign debt and border control: areas critical to local security and rights are not first priority.<sup>56</sup> When funds *are* channelled to local needs, they usually benefit short-term physical projects, like a school building, but not teacher training.<sup>57</sup> While in Kosovo and Eastern Europe the term ‘transition’ (to democracy and market economy) is favoured above ‘development’ (associated with the Third World)<sup>58</sup> the security rationale of the processes is the same: by building market liberal democracies, statebuilders seek to

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<sup>50</sup> Hameiri 2009, p. 72.

<sup>51</sup> See Morten Bøås and Kathleen Jennings: ‘Insecurity and development: The rhetoric of the “failed state”’, *European Journal of Development Research*, 17, September 2005.

<sup>52</sup> Sørensen 2009, p. 19.

<sup>53</sup> This has been addressed by economic scholars such as Amartya Sen and dependency theorists Raúl Prebisch and Hans Singer. Paul A. Baran’s *The political economy of growth* (1957) was a pioneer work in the field. See also Shahar 2009, p. 61.

<sup>54</sup> Sørensen 2009, pp. 22 and 51–52. For a recent example of a strategy outlining the outlook of a major donor in the Kosovo context, see USAID ‘Kosovo strategy 2010–2014’, accessed on 5 August 2010 at <http://www.usaid.gov/kosovo/eng/evaluations.html>.

<sup>55</sup> Chandler in Pugh et al. (eds.) 2008, p. 37

<sup>56</sup> Woodward in Chandler (ed.) 2009, pp. 60–61.

<sup>57</sup> *Ibid.*

<sup>58</sup> Sørensen 2009, p. 2. For one example, see Avdullah Hoti: ‘Human capital and unemployment in transition: The case of Kosova’, RIINVEST, Pristina 2004.

protect themselves from cross-border instability, including refugee flows, terrorism and criminal networks.<sup>59</sup>

In terms of value commitment, ‘liberal’ international statebuilding has a non-liberal streak. The security paradigm within which such projects are undertaken means that state effectiveness and security are prioritized above economic development and citizens’ rights.<sup>60</sup> Parallels have been drawn with the ‘paradox’ of 19<sup>th</sup> century Western liberalism, which supported democracy and the rule of law in the West, while ‘accept[ing] the necessity of non-representative and despotic forms of imperial rule overseas’.<sup>61</sup> Indeed, one contemporary statebuilding proponent defends the concept with the assertion that ‘Nobody likes empires but there are problems for which there are only imperial solutions’, since imperialism ‘has become a precondition for democracy’.<sup>62</sup> Statebuilding’s liberal paradox awakes associations to Cold War modernization where ‘modernization policies had two goals: the first was the modernization of Third World countries which, in turn, would achieve the second goal, namely security for the First World.’<sup>63</sup> For local actors, their freedom and inclusion in decision-making were made conditional on participation in the modernizing process, on the terms set by international interveners.<sup>64</sup>

Critics claim that such ‘imperial’ policies transferred to the context of contemporary international statebuilding might result in socio-economic misery in targets, thereby undermining statebuilding operations’ aim of international security.<sup>65</sup> Some have called for increased focus on the rights of local populations in order to avoid consigning them ‘to

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<sup>59</sup> Sørensen 2009, p. 3; Susan Woodward: ‘A case for shifting the focus: Some lessons from the Balkans’, in Martina Fischer and Beatrix Schmelzle (eds.): *Building peace in the absence of states: Challenging the discourse on state failure* (2009), p. 51.

<sup>60</sup> Oliver Richmond: ‘Welfare and the civil peace – poverty with rights?’ in Pugh et al. 2008, p.293; Doyle: ‘Kant, liberal legacies, and foreign affairs’, Part 2 *Philosophy and Public Affairs*, 12 (4), 1983, p. 335.

<sup>61</sup> Duffield 2007, p.7. Doyle: ‘Kant, liberal legacies, and foreign affairs’, Part 2’ (1983), p. 331.

<sup>62</sup> Ignatieff 2003, p. 11 – later admitting that self-determination and imperial power are not easily reconciled, pp. 102–114.

<sup>63</sup> Jahn: ‘The tragedy of liberal diplomacy: Democratization, intervention, statebuilding (Part I)’, *Journal of Intervention and Statebuilding*, 1, (1), 2007

<sup>64</sup> While ‘mass political participation was identified as the most dangerous and destabilizing element of the modernizing process’, with potential to challenge the elite’s leading role. Ibid, claiming that this ‘modernisation before democratisation’ approach interpreted non-voting ‘as contributing to the efficient functioning of the democratic process’. Ibid.

<sup>65</sup> For instance by making war ‘the only ‘job’ around’; see Peter Wallenstein: ‘Strategic peacebuilding: Issues and actors’, Kroc Institute Occasional Paper #28:OP:1, September 2007, pp. 10–11. For another approach to economic dimensions of conflict generation, see Paul Collier and Anke Hoeffler: ‘Greed and grievance in civil war’, *Oxford Economic Papers*, 56, 2004.

a bare life of political rights without economic opportunities',<sup>66</sup> recommending less interventionist strategies with funds channelled directly to social security projects.<sup>67</sup> It has been claimed that the 'Western and liberal focus on political rights as separate and superior to economic rights [might] betray [...] a certain Orientalism towards the inhabitants of post-conflict states, whose populations value political rights but might well give economic rights and opportunities a higher priority.'<sup>68</sup>

Furthermore, statebuilders may invoke claims of targets' consent or invitation to distinguish their projects from interventions of the kind of wartime invasion or colonization, but the legitimacy and legal foundations for international statebuilding's sovereignty and self-determination interference remain opaque.<sup>69</sup> International statebuilders see negative sovereignty – the right to non-intervention – of targets as contingent on positive sovereignty – the capacity to provide citizens with basic services, including security,<sup>70</sup> but this does not explain why (partial) international statebuilding governance lacks the accountability mechanisms that should accompany democratic systems.<sup>71</sup> The legal and political situation created by international statebuilding projects may be defined as an extended 'state of exception' in that adherence to established democratic practices and the protection of citizens' rights are partially suspended in the name of a 'greater public good'<sup>72</sup> – the aim of international security and stability.<sup>73</sup>

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<sup>66</sup> Richmond 2008, p. 298.

<sup>67</sup> David Roberts: 'The superficiality of statebuilding in Cambodia: Patronage and clientelism as enduring forms of politics', in Paris and Sisk (2008), pp. 164 and 167.

<sup>68</sup> Richmond 2008, p.294.

<sup>69</sup> For a recent Kosovo-relevant discussion, see Robert Muharremi: 'The European Union Rule of Law Mission in Kosovo (EULEX) from the perspective of Kosovo constitutional law', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 70, 2010.

<sup>70</sup> See Jackson 1993; and Zaum 2007 and Oisin Tansey: *Regime building: Democratization and international administration*, Oxford University Press, Oxford, 2009. For the concept of 'contingent sovereignty', see e.g. Duffield 2007, chapter 3. This line of reasoning was at the core of the concept of 'Responsibility to protect' (R2P), International Commission on Intervention and State Sovereignty: *The responsibility to protect. report of the International Commission on Intervention and State Sovereignty* (2001)

<sup>71</sup> Space does not allow for a full discussion of the concept of accountability; suffice it to say that it includes principles of *answerability* and *enforcement*. See e.g. Andreas Schedler: 'Conceptualizing accountability' in Schedler et al (eds.): *The self-restraining state: Power and accountability in new democracies* (1999).

<sup>72</sup> Giorgio Agamben: *State of exception* (2005).

<sup>73</sup> In 2001, UNMIK labelled the situation in Kosovo an 'emergency', warranting extraordinary measures by international statebuilders, UNMIK News 25 June 2001, quoted in Cameron 2006, note 27. See also Besnik Pula: 'The permanent state of exception: International administration in Kosovo' in Yildiz Atasoy (ed.): *Hegemonic transitions, the state and crisis in neoliberal capitalism* (2009).

The lack of accountability of international statebuilding projects and associated officials has been the topic of extensive criticism.<sup>74</sup> As most such operations are undertaken under a UN umbrella, statebuilding staff are generally immune from legal process.<sup>75</sup> Although statebuilding operations exercise state functions, they do not possess the *legal* personality of states – thus falling outside the jurisdiction of international mechanisms such as the European Court of Human Rights.<sup>76</sup> ‘Accountability’ in international statebuilding parlance refers to accountability of targets, for example of local governments towards constituencies.<sup>77</sup> Thus far, calls for more meaningful accountability for international statebuilders have not resulted in the establishment of effective organs for transparency, answerability, enforcement or redress, and UN officials remain wary of the issue.<sup>78</sup>

Lack of accountability has been a recurring point of criticism against international statebuilding projects in Kosovo and Bosnia.<sup>79</sup> In Kosovo, even UNMIK staff point out that the international statebuilding project’s non-accountable, wide-ranging powers run in the face of

<sup>74</sup> See e.g. The International Law Association’s reports ‘Accountability of international organisations’, in particular the second report, London Conference, 2000, the report from the New Delhi Conference, 2002, and the final report, Berlin Conference, 2004; Rebecca Everly: *The regulation of international territorial administration in Bosnia and Herzegovina and Kosovo* (2006); Aleksandar Morimov: *Accountability of international organizations in post-conflict governance missions* (2005); Lindsey Cameron: *Accountability of international organisations engaged in the administration of territory* (2006); Florian Hoffmann and Frédéric Mégret: ‘Fostering human rights accountability: An ombudsperson for the United Nations?’, *Global Governance*, 11, 2005.

<sup>75</sup> UN General Assembly: *Convention on the privileges and immunities of the United Nations*, 13 February 1946.

<sup>76</sup> This has been an enduring source of frustration among human-rights workers in Kosovo, who have called for effective redress mechanisms for human rights violations committed by international statebuilders. Author’s interviews with local and international human rights activists and lawyers, and with officials in the Ombudsperson Institution in Kosovo, November 2006–July 2010.

<sup>77</sup> See e.g. UN Peacebuilding Commission: ‘Sierra Leone peacebuilding cooperation framework’, 12 December 2007, p. 2.

<sup>78</sup> ‘Accountability and the United Nations System’, United Nations University Policy Brief, p. 8, 2007, was only able to *suggest* a *normative* framework for UN accountability. UNMIK’s deep discomfort with the prospects of being held to account for its actions in Kosovo was expressed by UNMIK officials interviewed by the author in May 2009.

<sup>79</sup> European Stability Initiative (ESI): ‘On Mount Olympus. How the UN violated human rights in Bosnia and Herzegovina, and why nothing has been done to correct it’, Berlin 2007; Ombudsperson Institution in Kosovo: ‘Special Report no. 1 on the Compatibility with Recognized International Standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo (18 August 2000) and on the Implementation of the Above Regulation’, 26 April 2001; Malin Palm: ‘Accountability and effectiveness of CSDP Missions: The role of civil society’, European Peacebuilding Liaison Office, 2010; Human Rights Watch: ‘Better late than never: Enhancing the accountability of international institutions in Kosovo’, 13 April, 2009, accessed on 8 July 2008 at <http://www.hrw.org/en/reports/2009/04/13/better-late-never>; David Marshall and Shelley Inglis: ‘The disempowerment of human rights-based justice in the United Nations Mission in Kosovo’, *Harvard Human Rights Journal*, 16 (84), 2003.

democratic power sharing principles,<sup>80</sup> with the risk of undermining the state institutions that were supposed to be ‘built’. The situation has not improved with the 2008 establishment of the EU’s Rule of Law mission EULEX and the International Civilian Office (ICO), led by the International Civilian Representative (ICR – who is the same individual as the EU Special Representative in Kosovo, EUSR).<sup>81</sup> Both offices are vested with executive powers, but have failed to convince on the commitment to accountability, undercutting the legitimacy of their operations, spurring accusations of double standards, and contributing to a drop in public confidence.<sup>82</sup>

While the liberal value orientation of international statebuilding may be disputed, its economic enactment of the liberal peace thesis is less ambiguous. The statebuilding template includes ‘Liberal democracy, a market economy and market-friendly state, economic policy defined by neoclassical growth theory and the new institutionalist economists, community participation in development, and a strong role for civil society and the private sector’.<sup>83</sup> Based on the rationale that ‘giving people an economic stake in peace rather than war’ will make violence less likely,<sup>84</sup> economically liberal reform – including, notably, privatization and free trade – is promoted throughout the world. This economically liberal drive may appear paradoxical in light of statebuilding projects’ goal of ‘building’ state institutions: economically liberal reform and privatization mean reducing the role of the state and transferring economic power to private hands.<sup>85</sup> Policies promoted by international statebuilders might defeat their own purpose by limiting the capacities of weak states, thereby contributing to their heightened fragility – ‘which then in turn is registered as a threat to the security of the “strong” developed states and their societies.’<sup>86</sup>

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<sup>80</sup> Débora García-Orrico: ‘Kosovo’, in Security Council resolutions under Chapter VII: Design, Implementation and Accountabilities’, FRIDE 2009, p. 142. García-Orrico was an UNMIK political affairs officer from 1999 to 2006; Cameron 2006, pp. 5–6.

<sup>81</sup> See websites of EULEX <http://www.eulex-kosovo.eu/en/front/> and ICO <http://www.ico-kos.org/?id=1>, accessed on 10 August 2010.

<sup>82</sup> Palm 2010, especially p. 9; Balkan Gallup: ‘Key findings 2009’, COWEB, 15 March 2010; Balkan Gallup: ‘Kosovo’s independence’, GMB *Focus on*, No 3, 2010.

<sup>83</sup> Woodward in Chandler 2009, p. 59.

<sup>84</sup> Herring in Pugh et al. 2008, p. 48.

<sup>85</sup> See Alejandro Bendana: ‘From peacebuilding to state building: One step forward and two steps back?’, *Development*, 48 (3), 2005, p. 9.

<sup>86</sup> Boege et al. 2009, pp. 18–20. Cramer 2009, p. 144 describes the advocacy of economically liberal reform as ‘kicking away the ladder’ for development, and as being about ‘rich country protection against developing country exports’. A Kosovo critic has pointed to the related paradox of international statebuilders promoting trade protectionism for their own produce while insisting on Kosovo opening up its market to foreign products. Avni Zogiani, author’s interview, Pristina 20 April 2010.

Sceptics claim that there is not necessarily a ‘natural partnership between business and peacemaking’, and that individuals may be able to benefit from violence and conflict.<sup>87</sup> The alleged positive relationship between economic openness and peace ‘is far from clear’<sup>88</sup> – indeed, violence has been a key feature of modern development.<sup>89</sup> The destabilizing effects of the process of democratization have also been highlighted, with the argument that while more mature liberal democracies may limit the occurrence of interstate conflict and internal instability, reaching that stage is likely to lead to conflict – due to the nature of domestic competition after conflict and authoritarianism,<sup>90</sup> or because of the logic of market democracy, which encourages competition and disagreement.<sup>91</sup>

Bearing in mind these conceptualizations of international statebuilding, the international involvement in Kosovo’s privatization process emerges as an important manifestation of the liberal peace thesis at the heart of such projects: privatization is a central part of international statebuilding’s liberal approach to targets, and Kosovo is perhaps the most extensive statebuilding project ever initiated. The development of internationally led privatization in Kosovo materialized from the interaction of the statebuilding template for liberal reform with factors related to the special Kosovo environment, which will now be explained.

### **Kosovo’s economy before international statebuilding**

The economic problems facing Kosovo at the time of international statebuilding had started while it was a province of the Yugoslav Federation. Kosovo remained the least economically developed part of socialist Yugoslavia throughout that country’s existence,<sup>92</sup> with the highest unemployment rate, the worst roads and infrastructure, the lowest educational levels and the fastest growing population.<sup>93</sup>

<sup>87</sup> Selby in Pugh 2008, p. 23; Collier and Hoeffler 2004.

<sup>88</sup> Selby in Pugh 2008, p. 18.

<sup>89</sup> See e.g. Charles Tilly: ‘Violence, terror, and politics as usual’, *Boston Review* 2003, accessed at <http://www.bostonreview.net/BR27.3/tilly.html> on 10 July; and Charles Tilly: *The politics of collective violence* (2003).

<sup>90</sup> Edward D. Mansfield and Jack Snyder: ‘Democratization and war’, *Foreign Affairs*, 74 (3), 1995; Edward D. Mansfield and Jack Snyder: ‘Democratization and the danger of war’, *International Security*, 20 (1), 1995.

<sup>91</sup> Paris 2004; Paul Collier: ‘Economic causes of civil conflict and their implications for policy’ (2006).

<sup>92</sup> See Susan Woodward: *Socialist unemployment: The political economy of Yugoslavia, 1945–1990* (1995b); Sabrina Ramet: *Nationalism and federalism in Yugoslavia 1962–1991*, (1992).

<sup>93</sup> Sabrina Ramet: *The three Yugoslavias: State-building and legitimation 1918–2005* (2006), p. 273.

Kosovo's overall development was not a priority for the Yugoslav federal authorities, and the province was until 1955 excluded from beneficial treatment as an underdeveloped region. Although financial support was later allocated through the Fund for the Accelerated Development of the Underdeveloped Republics and Kosovo, resources devoted to Kosovo through the federal budget remained lower than what the more prosperous republics benefited from; moreover, and they *declined* significantly throughout the 1960s and 1970s, when Kosovo stagnated while the better-off parts of Yugoslavia enjoyed economic growth.<sup>94</sup> In 1975, a World Bank report warned about the huge and increasing regional differences in development levels in Yugoslavia, and pointed out that Kosovo's average per capita GNP was only 45% of that of the underdeveloped republics.<sup>95</sup>

Moreover, funds set aside for Kosovo in Yugoslavia, including during the decades of general federal growth in the 1960s and 1970s, were channelled to investment-intensive and heavy industry rather than to labour-intensive sectors or agriculture.<sup>96</sup> It seems that increased Yugoslav investments in Kosovo, especially in mining and to developing energy capacities, were intended 'mainly to fulfil the huge needs of other parts of the country'.<sup>97</sup> Two-thirds of energy produced in Kosovo was 'sold' to other regions with low prices decided by federal authorities, and most of the mineral wealth produced there was exported.<sup>98</sup> Even after 1975, when Kosovo's economy started to grow in absolute terms, in relative terms it 'continued to slide backward', with all sectors operating 'well below capacity'.<sup>99</sup>

The death of Yugoslav leader Josef Broz Tito in 1980 was followed by a decade of deepening economic crisis.<sup>100</sup> Slobodan Milosevic's ascendancy to power in Belgrade in 1987 exacerbated the problems of

<sup>94</sup> Bruno Dallago and Milica Uvalic: 'The distributive consequences of nationalism: The case of Former Yugoslavia', *Europe-Asia Studies*, 50, 1, 1998, p. 74. See also Ramet 2006, pp. 267–270.

<sup>95</sup> World Bank Country Economic Report: *Yugoslavia: Development with decentralization* (1975), p. 13, which also notes rising disparities in average per capita income: in 1953, average income in the underdeveloped regions was about two-thirds of that in the developed regions, but fell to less than half by 1971.

<sup>96</sup> Ramet 2006, pp. 270 and 275. See also James Pettifer: 'Kosovo economy & society after 1945 – Some observations', January 2002, pp. 4–7.

<sup>97</sup> Verli Marengelen: *Ekonomia e Kosovës në Vargonjtë e Politikës Jugosllave: 1945–1990* (2000), p. 190, Quoted in the Human Rights Centre of the University of Pristina (HRCUP): *Economic and social rights*, (2008), p.17.

<sup>98</sup> Ibid. See also UNDP: *Energy for development: Kosovo Human Development Report* (2007), p. 6, describing the same phenomenon in the electricity industry, and HRCUP 2008, pp. 15–18.

<sup>99</sup> Ramet 2006, pp. 270, 275.

<sup>100</sup> Karim Medjad: 'The fate of the Yugoslav model: A case against legal conformity', *American Journal of Comparative Law*, 52, 2004, pp. 294–295, indicates that the death of Tito death triggered the crisis – Woodward claims it did not, in 1995b, p. 345.



the federation by encouraging nationalism and ‘tragic’ economic policies,<sup>101</sup> and by introducing a regime that spurred corruption and mismanagement.<sup>102</sup> The crisis had wide-ranging societal as well as economic effects – as described by Michel Palairet’s study of the economic consequences of Milosevic’s rule: ‘the most baleful predicted consequence of economic decline is its attrition of the human capital stock, through the deterioration of physical health, the quality of education and training, and the condonement of moral irresponsibility on the part of decision makers.’<sup>103</sup> The effect of the 1980s crisis on the popular mindset was shaped by its following a long period of growth and relative prosperity.

The 1980s were to mark the end of the Yugoslav type of socialist economic management.<sup>104</sup> The decade ‘began with a shift in governmental policy, a return to an explicit program of marketizing, “efficiency-oriented” economic reform (and) closed in 1989 with legislation ending the property rights of the socialist system’.<sup>105</sup> Significant pressure for change came from outside,<sup>106</sup> mainly from the IMF, the World Bank, the USA and the European Community.<sup>107</sup> In 1982, for instance, the IMF set strict conditions for economic liberalization on aid to Yugoslavia.<sup>108</sup> Throughout the decade, other international actors joined in, with increased pressure to abandon socialism and undertake liberal economic reform.<sup>109</sup> The approach resembles that taken by international statebuilders in Kosovo in 1999, where ‘local populations were viewed as being burdened by the legacy of communist politics

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<sup>101</sup> Dallago and Uvalic 1998, p. 87.

<sup>102</sup> Michael Palairet: ‘The economic consequences of Slobodan Milosevic’, *Europe-Asia Studies*, 53 (6) 2001, p. 911.

<sup>103</sup> *Ibid.*, p. 914

<sup>104</sup> For the Yugoslav system of workers’ self-management, see below; also Benjamin Ward: ‘The firm in Illyria: Market syndicalism’, *American Economic Review*, 48 (4), 1958, as well as Saul Estrin: *Self-management: economic theory and Yugoslav practice* (1983), and Will Bartlett: ‘Social services and local democracy in Yugoslavia’, *Community Development Journal*, 20 (1), 1985.

<sup>105</sup> Woodward: 1995b, p. 345. See also Milica Uvalic: ‘Nationalism and economic policy in the Former Yugoslavia’, *MOCT-MOST*, 5, 1995.

<sup>106</sup> For one outline, see e.g., Woodward 1995b, p. 347.

<sup>107</sup> Already in 1975, the World Bank reported that Yugoslavia was underway to develop a market economy: see World Bank Country Economic Report: *Yugoslavia: development with decentralization* (1975), e.g. p. 27. In 1993, the EU succeeded the European Community, choosing the name ‘European Community’ for one of its pillars. In this report, however, ‘EC’ refers to the European Commission.

<sup>108</sup> See Susan Woodward: *Balkan tragedy: Chaos and dissolution after the Cold War* (1995a), p. 48. Emergency credits from the IMF had been drawn upon as early as in 1979.

<sup>109</sup> See also Medjad 2004, especially pp. 294–295, and Mike Karadjic: ‘Was Milosevic’s Serbia socialist?’, *Alternative Information Network*, Paris, 5 January 2004.

and centrally planned economies and, thus, had to be forced to become democrats and create market economies.<sup>110</sup>

The first stock exchanges in Eastern Europe were set up in Serbia and Slovenia in 1988. In May 1988, Milosevic launched a series of IMF-supported economic moves, including opening up for full foreign ownership rights and calling on people to abandon their ‘unfounded, irrational and primitive fear of exploitation by foreign capital’; giving private property constitutional equality with public property; and deregulating banks.<sup>111</sup> These ‘May Measures’ limited wages, money supply and public expenditures, and put an end to worker participation in firms. ‘Overnight’, Yugoslav worker self-management of enterprises was brought to an end, on the argument that it ‘prevented the rational allocation of labor and the incentives necessary to higher productivity’.<sup>112</sup> The reasoning might have been based on the questionable assumption that worker management of firms leads to wage pressure – in fact, wages had not kept pace with prices since 1981.<sup>113</sup>

With the end of the Cold War and the fall of communism in Eastern Europe, the West suddenly lost interest in maintaining a special relationship with Yugoslavia as a ‘buffer’ against the East. Throughout the Cold War, Yugoslavia had benefited from its ‘third way’ socialism and favourable geopolitical position between East and West. Susan Woodward describes Cold War Yugoslavia as having a ‘mixed personality – West and East, communist-ruled and internationally open, second and third world’.<sup>114</sup> The favourable geopolitical position had given powerful international actors a special stake in Yugoslavia’s development during the Cold War, but with its end the country had to approach aid institutions on the same terms as others,<sup>115</sup> and was forced to yield even further to pressure for liberal economic reform in return for assistance.<sup>116</sup>

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<sup>110</sup> Woodward in Fischer and Schmelzle 2009, p. 52, referring to the former Yugoslav region as a whole.

<sup>111</sup> Karadjis 2004 (unpaginated).

<sup>112</sup> Woodward 1995b, p. 5.

<sup>113</sup> Woodward 1995a, p. 96 and note 27.

<sup>114</sup> *Ibid.*, p. 59.

<sup>115</sup> See *ibid.*, ‘Escalation’, especially pp. 104–107; and Milica Uvalic ‘Federal Republic of Yugoslavia (FRY)’, draft paper for *Southeast Europe and Black Sea Studies*, 1 (1), 2000.

<sup>116</sup> For a review of the Yugoslav system and the early period of transition, see: Milica Uvalic: *Investment and property rights in Yugoslavia: The long transition to a market economy* (1992). For the year 1990 and its projected economic implications, see Janez Prasnjar and Zivko Pregl: ‘Economic development in Yugoslavia in 1990 and prospects for the future’, *The American Economic Review*, 81 (2), 1991.

In 1989, following IMF demands, mass privatization was initiated with the so-called Markovic laws,<sup>117</sup> named after Ante Markovic, Yugoslavia's last prime minister. Of these laws, the 1989 Law on Enterprises aimed at 'encourag[ing] foreign investment, [giving] managers full rights to hire and fire labor and eras[ing] the system of self-management.'<sup>118</sup> These 'abrupt'<sup>119</sup> changes to Yugoslavia's system of social ownership and workers' management were politically destabilizing, prompting claims that they contributed to the break-up of the federation<sup>120</sup> and 'destroyed class solidarity'.<sup>121</sup> In retrospect it seems clear that the Markovic economic reforms succeed neither in reviving the economy nor in keeping the federation together.<sup>122</sup>

In Kosovo, the Markovic economic reforms were initiated as other dramatic developments unfolded. Kosovo was at the time an autonomous province of the Serbian Republic in the Yugoslav Federation, with a large Albanian majority. Milosevic gained power in Belgrade much on the basis of exploiting Serb anxieties over that Albanians constituted a majority in the province, and soon commenced on an organized campaign of ethnically based oppression.<sup>123</sup> Bruno Dallago and Milica Uvalic explain that the rise of nationalism in Serbia gained pace with elites' claims that 'Serbia had been continually discriminated against through deliberate economic policies which had contributed to its economic backwardness, and constitutional solutions which had created autonomous regions within Serbia, thus making it the only republic not able to exercise full sovereignty over its whole territory.'<sup>124</sup> After a decade of the Belgrade regime's campaign to

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<sup>117</sup> Medjad 2004 pp. 294–295; Woodward 1995b, p. 280. See also Mladen Lazic and Laslo Sekelj: 'Privatisation in Yugoslavia (Serbia and Montenegro)', *Europe-Asia Studies*, 49 (6), 1997.

<sup>118</sup> Woodward 1995b, p. 280. In Serbia, the Markovic laws were followed by a decade with 'at least half a dozen' privatization laws, Uvalic 2000, p. 12.

<sup>119</sup> Ljubisa Adamovich: 'Economic transformation in Former Yugoslavia, with special regard to privatization', in Sabrina Ramet and Ljubisa Adamovich (eds.): *Beyond Yugoslavia: Politics, economics, and culture in a shattered community* (1995).

<sup>120</sup> Woodward 1995a, shows that such pressures negatively impacted on the prospects of overcoming the political crisis in the SFRY. Her argument is summarized in Woodward 1995b, p. 345: 'Economic crisis had led to political crisis, then to a siege of the federal government, and by 1991 to implosion and multiple civil wars.' Dallago and Uvalic 1998 echo this view.

<sup>121</sup> Karadjis 2004.

<sup>122</sup> See e.g. Lazic and Sekelj 1997, claiming a strong connection between these two factors, e.g. on p. 1060.

<sup>123</sup> For the rise of Milosevic to power, as well as the resurgence in Serbian nationalism in the 1980s, see Lenard Cohen: *Serpent in the bosom: The rise and fall of Slobodan Milosevic* (2001) and Jasna Dragovic-Soso: 'Saviours of the nation': *Serbia's intellectual opposition and the revival of nationalism* (2002).

<sup>124</sup> Dallago and Uvalic 1998, p. 81, referring to the infamous nationalist *Memorandum*, which emerged in 1986 and was written by Serb intellectuals, soon to be exploited by Milosevic to boost nationalist sentiments in Serbia and the power of his regime.

exacerbate animosities between Kosovo's population groups, 41.8% of surveyed Serbs (throughout Serbia) insisted 'that the solution to the problems in Kosovo lay in the expulsion, whether peacefully or by force, of the Albanian population of the province.'<sup>125</sup>

In 1989, Milosevic revoked Kosovo's autonomy and stepped up repression.<sup>126</sup> Expulsion and arbitrary arrest of Albanians – including members of the Kosovo parliament – became frequent, along with mass dismissals of Albanian employees, brutal policing, and a halt to teaching in Albanian language. An estimated 145 000 Albanians were fired from posts in the civil administration, public services and economic enterprises.<sup>127</sup> Land and other property were confiscated from Albanians and given to Serb 'colonists', who were encouraged to settle in the province in order to shift its demographic balance.<sup>128</sup> The apartheid measures triggered a 'parallel state' in Kosovo: from late 1980s, Albanians organized themselves with economic, social and political arrangements distinct from those of the central authorities.<sup>129</sup> The majority of Kosovo's population, however, wanted a definitive end to Serbian rule. In the autumn of 1991, after a referendum in the province, Kosovo declared its independence. Only Albania then recognized Kosovo as an independent state.

Serbia's oppression of Kosovo in the 1990s included imposition of a 'discriminatory' privatization regime,<sup>130</sup> described as putting 'the whole of Kosova up for sale at bargain basement prices' whilst excluding Albanians from the right to take part or be consulted.<sup>131</sup> Short-term soft loans from central authorities and domestic banks that had assisted Kosovo's SOEs until 1989 were discontinued, leaving enterprises 'at the mercy of long-term under-investment and capital depreciation [...] and cannibalization of plant and equipment, which were

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<sup>125</sup> Ramet 2006, p. 514, citing figures from November 1997. Only 27.2% felt that a policy combining tolerance and cultural autonomy would be the best approach.

<sup>126</sup> See e.g. Jane Sharp: 'Rethinking Western policy in the Balkans', *Cambridge Review of International Affairs*, 12 (2), 1999, p. 111; Denisa Kostovicova: 'Albanian schooling in Kosovo 1992–1998: "Liberty imprisoned,"' in Michael Waller et al. (eds.): *Kosovo: The politics of delusion* (2001), e.g. p. 13; Denisa Kostovicova: *Kosovo: The politics of identity and space* (2005); Maria Stephan: 'Fighting for statehood: The role of civilian-based resistance in the East Timorese, Palestinian, and Kosovo Albanian self-determination movements', *Fletcher Forum of World Affairs*, 30 (2), 2006.

<sup>127</sup> International Labour Organization, quoted in Hoti 2004, p. 7; Lajos Héthy, 'Employment and workers' protection in Kosovo', *South-East Europe Review for Labour and Social Affairs*, 2, 2000, p. 10, quoted in HRCUP 2008, p. 18.

<sup>128</sup> Sabrina Ramet: 'War in the Balkans', *Foreign Affairs*, 71 (4), Autumn 1992, p. 88; Stephan 2006, p. 71.

<sup>129</sup> Besnik Pula: 'The emergence of the Kosovo "parallel state" 1988–1992', *Nationalities Papers*, 32 (4), 2004; and Kostovicova 2005.

<sup>130</sup> Perrit 2005, p. 140.

<sup>131</sup> Karadjis 2004.

transferred to SOEs based in Serbia'.<sup>132</sup> Following the passing of the Markovic laws, most Kosovo SOEs came under emergency measures introduced by Belgrade. Along with large-scale dismissal of Albanians, these included forced takeovers and mergers of Kosovo's companies with Serbian ones,<sup>133</sup> and sale of enterprises in a discriminatory manner excluding Albanians as well as other investors deemed unfavourable by the Belgrade regime. The fact that Kosovo's values became subject to several such 'illegal ownership transactions' in the 1990s was to have serious implications on international statebuilders' post-war privatization.<sup>134</sup>

Kosovo's significant and still largely unutilized mineral wealth – representing an important possible source for economic growth – was hit hard by the 1990s. Lignite reserves in Kosovo are Europe's third largest, with an estimated trade potential of 80.5 billion Euro; the lead, zinc and silver reserves are claimed to be worth 9.36 billion Euro.<sup>135</sup> In 1988, 48% of Kosovo's GDP was provided by the minerals industry, but since 1989, disinvestment and demolition have considerably reduced the role of the sector.<sup>136</sup> The Milosevic regime's neglect and destruction of the Kosovo mineral industry – followed by war and subsequent international non-encouragement of sectoral development – has thus impeded Kosovo's overall growth potential.

The 1998/1999 war was another severe blow to the economy. Systematic destruction by the Serbian regime, looting, and the NATO bombing left Kosovo's resources in a catastrophic state. UN food agencies have estimated that Kosovo lost 65% of its agricultural produce and livestock as a result of the war, and in 1999, wheat production covered only 30% of Kosovo's needs.<sup>137</sup> The material destruction was not limited to agricultural capacities: after the Serbian regime had 'annihilated' two thirds of Kosovo's 180 libraries during the 1990–99 period, including over 900,000 books (almost half of all library books in

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<sup>132</sup> James P. Korovilas, 'Is privatisation in post-conflict Kosovo possible?', *Comparative Economic Studies*, 48 (2), June 2006, quoted in HRCUP 2008, p. 52.

<sup>133</sup> Isa Mulaj, 'Delayed privatization in Kosovo: Causes, consequences, and implications in the ongoing process', in Sinisa Kusic (ed.), *Path-dependent development in the Western Balkans: The impact of privatization* (2005). See also Zaum 2007, p. 155 and Perrit 2005.

<sup>134</sup> Mulaj 2005 (cited from unpaginated copy). The implications of these transformations are discussed in the next part of this report.

<sup>135</sup> Centre for Economic Performance International Conference, 2006, quoted in HRCUP, p. 59. The former figure is determined based on an export estimate of 11.5 billion tonnes of lignite – while in 2007, UNMIK evaluated Kosovo's lignite reserves to amount to around 14 billion tonnes. UNMIK Economic Policy Office: 'From consolidation to sustainability: Maintaining and improving achievements', 2007, p. 17.

<sup>136</sup> Centre for Economic Performance International Conference, 2006, quoted in HRCUP, p. 59. See also UNDP, *Kosovo Human Development Report 2007*, p. 6.

<sup>137</sup> Ramet 2006, pp. 537–538.

Kosovo), another 263,322 books were destroyed during the NATO campaign.<sup>138</sup>

Despite these grave damages, the estimated economic value and development potential of Kosovo and its SOEs at the start of international statebuilding were far from insignificant.<sup>139</sup> Kosovo's SOEs operated in a wide range of sectors, from primary to tertiary industries, and employed tens of thousands of people at the very least, although the exact figure has not yet been established.<sup>140</sup> A 2001 study valued the fixed assets of 192 large and medium-sized SOEs – altogether estimated by the study to be 55% of the total number of SOEs – at 4.5 billion DM, while losses from wartime destruction were assessed at 1.3 billion DM.<sup>141</sup> Average liabilities were estimated to be in the order of 1 million DM.<sup>142</sup> Although capacity utilization at this time was low, the study showed increased activity, turnover and revenue in most of the SOEs examined.<sup>143</sup> Later analyses have held that Kosovo's SOEs had an even greater worth.<sup>144</sup> A 2004 study put the total number of SOEs at several hundred,<sup>145</sup> of which 75% were deemed to be operating. Together these SOEs were estimated to represent '90 percent of Kosovo's industrial and mining base, 50 percent of commercial retail space, and 20 percent of agricultural land – including all prime commercial agricultural land and the vast majority of Kosovo's forests.'<sup>146</sup>

Evidently, SOEs were a key part of the economy at the start of the international statebuilding project and represented a significant potential source of reconstruction and longer-term economic development. The POEs in Kosovo – which were also put under Pillar IV administration in 1999 – are generally estimated to be worth even more than the SOEs,<sup>147</sup> but these were not to be scheduled for privatization until after the end of formal international leadership of privatization in Kosovo.

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<sup>138</sup> Ibid.

<sup>139</sup> RIINVEST 2001; Barbara Frye: 'Kosovo: Buried treasure', *Transitions Online*, March 7, 2007; Forum 2015: 'Privatization and post-privatization in Kosovo: Glass half empty or half full?', Pristina, 2008.

<sup>140</sup> Héthy 2002, p. 70, suggests 70, 000. See discussion in the conclusion of this report.

<sup>141</sup> RIINVEST 2001.

<sup>142</sup> Ibid, p. 4.

<sup>143</sup> Ibid, pp. 13–14.

<sup>144</sup> KTA: 'Draft strategy of the Privatisation Department of the Kosovo Trust Agency', April 2004, accessed at [www.esiweb.org/pdf/bridges/kosovo/1/14.pdf](http://www.esiweb.org/pdf/bridges/kosovo/1/14.pdf), 5 June 2010, p. 1; UNMIK Economic Policy Office 2007, p. 15.

<sup>145</sup> KTA: 'Draft strategy'. The study cites KTA's 450 confirmed SOEs and another 180 with unclear status.

<sup>146</sup> Ibid.

<sup>147</sup> There was agreement on this among subjects interviewed by the author for this project in Kosovo between January and July 2010.

## Implications of 'social ownership' for internationally managed privatization

The EU-led Pillar IV responsible for economic reconstruction and development quickly made it clear that a massive privatization programme would be the strategy of the international statebuilding project with regard to Kosovo's shattered economy.<sup>148</sup> Among the first actions under this Pillar was the establishment of a Tax Administration, a Central Banking Authority, a Pension and Savings Trust, and a customs service – and already in autumn 1999, UNMIK and Pillar IV made it clear that privatization would be their 'key policy to promote the growth and development of a market economy in Kosovo.'<sup>149</sup> Kosovo's unresolved status at the time closed off avenues normally available to countries hoping to benefit from international assistance and investment,<sup>150</sup> and internationally led privatization was in effect also the *only* encompassing economic strategy for Kosovo.

<sup>148</sup> For how the international statebuilding project has evaluated Kosovo's socio-economic situation and economic history, see e.g. United Nations Development Programme (UNDP)'s Human Development Reports (the first published in 2002), accessed at <http://www.ks.undp.org/?cid=2,40> on 10 July 2010; UNMIK reports such as UNMIK Economic Policy Office 2007 and UN Division for Public Administration and Development Management and Department of Economic and Social Affairs: 'Province of Kosovo: Public Administration Profile', December 2003; World Bank Kosovo Poverty Assessment Reports, accessed at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/KOSOVOE/XTN/0,,contentMDK:20139470~menuPK:297796~pagePK:1497618~piPK:217854~theSitePK:297770,00.html> on 10 July 2010, including the first report, World Bank: *Kosovo Poverty Assessment: Volume I (Main Report) and Volume II (Annexes)*, December 20, 2001; other world Bank reports, including World Bank: *Economic and social reforms for peace and reconciliation*, Report 21784-KOS 2001, especially Annexes pp. 37–166, and World Bank: 'Conflict and change in Kosovo – Impact on institutions and society', 2000; USAID's publications accessed at <http://www.usaid.gov/kosovo/eng/evaluations.html> on 10 July 2010, including USAID: 'Assessment of economic conditions and possible development projects in Northern Kosovo', October 2006; EC evaluations including its progress reports (from 2004), accessed at <http://www.delprn.ec.europa.eu/?cid=2,60> on 1 July 2010, and European Commission: 'Kosovo (as defined under UNSCR 1244)', undated, accessed at [http://ec.europa.eu/economy\\_finance/international/non\\_eu/western-balkan/kosovo\\_en.htm](http://ec.europa.eu/economy_finance/international/non_eu/western-balkan/kosovo_en.htm) on 1 July 2010. All reports stress that economic liberalization and private sector development should be the core economic strategy for Kosovo.

<sup>149</sup> Zaum 2007, p. 155. The recommendation was made in September 1999 by Joly Dixon, who was head of UNMIK's Pillar IV and Deputy SRSG in Kosovo.

<sup>150</sup> UNDP's 2006 Human Development Report for Kosovo, p. 31 highlighted that uncertainty regarding Kosovo's status scared away potential investors. Bence Németh, 'Economic and social processes in Kosovo', *International Affairs Journal*, 19 September 2007, also underlines that Kosovo's unresolved status holds back economic development, quoted in HRCUP 2008, p. 33. See also Rakia Moalla-Fetini et al. for the IMF: 'Kosovo: Gearing policies towards growth and development', IMF, 2005; and Bernhard Knoll: 'From benchmarking to final status? Kosovo and the problem of an international administration's open-ended mandate', *European Journal of International Law*, 16 (4), 2005, p. 647.

International officials deemed it important to clarify legal ownership of Kosovo's enterprises before privatizing, especially of the socially owned ones that were to be privatized first. While Serbia was laying claim to all Kosovo's POEs and SOEs – indeed, to Kosovo as a whole – identifying the ultimate title-holder of Kosovo's SOEs was first and foremost related to Yugoslavia's specific ownership system, to the concept of social ownership in particular.<sup>151</sup>

Despite the tendency to conflate Yugoslavia's two ownership categories<sup>152</sup> – 'social' and 'public' – they are not the same.<sup>153</sup> The matter is, however, regarded as 'complicated'.<sup>154</sup> Also parts of UNMIK regarded social ownership as 'actually mask[ing] state ownership in Kosovo'.<sup>155</sup> Historically, social ownership originated from Tito's distancing from the Soviet Union and the Soviet economic model in the 1950s, when social ownership replaced the legally more straightforward system of state ownership.<sup>156</sup> Somewhat simplified, Yugoslav 'public' ownership equals state ownership, with the state as defined owner – whereas with social ownership, the owner remains legally undefined and unidentifiable. Ownership regulating Kosovo's SOEs was unique to Yugoslavia, a 'sui generis notion',<sup>157</sup> lacking historical or global counterparts, without any agreed legal definition even within the federation.<sup>158</sup> To some extent, this ambiguity was intentional: Yugoslavia's socially owned values were meant to belong to *society as a whole*, to 'no one and to everyone'.<sup>159</sup> Such a conception of ownership is of a philosophic or perhaps poetic rather than legal nature, rendering it impossible to tie ownership down to a clear legal personality.

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151 For one perspective on the concept and its implications for privatization in Kosovo, see RIINVEST: 'The status of socially owned property in Kosova: Contests and privatization', 2004b. See also the other sources cited below.

152 See e.g. the European Commission and the World Bank: 'Toward stability and prosperity', 3 November 1999, p. 12, note 14 and Robert Cemovich for the International Fertilizer Development Center and USAID: 'On analysis of UNMIK regulations and pre-existent Yugoslav laws related to agricultural land privatization/commercialization in Kosovo', 5 July 2001, p. 7.

153 See Uvalic 1995.

154 Perrit 2005, p. 141.

155 Legal memorandum dated 25 May 2001 by UNMIK's Department of Trade and Industry advisor Aleksander Dardeli, quoted in Cemovich for the International Fertilizer Development Center and USAID 2001, pp. 6–7.

156 Uvalic 1995, note 11.

157 Medjad 2004, p. 289.

158 Isa Mulaj: 'Redefining property rights with specific reference to social ownership in successor states of Former Yugoslavia: Did it matter for economic efficiency?' (2006), p. 12.

159 Quoted in Lazic and Sekelj 1997, p. 1061.



Politically, the purpose of social ownership was to fundamentally re-organize economic activity and social relations ‘in order to make unemployment economically unnecessary and to deprive it of its political role. In that re-organization, job security was intended to be a direct incentive to effort and rising productivity of the kind attributed to systems with private ownership’ – whereas full employment ‘was a political choice [...] on which the party’s political legitimacy came to rest.’<sup>160</sup> Social ownership reflected the aim that ‘the party should represent the collective interests of all working people – of society as a whole – above their particular interests (served by the many other official forms of representation, such as firms, localities, industries, and professional groups).’<sup>161</sup> The Constitution enplaced strict conditions on sales and transfers of social property, stipulating that ‘a social enterprise may be sold to a private person only if it is not attractive to the social sector.’<sup>162</sup>

In practice, much of the decision-making power over Yugoslavia’s SOEs lay with the workers, who managed the enterprises, made strategic plans and took business decisions in *workers’ councils*, the prime unit of the Yugoslav ‘third way’ economic system.<sup>163</sup> The Yugoslav system of self-management also included the ‘self-managed interest community’ entering into agreements for provision of social services.<sup>164</sup> In the SOEs, workers’ councils were ‘authorised to ‘appropriate all value-added’ produced by the company, after interest, taxes and depreciation’. At the same time, authority over business decisions was ‘limited to marginal adjustments in the allocation of “net income” among a number of funds: a capital fund for re-investment in the enterprise; collective consumption [...]; salaries; and reserves.’<sup>165</sup>

This type of self-management ‘was not, and never became, a system of workers’ control’.<sup>166</sup> Contrary to popular belief, ‘it simply was not the case that workers and employees could not be fired.’<sup>167</sup> Detailing the operation of firms in Yugoslav times, Benjamin Ward concludes that while the system involved ‘a considerable measure of autonomy

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<sup>160</sup> Woodward 1995b, p. 5.

<sup>161</sup> Ibid, p. 322.

<sup>162</sup> Quoted in Lazic and Sekelj 1997, p. 1061.

<sup>163</sup> According to Mulaj 2007, p. 230, ‘In theory, the Yugoslav workers were the agents of the state, though in practice the state played a double role (as principal and agent)’.

<sup>164</sup> See Bartlett 1985, p. 19.

<sup>165</sup> Lessons Learned and Analysis Unit of ESI and the EU Pillar of UNMIK in Kosovo (LLA): ‘The Ottoman dilemma: Power and property relations under the United Nations Mission in Kosovo’, 2002, p. 16. See also Woodward 1995b, p. 166: ‘the *incentive to increase produced value* (that is, productivity, or net value) [...] would derive from rights of political and economic decision-making.’

<sup>166</sup> Woodward 1995b, p. 166.

<sup>167</sup> Ibid, p. 300, note 99.

for the firm, it should not be thought that independence of the sort possessed within the legal framework of capitalism has been acquired by the Yugoslav firm. The state reserves the right to intervene directly to alter any decisions of which it disapproves.<sup>168</sup> Mladen Lazic and Lasko Sekelj also confirm the prominent role of the state in managing socially owned values in the socialist Yugoslav federation.<sup>169</sup>

Significantly, the constrained power of workers over socially owned enterprises did not include any authority to dispose of assets by transferring them to private hands, nor the right to use socially owned capital for any other purpose than what it was originally allocated for.<sup>170</sup> Moreover, workers had little say in final decisions regarding their earnings.<sup>171</sup> Although each firm's rulebook for wages needed formal approval from the workers' councils,<sup>172</sup> it was in fact the 'political elites, in blatant violation of the proclaimed autonomy of workers, [who] set workers' earnings with the clear goal of evening out differences among firms. They achieved this through a pervasive and massive redistribution of income, implemented by discretionary taxation and subsidization of enterprises.'<sup>173</sup>

It should be emphasized that while SOE workers possessed management rights and had a clear, direct stake in the operation and development of the enterprises in which they were employed, neither the workers nor the SOE they managed were 'the owner but only the *user* of the socially-owned assets in its possession, e.g., land, buildings and equipment.'<sup>174</sup> SOE workers' councils held the right to operate enterprises, but not to *own* them. To some extent, the workers *were* the enterprises,<sup>175</sup> with the right to use socially owned property only for the specific and restricted purpose of social production as defined in the company statutes.<sup>176</sup>

Apart from workers, the *municipalities* had an important role with respect to the SOEs located within their boundaries. While the role of

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<sup>168</sup> Ward 1958, p. 570.

<sup>169</sup> Lazic and Sekelj 1997.

<sup>170</sup> See e.g. Kosovar Institute for Policy Research and Development (KIPRED): 'The United Nations Mission in Kosovo and the Privatization of Socially Owned Property: A Critical Outline of the Present Privatization Process in Kosovo', Policy Research Series, Paper #1, Pristina, 2005, p. 5.

<sup>171</sup> See Milan Vodopivec: 'Determination of Earnings in Yugoslav Firms: Can It Be Squared with Labor Management?', *Economic Development and Cultural Change*, 41, 3, 1993.

<sup>172</sup> Woodward 1995b, p. 175.

<sup>173</sup> Vodopivec 1993, p. 623.

<sup>174</sup> Medjad 2004, p. 310, added emphasis.

<sup>175</sup> LLA 2002, p. 16.

<sup>176</sup> *Ibid.*, pp. 8–9.

workers and the workers' councils was most prominent in SOEs' day-to-day business, municipalities were vested with a more fundamental 'right of disposal' of SOEs and the land on which they were situated. To a great extent, both workers and municipalities saw SOEs as 'their property'.<sup>177</sup> Crucially, though, neither municipalities, workers nor any other party held the right to transfer SOEs or the land on which such enterprises were placed to private hands.<sup>178</sup> So the fact that municipalities for most practical purposes *controlled* and administered the land<sup>179</sup> did not mean that they *owned* it. Yugoslav law instead seemed to regard the municipalities as trustees of the interests of 'society' – that is, everyone but no one in particular.<sup>180</sup> In fact, the legal position of SOEs with their workers councils also resembled that of trustees with 'enhanced usage and possessory rights' who, however, could 'buy, sell and modify the usage' of SOEs and land only with written approval from the municipality.<sup>181</sup>

In trying to identify the ultimate legal title-holder of Kosovo's SOEs, most international statebuilders seemed to conclude that the municipalities were the closest it was possible to get.<sup>182</sup> In a March 2002 UNMIK Pillar IV Information Memorandum suggesting a regulation for establishing the KTA, German professor Stephan Hobe outlined three organs that might represent 'society' with respect to social property in Kosovo: the state, the municipalities, and the SOE workers' councils.<sup>183</sup> Although the legal situation was described as 'very uncertain', the document along with other legal analyses indicated that the municipalities had the clearest right to socially owned property, since they in practice acted 'for and on behalf of the society' in administering it.<sup>184</sup>

Kosovo's unresolved status further complicated the matter of defining social ownership before international officials could proceed with large-scale privatization of SOEs. UNMIK and EU Pillar tended to see the municipalities in Kosovo as organs of the state – so if either these, or 'the state', should be adjudged the owners of social property, international statebuilders were unsure as to exactly what that 'state' would

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<sup>177</sup> Zaum 2007, p. 162. See also the next part.

<sup>178</sup> LLA 2002, p. 12.

<sup>179</sup> It could be that this is what has led some analysts to equate social with public ownership, as municipalities were seen as organs of the state.

<sup>180</sup> Perrit 2005, p. 160.

<sup>181</sup> Cemovich for the International Fertilizer Development Center and USAID 2001, p. 7.

<sup>182</sup> KIPRED 2005, pp. 5–6. Most actors involved in privatization in Kosovo interviewed by the author in Kosovo between January and July 2010 favoured this interpretation.

<sup>183</sup> The Memorandum was addressed to the UN Department of Peacekeeping Operations and the UN Office of the Legal Advisor. KIPRED 2005, pp. 5–6. See also Perrit 2005, p.160.

<sup>184</sup> KIPRED 2005, pp. 5–6.

be: Yugoslavia, the Republic of Serbia, UNMIK, or Kosovo?<sup>185</sup> Belgrade's insistence on ownership of all publicly and socially owned property in Kosovo increased the nervousness among the international officials as to future problems, should they be found to have exceeded their mandate when privatizing. According to a former privatization director, throughout the period of international statebuilding, the Serbian government 'directly and through its representatives in Kosovo' used 'all possible legal means to halt and to delay Kosovo's privatization program – including a barrage of court suits' along with 'behind the scenes physical threats and intimidation.'<sup>186</sup>

### Other questions

The ownership intricacies outlined above came on top of other legal and political difficulties facing the international officials who were determined to privatize in Kosovo. For one thing, as in the rest of ex-communist and ex-socialist Eastern Europe, it is possible that, with the socialist takeover in 1944, some public property had been expropriated not fully in line with internationally accepted procedures.<sup>187</sup> While other countries have sought to resolve this matter through restitution laws, Kosovo still lacks such legislation. Restitution is the last point of the Ahtisaari Plan,<sup>188</sup> but international officials – still active in Kosovo's law-making<sup>189</sup> – seem cautious to proceed here, and explain that the issue is seen as politically sensitive.<sup>190</sup>

Moreover, no official cadastre exists in Kosovo. Cadastral records – however flawed these might have been – were brought to Serbia with the regime's post-war withdrawal in 1999 and are now located in various towns in Serbia.<sup>191</sup> Negotiations on their return collapsed in 2002.<sup>192</sup> Meanwhile, documents may be released in individual cases,

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<sup>185</sup> Németh 2007 notes the same uncertainty preventing investments in Kosovo, quoted in HRCUP 2008, p. 33.

<sup>186</sup> John Johnson, Pillar IV Director of Privatization from March 2003 to March 2005, email interview by author received on 17 April 2010.

<sup>187</sup> Perrit 2005, p. 140.

<sup>188</sup> Comprehensive Proposal for the Kosovo Status Settlement, 2 February 2007 (the Ahtisaari Plan hereafter), Annex XII, 2.13.

<sup>189</sup> See *ibid.*, Annex IX, 4.3.

<sup>190</sup> Freek Janmaat, Head of economic policy at the European Commission (EC) in Kosovo, former ICO/EU planning team economic advisor, and the EC's representative at the PAK board, author's interview, Pristina, 12 April, 2010.

<sup>191</sup> U4 Expert answer: 'Corruption in land administration/ land management in Kosovo', U4, Transparency International and Chr. Michelsen Institute, Bergen, 20 August 2008, p. 4, and cadastral expert Hyzri Llabjani, interviewed by author, Pristina, 12 April, 2010. Llabjani served as a KTA cadastral officer from 2004 to 2007.

<sup>192</sup> U4 Expert answer 2008, p. 4.

but only after significant payment.<sup>193</sup> Various region-specific complications – notably including several businesses in Kosovo’s western town of Gjakova (semi-)privatized during the early 1990s – made the situation facing international officials in Kosovo even more complex.<sup>194</sup>

The forced sales, takeovers and mergers undertaken in Kosovo by the Milosevic regime in the 1990s also obstructed international statebuilders in their ambition to proceed quickly with privatization. While some officials favoured taking into account these ‘transformations’ and regarded privatization as already (partially) having happened in Kosovo, others – along with external legal experts and Kosovo’s general public – insisted that all of the Belgrade regime’s 1990s transactions in Kosovo should be disregarded as being discriminatory and in violation of human rights law.<sup>195</sup> While key European decision-makers, UNMIK and Pillar IV appear to have tended to favour the first line of reasoning, US actors were inclined to support the second.<sup>196</sup> As will be shown, the latter approach won through in the end (in theory at least), indicating the role and respective influence of international actors in Kosovo’s privatization process.

The ‘murky set of legal relationships’<sup>197</sup> put into play with the plans for internationally led privatization accentuated crucial issues: whose property would be sold off when tendering enterprises, who would have the right to privatization proceeds; and who would be accountable in the case of objections and mistakes? International statebuilders were particularly worried about opposition from Serbia, including protests related to the status of Kosovo, the UNMIK mandate, and demands from people who had benefited from the 1990s transformations.<sup>198</sup> The UN, UNMIK and EU Pillar were eager to create a sound legal framework for privatization that could safely absolving international officials from legal responsibility, before starting to privatize. So while UNMIK had immediately aimed at creating a liberal market economy in Kosovo through privatization, uncertainty over legal ownership and the related concern for international liability caused inception of privatization to go through several phases before it could get underway fully in 2002.

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<sup>193</sup> Registered owner of property sold by the KTA, author’s interview, July 2010.

<sup>194</sup> See Mulaj 2007 and Mulaj 2005.

<sup>195</sup> See the next part.

<sup>196</sup> E.g. USAID memo: ‘History of the Kosovo Privatization Program’, 15 December 2003, in possession of the author.

<sup>197</sup> Perrit 2005, p. 160.

<sup>198</sup> This was repeated in most interviews conducted by author with former KTA officials, UNMIK advisors and close observers of the process. See the next part.

## Questioning privatization

Bearing in mind the legal uncertainty, practical problems, and risks the international statebuilding project associated with privatization in Kosovo, one may wonder why international statebuilders pressed ahead regardless, with such eagerness and speed, and why there seems to have been no discussion on alternative economic approaches. Debates focused on the legality of privatization – that is, *how to make it legal*, how to avoid international liability; range and type of enterprises subjected to privatization; method of privatization; and potential political and security ramifications. The choice of privatization as the core economic strategy for Kosovo never seems to have been in doubt. Keeping property temporarily or longer-term under public administration does not appear to have been considered. No comprehensive, context-specific evaluation of different approaches to development in Kosovo was undertaken.

The only apparent proposal for a substantially *different kind* of privatization than the massive programme planned and implemented under international leadership in Kosovo came from the Lessons Learned and Analysis Unit of the EU Pillar (LLA) – a joint project of the Berlin think-tank European Stability Initiative (ESI) and UNMIK's Pillar IV. While not opposing privatization as such, the LLA suggested bankrupting rather than selling SOEs and either creating a Kosovo Development Fund with the proceeds or letting those go to municipalities.<sup>199</sup> The LLA argued for keeping returns from land sales in a separate trust fund for public infrastructure development, for including municipalities in deciding on how to use these funds, and for giving municipalities the right to use some land for future social and public projects. In December 2002 it was suggested that KTA should transfer 30% of the land value (15% of the proceeds of the sale of an enterprise) to municipalities as an administrative conveyance fee.<sup>200</sup> While parts of UNMIK's Department for Trade and Industries (DTI) in 2001 indicated openness to a Kosovo development fund, the EU and UN soon rejected the idea – decisively.<sup>201</sup>

Rather than looking into such models or evaluating possible alternatives to privatization, international statebuilders, from the very outset, concentrated on formulating a safe legal framework for privatization and carrying out a 'massive investor promotion and public education

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<sup>199</sup> Author's interview, Pristina, April 2010. See Zaum 2007, pp. 157, 162. Zaum was part of the LLA expert team.

<sup>200</sup> Zaum 2007, *idem.*

<sup>201</sup> Former high-level KTA official, author's interview. DTI was established in December 2000 as part of Pillar IV, but was dissolved after the creation of KTA in 2002.

program',<sup>202</sup> with studies and awareness-raising campaigns intended to educate Kosovo's public on the benefits of privatizing. Such advocacy came unanimously from a plethora of official and unofficial studies produced or financed by international actors – in particular, the World Bank, USAID, the EC, and the IMF.<sup>203</sup> According to privatization insiders, the USA was particularly keen on privatizing in Kosovo.<sup>204</sup>

One of the first public international outlines for Kosovo's post-war development, formulated by UNMIK, the EC and the World Bank, presents reconstruction as a matter of effective and accountable institutions, establishment of a market economy through large-scale privatization, protection of property rights, and rule of law.<sup>205</sup> Like other documents produced by international statebuilders to encourage privatization, it presents the process as a technical issue of rebuilding and growth – not as a political question fit to subject to democratic contestation and debate. International promotion of privatization in Kosovo illustrates how statebuilders did not regard *state institutions* as the agent for transformation and development: what counted were rather 'the rules of the free market, where the institutional-political framework, and the state, are merely to guarantee certain institutions and regimes, such as property rights, contracts, etc.'<sup>206</sup>

An indication of the success of this unquestioning international approach to economically liberal reform in Kosovo is the fact that very few public voices objected to privatization when it was initiated, or indeed as it unfolded. While shedding light on various aspects of its implementation, local analyses have not essentially challenged privatization as the international statebuilders' economic strategy of choice.<sup>207</sup> Debates on the timeliness, alleged corruption, and methods chosen for privatization do occur in Kosovo, but alternatives – like keeping values under (short- or longer term, partial or complete) state control, or conducting a comprehensive evaluation of projected consequences of this and other strategies before commencing or proceeding with the process – are still not a matter of general public

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202 KTA: 'Draft Strategy' 2004, p. 2.

203 See e.g. World Bank references throughout this report as well as USAID-financed analyses by RIINVEST. USAID also funded significant Pillar IV staff. See Zaum 2007, p. 157.

204 Several privatization insiders interviewed by the author brought up this point, including legal scholar and lecturer at the University College for Business and Technology in Pristina, Robert Muharremi, Pristina 17 July, 2010. Muharremi served as a UNMIK Pillar IV legal counsel during key periods of its management of the privatization process in Kosovo.

205 European Commission and the World Bank 1999.

206 Sørensen 2009, p. 32.

207 E.g. KIPRED 2005, p. 3; RIINVEST 2001.

discussion.<sup>208</sup> Official Kosovo has instead been supportive of privatization and its international management.

The public expression of support for internationally led privatization in Kosovo might relate to that fact that it was internationally led – especially since Western and in particular US actors have been the most prominent advocates. Due to NATO's 1999 intervention, which brought an end to the Kosovo war, Kosovo's population is overwhelmingly pro-Western, and in particular pro-American, as the NATO-operation is seen as a US-led initiative.<sup>209</sup> The prevalence of public and largely unquestioning support for privatization in Kosovo might also have been grounded in the hope that members of the public would themselves be able to buy enterprises,<sup>210</sup> with workers and municipalities possibly hoping to formalize their practical control over SOEs in the form of 'real', legal ownership. Some might have seen privatization as the symbolic and actual end to Serbian control over enterprises and power over the economy of Kosovo.<sup>211</sup>

Another reason for the expressed official support for internationally led privatization could be that the process might have been perceived as representing an ideological and emotional break with the era of socialist Yugoslavia. As one civil society activist has explained: 'To argue against privatization was seen as something heretic, like blasphemy. If you did, you were accused of being a communist, Trotskyist, and so on.'<sup>212</sup> The era of Yugoslav socialism is in Kosovo

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<sup>208</sup> Luan Shllaku, executive director of the Kosovo Foundation for Open Society, author's interview, Pristina, 15 July 2010, and author's media observation in Kosovo in 2009 and 2010.

<sup>209</sup> Every autumn Kosovo celebrates its own version of Thanksgiving, and Pristina fills up with posters proclaiming, 'Thank you USA' as an expression of gratitude towards the US role in ending the 1999 war. In 2009, a large golden statue of Bill Clinton – US President at the time of the NATO bombing – was raised in the capital's *Bill Clinton Boulevard*. No comprehensive survey exists of opinions on privatization in Kosovo, but for surveys on attitudes towards the international community, see Balkan Gallup: 'Key findings 2009', COWEB, 15 March 2010; Balkan Gallup: 'Kosovo's independence', *GMB Focus on*, No 3, 2010; Balkan Monitor: 'Insights and perceptions: Voices of the Balkans', Analytical Report 2008; UNDP Early Warning reports, the most recent Fast Facts accessed at <http://www.ks.undp.org/?cid=2,26,958> on 9 July 2010; and Index Kosova, e.g. 'The most optimistic again (The Voice of the People)', December 2008, accessed at <http://www.indexkosova.com/fly/?page=6&lang=2&item=8> on 9 July 2010.

<sup>210</sup> Author's interview with Visar Ymeri, head of the Kosovo movement Vetëvendosje!'s (Self-determination!) committee for economic policies, 12 May 2010.

<sup>211</sup> Author's interview with Llabjani. John A. Gould: 'Privatization and political institution building in Kosovo and Bosnia & Herzegovina', IREX, 2007, p. 3 makes a similar case. His claim that privatization functioned as a mechanism for returning property to Albanians does however not seem accurate, as the most valuable going concerns appear to have bought by international investors – while a *numeral* majority was probably acquired by Albanians.

<sup>212</sup> Author's interview with Avni Zogiani, head of Kosovo's anti-corruption NGO COHU! (Stand up!) and former journalist in Kosovo's main daily *Koha Ditore*, Pristina, 20 April, 2010.



remembered as a time of Serbian occupation and repression. To some extent, left-wing politics in Kosovo is still perfunctorily associated with dogmatism, oppression and limitations on rights and freedoms.<sup>213</sup> Milosevic representing the *Socialist* Party of Serbia did not help Kosovo's left.<sup>214</sup> So in a situation where left-oriented (including social democratic) policies are instinctively viewed with massive scepticism if not resentment, many might have found it easy to accept privatization as something fresh and progressive, even liberating.<sup>215</sup>

Recently, however, public statements in support of privatization have been accompanied by some critical voices.<sup>216</sup> Pointing to a 'disconnect between established research and scientists, and political decision-makers', one economic scholar claims that people have been afraid to criticize privatization out of fear for their careers or other professional or personal relations: 'You were labelled a "madman" if you criticized the process with profound evidence, or attempted any real analysis of it.'<sup>217</sup> Trade union representatives have felt pressure to accede to KTA's privatization despite seeing its flaws, and others have kept quiet about their objections, fearing that criticism could damage Kosovo's status process – or, more lately, the process of international recognitions of independence.<sup>218</sup>

Some SOE workers did and have continued to protest the privatization of their workplaces, but this has generally received little public attention. An SOE representative explains that workers protested because the KTA ignored their demands of for jobs and social protection after privatization, and did not take into account the fact that 'SOEs were built, maintained, sustained and developed by workers' [efforts] and their continuous contributions.'<sup>219</sup> It is worth noting that this criticism is justified in terms of privatization having a detrimental impact on workers' private interests – and that the critique does not

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213 The fact that many people in Kosovo associate the rule of communist leader Enver Hoxha in Albania with oppression and poverty further underlines this general feeling.

214 Author's interview with a Member of Kosovo's Parliament, March 2009. All major parties in Kosovo describe themselves as belonging to the political right. Author's interviews with political party representatives in Kosovo, March to June 2009.

215 Author's interviews and observations in Kosovo between November 2006 and July 2010. Shllaku explains that 'privatization was seen as a must, something to which there was no alternative, and which it went without saying would detach us from our problematic past', author's interview.

216 In 2010, for instance, public debates arranged by civil society in Pristina questioned the speed, method – some even the purpose – of privatization in Kosovo. Author's observations in Pristina, 2010.

217 Author's interview with Isa Mulaj, Pristina, 6 April 2010.

218 Author's interviews with trade union representatives and civil society activists, Pristina, May 2010.

219 Representative of Fabrika e Amortizatorëve, Ramush Berisha, quoted in HRCUP 2008, p. 56.

fundamentally challenge the premises or legitimacy of the process. Even today, critics tend to focus primarily on allegedly flawed implementation – like purported corruption and mismanagement.<sup>220</sup>

The support for privatization among Kosovo's opinion-makers and general public has pleased international statebuilders. In 2004 the KTA commended Kosovo for being 'notable as [...] one of the few transformation economies where privatization is viewed positively, and is actively desired by the majority of the general population – including the government, business community, and trade unions.'<sup>221</sup> At the same time, it was also stressed that continued '[e]ducation and outreach to both the government and the general population will be driven by a recognition that buy-in at multiple levels is required for continued success.'<sup>222</sup>

The non-questioning attitude towards privatization in Kosovo is maintained until this day, and the process continues to be treated as a given, in need of no explanation. Discussing the background to internationally led privatization in Kosovo, UNMIK's top legal official – who is probably also the person with greatest insight into the process of defining Kosovo's legal privatization framework – explains: 'It was a question of capitalistic or more capitalistic. The general ideal was to rid the economy of the socialist-style approaches that had defined the Yugoslav economy over a long time.'<sup>223</sup> He insists: 'It was important to explain capitalist structures and economic dealings to local actors' and make them receptive to liberal reform including privatization. 'Why was it important to change this mind-set of the people? It was very clear to most of us that private entrepreneurs are the ones who could create jobs and growth, whereas the old style central command-based economy had led to the near bankruptcy of the Yugoslav state and was clearly dysfunctional in Kosovo.'<sup>224</sup> With reference to concept of 'biopower',<sup>225</sup> it has, in a different context, been pointed out

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220 Author's interviews for this project, and observations of local and international media coverage between November 2006 and July 2010, including e.g. websites Koha.net [www.koha.net](http://www.koha.net); Zeri: <http://www.zeri.info/index.php>; Gazeta Express: <http://www.gazetaexpress.com>; and Balkan Investigative Reporting Network (BIRN): <http://birn.eu.com/>

221 KTA 'Draft Strategy' 2004, p. 1.

222 Ibid.

223 Author's interview with Director of UNMIK's legal office (OLA) Ernst Tschoepke, Fushë Kosovë, 26 April, 2010. Tschoepke was intimately involved in Kosovo's privatization process from the start, participating in drafting the KTA regulations as a senior Pillar IV legal officer.

224 Tschoepke, author's interview.

225 Michel Foucault: 'The birth of bio-politics', lecture at Collège de France, 1979; lecture on 'bio-power', 11 January 1978, in *Security, territory, population*, Palgrave Macmillan, London, 2007; Giorgio Agamben: *Homo Sacer: Sovereign power and bare life*, Stanford University Press, Stanford, 1998, part three; Miguel de Larrinaga and Marc G. Doucet:

that this ambition to ‘change attitudes and behaviour’ is of a ‘radically interventionist’ kind.<sup>226</sup>

International officials’ explanations of liberal economics and the advantages of privatization for Kosovo seem to have been readily accepted and reproduced by the local elite, reflecting either ‘a subtle co-option of the liberal peacebuilding process by the local actors who are assumed to be its subjects’<sup>227</sup> – or perhaps rather the co-option of local actors by the liberal template of international statebuilding.<sup>228</sup> One of the most influential local persons involved in privatization in Kosovo holds an untroubled view: ‘Why privatization was chosen? Well Churchill said about democracy that it is not perfect, but it is the only system, there is no other alternative in place. This was the case with privatization as well. We had no other alternative.’<sup>229</sup> A former KTA cadastral officer asks ‘Why privatization? Well, why not?’<sup>230</sup>

Today this question, although clearly intended rhetorically, comes across as a good one. International statebuilders have tended not to explain the process beyond indistinctly claiming that privatization in general is the key, and even the only way to develop,<sup>231</sup> without showing to Kosovo-specific circumstances or detailed economic arguments. A 2002 IMF report, for instance, vaguely asserts that Kosovo must privatize in order to ‘send a powerful signal to domestic economic agents, as well as to the rest of the world, about the kind of economy Kosovo wants to build’.<sup>232</sup>

Some international officials maintain that privatization has been a matter of ‘address[ing] the underlying ownership and efficiency issues and creat[ing] effective corporate governance’<sup>233</sup> in Kosovo, and preserving values by giving enterprises a ‘known owner’ – and it is better, it is claimed, for property to have a known owner than an

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‘Sovereign power and the biopolitics of human security’, *Security Dialogue*, 39, 2008 and Duffield 2007.

226 Sørensen 2009, p. 14.

227 Richmond 2008, p. 296.

228 Mac Ginty 2008 has shown the general likelihood such co-option in peace-making operations.

229 Author’s interview, Pristina, May 2010.

230 Llabjani, author’s interview.

231 For one of many examples, see UNMIK: ‘Privatisation on a new legal basis’, *Focus Kosovo: Economy*, June 2005, asserting that ‘It is widely believed that privatisation promotes economic development, and the more prosperous the economy of a country, the less ethnic tension is found among its inhabitants.’  
<http://www.unmikonline.org/pub/focuskos/june05/focuskeco1.htm>, accessed on 6 July 2010.

232 Demekas et al. for the IMF 2002, p. 20.

233 European Commission and the World Bank 1999, p. 13.

unknown owner.<sup>234</sup> This reasoning appears odd, given that the privatization policy eventually chosen by international statebuilders was formulated with the purpose of *avoiding* identifying SOE owners, as will be shown. It also comes across as first and foremost aimed at *eliminating legal ambiguity* more than at promoting growth, which fails to explain why it would make more *economic* sense for property to have known owners, or why economic development cannot take place in the absence of a liberal standard of property rights.

One argument not prominent during the early stages of internationally led privatization in Kosovo, but today retroactively drawn upon to explain the process, holds that transferring property to private hands helps to fight corruption.<sup>235</sup> Paradoxically, this reasoning started to emerge in parallel with mounting allegations of corruption related to the privatization process itself. Indeed, privatization is known to ‘create avenues for corruption’.<sup>236</sup> As pointed out by economic scholar Isa Mulaj, ‘Corruption is not an argument for selling PTK [Post and Telecom of Kosovo], KEK [Kosovo Energy Corporation], or other [publicly or socially owned] companies – corruption is a crime that should be dealt with by legal authorities, not by privatizing it as a reward.’ According to Mulaj, privatization in Kosovo has instead led to ‘gangsterization’ of companies.<sup>237</sup>

Meanwhile, the issue of whether, to what extent – and by whom – Kosovo’s economy should be subjected to liberal reform with strong emphasis on private ownership has been a non-topic throughout the period of international statebuilding. Reflecting on the role of the international statebuilding project in Kosovo’s economy, an international official concludes that privatization was imposed on Kosovo by the UN without discussion of the ideological aspects of the process. The Ahtisaari Plan, this official explains, imposes continuation of privatization and turns it into a rule with force above the Constitution, as both Kosovo’s declaration of independence and the Constitution pledge to adhere to the Ahtisaari Plan. This, the official adds, is ‘probably not healthy’ for Kosovo’s democracy or debate on economic policy.<sup>238</sup>

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<sup>234</sup> Author’s interview with high-level international official, Pristina, April, 2010.

<sup>235</sup> For a recent example, see the speech of the US Ambassador to Kosovo, Christopher Dell at RIINVEST 14 May, 2010, <http://www.aabriinvest.net/?page=2,1>, accessed on 13 June, 2010.

<sup>236</sup> U4 Expert answer 2008, p. 3. See also reports from COHU at [www.cohu.org](http://www.cohu.org); Youth Initiative for Human Rights: ‘State of constriction? Governance and free expression in Kosovo’, Pristina, 24 May, 2010; and Gould 2007.

<sup>237</sup> Mulaj, author’s interview.

<sup>238</sup> High-level international official, author’s interview.

In electoral democracies, ownership of resources can be a highly disputed matter that political parties fight over in order to win votes. In Kosovo, however, citizens' interests or approval do not seem to have been deemed relevant when the international statebuilding project immediately undertook privatization-facilitating initiatives as its main economic strategy. The technical, de-politicizing manner in which privatization was chosen, promoted and implemented in Kosovo<sup>239</sup> contrasts other former parts of Yugoslavia, where privatization was debated and conducted more slowly, while protecting the role of the state in the economy.<sup>240</sup> Slovenia, for example, 'the wealthiest and most stable of all the new EU member states' in fact 'never conceded to a complete neoliberal model, quietly retaining instead significant characteristics and capacities from the socialist period'.<sup>241</sup>

### **A chronology of early endeavours**

Early pre-privatization proposals put forward by international officials for privatizing Kosovo's enterprises included an immediate suggestion from UNMIK of selling SOEs through auction of small and medium enterprises in a quick sale, followed by privatization of larger companies with tenders to strategic investors.<sup>242</sup> The EC and the World Bank soon followed suit, outlining a slightly different strategy for transferring property to private hands.<sup>243</sup> In a joint report, the two organizations underline the importance of private sector development including the creation of a privatization framework, by urging for the allocation of almost three times as much funding to this budget post as to the complete cost of efforts they relate to improving the health situation of the population.<sup>244</sup>

Inspired by these early proposals, the EU-led Pillar IV in May 2000 published a 'White Paper – Enterprise Development Strategy' focused on privatization. This policy document aimed to 'establish social

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<sup>239</sup> For a parallel, see José Manuel Pureza et al.: 'Do states fail or are they pushed? Lessons learned from three former Portuguese colonies', Peace Studies Group, University of Coimbra, 2007, on the de-politicization of the concept of 'failed states'.

<sup>240</sup> See Mulaj 2007 for an outline. For Serbia and Montenegro, see Lazic and Sekelj 1997.

<sup>241</sup> Woodward 2009a, p. 53, on how privatization, although implemented due to international pressure, was disputed also in Bosnia. For some of the post-breakup variations in the economic trajectories of different parts of the former Yugoslavia, see: Ivo Bicanic: 'The economic divergence of Yugoslavia's successor states' in Ian Jeffries (ed.): *Problems of economic and political transformation in the Balkans* (1996).

<sup>242</sup> According to Zaum 2007, p. 155, this was postponed due to preference for public support. Kosovo's first post-war democratically elected representatives would be installed following the municipal elections of 28 October 2000. The Provisional Institutions of Self-Government (PISG) was established by UNMIK in May 2001.

<sup>243</sup> European Commission and the World Bank 1999.

<sup>244</sup> 230 and 85 million USD respectively. *Ibid*, pp. 63 and 121.

consensus' on the matter and insisted on the creation of a privatization agency for Kosovo and a legal privatization framework.<sup>245</sup> On 30 June 2000, a World Bank report suggested an even more assertive approach to privatizing Kosovo's resources.<sup>246</sup> Legal concerns, however, troubled the international statebuilders, particularly the undefined issue of who owned Kosovo's enterprises, and how international officials could avoid liability when privatizing them.

In 2001, a USAID-funded report concluded that in order to privatize Kosovo's socially owned property, international statebuilders would either have to empower Kosovo to enact its own privatization laws; UNMIK would have to create its own privatization regulations; or post-1989 laws would have to be utilized after first defining them as non-discriminatory.<sup>247</sup> As will be shown, international officials came to opt for the second of these strategies: constructing an intricate legal framework intended, primarily, to transfer SOEs to private hands in a way that would exempt them from liability – before, in 2008, administrative responsibility for the process was taken over by Kosovo's local authorities.

While the international legal debates continued on how to make privatization legal and risk-free, international officials undertook several short-term pre-privatization experiments. One of the early practical results of the UN and EU Pillar's ambivalence on how to go about privatizing was that from the end of 1999 until the end of 2000, municipal UNMIK administrators briefly tried to rule enterprises by 'reinstating socialist-era reporting and institutional controls' – but this was soon deemed unsatisfactory.<sup>248</sup> In December 2000, Pillar IV through DTI instead recommended to begin privatization based on the Markovic laws, in order to get enterprises into private hands as quickly as possible. According to Dominik Zaum, this did not materialize due to objections from UNMIK's Office of Legal Affairs (OLA),<sup>249</sup> which generally saw privatization as being outside of UNMIK's mandate and was worried about vulnerability to future claims.<sup>250</sup> In early 2000, Pillar IV also tested the argument that SOEs

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<sup>245</sup> Quoted in RIINVEST 2001, p. 26, which criticizes UNMIK for not following up on this strategy.

<sup>246</sup> Ibid, pp. 27–28.

<sup>247</sup> Cemovich for the International Fertilizer Development Center and USAID 2001 is another example.

<sup>248</sup> LLA 2002, p. 12.

<sup>249</sup> OLA is sometimes also referred to as an abbreviation for 'Office of the Legal Advisor'.

<sup>250</sup> Zaum 2007, p.157, claiming that the head of Pillar IV Andy Bearpark decided to move forward with privatization regardless of these objections.

‘already “belonged” to the workers, and were therefore not state property at all’ – a reasoning shelved not long after.<sup>251</sup>

As part of the international pre-privatization strategy, UNMIK soon after DTI’s establishment in December 2000, decided to eliminate municipal power over SOEs, and increase the control of international statebuilders over Kosovo’s enterprises.<sup>252</sup> This policy was outlined in a joint Memorandum of DTI and UNMIK Department of Local Administration dated February 2001, and seems to have been justified with the mistaken assertion that applicable law ‘provides no authority to governmental bodies, at any level, to manage SOEs’.<sup>253</sup> According to the LLA, UNMIK’s termination of the municipalities’ historical say over SOEs resulted from the political allegiances of the DTI’s local members, who were appointed by the Democratic Party of Kosovo (PDK). After the victory of PDK’s rival the Democratic League of Kosovo (LDK) in the October 2000 municipal elections, most municipalities became LDK-controlled. LLA thus concludes that the decision to remove municipal decision-making power over SOEs and the land on which they were placed expressed a PDK-driven attempt to limit LDK authority over Kosovo’s economy.<sup>254</sup> Regardless of the reasons for UNMIK’s 2001 sidelining of the municipalities, international officials involved in privatization in Kosovo have long shown a preference for minimizing local authority.<sup>255</sup>

After excluding municipalities from deciding on SOE matters, DTI and UNMIK’s municipal administrators in a short period from early 2001 tried to re-establish the Yugoslav-era workers’ councils in some companies – in a few cases, arranging elections where enterprises’ workers voted directly on such councils.<sup>256</sup> An international observer notes in disbelief that UNMIK ‘was actually conducting workplace elections inside of Kosovo’s SOEs’ – a strategy that, in his view, did not work at all.<sup>257</sup> Around the same time in 2001, DTI briefly tested out a form of temporary international enterprise management, an

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<sup>251</sup> LLA 2002, p. 18, stating that it was the DTI (which was part of Pillar IV) that argued this way – however the DTI was only established in December 2000. On the issue concerned, Karadjis 2004 elaborates: ‘under Tito’s market socialism, decentralization of power to the enterprises had reached extreme levels, with the result that much of the social product had already been in a certain sense “privatized”, with the individual enterprises – regardless of how real was “workers’ self-management” within them – operating far more for their own benefit and according to their own rules than what is possible for a workers’ state to maintain some kind of overall control of the social product.’

<sup>252</sup> KIPRED 2005, p. 7; LLA 2002, p. 13.

<sup>253</sup> LLA 2002, p. 13.

<sup>254</sup> *Ibid.*

<sup>255</sup> As pointed out by several former KTA officials in author’s interviews, March–July 2010.

<sup>256</sup> LLA 2002, p. 17

<sup>257</sup> Author’s interview, Pristina, April 2010.

initiative said to have had equally limited success.<sup>258</sup> UNMIK's DTI and its Department of Local Administration were at the same time also looking for investors interested in *leasing* SOEs under concession agreements as a provisional solution until full-blown privatization could be initiated.<sup>259</sup>

The year 2001 was also when the DTI decided to move forward with what came to be known as 'commercialization'.<sup>260</sup> This was a process whereby UNMIK's DTI granted private investors concession agreements for selected SOEs, with ten-year lease contracts allocated through public tender. Bid winners gained the right and obligation to operate and manage SOEs with their workforce, and committed to paying an annual concession fee as well as to making various investments in the businesses, including capital investments and training programmes. Investors were not responsible for pre-commercialization debts, and had to leave SOEs in good condition at the end of the concession period: the value of SOEs was to remain constant or increase during the time of concession. Ownership rights were not included in the commercialization agreements, and investors did not gain the right to transfer or place encumbrances on the enterprises acquired. Commercialization revenues were put on trust, pending future resolution of ownership and creditor claims – an arrangement that would be replicated when privatization started properly the following year.

Commercialization expresses the tension between international state-builders' eagerness to get the SOEs into private hands, and Pillar IV's urge to soothe fears held by OLA and the UN Headquarters in New York,<sup>261</sup> which at the time strongly opposed direct privatization due to liability concerns.<sup>262</sup> The commercialization process has been criticized for being too slow, too limited, entailing high transaction costs, and for presenting potential investors with limited incentives.<sup>263</sup> A former KTA Deputy Managing Director insists that the 'idea of commercialization was good in theory, but in practice it proved to be a

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<sup>258</sup> LLA 2002, p. 11. See also KIPRED 2005.

<sup>259</sup> LLA 2002, p. 13.

<sup>260</sup> See KIPRED 2005 for a brief outline.

<sup>261</sup> LLA 2002, p. 11.

<sup>262</sup> KIPRED 2005, p. 8.

<sup>263</sup> Medjad 2004, p. 313; according to LLA 2002, pp. 21–23, out of more than 330 SOEs, 65 were tendered for commercialization and by late 2001, 34 tenders had attracted a credible offer; and only seven more than one bid. 12 concession agreements were concluded, latest (Minex) in February 2002. Although DTI continued to announce tenders, no further concession agreements were signed and the policy appeared abandoned. According to KIPRED 2005, p. 8, the DTI commercialized 13 out of 520 SOEs, namely Sharr Cement, Mirusha, Progress Meat, Progress Export, Fapol, Mustafa Goga, Alcon Sunflower, Betonjerka, Adi Poultry, Artizanati, Kosova Brick, Tervovent, Minex. KIPRED evaluates that only five of these can be labelled as successful.



failure in the vast majority of cases'.<sup>264</sup> Many commercialization investors seemed more interested in the SOEs' land than in their buildings or effective operations, and that contributed to malfunctioning and deterioration of commercialized enterprises.<sup>265</sup> Meanwhile, uncertainty prevailed among international statebuilders on the appropriate legal framework for privatizing in Kosovo and how to implement privatization in practice without being held to account. Frustration came to the fore in internal debates as well as through conflicting signals sent out by UNMIK.<sup>266</sup>

Dissatisfied with the period of quick international experimentation with Kosovo's enterprises, in March 2001 all international donors had come to agree on a privatization strategy formulated by the DTI – which was, however, rejected by UNMIK's OLA and UNHQ.<sup>267</sup> UN objections again seemed to stem from concern of exposing UN officials to liability claims since ultimate ownership remained undefined. As such, it was feared, the process could be seen to exceed UNMIK's mandate and UNSC Resolution 1244, especially in view of Kosovo's unresolved status at the time.<sup>268</sup> Knoll explains that OLA interpreted 1244 as prohibiting UNMIK from making lasting changes to the ownership status of SOEs, which might prejudice rights of claimants.<sup>269</sup> The DTI proposal had included suggestions for 'spin-off' privatization – to be explained in the next part – as well as liquidation,<sup>270</sup> and the UN's objections made DTI focus on spin-offs. In the face of OLA's protests, USAID, which was funding significant Pillar IV staff, continued to press for privatization. This conflict culminated in May 2001 with USAID withdrawing its privatization advisors.<sup>271</sup>

Pillar IV spent the second half of 2001 drafting the regulation on the KTA. In an attempt to limit UN liability, drafters aimed to establish

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<sup>264</sup> Shkumbin Bicaj, author's interview, Pristina, 14 April 2010. Bicaj was a DTI employee from 2000, then worked in KTA, including as its Deputy Managing Director, before for a period working as PAK Director of Privatisation in 2008.

<sup>264</sup> Author's interviews with privatization observers, Pristina, April 2010.

<sup>265</sup> KIPRED 2005 p. 14.

<sup>266</sup> One example was when in May 2001 DTI legal advisor Allan Shin told SOE managers in the west Kosovo town of Gjakova that selling SOE assets was acceptable, as long as it did not involve 'core assets' and did not exceed DM 1 million in value. LLA 2002, p. 10, note 11.

<sup>267</sup> Zaum 2007, p. 158. Unless otherwise stated, this chronology is based on the overview provided by Zaum.

<sup>268</sup> Ibid.

<sup>269</sup> Knoll 2005, p. 651.

<sup>270</sup> Liquidation in this context refers to the handling of non-viable companies through a reorganization in practice equalling bankruptcy – it does *not* here refer to the post-privatization liquidation of SOE 'shells', projected to take place in 2010 and 2011, which will be explained in the conclusion.

<sup>271</sup> Zaum 2007, p. 158.

KTA separately from UNMIK and the UN, with its own judicial personality. The land on which enterprises were located, seen as the most valuable part of some of the SOEs,<sup>272</sup> was included in early privatization drafts, but was then taken out awaiting ‘momentum’ to clarify ownership – again due to international statebuilders’ liability concerns.<sup>273</sup> On 27 October 2001, a draft regulation submitted to OLA and UNHQ gave the planned KTA wide-ranging powers over Kosovo’s values, and tasked it with privatizing SOEs, POEs, utility companies and municipal service providers, postal and telecommunications services, along with the railways and airport.<sup>274</sup> OLA now agreed to KTA *administering* SOEs and POEs, but remained sceptical towards privatization, especially on the scale suggested.<sup>275</sup> In 2002, the IMF, reiterating its support for privatization, explained that UNMIK’s proposed plan at the time consisted of ‘spin-offs’, transformations, and liquidations.<sup>276</sup> A draft from January 2002 included plans for a judicial review mechanism for property claims and left out POEs from the first rounds of privatization. Although OLA now reportedly had no principled objections to privatization in Kosovo, it rejected the draft, still worried that the UN could be held responsible for the process.<sup>277</sup>

Thus the ‘Battle of the Legal Advisers’ continued, with UNMIK further attempting to legally distance the UN from the planned privatization and protect its officials from liability.<sup>278</sup> With Michael Steiner’s advent as SRSG in March 2002, the process seemed to gain speed, even though Steiner and UNHQ legal advisers initially disagreed on whether privatization would be within the UNMIK mandate. The UNHQ stated that a permanent change in property rights might exceed UNMIK’s authority,<sup>279</sup> since its mandate covered only short-term physical reconstruction and stabilization<sup>280</sup> and the right and responsibility to *administer* on the territory of Kosovo<sup>281</sup> – not outright building a market economy.<sup>282</sup> Soon afterwards, however, OLA agreed with Pillar IV’s privatization outline after making changes to the

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<sup>272</sup> See Ibid, and Dimitri D. Demekas et al. for the IMF: ‘Kosovo: Institutions and policies for reconstruction and growth’, IMF, 2002, p. 19.

<sup>273</sup> Zaum 2007, p. 158.

<sup>274</sup> Ibid.

<sup>275</sup> For one summary of the concerns involved, see Moalla-Fetini et al. for the IMF 2005, pp. 38–39. See also Zaum 2007.

<sup>276</sup> Demekas et al. for the IMF, 2002, p. 19, also referring to the ‘bankruptcy type’ of liquidation.

<sup>277</sup> Zaum 2007, p. 158–159.

<sup>278</sup> Knoll 2005, p. 653–654.

<sup>279</sup> Ibid, note 71.

<sup>280</sup> Perrit 2005, pp. 170–171.

<sup>281</sup> UNMIK Regulation 1999/1.

<sup>282</sup> Perrit 2005, pp. 170–171.

composition of the KTA board, the role of the chairman, and further distancing the SRSG from KTA, trying to minimize his exposure to liability.<sup>283</sup> The liability debate among international statebuilders continued also after the establishment of KTA in June 2002.<sup>284</sup> Usually, it seems, OLA, the UNHQ and most KTA leadership were on the one side, and the SRSG, Pillar IV and US officials on the other.<sup>285</sup> Concerns for liability and especially claims from Serbia<sup>286</sup> certainly distinguished privatization in Kosovo from the other former Yugoslav countries, where worries about claims coming from elsewhere in the one-time federation were hardly an issue.<sup>287</sup>

International statebuilders' debates on how to privatize legally in Kosovo have been seen as rooted in differing conceptions of UNMIK's fiduciary obligations.<sup>288</sup> The UNHQ 'wing' has been seen to favour perceived responsibilities towards SOE *owners* – an orientation reflected when international officials have stated that investors who gained from the Milosevic regime's transformations might have justified claims to ownership of Kosovo's enterprises.<sup>289</sup> Pillar IV, on the other hand, has been seen to regard their primary responsibilities as being towards the economic recovery of Kosovo through the establishment of a market economy, regarding UNMIK a trustee for Kosovo *society*. It is on this basis that Pillar IV has argued that privatization would clarify ownership and encourage private investment without which SOEs would deteriorate in value – a devaluation that would violate UNMIK's responsibilities.<sup>290</sup> This conception of trusteeship is claimed to be 'less concerned with the administration of property than with legitimizing the denial of self-determination of a people'.<sup>291</sup> However, while the reasoning might explain the possibility of KTA being a 'UN agent' with sovereign character<sup>292</sup> – and UNMIK being vested with legislative and executive *state* powers by the Security Council,<sup>293</sup> of a kind that would legitimize interference with Serbia's sovereignty – it leaves unclear the grounds for the international

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283 Zaum 2007, pp. 161–162.

284 See the next part.

285 See Zaum 2007 pp. 159–162; author's email interview with Johnson.

286 See e.g. European Commission Economic and Fiscal Affairs: 'Kosovo: An Economy on Hold' (undated), accessed on 10 July 2010 at [http://ec.europa.eu/economy\\_finance/een/008/article\\_6170\\_en.htm](http://ec.europa.eu/economy_finance/een/008/article_6170_en.htm)

287 Medjad 2004, p. 314.

288 Ibid; Knoll 2005, p. 653; Zaum p. 159.

289 Zaum 2007, p. 159; a close observer of these discussions, author's interview, Pristina, May 2010.

290 Knoll 2005, p. 653; Zaum 2007, p. 159.

291 Zaum 2007, p. 160; Perrit 2005, p. 171–172.

292 Perrit 2005, pp. 167–169, explaining that KTA's role in privatization should be seen as governmental rather than commercial.

293 Ibid, pp. 167 and 172.

project's interference with the right to self-determination of Kosovo's population.

The years of international debates and experimentation did not diminish statebuilders' determination to privatize in Kosovo, but did contribute to the deterioration of enterprises under international administration. While struggling with legal privatization dilemmas, international statebuilders halted the operations of enterprises, pending final privatization.<sup>294</sup> Many Kosovo SOEs were not allowed to function properly before being privatized, and were left unable to maintain or update production or facilities – while SOE workers were stripped of their salaries and the chance to practise their profession.<sup>295</sup> A close observer explains that KTA's decision to halt operations of SOEs and POEs resulted from international nervousness about being held liable for claims.<sup>296</sup> Other SOEs were leased out in violation of applicable law, which stated that they should be used for production.<sup>297</sup> Meanwhile, Kosovo became increasingly de-industrialized, to the detriment of the value of these enterprises and Kosovo's general economic potential.<sup>298</sup>

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294 Author's interview with the vice president of the Union of Independent Trade Unions of Kosova (BSPK) Hasan Abazi, Pristina, 7 May 2010 and with former KTA official, Pristina, July 2010. Lajos Héthy: 'Labour law for Kosovo's 2002, p. 70, accessed at [www.boeckler.de/pdf/South-East\\_Europe\\_Review-2002-03s-p65.pdf](http://www.boeckler.de/pdf/South-East_Europe_Review-2002-03s-p65.pdf), 7 July 2010, also makes clear that decision on whether to operate SOEs prior to privatization was UNMIK's. See also the next part.

295 See HRCUP 2008, pp. 57–58, and the conclusions of this report.

296 Former International Telecommunications Union official Ismet Hamiti, author's interview, Pristina, 16 July 2010, explaining that 'UNMIK and later KTA, in effect, halted operations of all Kosovo's SOEs and POEs, by questioning ownership and failing to address their legal status. "Do nothing, because we do not know who they belong to!" – was their position. Telecom is an exception, because PTK restarted its operations before UNMIK was fully established.'

297 KIPRED 2005, p. 8.

298 See ESI reports: 'De-industrialisation and its consequences: A Kosovo story', Berlin, 2002; 'The development trap at the heart of the Balkans. A socio-economic portrait of Gjilan, Kumanovo and Presevo', Berlin, 2005; 'The Ottoman dilemma', Berlin, 2002.

## 2. Internationally led Privatization

The period of actual and formal internationally managed privatization in Kosovo started with the establishment of KTA in 2002 and ended with the creation of the Privatisation Agency of Kosovo (PAK) and the closure of KTA operations, following Kosovo's declaration of independence in 2008. These six years were to be shaped by the same issues that had dominated discussions leading up to privatization – in particular the international fear of liability, and the question of SOE ownership. While distinct, the process of international privatization in Kosovo illustrates some of the key issues in contemporary international statebuilding, including level of (non-)accountability for international statebuilders, and the local–international balance in decision-making in statebuilding operations. This part will examine how these questions and issues manifested themselves in the operational structure and methods chosen for privatization in Kosovo, explain key debates that informed the process, and highlight some major developments during the period of internationally led privatization – notably the 2003–2005 halt to the process.

### Establishing the KTA

On 13 June 2002, after three years of trials and deliberations on transferring Kosovo's enterprises into private hands, the head of UNMIK, the SRSG, established the KTA.<sup>299</sup> The regulation creating the Agency authorized it to 'administer' POEs and SOEs and related assets,<sup>300</sup> as a 'trustee for their owners',<sup>301</sup> 'without prejudice' as to who these owners might later be determined to be.<sup>302</sup> 'Administration' referred to any action the KTA considered appropriate to preserve or enhance the value, viability, or governance of Kosovo's enterprises,<sup>303</sup> and a specific privatization method was outlined for SOEs. The word 'privatization' was, however, avoided in both the name of the KTA and its regulations, as this was regarded as too sensitive a term. International

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<sup>299</sup> UNMIK Regulation 2002/12, as amended. See Perrit 2005, pp. 162–65 and KIPRED 2005, p. 13, for overviews.

<sup>300</sup> UNMIK Regulation 2002/12, 2.1.

<sup>301</sup> UNMIK Regulation 2002/12, 2.2 (a).

<sup>302</sup> UNMIK Regulation 2002/12, 8.7.

<sup>303</sup> UNMIK Regulation 2002/12, 2.2 (b).

officials still feared liability – in particular, Serbian objections to the process.<sup>304</sup>

UNMIK Regulation 2002/12 on establishing the KTA stipulated that its management was to consist of a board and a managing director with two deputies.<sup>305</sup> The board would be chaired by the Deputy SRSG, who was also the head of EU Pillar, and would consist of three additional international directors – including his Deputy, the Deputy SRSG for Civil Administration, and KTA's Managing Director. The four Kosovo directors on the board were all to be appointed by the SRSG and should include three ministers from Kosovo's Provisional Institutions of Self-Government (PISG – established with the stipulation of Kosovo's Constitutional Framework in 2001), one of whom had to be a Kosovo Serb, along with the President of the Union of Independent Trade Unions of Kosova (BSPK).

Board decision-making regulations required a quorum of five or more board directors present, with voting requiring a simple majority of those present. If a qualified majority was required, at least five affirmative votes would be needed, and the chairperson would have a casting vote in case of a tie. Nominations for managing director with deputies would be put forward by the chairman; these persons would be appointed by, and fully accountable to the KTA board. The managing director would be tasked with the organization and operation of the agency, with appointing and dismissing staff, preparing board meetings and ensuring implementation of board decisions.

The establishment of the KTA was evidence that the international statebuilders felt sufficiently confident of their approach to what they saw as the two key problems with privatization in Kosovo – concern for liability, and undefined ownership – to go ahead and privatize. In fact, these two concerns, especially the former, were to influence the privatization process significantly as it unfolded under formal international leadership. It was in order to limit UN and UNMIK liability that the KTA was established with 'full juridical personality', able 'to sue and be sued in its own name'.<sup>306</sup> However, even the perception of the KTA as an organ independent from UNMIK and the UN was compromised from the outset by the fact that it had been established by the SRSG, and was ultimately answerable to him. Everyone serving on

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<sup>304</sup> Former KTA officials interviewed by the author in Pristina between January and July 2010, and UNMIK internal documents from 2000 and 2001 in possession of the author.

<sup>305</sup> See UNMIK Regulation 2002/12, Section 10 on KTA operational policies, and Chapter 3 on organization and management. These matters are dealt with by the same respective parts of subsequent amended KTA regulations.

<sup>306</sup> UNMIK Regulation 2002/12, as amended, Section 1. See also Knoll 2005, p. 652.

the KTA board were either directly nominated by the SRSG, or were his deputies.

### **Establishing the Special Chamber<sup>307</sup>**

The establishment of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, with *exclusive* authority to deal with such matters,<sup>308</sup> was intended to limit the chances of UNMIK and UN entanglement in potential problems with privatizing in Kosovo. The creation of the Chamber reflects significant issues related to the approach of international statebuilding projects to accountability when operating in targets. The Special Chamber is one of the extremely few organs established by the UN with formal power to hold any part of its international peacebuilding or statebuilding operations to account.

According to the Special Chamber regulation, promulgated by the SRSG the same day as the regulation on the KTA, the Chamber's authority would include, but not be limited to, challenges to actions and decisions of the KTA; claims against KTA for financial loss resulting from KTA acting in its role of administrator of enterprises; and claims against businesses under administrative authority of the KTA, including questions of a right, a title or interest in property in control of enterprises under KTA authority.<sup>309</sup> No other court in Kosovo or elsewhere would be given jurisdiction over such categories of claims, but the Special Chamber could decide to refer claims to local Kosovo courts – and would then function as appellate body.<sup>310</sup> Special Chamber judging panels were to consist of five judges, including three SRSG-appointed international ones.<sup>311</sup> One of these international judges would be assigned by the SRSG as the presiding judge, after consultation with the President of the Supreme Court. Decisions of the Special Chamber were to be rendered in writing within two months of completion of proceedings, after private deliberations among judges.<sup>312</sup> Adjudicating a claim or deciding on an appeal would require the supporting vote of at least three judges.

The power of the SRSG over the Special Chamber, the authority of SRSG-appointed international judges within it, as well as the fact that

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<sup>307</sup> This section – like the remainder of this report – deals with the period up until 2008: the period of formal international management of privatization in Kosovo.

<sup>308</sup> UNMIK Regulation 2002/13, p. 1 and Section 4. See also Perrit 2005, pp. 164–68.

<sup>309</sup> UNMIK Regulation 2002/13.

<sup>310</sup> UNMIK Regulation 2002/13, Section 4.

<sup>311</sup> UNMIK Regulation 2002/13, Section 3 on Composition.

<sup>312</sup> UNMIK Regulation 2002/13, Section 9.

the Chamber had its own, internationally staffed Registry, in effect made it a separate international court with only formal connection to Kosovo's Supreme Court.<sup>313</sup> According to the Pristina think-tank KIPRED, this formal connection between the Special Chamber and Kosovo's (local) Supreme Court exposed Kosovo's local authorities to the risk of legal liability for Special Chamber actions, undertaken outside of local influence.<sup>314</sup> International statebuilders' deep worries about being held to account for privatization may indicate that this institutional arrangement could have been a deliberate effort to transfer liability from international officials and organs onto Kosovo's domestic institutions.

As with the KTA, the Special Chamber's independence from UNMIK may be questioned. At the time of its establishment, the Special Chamber, Kosovo's judiciary, and the KTA were legally under, and reported to, the SRSG, who was also head of UNMIK and vested with executive and legislative powers.<sup>315</sup> In 2008, OSCE pointed out that short-term appointments (six months) of Special Chamber judges as 'UNMIK consultants', along with their performing several different functions within the same legal process, compromised the independence of judges.<sup>316</sup> A similar lack of independence and strong ties to international statebuilders' executive organs is in fact a residual concern regarding all international judges in Kosovo.<sup>317</sup> The SRSG still appoints international judges, with exclusive authority to assign international judges to the Special Chamber – while the authority of UNMIK and other international statebuilding organs in Kosovo remains strong, though ambiguous.<sup>318</sup>

Other criticisms of the Special Chamber from the period up till 2008 charged that the Chamber was 'hapless', making decisions without real weight,<sup>319</sup> that its legal framework was too complex,<sup>320</sup> contained

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<sup>313</sup> As pointed out by KIPRED 2005, p. 14.

<sup>314</sup> Ibid, p. 14.

<sup>315</sup> OSCE: 'Privatization in Kosovo: Judicial review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo', Monitoring Department/Rule of Law Division, May 2008, pp. 37–38. This critical report on the human rights record of the Special Chamber was released just before the process of privatization in Kosovo was transferred to local hands. See also Perrit 2005, pp. 173 and 167, where the KTA is labelled a 'UN agent'.

<sup>316</sup> OSCE 2008, p. 38.

<sup>317</sup> Gjylbehare Murati: 'The independence of the judiciary and its role in the protection of human rights under UN administration using the Case of Kosovo', European Society of International Law, 2004; Muharremi 2010; OSCE 2008, pp. 37–38.

<sup>318</sup> See Muharremi 2010.

<sup>319</sup> Gould 2007, p. 4.

<sup>320</sup> See Muharremi 2010, p. 19, for one illustration of the uncertainty as to the Chamber's legal framework.



in several different instruments,<sup>321</sup> incomplete,<sup>322</sup> and that its regulations avoid defining such key terms as ‘trust’ and ‘owner’<sup>323</sup> – although the latter ambiguity might have been intentional by those who drafted the regulations.<sup>324</sup> Questions have been raised about lack of transparency regarding Chamber procedures and decisions, poor quality of legal representation before the Chamber – including by the KTA when representing SOEs<sup>325</sup> – as well as procedural delays,<sup>326</sup> lack of resources, discrimination,<sup>327</sup> and administrative errors.<sup>328</sup> In 2005 and 2008 analysts claimed that flaws in the legal structure and actual operation of the Special Chamber might have constituted a human rights violation, including of the right to due process.<sup>329</sup>

Changes in the Special Chamber that came after the 2008 end to formal international leadership of privatization in Kosovo are not the topic of this report, and it is an open question whether the pre-2008 criticism remains valid. However, in spring 2010 a much lower than projected number of Special Chamber judges had been appointed to the court, and although each Chamber panel was supposed to include at least one local Kosovo judge, few local judges appear to have served on such panels.<sup>330</sup> Only recently has the Chamber decided on the merits of cases, and observers allege that it prefers to postpone politically ‘tricky’ cases at the expense of resolving claims expediently and

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<sup>321</sup> OSCE 2008, p. 17.

<sup>322</sup> Perrit 2005, p. 164.

<sup>323</sup> OSCE 2008, p. 18.

<sup>324</sup> Current head of OLA and former senior Pillar IV legal officer Tschoepke explains: ‘Due to the complex legal background to the privatization process in this region, the legal framework defined the term “owner” in a manner that allowed the privatization process to move on without too many initial legal challenges’: author’s interview. However, the definition of ‘owner’ was amended soon after the point was raised by the OSCE report mentioned above – from defining ‘owner’ as someone ‘with a claim’ to ownership, owner was defined as someone ‘with a *valid* claim to ownership’, UNMIK Regulation 2008/27, Section 3, emphasis added.

<sup>325</sup> OSCE 2008, pp. 42–44, and p. 14. Transparency on the Chamber’s decisions and operations was not improved by the fact that its website, <http://specialchamber.info/default.html?aspxerrorpath=/PerNe.aspx>, accessed throughout spring 2010, expired on 25 June 2010 ‘pending renewal or deletion’; accessed on 16 July 2010.

<sup>326</sup> OSCE 2008, p. 45; Edward Tawil: ‘Property rights in Kosovo: A haunting legacy of a society in transition’, International Center for Transitional Justice, Brussels and Belgrade 2009, pp. 41–45.

<sup>327</sup> OSCE 2008, pp. 20–21; Tawil 2009, pp. 41–45.

<sup>328</sup> OSCE 2008, p. 47.

<sup>329</sup> As granted by the European Convention on Human Rights (ECHR), see Perrit 2005, p. 173, p. 164, where he sums up that the situation created by the difficulties related to the Special Chamber was ‘significantly out of compliance’ with the ECHR; OSCE 2008, pp. 18 and 27.

<sup>330</sup> Special Chamber decisions in possession of the author, and author’s interview with a close observer of the Chamber.

fairly.<sup>331</sup> In light of international officials' marked aversion to liability, this possible hesitation may relate to concern for setting precedence for future cases – such precedence might have implications for both Kosovo and UN statebuilding operations elsewhere. Also the apparent strictness of admissibility criteria for cases before the Special Chamber could be seen as a reflection of international statebuilders' concern for being held responsible for actions undertaken while 'on mission'.<sup>332</sup>

Questions raised by the Special Chamber regarding UN fears of accountability resemble those arising from another international organ in Kosovo created to hold UNMIK and associated staff to account: the Human Rights Advisory Panel.<sup>333</sup> Like the Special Chamber, this Panel was established by UNMIK, and answers to the SRSG.<sup>334</sup> Unlike the Special Chamber, decisions of the Panel are merely advisory, and UNMIK is under no obligation to implement them. The two Panel cases described by Panel members and UNMIK as 'most sensitive'<sup>335</sup> include allegations of violations of the right to life: the one concerns UNMIK's decision to locate hundreds of internally displaced Roma in camps established on land with lethally high lead levels and leaving them there for a decade before transferring the matter to Kosovo's local authorities; the other concerns a 2007 demonstration where two peaceful protesters were shot and killed by UNMIK police, and over 80 others injured by outdated rubber bullets fired at close range to the heads of demonstrators.<sup>336</sup> In both cases, UNMIK has acted to make sure no UN personnel will be held to account – not even with an advisory opinion from the Panel.<sup>337</sup>

On the other hand, due to the issue of Kosovo's status, it is far from evident how any *other* actor than UNMIK and the UN can be held to

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<sup>331</sup> Author's interview with two close observers of the Special Chamber, Pristina, 2010.

<sup>332</sup> See UNMIK Regulation 2002/13 for the admissibility criteria of the Special Chamber.

<sup>333</sup> See the Panel's website at [http://www.unmikonline.org/human\\_rights/index.htm](http://www.unmikonline.org/human_rights/index.htm), accessed on 8 July 2010.

<sup>334</sup> The Panel was established as the Kosovo Ombudsperson in 2006 seemed to be stripped of the authority to issue (advisory) opinions on UNMIK's actions – but the Panel did not become operational until a year later.

<sup>335</sup> Author's interviews with Panel insiders, and with UNMIK representatives involved with Panel cases, Pristina and Fushë Kosovë, spring 2009.

<sup>336</sup> For the latter case, see UNMIK Special Prosecutor Robert Dean's two reports, 2007, concluding that the role of UNMIK police in the deaths was unnecessary, avoidable, and criminal: 'Interim Report of the Special Prosecutor to the SRSG regarding the deaths and serious wounding of protestors during the 10 February 2007 demonstration in Prishtinë/Pristina', 16 April 2007 and his subsequent final report of 2 July 2007.

<sup>337</sup> This was done by UNMIK issuing an administrative regulation – the first of its kind – making these two cases inadmissible. See Amnesty International: 'Hearing into deaths in Kosovo could find UN accountable', 23 March 2009, accessed on 8 July at <http://www.amnesty.org/en/news-and-updates/news/hearing-into-deaths-kosovo-could-find-un-accountable-20090323>

account for privatization-related matters in Kosovo. PAK would seem the most obvious candidate, taking over the KTA's formal responsibility for privatization in 2008 and defining itself as the agency's legal successor.<sup>338</sup> However, due to the Special Chamber's 'status neutrality' as a UN organ, the Chamber would not straightforwardly accept PAK as a respondent in cases before it. Although the meaning of 'status neutrality' remains ambiguous – there appears to be no 'neutral' position between recognizing status, and ignoring it – the fact that Kosovo is not a UN member seems to have made international officials wary of acknowledging the responsibilities of a Kosovo institution before a UN-created court. This, international officials have held, might be taken to imply indirect recognition of Kosovo's independence, to which Serbia in particular might object.

While possibly hoping to transfer liability to Kosovo's local institutions at the time of the Special Chamber's establishment by making it a part of Kosovo's Supreme Court, international statebuilders have, with their non-recognition of Kosovo's independence, painted themselves into a legal corner. At present, 'UNMIK considers that it does not incur any liabilities through actions of the Privatisation Agency of Kosovo',<sup>339</sup> but it seems clear that UNMIK and the UN will remain responsible for actions of the KTA and the Special Chamber at least until the UN recognizes Kosovo as independent.<sup>340</sup> Thus far, the answer to how to deal with PAK in Special Chamber processes has come in the formulation that 'the Special Chamber accepts the activities of the PAK as an obvious matter of fact to enable the workers involved in the privatization process to have effective access to court in the meaning of Article 6 of the ECHR [the European Convention on Human Rights]. This does not mean that the Special Chamber accepts the PAK Law as applicable law in Kosovo' – but that the Chamber deems it necessary to treat this law 'as valid and binding internal rules of organization within the privatization process.'<sup>341</sup>

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<sup>338</sup> Law No. 03/L-067 On the Privatization Agency of Kosovo (hereafter: the PAK Law), 21 May 2008.

<sup>339</sup> EC representative at the PAK Board Janmaat, author's interview.

<sup>340</sup> It is open to contention whether international statebuilders (e.g. at the UN, EU, or on individual basis) will remain responsible for KTA, UNMIK and/or Special Chamber actions also after this point.

<sup>341</sup> Special Chamber decisions of 4 February, 8 March (ASC-10-0002) and 9 March 2010 (ASC-09-0087), where it is also asserted that PAK is 'factually acting as successor to the KTA on the field of privatization'. The 9 March decision stresses the 'imminent need for SOEs being duly represented' as well as the necessity of legal systems following the rule of law and not allowing for legal vacuums. For these reasons, it is explained, representation of SOEs by PAK will 'for the time being' be accepted. OLA seems to represent respondents (on behalf of the non-operating KTA) when claimants are Serb. See e.g. decision of 8 March 2010.

Whether Kosovo's local authorities can be required to answer for actions undertaken by UNMIK has ramifications well beyond the field of privatization. In 2004, this was taken up in a letter to the UN Secretary-General by the President of the European Commission and the President of the European Investment Bank, requesting confirmation from the UN that '(a) obligations contracted by UNMIK will be binding on any authority that will administer Kosovo after the replacement or termination of UNMIK's mandate; and (b) this authority will unconditionally accept those obligations as continuing obligations of Kosovo'.<sup>342</sup> In consequence, UNMIK routinely inserted a 'roll-over clause' in agreements it entered into with international financial institutions on Kosovo's behalf – attempting to transfer responsibility to Kosovo's domestic authorities while simultaneously exempting UNMIK from liability.<sup>343</sup>

### The question of 'transformations' and the halt to privatization

Since the Yugoslav ownership system defined 'society' as the owner of Kosovo's SOEs – effectively giving this entity a stake in the privatization of SOEs as well as post-privatization proceeds – claimants arguing to represent society might be expected before the Special Chamber. In fact, though, international officials have been more worried about being sued by investors benefiting from the Milosevic regime's sales, mergers and takeovers for selling off what these claimed as *their* property.<sup>344</sup> These 1990s *transformations* were legally dubious, however, and 'opaque' in having been conducted in a manner that discriminated primarily against Kosovo's Albanian majority population,<sup>345</sup> and for involving asset-stripping and illegal money transfers to foreign, private bank accounts.<sup>346</sup> With reference to the Belgrade regime's pre-1994 privatizations, it has been concluded that these have been 'rightly regarded' 'as robbery'.<sup>347</sup> Still, international officials have been troubled by the possible scenario of being accused of illegal expropriation if selling property previously subjected to transformations. This fear made the 1990s transformations a key topic in

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<sup>342</sup> Quoted in Knoll 2005, p. 648.

<sup>343</sup> Ibid, p. 648; UNMIK Regulation 2004/30 On the Promulgation of the Law on International Financial Agreements, 9 Aug. 2004, Art. 5.

<sup>344</sup> Several former privatization officials and other close observers of the process have confirmed this in author's interviews, including Former KTA Deputy Privatization Director Bicaj.

<sup>345</sup> Perrit 2005; Mulaj 2007; Karadjis 2004.

<sup>346</sup> Uvalic 2000, p. 13. See Lazic and Sekelj 1997, p. 1064, for claims of other kinds of 'injustices' committed during these transformations.

<sup>347</sup> Lazic and Sekelj 1997, p. 1069.

international statebuilders' debates on liability and ownership when privatizing in Kosovo.

The original KTA regulation of June 2002 stipulates two criteria for evaluating Serbia's 1990s transformations when privatizing in Kosovo. Transformations should be taken into account only if they were carried out in line with applicable law, and if they were not conducted in a discriminatory manner or in violation of the European Convention on Human Rights. Any transformation that fails to meet these criteria should be disregarded by the KTA. Notably, transformations deemed 'acceptable' according to these criteria might be considered only 'for the sole purpose of identification of the Owners and distribution of the Proceeds' – in other words, not in order to return property to pre-privatization owners.<sup>348</sup> This, however, was not the end of the story of international officials and their approach to the Milosevic regime's transformations when privatizing in Kosovo, as both criteria were challenged from within the statebuilding project.

As regards the first criterion, on applicable law, one of UNMIK's earliest legislative acts was to pass a regulation changing the applicable law in Kosovo to that which had been valid *before 23 March 1989*<sup>349</sup> – the date of Serbia's illegal termination of Kosovo's autonomy and the expulsion of Albanian members of Kosovo's parliament. During the period of international statebuilding in Kosovo, then, applicable law was to consist of both pre-1989 Yugoslav laws and UNMIK's many regulations. UNMIK's applicable law regulation also stated that in case of 'gaps' in the pre-1989 legislative framework, post-1989 laws might be applied. What this meant was that if laws passed prior to 23 March 1989 did not deal with a certain issue or legislative field, but this field *was* covered by laws passed by Belgrade subsequent to that date, the relevant later laws might be utilized.

The 'gap' provision in UNMIK's regulation on applicable law has been the legal justification of international officials who have occasionally proposed utilizing post-23 March 1989 laws when privatizing in Kosovo.<sup>350</sup> Since privatization was not covered by pre-1989 laws, it was argued, also the Markovic privatization laws could be utilized when international statebuilders privatized in Kosovo.<sup>351</sup> However,

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<sup>348</sup> UNMIK Regulation 2002/12, as amended, 5.4 (b).

<sup>349</sup> UNMIK Regulation 1999/24 (12 December 1999); Zaum 2007, p. 155.

<sup>350</sup> See e.g. Cemovich for the International Fertilizer Development Center and USAID 2001, p. 3.

<sup>351</sup> Tschoepke explains: 'Privatization was not covered by the pre-1989 legal framework, for that reason the Markovic privatization laws were applied when transformations of enterprises were considered. These laws had been used in privatizations in Kosovo during 1990 and 1991, in particular for a number of enterprises in Gjakova.' (author's interview). On 28 February 2001, UNMIK suggested ownership restructuring for the most

privatization ultimately concerns regulating ownership of property – and property ownership *was* regulated by pre-1989 Yugoslav laws. While novel in its specific call for *private* ownership, the post-1989 and Markovic laws did not cover an ‘empty’ legislative field: they were simply another way to regulate ownership of property located on the territory of the former Yugoslavia.

The KTA regulation’s applicable law criterion for evaluating the validity of transformations provided the grounds for USAID and the Pillar IV staff on its payroll to argue that all 1990s transformations should automatically be discounted, because they had not been undertaken in line with the law applicable *at the time the KTA regulation was passed*. As explained above, applicable law in Kosovo was defined by UNMIK as pre-23 March 1989 law plus post-1999 UNMIK Regulations – whereas transformations had been carried out with reference to laws passed by Belgrade between 1989 and 1999, including the Markovic laws. Since also UNMIK’s KTA regulation, as amended, defines ‘Applicable law’ in Kosovo as the ‘law applicable in Kosovo pursuant to UNMIK Regulation 1999/24 of 2 December 1999, as amended, On the Law Applicable in Kosovo’, US privatization officials claimed that only *pre-1989* transformations of Kosovo’s SOEs and POEs would have to be evaluated according to the second criterion, concerning discrimination and human rights violations.<sup>352</sup>

Contrasting the uncomplicated logic of this argument, the original KTA regulation does seem somewhat unclear on exactly how to determine the validity of the 1990s transformations – similar to the way this and UNMIK’s other KTA regulations seems to prefer ambiguity on crucial issues seen as contentious – especially since ‘transformation’ is defined as ‘a merger, transformation, (re-) registration, incorporation as a joint stock or limited liability company or partnership or other legal entity, bankruptcy, liquidation, insolvency, organization into a distinct form or other entity or any other event or process by which any of the following is altered with respect to that entity: its legal identity, form or nature or the nature of its ownership, or of its capital or its seat, and where any such event or process or any part thereof took place *at any time between 22 March 1989 and 13 June 2002*’.<sup>353</sup> This may be taken to open for evaluating all transformations from the whole 1989–2002 period according to the second criterion, regarding discrimination and human rights.

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valuable of all SOEs in Kosovo, the Trepca mining complex, on the basis of Markovic laws – interoffice memorandum in possession of the author.

<sup>352</sup> USAID memo from 2003 in possession of the author.

<sup>353</sup> UNMIK Regulation 2002/13, as amended.

The US argument on the automatic non-validity of all 1990s transformations based on the KTA's applicable law criterion failed to win over the Europeans in UNMIK and KTA, who feared that ignoring the Milosevic regime's transformations might expose international statebuilders to liability for claims from Serbia and investors who had benefited from these transformations.<sup>354</sup> UNHQ in New York initially remained equally unconvinced. Today, European officials involved in privatization in Kosovo express strong scepticism of what they see as the US' 'political' call for ignoring the 1990s transformations, claiming that it stemmed from a general US 'dislike' of 'Serb influence in Kosovo'.<sup>355</sup>

International statebuilders' fear of institutional and personal liability in connection with privatization – including when considering selling property subjected to 1990s transformations – culminated in October 2003, when the process was stalled for around eighteen months.<sup>356</sup> Leading up to this halt, KTA's newly appointed managing director Maria Fucci insisted that in principle, all the Milosevic regime's transformations should be considered valid unless solid proof were found for each individual case that enterprises had been sold off in violation of applicable law, or in a discriminatory manner. This new line shifted the burden of proof onto those who insisted that the transformations should be disregarded – and it received backing from the head of the EU Pillar, Nikolaus Lambsdorff.<sup>357</sup> After the first wave of tenders was launched by the KTA in May 2003 and the second wave soon after,<sup>358</sup> the third wave was then stopped, awaiting legal and political clarification on how to proceed. KTA insiders explain that the new policy created by Fucci 'brought the whole process to a standstill', by 'creating a very complicated process with overly complex criteria for evaluating

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<sup>354</sup> Officials closely involved in privatization in Kosovo confirmed this in author's interviews, spring 2010, as do UNMIK interoffice memoranda from 2000 and 2001 in possession of the author.

<sup>355</sup> EU-seconded privatization officials interviewed by author, Pristina, April and May, 2010.

<sup>356</sup> See e.g. Transitions Online: 'Privatization Halted', 13 October 2003, accessed at <http://www.tol.org/client/article/10806-privatization-halted.html> on 6 June 2010. Knoll 2005, pp. 652–53 and note 78: 'The case of *Wood Industries LLC v United Nations, UNMIK, and the Kosovo Trust Agency* (2003) (Supreme Court of the State of New York, Index No. 03/602741) appears to demonstrate that the risk of being sued is considerable (Wood Industries withdrew the complaint and re-filed the case in the Special Chamber of the Kosovo Supreme Court where it is now pending the decision to dismiss).' Around the same time, international statebuilders' risk and concern for liability was highlighted in international media, see e.g. Jean-Arnault Dérens: 'Reconstructing states: Protectorate of Kosovo', *Le Monde diplomatique*, December 2003.

<sup>357</sup> Former KTA officials interviewed by author in Kosovo, spring 2010, including Arten Bajrushii, Drenas, 22 April 2010.

<sup>358</sup> See e.g. Moalla-Fetini et al. for the IMF 2005, p. 39. Currently the PAK is underway with the 45<sup>th</sup> wave of tenders, see <http://www.pak-ks.org/?id=58>, accessed on 10 July 2010.

various claims and transformations.<sup>359</sup> Perrit describes the establishment of these ‘illogical operational policies’ as an overreaction to criticism, which ‘resulted in a number of roadblocks’, including political controversy among the KTA, unions and Kosovo’s locally elected leadership.<sup>360</sup> A former Pillar IV Privatization Director maintains that the objective of the new line was political, aimed ‘to rid the KTA of non-EU (American and Kosovar) decision-makers and to implement a program of restitution to the government of Serbia.’<sup>361</sup>

Parallel with the internal EU Pillar debate on how to deal with transformations when privatizing in Kosovo, the legal ‘standoff’ on the overall risk for international liability continued throughout 2003 and 2004: UNHQ and OLA now argued that EU-seconded staff in KTA did not enjoy UN immunity, while Pillar IV insisted that they did, as they should be seen as ‘experts on missions’ performing functions on behalf of the UN.<sup>362</sup> In the end, it seems, KTA officials were not to be protected by UN immunity – the only immunity relevant to their status appears to be that outlined by the KTA itself.<sup>363</sup> The 2003–2005 halt to privatization should thus be seen as caused both by technical complications related to the new procedures for evaluating transformations, and by international officials’ lingering worries about liability. Again, questions over defining enterprise owners – including whether to invalidate the 1990s transformations – and international officials’ aversion to liability were key issues involved in shaping the international involvement in privatization in Kosovo.

In 2004, Fucci was removed from office by the SRSG, before an amended KTA regulation was drafted and the privatization process was restarted in March 2005.<sup>364</sup> The dismissal of Fucci came after her new privatization policy had come under fire from the US office in Pristina, as well as from the KTA’s own staff, international and domestic experts, and the media in Kosovo, with allegations ranging from incompetence and bad will, to her being an agent for Serbia.<sup>365</sup> That it was the SRSG, as the head of UNMIK and the KTA’s ultimate authority, who in the end dismissed Fucci underlined the supreme role of UNMIK and the UN in privatization and their formal power over

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<sup>359</sup> Ekrem Tahiri, author’s interview, Pristina, 12 April 2010. Tahiri worked for the KTA from 2003 to 2007, including as its spokesperson.

<sup>360</sup> Perrit 2005, p. 174.

<sup>361</sup> John Johnson, email interview by author.

<sup>362</sup> Knoll 2005, pp. 654–55, claiming that Pillar IV’s argument is supported by the International Court of Justice.

<sup>363</sup> Author’s interview with legal scholar Muharremi, who served as a legal counsel with UNMIK Pillar IV on key parts of the privatization process.

<sup>364</sup> The content of this new regulation is further discussed below.

<sup>365</sup> KTA employees organized a petition against Fucci, demanding that she should go. Former KTA official, author’s interview, Pristina, July 2010; Zaum 2007, p. 164.



and responsibility for the KTA and privatization – despite all attempts by international statebuilders to distance themselves from the process.<sup>366</sup>

During the 18-month halt to the internationally led privatization process, SOEs deteriorated further in value, as the KTA prevented many enterprises from operating while awaiting privatization and did not act to maintain them as going concerns.<sup>367</sup> Mismanagement of pre-privatization enterprises within the KTA's area of responsibility seems to have prevailed throughout the years of international statebuilding. Even simple reparations and basic production of SOEs and POEs were effectively blocked by the agency.<sup>368</sup> No consideration seems to have been given to channelling some of the international resources spent on privatization in Kosovo into helping enterprises survive,<sup>369</sup> leaving workers without the opportunity to exercise or develop their skills, and the physical infrastructure, markets and reputation of the enterprises suffering. While SOEs represented a crucial part of Kosovo's post-war development potential, internationally managed privatization seems to have contributed to diminish their role in the economy.

The value deterioration of enterprises under KTA administration is likely to have affected the sales price when enterprises were privatized after the restart of the process in 2005, with fewer and less interested investors offering bids lower than the SOEs' original value.<sup>370</sup> Observers suspect that this resulted from an intentional international strategy of driving down the prices of enterprises and selling them cheaply for matters of personal and political interest.<sup>371</sup> At the same time, this value deterioration might have fuelled international officials' nervousness about ensuring sales and successful privatization as a core manifestation of their statebuilding project in Kosovo.

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<sup>366</sup> Zaum 2007, pp. 164–165.

<sup>367</sup> BSPK Vice President Abazi; former International Telecommunications Union official Hamiti; and former KTA official, author's interviews, Pristina, 2010. The latter insists that the halt to operations was intended to last only for brief periods of time, while admitting that it might have lasted longer in some cases.

<sup>368</sup> Hamiti, at the time working for the International Telecommunications Union, has offered a concrete example (author's interview).

<sup>369</sup> Author's interviews with privatization insiders, spring 2010.

<sup>370</sup> The corruption practice of 'speculative bids', outlined in Korovilas 2006, quoted in HRCUP 2008, pp. 54–55 – resulting from the internationally chosen privatization method in Kosovo – must have contributed to even lower returns: former KTA officials in author's interviews, Pristina, July 2010.

<sup>371</sup> Privatization insiders, observers, civil society and trade union representatives interviewed by the author. See also HRCUP 2008, p. 55, and the conclusion.

Privatization officials explain that momentum for resuming privatization after the 2003 halt was triggered by the riots of March 2004.<sup>372</sup> Sparked by the drowning of three Albanian children who were scared by Serbs in the river Ibër, these riots were directed against the international and Serb presence in Kosovo. The unrest left 19 people dead – 11 Albanians and 8 Serbs – and much Serb and internationally owned property destroyed. The events expressed dissatisfaction with economic and political stagnation and the failure of international statebuilders to contribute to improvement. Since many international officials saw the riots as resulting in part from the population's economic frustration, they were keen to resume privatization, still without considering alternative approaches.<sup>373</sup> Statebuilders might have been concerned with how to legitimize their powers in Kosovo if fast action was not undertaken to change the dire economic situation.<sup>374</sup> The impact of the March 2004 riots on resuming privatization a year later underlines the security paradigm that guided the international statebuilding project, including its approach to privatization.

### **Restarting privatization and the concept of 'eminent domain'**

The halt to privatization between autumn 2003 and spring 2005 and the resulting amended KTA regulation were closely related to disagreement on the burden of proof regarding the Milosevic regime's transformations; and discomfort with the undefined validity of these transformations was central to delaying the resumption of the process for a full year and a half.<sup>375</sup> The issue of transformations, which was seen as part of the problem of defining legal ownership of enterprises, is also central to the amendment of the KTA regulation passed by UNMIK before privatization was restarted: UNMIK Regulation 2005/18 from 22 April 2005, amending 2002/12 on establishing the KTA, was the result of international statebuilders' need to clarify the

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<sup>372</sup> Former KTA officials, author's interviews, Pristina 2010, including Tahiri, saying that 'March 2004 created a momentum to restart the process'. Lilianna Pop: 'Privatisation and state-building in the Western Balkans', 2008; and Gould 2007 make the same argument.

<sup>373</sup> The post-March 2004 eagerness of the KTA to resume privatization is illustrated by its prediction in April 2004 that it would 'complete the process of selling all strategic and "going-concern" SOEs by mid-2005, with rapid liquidations of insolvent SOEs and SOE assets completed by early 2006.' KTA 'Draft Strategy' 2004, p. 2.

<sup>374</sup> In the words of Zaum 2007, p. 165: 'The recognition that further delays in the privatization process would seriously undermine UNMIK's legitimacy was important for overcoming the legal concerns of OLA/NY with regard to the KTA regulation in March 2002, and in pushing the SRSG to take action to resume privatization in March 2004.'

<sup>375</sup> The KTA explains that the delay was caused by 'new guidelines set by the UN regarding the determination of SOE status (i.e. what documentation is required to confirm that an enterprise is, in fact, 'socially-owned'); the delay in adoption by UNMIK of a regulation for the liquidation of SOE land; and the desire by new officials to introduce major changes to the privatisation policies and procedures.' KTA 'Draft Strategy' 2004.

legal basis on which privatization could proceed in the absence of having managed to identify the ultimate title-holders of enterprises. The regulation emphasizes the concept of *eminent domain* as the basis for privatization – although without using this term explicitly.<sup>376</sup>

The notion of eminent domain is equivalent to the more straightforward term ‘expropriation’,<sup>377</sup> as it gives the state authority to seize property without owners’ permission – as long as adequate compensation is awarded, and under the condition that taking the property is in the interest of the state, society, and/or the public good.<sup>378</sup> While UNMIK’s original KTA regulation merely states that the KTA has the mandate to undertake actions that may ‘enhance the value, viability and governance of Enterprises’,<sup>379</sup> the amended Regulation 2005/18 adds that the agency can ‘carry out other activities to preserve or enhance the value or viability of the activities concerned and take such other steps or measures as it in its discretion deems appropriate (taking into account any guidance from the SRSG) *which encourage the economic reconstruction and development of Kosovo and the welfare of its inhabitants or those of any specific region*’.<sup>380</sup>

With this formula, UNMIK and the EU Pillar were in essence arguing that privatization should go ahead despite the significant legal and political uncertainty since Kosovo would gain from the process, making the case that the internationally managed privatization would be legally justified (only) if the process benefited Kosovo’s society and the overall public good.<sup>381</sup> Karim Medjad sees this as UNMIK ‘bending the notion of broader social community to adjust it to Kosovo’s current [at that time: unresolved] status’, and interprets it as a pragmatic rather than legal attempt to ‘narrow the residual owners of the Kosovar socially-owned enterprises to a group titled ‘the People of Kosovo’.’<sup>382</sup>

During the drafting of the amended 2005 regulation, privatization proponents added another argument to why privatization should proceed without first having determined enterprises’ original ownership: privatization, they insisted, would also be in the interest of *owners*,

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<sup>376</sup> For brief explanations see Knoll 2005, note 84 and Gould 2007, p. 3.

<sup>377</sup> Author’s interview with legal scholar Muharremi.

<sup>378</sup> Perrit 2005, pp. 170–71, makes the same point.

<sup>379</sup> UNMIK Regulation 2002/12, 2 (b).

<sup>380</sup> UNMIK Regulation 2005/18, emphasis added.

<sup>381</sup> Tschoepke, one of the key drafters of the KTA regulations, deems the amendment unnecessary: ‘The “eminent domain” amendment in UNMIK Regulation No. 2005/18 was legally redundant as the principle of “eminent domain” had been at the legal basis of the entire privatization process from the outset.’ Author’s interview.

<sup>382</sup> Medjad 2004, pp. 312–13.

whoever these may be – and even if these owners should be found to be those who benefited from the 1990s transformations.<sup>383</sup> Also today, privatization supporters argue that privatization means selling off enterprises to the highest bidder and giving proceeds to the original owner – while the alternative would be to let values decline, leaving merely a minimal remainder for owners to collect whenever in the future it might be possible to identify who they are.<sup>384</sup>

This reasoning is premised on the assumptions that the worth of enterprises would automatically suffer outside private hands, that versions of public ownership cannot be economically profitable and that private ownership is always the best.<sup>385</sup> Kosovo's SOEs, however, seem to have deteriorated in value *before* privatization – not because they were publicly owned, but due to decades of mismanagement and destruction, as well as international officials' insistence on privatization before operation. In the end, Kosovo's SOEs were sold off strikingly cheap,<sup>386</sup> leaving little for owners and other rightful beneficiaries to collect. The fact that enterprises also deteriorated in value, and that several were closed down after and allegedly because of privatization, further weakens the argument: The vast majority of SOEs were sold without conditions, allowing buyers to use them solely for their land – whether for storage halls, apartment blocks, gas stations, hotels or restaurants, closing down original operations and laying off workers.<sup>387</sup>

The 'in the interest of the owner' argument indicates that privatization was chosen by international statebuilders not primarily as a development strategy, but as a political solution to a legal problem.<sup>388</sup> SOEs are here not seen as a resource upon which Kosovo's socio-economic future depends, but as a legal obstacle to liberal reform: primarily as *undefined* property in need of being defined by transfer to private owners. Moreover, the reasoning puts the interest of individual owners above that of Kosovo's overall development, which runs in the face of the 'eminent domain' formula established as the legal basis for privatization, and ignores the right to economic self-determination of

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<sup>383</sup> Former KTA officials, in author's interview.

<sup>384</sup> Author's interviews and media observation.

<sup>385</sup> Empirical examples ranging from contemporary China to Scandinavia (and to former socialist Yugoslavia) might contest this, but a full discussion of the issue of public versus private ownership is well beyond the scope of this report.

<sup>386</sup> Many privatization officials, analysts and observers brought up this point in author's interviews in Kosovo between January and July 2010. See also HRCUP 2008, p. 58; and Neil MacDonald: 'Transfer of power sees legal tangles proliferate', Financial Times Special Report, p. 3, 5 June 2009.

<sup>387</sup> Several former KTA officials and former SOE workers lamented this development of privatized companies in author's interviews in Kosovo between January and July 2010. See also BSPK legal officer Shefkije Rexhepi quoted in HRCUP, p. 57.

<sup>388</sup> This was pointed out by Glauk Konjufca, head of Vetëvendosje!'s committee for political and legal affairs, author's interview, Pristina, 9 July 2010.

Kosovo's population. The argument, then, also conflicts with UNMIK's mandate if UNMIK is seen as a trustee for the interests of Kosovo's society with power to restructure property rights only when 'justifiable as useful in protecting and enhancing the interests of the beneficiaries of the trusteeship – the people of Kosovo.'<sup>389</sup>

Returning to the issue of the 1990s transformations, a few days before disbanding the KTA's operations in June 2008, UNMIK passed a regulation crucial to their validity. Regulation 2008/27 of 27 May 2008 is yet another amendment to 2002/12 on establishing the KTA. Although nowhere to be found on UNMIK's official gazette publishing system, regulation 2008/27 is the last word so far from the international statebuilding project on the matter of transformations. Referring to the original two requirements for evaluating the validity of transformations – applicable law, and discrimination and human rights – the regulation states that 'the Agency shall be entitled to assume that the Transformation *does not* meet all requirements [...] unless clear evidence is available to the Agency, which conclusively establishes that the Transformation meets these requirements'.<sup>390</sup>

The significance of Regulation 2008/27 is that it places the burden of proof with anyone claiming that transformations *should* be taken into account. Unless evidence can be provided that transformations were carried out in a non-discriminatory manner, adhering to the European Convention on Human Rights, and in line with applicable law, all transformations by Serbia in Kosovo in the 1990s should be ignored. This reasoning, with its obvious political and legal implications, was also included in the PAK law of 21 May 2008. The law makes it clear that in the absence of readily available evidence proving that 1990s transformations should be taken into account, they shall all be disregarded and PAK shall assume their non-validity.<sup>391</sup> That it took international statebuilders almost nine years to clarify transformations' (non-) validity shows how contentious the issue was perceived to be and indicates the extent of international distress at to the prospect of being held liable for privatization by actors who benefited from the Milosevic regime's economic transactions in Kosovo.

It is an open question whether this legal line is implemented in practice. One Kosovo analyst suspects that buyers of property during the Milosevic era are likely to win if they take their cases to a court of

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<sup>389</sup> Perrit 2005, pp. 171–72, noting that UNSC Resolution 1244 foresees new settlement of Kosovo's status.

<sup>390</sup> UNMIK Regulation 2008/27, 5.3 (b), added emphasis.

<sup>391</sup> PAK Law, especially 5.3 (b).

human rights<sup>392</sup> – although it is unclear how this would play out, as Kosovo does not have any such a court and the UN’s non-recognition of Kosovo closes off international avenues for holding either Kosovo or UNMIK to account. The status of the most significant of all Kosovo SOEs – the large Trepca mining complex – remains undefined due to both political sensitivity of most of the company being located in the Serb-dominated northern part of Kosovo, and due to complaints from investors who claim to have bought the company during the era of Milosevic.<sup>393</sup> International statebuilders’ residual concern for acting on politically difficult issues, their aversion to liability – and consequent inaction – have in this case ‘basically shut down what used to be one of the main sectors of the economy’.<sup>394</sup> Similarly, very few SOEs have been privatized in Serb-populated areas,<sup>395</sup> reflecting the political orientation of international statebuilders when privatizing in Kosovo, fear of Serb protests, and continued uncertainty as to how to deal with transformations *in practice*.<sup>396</sup>

### Spin-off privatization and the question of land

Years before the issue of transformations had been theoretically clarified, concerns over the unidentified final title-holder of Kosovo’s enterprises and international fear of liability resulted in a peculiar kind of ‘spin-off’ privatization for Kosovo’s SOEs.<sup>397</sup> Spin-off resembles

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<sup>392</sup> Shpend Ahmeti, lecturer in public policy at the American University in Kosovo, head of the think-tank GAP and former World Bank official, author’s interview, Pristina, 13 May 2010.

<sup>393</sup> Similarly, in 2010, local media reported that Belgrade was demanding rent from the OSCE, claiming that the organization’s headquarters in Pristina were in fact an SOE belonging to Serbia. For the complexities regarding Trepca, see Michael Palaret for LLA/ESI: ‘Trepca 1965-2000’, 2002. International officials express extreme concern over the future of Trepca, seeming to prefer delaying resolution at least until termination of their mandate, author’s interviews, Kosovo, 2009 and 2010 and UNMIK internal documents from 2000 and 2001 in possession of the author.

<sup>394</sup> Moalla-Fetini et al., for the IMF 2005, p. 40.

<sup>395</sup> The well-known Brezovica ski resort in Serb-majority area Shtërpçë in South Kosovo is one of the SOEs the KTA chose not to privatize. See Investment Promotion Agency of Kosovo: ‘Brezovica at a glance: The last great opportunity in the Balkans’, Vienna, October 2007 and OSCE: ‘Shtërpçë/Strpce’, September 2009. See also Lavdim Hamidi: ‘Elections pave way for Kosovo privatisations’, BIRN, 26 November, 2009.

<sup>396</sup> Former privatization advisor in author’s interview, referring to a ‘pro-Serb’ attitude among international officials involved in privatization in Kosovo. EC official Janmaat, who was involved in drafting the transforming of UNMIK regulations into ICO and Kosovo Assembly laws after Kosovo’s declaration of independence, explains that drafters were worried about claims referring to the European Court on Human Rights, author’s interview.

<sup>397</sup> KIPRED 2005, p. 10; Mulaj 2005; Knoll 2005, note 71; Zaum 2007; RIINVEST: ‘Privatization in Kosova: Forwards and Backwards’, 2004a. The KTA Regulation does not use the term ‘spin-off’, but the procedure is described in UNMIK Regulation 2002/12, as amended, Section 6.2, Section 8, and further detailed in the ‘Land use’ UNMIK Regulation 2003/13, as well as in KTA’s ‘Rules of Tender for Spin-off Privatisation’, 28

UNMIK's attempt at commercialization in that it separates commercial issues from ownership – only that with spin-off, SOE assets were not leased out, but *sold*. Despite disappointment with commercialization, Pillar IV was hopeful that outright sales would be successful in attracting investors.<sup>398</sup> POEs were to remain under KTA administration until 2008, before PAK took over and in 2010 commenced on their privatization. An estimated 10% of all SOEs were categorized as non-going concerns that were not to be included in the spin-off, but instead put up for liquidation.<sup>399</sup>

Spin-off privatization means transferring an SOE's assets to a subsidiary company established by the KTA, a 'NewCo', and selling off this NewCo. NewCos were established by the KTA as limited liability companies, with the rights and interests of the old SOE's assets, but not liable for its debts or claims. Liabilities would remain with the old SOE 'shell', which would continue to exist legally, but no longer operate. Proceeds from spin-off sales would be kept in a Central Bank of Kosovo trust fund by the KTA, pending resolution of creditor and ownership claims<sup>400</sup> – an arrangement copied by PAK in 2008.

Interestingly in light of the intense debates regarding the ultimate titleholder of enterprises in Kosovo, spin-off privatization leaves ownership undefined: although post-privatization ownership to some extent would be clearer than it was before privatization, spin-offs would leave *original* title-holder as well as the definitive legal owner of SOE *land* unidentified. This ambiguity seems to have been deliberately created by international statebuilders. In 2001, for example, international officials making the case for the spin-off method stressed that the procedure would mean transfer of enterprises to private hands without taking a clear and irreversible stance on their status.<sup>401</sup> Due to disagreement on original ownership, unresolved creditor claims, and Kosovo's status, this solution was deemed more likely to fall within UNMIK's mandate than defining ownership outright, and thus as better able to protect international officials from being held to account.<sup>402</sup> However, keeping the ownership issue open has implications beyond the matter of legitimate allocation of sales proceeds, and clearly runs

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September 2005. The explanation of spin-off privatization presented in this report is based on these sources.

398 Zaum 2007, pp. 157–58.

399 UNMIK Economic News, 24 November 2005, announcing that the European Agency for Reconstruction would allocate 3.8 million Euro to liquidating SOEs. Liquidation in this context refers to the 'bankruptcy' type of liquidation – not to the liquidation of SOE 'shells' planned for 2010 and 2011.

400 UNMIK Regulation 2002/12, as amended, 8.6. See also the conclusion.

401 Zaum 2007, pp.157–58.

402 Medjad 2004, p. 313 and KIPRED 2005, p. 15, outlining that the method was chosen after OLA advised against 'full privatization', fearing liability claims from Belgrade.

contrary to the statebuilders' argument that privatization is necessary to deal with ownership and establish the 'known owners' of enterprises.

Ambiguity regarding legal ownership is most significant with regard to the land on which Kosovo's SOEs were located. In Yugoslav times, SOEs did not own: they merely *used* the socially owned movable and immovable assets in their possession, which besides land included buildings and equipment. Therefore, it has been noted, 'privatizing the former [would] not [be] privatizing the latter.'<sup>403</sup> To circumvent this, UNMIK's KTA 'land use' regulation determines that when selling SOE assets, *the right to use* the associated land would turn into leaseholds with 99-year terms.<sup>404</sup> However, the regulation also stipulates that the resulting 'Leasehold shall not be affected by any change to the *underlying ownership* of the Property subject to the Leasehold,'<sup>405</sup> and makes a distinction between leasehold and 'real property'.<sup>406</sup> In this, the regulation perpetuates the logic of regulation 2002/12, as amended, effectively separating commercial issues from those of ultimate legal ownership.

The internationally created legal framework for privatization in Kosovo thus leaves it unclear whether or not socially owned immovable property – in particular, the land on which enterprises were located – becomes private property after privatization.<sup>407</sup> In 2005, an IMF report admitted that the spin-off approach chosen by UNMIK 'recognized explicitly that there would always be some residual uncertainty regarding ownership' of the land of privatized companies.<sup>408</sup> A former Privatization Director explains that legal ambiguity regarding the status of SOE land was selected with Kosovo's unresolved status in mind: 'The owners of the Newcos obtained *the right to use* the related/underlying land for 99 years. The concept was that within 99 years Kosovo would be independent and able to give true land ownership and title to the Newco owners.'<sup>409</sup> Legally, however, the arrangement appears somewhat of an oddity: when a leasehold and a lessee exist (in this case, respectively, the right to use an SOE's land, and a NewCo buyer) there should also be a *lessor* (a 'landlord') to

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<sup>403</sup> 'except in cases where, as in Bosnia and Herzegovina, every social property was nationalized', Medjad 2004, p. 310.

<sup>404</sup> UNMIK Regulation 2003/13.

<sup>405</sup> UNMIK Regulation 2003/13, 8, added emphasis.

<sup>406</sup> E.g. by stating that 'A Leasehold or the Property subject to a Leasehold shall not be expropriated except under the same conditions and procedures provided under the applicable law for expropriation of ownership of real property.' UNMIK Regulation 2003/13, 9.

<sup>407</sup> As confirmed by a high-level international official in author's interview.

<sup>408</sup> Moalla-Fetini et al., for the IMF 2005, p. 38, note 1.

<sup>409</sup> Johnson in author's email interview, emphasis added.



lease out the leasehold. In the case of international spin-off privatization in Kosovo, this party is either mysteriously non-existent or remains, as in Yugoslav times, ‘society’.

When turning Kosovo’s socially owned immovable property including socially owned land, into 99-year leaseholds, international statebuilders made the right to use the land transferable and encumberable – thereby considerably expanding the land-use right from the period of Yugoslavia. Although placing encumbrances on socially owned land might have been allowed in Yugoslav times, transfer to private owners, or complete disposal, was not permitted.<sup>410</sup> While the land of Kosovo’s SOEs might have been made encumberable because this was important for ‘Western bankers’,<sup>411</sup> the legal basis on which the international statebuilding project stripped ‘society’ of the right to remain the owner of Kosovo’s land is unclear. It also contradicts the logic of legally grounding privatization on the concept of eminent domain – that is, on the process being in the interest of this very society.

Questions may be raised as to whether UNMIK’s expansion of the right to use socially owned land – making it transferable and encumberable during a 99-year leasehold term, without ensuring adequate compensation to the land’s owner, *the society* – amounted to illegal expropriation. Legal experts indicate that the mandate given UNMIK by the UN Security Council might not have included authority to administer socially owned property/land at all – ‘only’ state owned.<sup>412</sup> Ignoring Kosovo’s society’s right to the land along with issues such as restitution and the role of local authorities, including municipalities, when privatizing is at the very least another illustration of international statebuilders’ eagerness to go ahead with the process despite serious hurdles.<sup>413</sup>

Not unrelated to international officials’ expansion of the land-use right is that the KTA legal framework determines that owners of enterprises might be identified ‘[f]ollowing the completion of’ privatisation,<sup>414</sup> and then for the sole purpose of allocating them part of the sales proceeds, after creditor and other claims have been resolved.<sup>415</sup> In 2008, another amended regulation emphasized that ‘No party shall be entitled to a remedy that would require the rescission of a completed

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<sup>410</sup> Experts interviewed by the author in Kosovo, spring 2010, disagree on the matter of encumbrances while agreeing on the issue of transfers.

<sup>411</sup> A close observer of the international involvement in privatization in Kosovo, author’s interview.

<sup>412</sup> Perrit 2005, p. 172.

<sup>413</sup> See KIPRED 2005, pp. 17–19; OSCE 2008, pp. 23 and 28.

<sup>414</sup> UNMIK Regulation 2005/18, 5.3, emphasis added.

<sup>415</sup> See below on the 20% rule, and Knoll 2005, note 84.

transaction or the nullification of a contract validly entered into with a third party that acted in good faith and fully performed by the Agency, pursuant to its authority under UNMIK Regulation No. 2002/12.<sup>416</sup> Accordingly, an owner identified after privatization had been carried out would not have the right to get that property back – only to receive parts of the proceeds. In 2008, the OSCE pointed out that this might represent a violation of the European Convention on Human Rights.<sup>417</sup>

### Special spin-off privatization

Enterprises privatized in Kosovo through the ‘special spin-off’ procedure have involved another own set of controversies.<sup>418</sup> ‘Special spin-off’ meant selling SOEs to investors, with certain conditions attached. Buyers of the NewCos privatized through this procedure committed to maintain the operation of companies, to make set investments in the purchased NewCos, and to retain a certain number of workers.<sup>419</sup> A special spin-off bid winner was selected according to the offered price as well as on the basis of points allocated to the other criteria: 50% of points were given for the price, 25% for committed investments and 25 % for employment commitments. When putting NewCos up for sale through the special spin-off, the KTA seems to have specified a ‘minimum’ level for each requirement, including an expected investment sum and a set number of workers to be employed in the enterprise after privatization.<sup>420</sup> In total, 24 SOEs were privatized through the special spin-off – among them significant businesses like the nickel plant Ferronikeli, the Llamkos factory for galvanized iron, Peja Brewery, and Grand Hotel Prishtina. Similar to the ordinary spin-off procedure, proceeds from special spin-off sales were held by the KTA in trust pending resolution of debts and ownership claims.

A frequently heard criticism of the special spin-off procedure is that it included no mechanism to ensure that obligations entered into at the time of sale were maintained by NewCo buyers. Both investment and employment commitments have in fact been ignored by NewCo buyers, with few of the companies’ – or their workers – actually

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<sup>416</sup> UNMIK Regulation 2008/4, 10.5.

<sup>417</sup> OSCE 2008, p. 28.

<sup>418</sup> See e.g. Ahmet Shala and John Johnson’s presentation: ‘Privatisation in Kosovo’, 29 October 2004. For details on the sale of the largest company sold under the special spin-off procedure, see KTA’s ‘Rules of Tender for Special Spin-off Privatisation of NewCo Ferronikeli L. L. C.’, 22 December 2004.

<sup>419</sup> For specific conditions, see PAK: ‘Annual Report 2009’, p. 53.

<sup>420</sup> High-level international official, author’s interview, Pristina, May 2010, who also maintained that this practice was highly problematic.

benefiting from the criteria set for the sale.<sup>421</sup> Allegations that conditions were not upheld because the investment and employment criteria were ‘too high’<sup>422</sup> ignore the basic point that buyers should not enter into agreements without being confident that they can deliver. On the other hand, companies privatized through the ordinary spin-off have not been checked, monitored or assisted either.<sup>423</sup> An independent member of Kosovo’s Parliament has criticized privatization authorities for not monitoring post-privatization operation of all former SOEs, which could have ensured viable operations.<sup>424</sup> Other critics also maintain that this has resulted in privatized NewCos’ generally having deteriorated in value, laid off workers, and contributed to limit Kosovo’s overall growth potential.<sup>425</sup>

Criticism of the lack of follow-up on companies privatized through the special spin-off resembles objections raised against the procedures for selecting NewCos buyers for both types of spin-off privatization. Besides simply reading out the offered price in a sealed bidding process, there were few mechanisms to ensure that enterprises did not fall into the hands of investors without the capacity or will to preserve or develop meaningful operations. A standard background check – with a formal request letter sent to the Kosovo police – and a short procedure intended to rule out the most blatant suspicions of money laundering were the sole vetting systems in place for filtering NewCo buyers.<sup>426</sup> During the period of internationally led privatization in Kosovo, no buyer was reportedly excluded on this basis.<sup>427</sup> Privatization has not included any system for estimating whether new owners would be able to maintain or enhance the value of the enterprises, stand by their obligations in the case of special spin-offs, or contribute to increased economic activity and overall development.<sup>428</sup>

International officials involved have complained that placing conditions on the sale of privatized companies, as done with the special spin-off, represents inappropriate ‘interference with the market’: central authorities in Kosovo, whether local or international, should have no business in monitoring companies after their transfer to private

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<sup>421</sup> See PAK: ‘Work Report August 2008–August 2009’, Pristina, 2009 for details on specific enterprises.

<sup>422</sup> Most of the officials involved in privatization interviewed by the author in Kosovo between January and July 2010 drew upon this argument to explain why special spin-off commitments had not been upheld.

<sup>423</sup> As pointed out by e.g. Forum 2015 2008, at p. 26.

<sup>424</sup> Driton Tali interviewed by Rudina Hasimja for this project, Pristina, 13 April 2010.

<sup>425</sup> Author’s interviews in Kosovo between January and July 2010.

<sup>426</sup> Former long-time KTA, now PAK official, author’s interview, Pristina, May, 2010.

<sup>427</sup> Former KTA, now PAK official, author’s interview, Pristina, May, 2010.

<sup>428</sup> Former KTA, now PAK official, author’s interview, Pristina, May 2010.

hands.<sup>429</sup> However, as the legal foundation for privatization was the concept of ‘eminent domain’, the international statebuilding project’s own framework for the process determined that privatization would be legal and legitimate (only) if it would benefit Kosovo as a whole, especially in terms of economic development. Grounding privatization on the concept of eminent domain legally and practically meant that international statebuilders underlined their own responsibility for Kosovo’s economy. In this light, monitoring enterprises after privatization and placing conditions on sales would come across, if anything, as an overly mild form of interference.

Moreover, international statebuilders might worry about losing the support of both local populations<sup>430</sup> and international capitals if they were unable to point to beneficial socio-economic trends resulting from their actions in Kosovo. Claims of the justifiability of the international statebuilding project’s denial of Kosovo’s right to self-determination when privatizing in Kosovo rested on perceptions of political (perhaps also moral) legitimacy, not only formal legality. A more stringent vetting of NewCo buyers, post-privatization follow-up of companies, and control of special spin-off obligations might therefore have benefited international statebuilders as well as Kosovo’s economic development – regardless of whether such mechanisms might have interfered with the free market.

### **Two special spin-offs: Llamkos and Ferronikeli**

As yet, neglect of special spin-off conditions has had consequences for only one single enterprise in Kosovo. With the Llamkos factory for galvanized iron, neither the investment nor employment commitment entered into at the time of the sale was upheld after privatization:<sup>431</sup> in the words of PAK, ‘the Buyer and the Company have egregiously violated the Commitment Agreement’.<sup>432</sup> In September 2009, PAK therefore exercised the ‘call option’ with Llamkos NewCo, transferring it back to direct PAK administration. A well-placed international observer has commented that the return of Llamkos to Kosovo’s authorities

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<sup>429</sup> International officials involved in privatization in Kosovo, author’s interviews in Kosovo, April and May 2010.

<sup>430</sup> See Balkan Gallup: ‘Key findings 2009’, 2010; Balkan Gallup: ‘Kosovo’s independence’, 2010; and UNDP Early Warning reports for the declined popularity of UNMIK and EULEX.

<sup>431</sup> See PAK: ‘Annual report 2009’, p. 53 for details. For some information on the Llamkos factory, see e.g. Arta Pllana: ‘Llamkos Factory’, UNMIK, November 2005, accessed at <http://www.unmikonline.org/radio/scripts/English/november05/291105.htm>, on 23 April 2010.

<sup>432</sup> PAK: ‘Annual report 2009’, p. 26.

was effectuated by the PAK simply sending a note to the Kosovo business registry, listing itself as Llamkos' new owner.<sup>433</sup>

A 'call option' is indeed outlined in the original rules of tender for the special spin-off procedure, allowing KTA or its successor to 'claw back' companies that were not 'being developed and adequately operated' in line with special spin-off obligations. Formally, though, this option could be activated only by 'the SRSG or his/her legal successor'<sup>434</sup> – opening the debate as to whether the Kosovo government and PAK may qualify as the legal heir to the SRSG. Questions also remain as to why PAK chose the call option for Llamkos, while overlooking other special-spin off companies with comparably insufficient commitment to post-privatization obligations. Perhaps the brief mention in PAK's annual report, noting that one of the problems with Llamkos was 'Continues Protests of workers' [sic] might be relevant here.<sup>435</sup> The extent of Llamkos' deterioration while in private hands was indicated when PAK's 2010 re-tendering attracted *no* interested investors, bleakly reflecting a general trend in the development of Kosovo's post-privatization enterprises.<sup>436</sup> The factory is currently advertised for sale in international media, with a new bidding round expected shortly.<sup>437</sup>

The nickel plant Ferronikeli was the largest NewCo privatized through the special spin-off, and is arguably the most important company of all former SOEs privatized by the international statebuilding project in Kosovo.<sup>438</sup> While described by privatization proponents as a 'success story',<sup>439</sup> the sale of Ferronikeli has been marred by controversy. Workers protested from the start, with Ferronikeli's union leader stating he had 'always been against the sale of the company and is convinced that the sale is a great crime against the national

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433 High-level international official, author's interview.

434 As outlined in KTA: 'Rules of tender' 2004, Annex C, A.

435 PAK: 'Annual report 2009'; for the workers' protests and the situation regarding Llamkos in 2009, see MacDonald 2009.

436 Author's observation at the 'bidding day' with reading of bids for tenders launched in PAK's 43<sup>th</sup> privatization wave, Pristina, 12 May 2010.

437 The Economist website, accessed on 23 August 2010 at: [http://www.economist.com/classifieds/view\\_classified.cfm?sitd=9798&key=&sitd\\_type=ALL](http://www.economist.com/classifieds/view_classified.cfm?sitd=9798&key=&sitd_type=ALL)

438 For information on the plant, see KTA's pre-privatization 'Fact sheet' from December 2004, accessed at <http://www.kta-kosovo.org/factsheetseng/ferronikelieng.pdf> on 9 May, 2010; and Kosova Foundation for Economic Reconstruction and Development: 'Ferronikel', 2003, accessed at <http://www.kosova-foundation.com/ferronikel01.html> on 22 April 2010.

439 E.g. by PAK: 'Success stories', accessed at <http://www.pak-ks.org/?id=115> on 7 June 2010 and UNMIK: 'Progress on Privatization: Ferronikeli success', January 2006, accessed at <http://www.unmikonline.org/pub/focuskos/jan06/focuskeco1.htm>, on 7 June 2010.

economy'.<sup>440</sup> Disputes concerning the sale concern not so much whether special spin-off obligations were upheld by the buyer of the Ferronikeli NewCo – indeed, these commitments appear to have been more than upheld.<sup>441</sup> No, controversy surrounds the very basis of the sale.<sup>442</sup>

While three bidders would ordinarily be required by the KTA to proceed with privatizing a NewCo,<sup>443</sup> in the case of Ferronikeli – described by the World Bank as ‘one of the largest and most valued Socially Owned Enterprises in Kosovo’<sup>444</sup> – only two companies submitted bids. Of these, the KTA disqualified the bidder offering the highest price, and announced as the winner the second and significantly lower (and indeed, the lowest) bid, which came from the UK-based investor Alferon.<sup>445</sup> Regardless of the grounds for disqualification,<sup>446</sup> proceeding with the sale under these circumstances certainly contributed to a less than ideal sales price for this significant company.

Moreover, a serious conflict of interest involving the KTA might have occurred when the buyer Alferon, prior to the sale, was awarded an extraordinary agreement for cheap and constant electricity supply to

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440 Ferki Karaxha quoted from Koha Ditore at Economic Initiative for Kosovo News, ‘Kosovo: ex-employees of Ferronikeli end their protest’, 18 April 2007, accessed at [http://www.eciks.org/english/lajme.php?action=total\\_news&main\\_id=627](http://www.eciks.org/english/lajme.php?action=total_news&main_id=627) on 7 June 2010. General Manager Murat Meha was in favour, echoing the general argument that ‘With the privatization, the owner of the factory would be finally determined’; interview 15 April, 2005, World Investment News, accessed at <http://www.winne.com/kosovo/to05interv.html>, on 12 June 2010. Also in 2010, Kosovo media reported on worker protests at the Ferronikeli plant.

441 See PAK: ‘Annual report 2009’, p. 53, showing that the Ferronikeli NewCo invested three times more, and employed more workers, than what was stipulated by commitments at the time of the sale. According to the Logistics Coordinator at Ferronikeli NewCo, most of the present employees at the plant were also employed before the war (excluding himself), author’s interview, Drenas, 22 April 2010. ‘Before and after’ photos of the plant in possession of this author show significant infrastructural developments since the war, when the factory suffered severe damages. Author’s field research at Ferronikeli, Drenas, 22 April 2010.

442 The case of Ferronikeli has also been drawn upon to highlight other problems of Kosovo’s economy, which space will not allow for a full discussion of here, see e.g. Besiana Xharra: ‘Importing lignite into coal rich Kosovo’, BIRN, 27 November 2009.

443 See KTA: ‘Rules of tender’ 2004, and ‘Rules of tender for spin-off privatisation’, 28 September 2005 – both outlining a process consisting of two bidding rounds, with only the three highest from the first round qualifying for the second.

444 World Bank: ‘Kosovo monthly Economic Briefing’, 31 May 2005.

445 See e.g. Kosovareport: ‘Kosovo sells ferro-nickel plant Ferronikeli to British Alferon’, 18 November 2005, accessed at <http://kosovareport.blogspot.com/2005/11/kosovo-sells-ferro-nickel-plant.html> on 7 June 2010. US-Albanian Adi Nickel offered around 49.5 million Euro, while Alferon’s bid amounted to 30.5 or 33 million – for different figures, see UNMIK: ‘Progress on privatization’, Economic Initiative for Kosovo News reporting at [www.eciks.org](http://www.eciks.org), and UNMIK media monitoring, 2 November 2005.

446 In July 2005, KTA’s spokesperson announced that the highest bidder ‘was not a valid consortium anymore’, quoted in Kosovareport 2005.

Ferronikeli NewCo.<sup>447</sup> The electricity agreement, reportedly ‘crucial’ in ensuring the sale of Ferronikeli NewCo,<sup>448</sup> guaranteed Alferon an electricity price that would cover only half of the production costs of Kosovo Energy Corporation (KEK). That this is of relevance beyond Ferronikeli’s commercial development is underlined by the fact that the factory reportedly consumes around 10% of all electricity in Kosovo.<sup>449</sup> The alleged conflict of interest seems to lie in the KTA being responsible both for selling off Ferronikeli NewCo *and* for exercising management authority over KEK – which is a POE.

At the time of announcing the Ferronikeli tender, the KTA was still troubled by contentions surrounding the halt to privatization, and must have been looking for a success story.<sup>450</sup> The embarrassing fact that KTA did not manage to attract more than two bidders for Ferronikeli, and then proceeded to disqualify the one offering the highest price, must have added to international statebuilders’ nervousness. Failure to secure the sale of Ferronikeli NewCo would have further undermined the (at the time, extra-fragile) perceptions of the effectiveness, legitimacy and legality of the international leadership of the privatization process in Kosovo, and might have given rise to questions about the role of UNMIK and the mandate of international statebuilding as a whole. Moreover, the KTA, as administrator responsible for Kosovo’s POEs, including KEK, held the power to decide on the terms of agreements entered into by the electricity company, and would in theory be able to use this power to ‘subsidize’ the already low price offered by Alferon in order to seal the sale of Ferronikeli NewCo and establish a success story of the kind the international actors involved in Kosovo’s privatization might have desperately wanted.

A former KTA official who today is Manager of Administration and Public Relations at Ferronikeli NewCo insists that KTA had nothing to do with the agreement made between KEK and Alferon on electricity supply: ‘This was an agreement negotiated between the KEK, Energy Regulatory Office and the private buyer as strategic partners.’<sup>451</sup> Furthermore, he asserts, it would be a mistake to regard the negotiated price as disadvantageous for KEK, as he estimates that the price is above the average of KEK’s returns for electricity – because in fact, due to electricity losses and non-invoiced output, only 30–40% of

<sup>447</sup> The sale was finalized in early 2006, see e.g. Mining Journal: ‘Ferronikeli sale completed’, 28 April 2006, accessed at <http://www.mining-journal.com/production-and-markets/ferronikeli-sale-completed>, 7 June 2010.

<sup>448</sup> Bajrush, author’s interview. Bajrush, a former KTA employee, is Ferronikeli NewCo’s Manager of Administration and Public Relations.

<sup>449</sup> This was the estimate provided by experts in author’s interviews, May and July 2010.

<sup>450</sup> Zogiani, author’s interview. Zogiani has actively monitored privatization in Kosovo as a journalist and as head of Kosovo’s anti-corruption NGO COHU!

<sup>451</sup> Bajrush, author’s interview.

KEK's electricity is paid for in Kosovo. However, whatever the level of the KTA's practical involvement in the electricity agreement, the agency *did* have legal, formal, actual, and final authority over and responsibility for KEK when it presided over the sale of Ferronikeli NewCo. A critic notes that with the KEK-Alferon electricity agreement, KTA effectively utilized money belonging to the citizens of Kosovo in order to subsidize the privatization of Ferronikeli – to the benefit of a UK-based private investor rather than Kosovo's population or overall good.<sup>452</sup>

### Local involvement and the 20% rule

That international statebuilders from time to time have publicly expressed the desire for more 'local ownership'<sup>453</sup> in privatization in Kosovo might be seen as reflecting their hopes of steering clear of controversy of the kind seen in the case of Ferronikeli, and of transferring responsibility – although not actual authority – to local elites. 'Local ownership' has been the subject of much discussion within the burgeoning body of statebuilding literature, although it remains unclear what the term means in practice.<sup>454</sup> Some hold that it simply refers to international statebuilders imposing their own agenda on locals,<sup>455</sup> that statebuilders rarely pay more than lip service to the term, and that, 'in effect, local actors are supposed to "own" what outsiders tell them to.'<sup>456</sup> The fundamental irony in the concept being advocated by external actors has also been pointed out,<sup>457</sup> with even statebuilding advocates admitting that the nature of national–international relations in peacebuilding and statebuilding operations will always undermine the possibilities of meaningful local ownership.<sup>458</sup> International statebuilders' claims of, and calls for, local ownership might serve to strengthen these officials' own powers and decisions, as could have been the case in Kosovo.<sup>459</sup>

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<sup>452</sup> High-level international official, author's interview, Pristina, May 2010.

<sup>453</sup> In 2004 for instance, KTA emphasized that by 'giving [local actors] more 'ownership' over the process, we will ensure political and public support for the program and its results.' KTA 'Draft strategy' 2004, p. 3.

<sup>454</sup> Simon Chesterman: 'Ownership in theory and in practice. Transfer of authority in UN statebuilding operations', in Chandler 2009, p. 21.

<sup>455</sup> See e.g. Astri Suhrke: 'Reconstruction as modernisation: the 'post-conflict' project in Afghanistan', *Third World Quarterly*, 28 (7), 2007, p. 1292.

<sup>456</sup> See Boege et al. 2009, p. 29.

<sup>457</sup> Chesterman 2009, p. 22.

<sup>458</sup> Barnett and Zürcher 2009, p. 33.

<sup>459</sup> See e.g. Tansey 2009, p. 123, dealing in particular with the 1999–2000 Kosovo Transitional Council.



The expressed need felt by international statebuilders to (be seen to) involve local actors in the privatization process has been cited as a reason why the KTA did not commence properly with privatization before the establishment of PISG and promulgation of Kosovo's Constitutional framework – in which, however, the SRSG was given ultimate power to administer and regulate POEs and SOEs, with Kosovo's local authorities merely allowed to comment.<sup>460</sup> It was to take three years of international statebuilding before Kosovo's local leadership was officially consulted on privatization, by being offered to comment on the draft law on establishing the KTA, on 17 April 2002.<sup>461</sup> However, local input could be – and was – easily ignored by UNMIK, which considered itself to be under no obligation to take local concerns into account. An independent member of Kosovo's parliament insists that local actors were able to exert only minimal influence on 'the rules of the game' in privatization, but had no possibility to get rid of the game altogether.<sup>462</sup> Throughout the period of international privatization, decisions on property rights remained an UNMIK *reserved power*, with the inclusion of local actors 'severely limited'.<sup>463</sup> Meanwhile, there have come claims that local actors have felt 'intense political pressure from KTA administrators to accept privatization outcomes', even ones that could 'adversely affect' local interests.<sup>464</sup>

The provision of allocating 20% of proceeds from privatization to former SOE workers is often referred to as the core materialization of local actor influence – however limited – over the internationally led privatisation process in Kosovo. This rule determines that 20% of sales proceeds from privatized SOEs shall be awarded to workers previously employed at these SOEs. This is to be paid out according to set criteria, after certain expenses have been covered, but before either creditors or owners receive their share.<sup>465</sup> The provision was included as compensation for workers' loss of their management rights,<sup>466</sup> which had been significant during Yugoslav times and had given workers a strong sense of ownership of the SOEs in which they were employed.<sup>467</sup>

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<sup>460</sup> KIPRED 2005, p. 9. See also Zaum 2007, p. 155.

<sup>461</sup> Zaum 2007, p. 160.

<sup>462</sup> Independent Member of Parliament Tali, interviewed by Hasimja.

<sup>463</sup> Zaum 2007 pp. 165–66.

<sup>464</sup> The quote, from Gould 2007, p. 3 relates to the interests of workers in the privatization process. The same point was emphasized by several involved actors interviewed by the author.

<sup>465</sup> UNMIK Regulation 2005/48, 44.

<sup>466</sup> See e.g. Mulaj 2007, p. 237.

<sup>467</sup> Medjad 2004, pp. 299 and 302, LLA 2002, p. 18 and Mulaj 2007, p. 235.

Analysts criticize the 20% rule for being a too large concession to local demands, with some insisting that it lacks a proper legal or economic justification and represents a violation of owners' and creditors' rights to the *total* proceeds.<sup>468</sup> One international official describes the arrangement as 'a gift to the workers with money belonging to owners'.<sup>469</sup> In fact, the 20% mechanism seems to be less of a local bargain than it may appear at first sight. At its most basic, the money is intended to benefit *individual* SOE workers rather than Kosovo as a whole, and is as such fully in line with the international strategy of transferring Kosovo's socially and publically owned property to private hands.

What is more, the 20% figure does not seem to have been reached primarily by taking local concerns into account. Already when outlining a proposed privatization strategy for Kosovo in 1999, the EC and World Bank suggested that 'While there is general acceptance that giving the enterprise to the workers is not a good option, there is a legitimate concern that workers have rights to at least part of the enterprise in which they are employed [...] This would typically be achieved by giving the workers a 15–20 percent share in the enterprise.'<sup>470</sup>

In light of the overall security framework of international statebuilding in Kosovo, this reasoning might be seen as a reflection of international officials' fear of workers inciting social unrest and thus representing a risk to the short-term stability of the international statebuilding project. Former privatization officials describe the 20% rule as a pay-off meant to buy social peace<sup>471</sup> and local support to privatization,<sup>472</sup> as a 'one-off goodbye kiss',<sup>473</sup> and as a way 'to buy a smile on the workers' faces'.<sup>474</sup> The head of OLA explains that the rule 'achieved that UNMIK got the political support from the local players need [sic] to go ahead with the privatization programme, and was also accommodating workers' demands.'<sup>475</sup> Content with the arrangement, KTA confidently stated in 2004 that the 20% rule had 'proven to be a particularly effective outreach tool' in the internationally led privatization process in Kosovo.<sup>476</sup>

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<sup>468</sup> Author's interviews, spring 2010. Ahmeti insists that Kosovo's government will 'for sure' be held liable for the 20% if creditors are not satisfied with their share, author's interview.

<sup>469</sup> International official, interview by author.

<sup>470</sup> European Commission and the World Bank 1999, p. 61.

<sup>471</sup> Former KTA Deputy Privatization Director Bicaj, author's interview.

<sup>472</sup> Former privatization official, author's interview.

<sup>473</sup> Former KTA spokesperson Tahiri, author's interview.

<sup>474</sup> Former high-level KTA official, author's interview, Pristina, April 2010.

<sup>475</sup> Tschoepke, author's interview.

<sup>476</sup> KTA: 'Draft strategy' 2004, p. 3.

Compared to privatization arrangements chosen by other parts of the former Yugoslavia – which carried out less comprehensive privatization programmes free of international statebuilding – KTA’s 20% provision represents less favourable terms for workers and society.<sup>477</sup> Yugoslavia’s first privatization model included in the Markovic laws also provided for significantly more beneficial terms for employers than 20%, making possible an overall workers’ discount of up to 70% of the nominal value of the shares of privatized enterprises.<sup>478</sup> Although space does not here allow for a full comparison, former Yugoslav republics seem to have taken care to carry out their privatizations within a framework that would benefit their overall economic development – for instance by retaining a level of public control over enterprises, allowing workers a greater share of sales returns, or by channelling proceeds to pension or development funds – not merely through paying a 20% portion of the proceeds to the private individuals who happened to be employed at a certain SOE at a certain time.<sup>479</sup> Moreover, even these socially more favourable terms than what was determined for Kosovo by international officials have been criticized for being inadequate compensation for workers’ loss of self-management rights.<sup>480</sup>

Due to the Markovic laws’ provisions for how workers were to benefit from privatization, UNMIK initially envisaged automatically assigning a much greater share of privatization proceeds to former SOE workers in Kosovo – indeed, ‘up to 60%’.<sup>481</sup> This was also the share of the proceeds requested by the Kosovo workers’ union when privatization commenced<sup>482</sup> – and, indeed, the proportion suggested by UNMIK as late as in 2002, at least for the category of SOEs estimated to meet minimum capital requirements but nevertheless be unable to attract investors.<sup>483</sup> However, as previously mentioned, early suggestions on establishing a ‘Kosovo Development Fund’ with some of the privatization funds, in order to increase the chances for Kosovo

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<sup>477</sup> Medjad 2004, pp. 316–17; Uvalic 1995, Dallago and Uvalic 1998, and Lazic and Sekelj 1997.

<sup>478</sup> See e.g. Lazic and Sekelj 1997, p. 1061.

<sup>479</sup> Mulaj 2007 provides a summary and analysis of privatization in the other parts of former Yugoslavia.

<sup>480</sup> Dallago and Uvalic 1998, p. 83.

<sup>481</sup> Medjad 2004, note 89, seeing the suggested 60% as ‘a mere reflection’ of the share awarded to workers according to the Markovic law. Zaum 2007, p. 157 quotes the same figure.

<sup>482</sup> Former high-level KTA official, author’s interview, Pristina, April 2010.

<sup>483</sup> Demekas et al. for the IMF 2002, p. 19.

overall gaining from the internationally led privatization, were rebuffed by the UN and EU.<sup>484</sup>

In the end, the EC-World Bank proposal won through, and the 20% rule became the thus far only way projected as to how Kosovo is to benefit from selling its socially owned property. A former high-level privatization official sums up negotiations on the issue as follows: ‘the initial demands we received mentioned a 40% stake. Later, a compromise was reached at 20%.’<sup>485</sup> Despite the objections many workers had against privatizing their enterprises,<sup>486</sup> in a situation where more than half of the population lives in poverty and an equal share is unemployed,<sup>487</sup> they might have seen this international compromise as better than being left with nothing.<sup>488</sup>

### **The formal end to international privatization**

The formal end to the international leadership of privatization in Kosovo was to play out in a manner in line with the problems that had been associated with the process from the start. In June 2008, KTA stopped its operations and PAK was created under the auspices of local Kosovo authorities. At this point, the plan was to terminate the KTA completely, and unambiguously transfer its responsibilities to PAK as the KTA’s legal heir. However, when Kosovo declared its independence on 17 February 2008, it did not become a UN member. The Russian part of the UN Security Council had made it clear that it would not agree to a Security Council Resolution allowing UNMIK to withdraw from Kosovo, seeing such a withdrawal as indirect acceptance of Kosovo’s independence. UNMIK has thus remained in Kosovo until this day, and the KTA – as part of UNMIK – continues to exist as a legal entity, although without any staff.

The practical handover of powers from KTA to PAK took place in a fashion dramatically detailed by several witnesses.<sup>489</sup> Since PAK was to be located in the same compound as the one used by the KTA, these were also the offices local KTA-turned-PAK staff returned to after the 2008 summer holidays. There, privatization officials found offices

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484 Former high-level KTA official, author’s interview, Pristina, April 2010; Zaum 2007, pp. 157 and 162. Author’s interview with former privatization advisor, Pristina, April 2010.

485 Tschoepke, today head of OLA, author’s interview.

486 See HRCUP 2008.

487 See e.g. United Nations Kosovo Team, <http://www.unkt.org/?cid=2,24>, accessed on 9 July 2010.

488 HRCUP 2008, p. 58.

489 Author’s interviews in Kosovo, May and July 2010.

stripped of everything save their bare desks, with other furniture and office equipment, computer hardware, crucial files and records missing. Piles of half-burned documents were spotted in the garbage containers in the yard of the premises, reportedly including everything from board meeting minutes to personal letters. Rather melodramatically, the KTA had physically sealed off the compound before leaving, prompting PAK to call in the Kosovo police to undertake a forced entry. After receiving notification of PAK's problems, SRSG Lamberto Zannier visited the premises and promised to return all KTA files to the offices. PAK staff today explains that the problems with the KTA-PAK transfer have severely hampered the work of PAK.<sup>490</sup>

The closure of KTA and start of PAK operations represented the end point of the formal international leadership of privatization in Kosovo, and illustrate the perpetual discomfort of international statebuilders with the process. Some of the distress involved might have been unfounded, as PAK continued with full-speed privatization soon after re-equipping the offices – implementing the process with procedures and rules practically identical to those in place during the time of internationally led privatization.

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<sup>490</sup> Author's interview with former KTA and present PAK staff. Chairman of the PAK Board Dino Asanaj confirms that there were problems with the KTA-PAK transfer, Hasimja's interview for this project, Pristina, 13 April 2010.

## Consequences and Conclusions

The internationally managed privatization of SOEs in Kosovo cannot be said to have been a success, if judged according to UNMIK Pillar IV's own stated objectives: economic reconstruction and development. Although no comprehensive evaluation has so far been undertaken of the economic impact of privatization in Kosovo,<sup>491</sup> the available evidence indicates that the process has contributed to limiting Kosovo's socio-economic potential, by restricting the operational possibilities of enterprises and transforming them into cash at a time of low value<sup>492</sup> – and by blocking employees from work while awaiting privatization, and not assisting with post-privatization employment or social protection.<sup>493</sup>

It seems that internationally led privatization has led to a *loss* of jobs in Kosovo, although the exact figures have not been established. In 2002, some 50,000 to 60,000 jobs were predicted to be negatively affected by UNMIK's administration of SOEs,<sup>494</sup> while Kosovo's trade union currently estimates that privatization has left around 75,000 workers jobless, without pensions or social assistance.<sup>495</sup> The precise figure relates to the number of actual SOE employees, since the number of jobs preserved by NewCo buyers in any case appears low.<sup>496</sup> While it is sometimes claimed that few registered SOE workers really worked or received a salary, a study of a sample of SOEs has

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<sup>491</sup> Forum 2015 2008 studied a selected 103 privatized companies and found that a third were 'not functioning' at all, whereas the rest had a 'significantly smaller turnover' than comparable private sector companies, at p. 16-17. For the only other notable attempt to evaluate the performance of privatized enterprises in Kosovo, see European Consultants Organisation, 'Post-privatization survey for the Kosovo Trust Agency (KTA)', July 2008. For the methodological and other problems with this study, see Forum 2015 2008, at p. 9.

<sup>492</sup> See the previous parts of this report. This has also been a point of local NGO criticism, especially from 2008. See also BSPK 2010, p. 4.

<sup>493</sup> HRCUP 2008, p. 56-58; BSPK legal officer Shefkije Rexhepi quoted in HRCUP, p. 57. See also the previous parts.

<sup>494</sup> Héthy 2002, p. 70.

<sup>495</sup> BSPK President Haxhi Arifi, author's interview, Pristina, 12 April 2010 and BSPK: 'Submission to the UN Committee on Economic, Social, and Cultural Rights', 2008.

<sup>496</sup> In 2007 UNMIK and KTA estimated the total number of jobs in privatized NewCos (i.e., after privatization) at about 10,000. UNMIK, 'From consolidation to sustainability', 2007, p. 15. According to Bicaj, former KTA Deputy Managing Director and a close observer of the international involvement in privatization, KTA tended to inflate privatization figures; author's interview.

estimated that in 2000, around six out of ten of registered SOE workers were active, full-time employees.<sup>497</sup>

While those keen to see a positive legacy for privatization in Kosovo<sup>498</sup> assert that the process has been a success, a necessity, or both,<sup>499</sup> at independent expert level it is described as a ‘disaster’,<sup>500</sup> ‘almost a complete failure’,<sup>501</sup> and as an ‘economic failure’.<sup>502</sup> The actions of UNMIK and the KTA are held to have had ‘devastating results’.<sup>503</sup> Kosovo’s trade union and independent civil society are highly critical.<sup>504</sup> The process has been marred by allegations of incompetence and mismanagement, and accusations of corruption abound.<sup>505</sup> After nine years of international concentration on privatization as the statebuilding project’s economic strategy of choice, around

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<sup>497</sup> RIINVEST 2001, p. 10. The study is based on a survey of 192 selected out of an estimated 350 or more SOEs, and finds that the number of active employees in these 192 was 24,662, while 42 581 workers were registered. Forum 2015 claims that 16 000 out of 60 000 SOE workers ‘were on a payroll’ after the war, but provides no source for the numbers, p. 11.

<sup>498</sup> These include actors who have themselves participated directly in privatization in Kosovo, such as UNMIK, EULEX and ICO officials, local politicians and privatization staff; analysts advocating the process from the start, including economically liberal think-tanks; and those with roles combining the two aforementioned, like USAID, the European Commission, and the US Embassy in Pristina. A small group of urban analysts and businessmen in favour of private ownership is also positive. See Berat Buzhala: ‘Shitni krejt’ (‘Sell everything’), *Gazeta Express*, 27 July 2009 for an example; accessed at <http://www.gazetaexpress.com/web/index.php/editorial/lexo/12190/C67/C74/> on 16 July, 2010. Since these categories together usually constitute the only source of information for international journalists, diplomats, visiting politicians and other opinion- and decision-makers on Kosovo, the assumption that the internationally managed privatization process has been necessary, and a success, seems to be on its way to becoming an established ‘truth’, at least on the popular level.

<sup>499</sup> Near all the former and present privatization officials interviewed by the author in Kosovo between January and July 2010 sums up the process in these terms. According to the EC representative on the PAK Board Janmaat, privatization in Kosovo has been a ‘big success story’. See also Ahmet Shala: ‘Privatisation in Kosovo: the Best in the Balkans?’, speech at the Austro-French Centre for Rapprochement in Europe and the French Institute of International Relations, 2006; UNMIK 2007, p. 3; and references throughout this report.

<sup>500</sup> Knoll 2005, p. 652.

<sup>501</sup> Mulaj, author’s interview. See also Zaum 2007, p. 166.

<sup>502</sup> Shllaku, author’s interview.

<sup>503</sup> Hamiti, author’s interview.

<sup>504</sup> Representatives of BSPK, COHU, and other local and international analysts interviewed by author in Kosovo between January and July 2010.

<sup>505</sup> Author’s interviews and observations in Kosovo between 2006 and 2010; author’s interview with land-owner who were asked for bribes by KTA regional administrators, Pristina, July 2010; Matthew Russell Lee: ‘In Kosovo, privatizations may include ex-UN officials Schook and Walker with Ramush’, *Inter City Press*, 23 Mars 2009, accessed at [www.intercitypress.com/kpp1schook032309.html](http://www.intercitypress.com/kpp1schook032309.html) in October 2009; and Stefano Valentino: ‘Kosovo: UN leaves, scandals stay’, Global Investigative Journalism Conference, 2008. See also the claims of ‘speculative bids’ in Korovilas 2006, quoted in HRCUP 2008, pp. 54–55, confirmed by a former KTA official as having been widespread during the time of international privatization in Kosovo, author’s interview.

half of the population of Kosovo remains without jobs, and a similar proportion still lives in poverty.<sup>506</sup> Scholars claim that the process shows the tragic nature of UNMIK's (self-proclaimed) 'civilizing mission', illuminating the 'constraints on the use of privatization to promote economic recovery.'<sup>507</sup> With its leadership of privatization, it is argued, UNMIK proved incapable of administering Kosovo's economy, providing 'an embarrassing example' of the UN undermining its 'basic goal of creating a viable economy under the rule of law.'<sup>508</sup>

Two years after the formal end to internationally managed privatization in Kosovo, the *economic* reasons for the process are not at all clear. International statebuilders' argument that privatization was necessary to prevent the deterioration of enterprises and to protect the overall good of Kosovo appears unconvincing, given the stagnation and decline that have ensued in wake of the process. The international selection, preparation and execution of privatization seem to have followed automatically from a pre-set statebuilding template for economically liberal reform, and not from context-specific evaluation of how best to approach Kosovo's economy.<sup>509</sup> Alternatives to privatization were not seriously considered, no comprehensive assessment of other ways to realize Kosovo's economic potential was undertaken, and local input does not seem to have been deemed very relevant. The process indicates that statebuilders entered Kosovo as much to undo a socialist economy as to 'build' state institutions, reflecting how the ideological foundations of the liberal peace thesis are manifested in statebuilding targets.<sup>510</sup>

While the establishment of international statebuilding governance in Kosovo marked an end to Serbian rule and underlined Kosovo's separation from Serbia, international statebuilders assumed economic control unconcerned with the right to self-determination of the population. The internationally led privatization process appears to have been based on the political assumption that Kosovo is, and will remain, incapable of economic management, and that this warrants international interference with its right to self-determination and selling off (and pressing local leaders to sell) its property. With the international actors aiming for quick and massive privatization, strengthening Kos-

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<sup>506</sup> United Nations Kosovo Team, <http://www.unkt.org/?cid=2,24>, accessed on 9 July 2010.

<sup>507</sup> Knoll 2005, pp. 659–60.

<sup>508</sup> Ibid, p. 655.

<sup>509</sup> See Joseph Stiglitz's criticism of the Washington consensus: it 'confused means with ends: it took privatization and trade liberalization as ends in themselves, rather than as means to more sustainable, equitable, and democratic growth'. Stiglitz 1998: 'Towards a new paradigm for development: Strategies, policies, and processes', Prebisch Lecture, UNCTAD, Geneva, 19 October 1998, p. 1.

<sup>510</sup> Zaum 2007, p. 165, notes that privatization 'suggests that the standard of a free market economy has heavily influenced the statebuilding work of UNMIK'; Héthy 2002, p. s74.



ovo's local capacities for viable and longer-term socio-economic growth fell by the wayside.

Despite the questionable legacy of international privatization in Kosovo – which mirrors similar experiences elsewhere<sup>511</sup> – international officials have never ceased calling for swift and total privatization, also after the formal end to KTA's operations in June 2008.<sup>512</sup> The EU and the USA in particular have continued to push for privatization, insisting that 'Kosovo's economy needs to be liberated from the burden of the state' – claiming that this is the best and even 'only, way to ensure the long-term survival of independent Kosovo'.<sup>513</sup> Pro-privatization arguments now assert that the process is necessary to improve Kosovo's overall economic situation, fight corruption, secure foreign investment, and to make progress in the European integration process.<sup>514</sup> This outlook is also incorporated in the PAK law – which, similar to the rest of Kosovo's legal framework, was formulated by international officials:<sup>515</sup> 'the economic reconstruction and development of Kosovo and the welfare of its population is of paramount importance and requires the proper administration, privatization and liquidation of socially-owned enterprises in a timely manner'.<sup>516</sup>

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<sup>511</sup> See in particular Michael Pugh: 'Transformation in the political economy of Bosnia since Dayton', *International Peacekeeping*, 12, 3, 2005. See also Narten 2009, p. 257; Cramer 2009, p. 141; Former Deputy Finance Minister and Director of Privatization in the Ministry of Finance, the Czech and Slovak Federal Republic Dusan Triska: 'Privatization: Czechoslovakia', *Eastern European Economics*, Leuven Institute for Central and East European Studies, 1991, p. 27. A Kosovo MP remarks that he doubts that officials in charge of privatization in Kosovo can have read any of the literature on privatization (Naim Rustemi, interviewed by Hasimja for this project, Pristina, 6 May 2010).

<sup>512</sup> That international officials still play the key role in privatization in Kosovo, is illustrated by the fact that BSPK's July 2010 paper highlighting the problems with privatization was addressed to 'Embassies and diplomatic offices accredited to Kosovo', p. 2.

<sup>513</sup> Speech of the US Ambassador to Pristina, Christopher Dell, RIINVEST 14 May, 2010, calling for 'a free economy, unshackled from state interference and led by a competitive private sector', and for the speedy and complete privatization of all Kosovo's remaining publicly owned enterprises, accessed on 13 July 2010 at <http://www.aabriinvest.net/?page=2,1>. See also speech of the International Civilian Representative (ICR)/ EU Special Representative (EUSR) Pieter Feith at the American University in Kosovo: 'Kosovo's future belongs to you', 27 April 2010, claiming that privatization will 'send the signal that Kosovo can be an attractive destination for large-scale investment and is a reliable partner', accessed on 13 July 2010 at <http://www.icos.org/?id=28>.

<sup>514</sup> See e.g. *ibid* and EC: 'Communication from the Commission to the European Parliament and the Council: Kosovo – fulfilling its European perspective', 14 October 2009, especially p. 6: 'Kosovo needs to make further progress with privatisation' and pp. 10–11. One analyst labels the latter argument 'blackmail'. (Interview by author, Pristina, 10 May, 2010.)

<sup>515</sup> See e.g. Woodward in Fischer and Schmelzle (eds) 2009: in Bosnia-Herzegovina, Macedonia and Kosovo 'the model for their independent states was drafted by outsiders, either US government lawyers (from the State Department and the National Security Council) or US and EU diplomats – and not even translated into local languages', p. 50.

<sup>516</sup> PAK Law, p. 1.

The continued international engagement in privatization in Kosovo indicates an involvement aimed more at creating *reliable partners* able to implement Western-liberal economic and security standards, than at building capacities or ensuring longer-term development and justice.<sup>517</sup> Instead of promoting democratic governance or real local empowerment, international officials tend to exclude or co-opt local influence, distinguishing ‘between friend and enemy in terms of the willingness to accept external aid and guidance’.<sup>518</sup> To some extent, this de-politicizing, functionalistic approach to liberal reform mirrors a broader Western development, where governance is redefined in terms of effectiveness and ‘competent risk management’, while ‘social and political conflicts of a material kind’ are discredited.<sup>519</sup> The logic of political ‘rule by ‘expertise’ – whereby public policy is justified and framed in terms of ‘sound’ management and not in terms of reaching a political accommodation between competing interests – is evident also in international statebuilding projects,<sup>520</sup> where power is ‘no longer used towards compensating for uneven allocation tendencies of liberal markets, but actually towards legitimizing market extension.’<sup>521</sup>

While highlighting statebuilding’s de-politicization of liberal economic reform including privatization, this report has also indicated a *politicization of law* in the international involvement in privatization in Kosovo. International officials involved in the process concentrated on making privatization legal and executing it without exposing themselves to risk – constructing a comprehensive legal framework for regulating property matters in Kosovo was principally a means to this end. In consequence, Kosovo today is left with an overly intricate framework for socio-economic development. Resolution of central economic, legal and political issues – like the status of socially owned land and how Kosovo’s former SOEs might contribute to overall growth – has been delayed. Uncertainty and wrangling are likely to continue. Statebuilders’ aversion to liability might be the single most important cause of these consequences,<sup>522</sup> reflecting the scholarly criticism that although international officials operate with imperial

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517 Woodward, paraphrased in Pureza et al. 2007, p. 6; Duffield 2007, p. 224 and 166; Pugh 2005, p. 457.

518 See e.g. Chesterman 2009, p. 25; Duffield 2007, pp. 192 and 176.

519 Hameiri 2009, pp. 66-71.

520 Ibid. Shllaku’s description of the international involvement in privatization in Kosovo reflects this: ‘we have been *ruled by experts* – from the IMF, World Bank and USAID – and whatever they presented, we accepted’ (author’s interview).

521 Hameiri 2009, p. 70.

522 See Zaum 2007, p. 166.

powers in targets, they are wary of being held responsible for the effects of the exercise of these powers.<sup>523</sup>

A noteworthy consequence of the international liability fears prominent in discussions on privatization in Kosovo is that the significant process of liquidating SOE ‘shells’ – legally registered SOEs made up of sales proceeds, as well as ownership and creditor claims – is still incomplete.<sup>524</sup> Liquidation was meant to be the final stage in privatizing SOEs, where ownership issues, allocation of proceeds, and (alleged) debt would be clarified by committees reviewing all claims for each enterprise. However, due to international statebuilders’ hesitation to define ownership, because of fears of being held to account, the KTA did not complete any of the liquidations it initiated.<sup>525</sup> Not one enterprise has been liquidated through this process so far. Liquidation committees started working only in 2010, with international members appointed by the ICR having with the deciding word, and local members appointed by PAK.<sup>526</sup> Around 600 enterprises stand in line for liquidation, and the total number of claims has been projected at 150.000.<sup>527</sup> Given the legal complexity, scale, and political impact of claims – and the precedence expected from the first cases – no liquidation is likely to be finalized before 2011 at the earliest.<sup>528</sup>

As of 30 December 2009, total proceeds from privatization in Kosovo amounted to 451,041,297 Euro, and these will be distributed during liquidations.<sup>529</sup> That this sum remains deposited in foreign banks, and is not invested in ways from which Kosovo might benefit more directly, has received considerable criticism.<sup>530</sup> Isolation of the funds from Kosovo’s economy has been found to have ‘a negative effect on economic growth’.<sup>531</sup> In late March 2010, a clash occurred between the Kosovo Central Bank and PAK, with PAK demanding that the privatization funds be transferred to Kosovo. Thus far, this has not

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<sup>523</sup> Chandler 2006.

<sup>524</sup> This section deals with the liquidation of SOE ‘shells’ – not with the type of ‘bankruptcy’ liquidation chosen by the KTA as a method to deal with non-going concern SOEs (which amounted to an estimated 10% of all SOEs) at the time of privatization.

<sup>525</sup> EC representative on the PAK Board, Janmaat, author’s interview.

<sup>526</sup> PAK: ‘Rules of Procedure of the Liquidation Review Committees’, 8, undated document in possession of the author; UNMIK Economic Policy Office 2007, p. 15.

<sup>527</sup> UNMIK Economic Policy Office 2007, p. 15.

<sup>528</sup> Mulaj, author’s interview.

<sup>529</sup> Republic of Kosova Office of the Auditor General: ‘Audit Report on the Financial Statements of the Privatisation Fund for the period from 01 October 2007 to 31 December 2009’, Pristina, July 2010, p. 8.

<sup>530</sup> Several civil society analysts interviewed by the author brought up this point. Tahiri often responded to such criticism in his capacity as KTA spokesperson, explaining that it is based on a misunderstanding. (Author’s interview).

<sup>531</sup> Forum 2015: ‘Privatization and post-privatization in Kosova’, Pristina, 2008, p. 35.

happened – because international officials are worried about claims from possible owners and creditors,<sup>532</sup> and because it is stressed as important that Kosovo does not have an internationally recognized credit rating system.<sup>533</sup> On 12 May 2010, ICR Pieter Feith notified Kosovo's Economy and Finance Minister Ahmet Shala that Kosovo could not benefit from the privatization funds, since they are reserved for creditors and owners, and that most of the money was likely to be allocated to *creditors* through the liquidations.<sup>534</sup>

Finalizing the SOE liquidations means that international statebuilders will have to clarify their position on some of the unique features of Kosovo's privatization. The liquidations will confront issues of original and ultimate ownership, legitimate beneficiaries for the 80% of the proceeds not reserved for SOE workers,<sup>535</sup> (non-)validity of the 1990s transformations, defining 'society' in legal terms, the status of former SOE land, and the solidity of creditor claims. It remains to be seen how the internationally led liquidation committees will handle these issues in practice. Liquidations are likely to be fraught with controversy and disagreement, with ramifications not only for Kosovo, but also UN, EU and other statebuilding operations elsewhere in the world. Their completion is eagerly awaited by those who expect this to be the moment when Kosovo finally gains from internationally led privatization.<sup>536</sup> Others, however, insist that the proceeds will not benefit Kosovo but will go to creditors and owners, who are mostly Serb.<sup>537</sup> Some fear that liquidations may become a source of social conflict.<sup>538</sup> The fact that the Special Chamber will handle appeals to liquidations, again leaving UNMIK with significant formal, exclusive authority, shows residual international power over significant parts of Kosovo's economy.

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<sup>532</sup> See e.g. Peter Grasmann, Head of Unit for Economic Affairs in the Western Balkans in DG ECFIN quoted by the European Commission Economic and Fiscal Affairs: 'Kosovo: An economy on hold' (undated): 'There are many appeals concerning the ownership, and thus the beneficiaries, of the privatization. For that reason, the privatization receipts are now set aside in trust funds and cannot yet benefit the Kosovo economy'. Accessed on 10 July 2010 at [http://ec.europa.eu/economy\\_finance/een/008/article\\_6170\\_en.htm](http://ec.europa.eu/economy_finance/een/008/article_6170_en.htm)

<sup>533</sup> Janmaat explains: 'according to the PAK law and the Ahtisaari plan, privatization proceeds have to be invested in instruments with at least an investment grade' (author's interview).

<sup>534</sup> Letter from Pieter Feith in his capacity as ICR to Ahmet Shala, 12 May 2010, in possession of the author.

<sup>535</sup> Although disagreement persists on individual workers' eligibility, the 20% figure is not itself contested.

<sup>536</sup> High-level politician, author's interview, Pristina April 2010. Former Privatization Director Johnson expressed similar expectations in email interview by author.

<sup>537</sup> Head of the think-tank GAP and former World Bank official Ahmeti, author's interview.

<sup>538</sup> Legal scholar Muharremi, author's interview.

In the end, it seems clear that the international statebuilding project's narrow focus on how to privatize legally in Kosovo in line with the liberal peace thesis, without exposing international officials themselves to liability, has come at the expense of formulating and realizing a Kosovo-specific, comprehensive and longer-term development strategy. It remains an open question why none of the international resources spent directly and indirectly on preparing, promoting, and carrying out privatization in Kosovo were ever channelled into creating and implementing such a strategy, on offering assistance with effective management of enterprises under international administration, or in other ways more directly promoting employment and welfare. International budgets were spent on international staff at the KTA, EU Pillar, UNMIK, UN and the EU, associated international consultants, and on local officials and analysts enlisted to work on relatively well paid privatization-promoting projects within the international statebuilding project or at internationally funded NGOs and media – effectively preventing resourceful people from contributing to Kosovo's development in other ways.

International statebuilders might have achieved responsibility-free privatization in Kosovo – but the wider domestic population does not seem to have benefited from the process. The losers, then, 'are those who always lose':<sup>539</sup> those who were already disadvantaged, with no social security, and few opportunities for political or economic empowerment.

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<sup>539</sup> Author's interview with privatization observer, Pristina, June, 2010.

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Statistical Office of Kosovo: [www.ks-gov.net/ESK/eng](http://www.ks-gov.net/ESK/eng)

Transitions Online: [www.tol.org](http://www.tol.org)

UN: [www.un.org](http://www.un.org)

Union of Independent Trade Unions of Kosova (*Bashkimit të Sindikatave të Pavarura të Kosovës*):

[www.bspk.org/ENG/home.html](http://www.bspk.org/ENG/home.html)

United Nations Development Programme (UNDP) in Kosovo:

[www.ks.undp.org](http://www.ks.undp.org)

United Nations Kosovo Team: [www.unkt.org](http://www.unkt.org)

United Nations Interim Administration Mission in Kosovo (UNMIK):

[ww.unmikonline.org](http://ww.unmikonline.org)

UNMIK Official Gazette (of UNMIK Regulations):

<http://www.unmikonline.org/regulations/index.htm>

United States Agency for International Development (USAID):

[ww.usaid.gov](http://ww.usaid.gov)

World Bank: [web.worldbank.org](http://web.worldbank.org)

World Investment News: [www.winne.com](http://www.winne.com)

Zëri: <http://www.zeri.info/index.php>