

International Territorial Administration in the former Yugoslavia: Origins, Developments and Challenges ahead

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“ ... in its future development the law governing the trust is a source from which much can be derived”

Sir Arnold McNair, Separate Opinion, ICJ,
Status of South-West Africa, 1950

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I. Introduction

In recent years, UN peace maintenance has developed beyond its traditional bounds. One of the most striking examples is the administration of territories by the UN.¹ The world organization has in a number of cases assumed executive tasks by exercising temporary governmental authority in territories requiring international assistance in the reconstruction of their internal order or temporary international surveillance within the context of a transfer of territory from one state to another.

The idea that countries may receive temporary assistance in governance from foreign authorities is not new in the history of international organizations. The League of Nations authorized individual states to administer the former colonies and dependent territories of nations defeated in World War I. After World War II the UN Trusteeship System was established by Chapters XII and XIII of the UN Charter placing territories under the administration of fully developed states acting as trustees. In the post-Cold War period the UN has started to conduct more and more ambitious peacekeeping operations in situations of internal strife (UNTAC in Cambodia², UNOSOM in Somalia³), entrusting multinational forces

¹ For a survey of the UN practice, see J. Chopra, UN Civil Governance-in-Trust, in: T.G. Weiss (ed.), *The United Nations and Civil Wars*, 1986, 69 et seq.; S.R. Ratner, *The New UN Peacekeeping*, 1996; F.-E. Hufnagel, *UN-Friedensoperationen der zweiten Generation*, 199; J.A. Frowein, *Notstandsverwaltung durch die Vereinten Nationen*, in: *Festschrift Rudolf* (forthcoming).

² In Cambodia, the UN operation was governed by the Paris Agreement on a Comprehensive Political Settlement of the Cambodia Conflict of 23 October 1991. Art. 3 of the Accord vested sovereignty in a Supreme National Council (SNC) composed of representatives of Cambodian factions. Art. 6 then went on to state: “The SNC hereby delegates to the United Nations all powers necessary to ensure the implementation of this Agreement, as described in Annex 1.” For a detailed legal analysis of the agreement, see S.R. Ratner, *The Cambodia Settlement Agreements*, *AJIL* 87 (1993), 1–41.

³ See SC Res. 814 for the mandate of UNOSOM II, which operated on the presumption that there was no sovereign authority in Somalia. See on peace maintenance in Somalia, J. Chopra, *Peace-Maintenance, The Evolution of International Political Authority*, 1999, at 123 et seq.

and UN special representatives with classical state powers such as the establishment of civil authority or the exercise of administrative and legislative functions.

In the aftermath of the conflict on the territory of the former Federal Socialist Republic of Yugoslavia, however, the practice of administering territories by organs of the international community seems to have reached a new dimension. By using its powers under Chapter VII of the UN Charter, the Security Council has, most recently in the cases of Bosnia and Herzegovina (BiH) and Kosovo, authorized international administrators to exercise governmental functions which have been interpreted as to encompass the power to adopt legal acts with direct and immediate effect on the local population.⁴ Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina⁵ has vested the High Representative (HR) with very broad powers in connection with the civilian implementation of the peace agreement. It declares him "the final authority" to interpret the civilian aspects of the peace settlement.⁶ The extent of authority conferred upon the HR at Dayton is rather unusual. Traditionally, the power to interpret an international agreement belongs to the contracting parties or a judicial or arbitral body appointed by them. In the case of the Dayton Peace Agreement (DPA), however, such power is conferred on a civilian authority, which was nominated by the Steering Board of a group of 55 governments and international organizations involved in the peace process (the Peace Implementing Council, PIC⁷), and then endorsed by the Security Council.⁸ Since the concrete and specific powers entrusted to the HR by the Dayton Agreement were not fully clear, the PIC has subsequently elaborated on his mandate. Perhaps the most far-reaching step was the

⁴ See in the case of BiH SC Res. 1031 of 15 December 1995 and SC Res. 1144 of 19 December 1997, in the case of Kosovo SC Res. 1244 of 10 June 1999. For an appraisal of the power of the Security Council to "frame the constitutional structures of a state", see C. Tomuschat, *Yugoslavia's Damaged Sovereignty over the Province of Kosovo*, in: *Festschrift für Kooijmans* (forthcoming).

⁵ General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, initiated at Dayton, Ohio on 21 November 1995, signed in Paris on 14 December 1995, reprinted in: I.L.M. 35 (1996), at 75 et seq.

⁶ Art. V of Annex 10 provides that the High Representative "is the final authority in theatre regarding interpretation of this Agreement on the Civilian Interpretation of the Peace Settlement."

⁷ Following the negotiation of the Dayton Peace Agreement, a Peace Implementation Conference was held in London on December 8–9, 1995, to "mobilise the international community behind a new start for the people of Bosnia and Herzegovina." The meeting resulted in the establishment of the PIC. See *Conclusions of the Peace Implementation Conference held at Lancaster House, London, 8–9 December 1995*, reprinted in: I.L.M. 35 (1996), at 223 et seq. The PIC comprises 55 governments and agencies, who support the peace process in many ways by assisting it financially, by providing troops for SFOR, or by running operations specific to Bosnia and Herzegovina. Since the London Conference, the PIC has come together at the ministerial level another five times to review progress and define the goals of peace implementation, namely in June 1996 in Florence, in December 1996 for a second time in London, in December 1997 in Bonn, in December 1998 in Madrid, and in May 2000 in Brussels. For the conclusions and declarations of the PIC conferences, see <http://www.ohr.int>. The actions of the PIC are reported to the Security Council.

⁸ See SC Res. 1031 of 15 December 1995, para. 26 and 27, whereby the Security Council, acting under Chap. VII "endorses the establishment of the High Representative" and "confirms that the High Representative is the final authority in theatre regarding interpretation of Annex 10". For a reaffirmation, see SC Res. 1256 (1999), para. 4.

adoption of the conclusions of the PIC Conference in Bonn (1997), by which the Council approved the HR's authority to remove from office public officials violating legal commitments of the DPA and his power to impose interim legislation in situations where BiH's national institutions fail to do so.⁹ The "Conclusions of the Peace Implementing Conference held in Bonn" and the "final authority" of the HR regarding Annex 10 of the DPA were then again approved by the Security Council.¹⁰

Five years after the signing of the DPA, the HR has adopted an impressive amount of laws and decisions in his capacity as a "stand-in legislator"¹¹, filling all too often a legal vacuum created by the inaction of the ethnically divided institutions of the central state¹², whose decision-making structure resembles more the work of a state conference than that of a federal state. The HR has not only used his "new" normative powers to impose national state symbols, such as the flag, the design of the currency or common vehicle licence-plates, but also decreed important legislation, especially in the field of property protection or the national judiciary. In a recent case, the HR has even gone one step further. Although there is no explicit provision in the Dayton Agreement which gives him a right of constitutional review over the promulgation of laws enacted by parliament, the HR has overruled certain provisions of a law adopted by the national parliament, arguing that the law violated the Bosnian Constitution.¹³ Moreover, in his most recent decision-making practice, the HR has exercised severe pressure on the two Entities by imposing final and binding arbitration on an Inter-Entity Boundary Line in

⁹ In paragraph XI of its conclusions, the PIC "welcomes the High Representative's decision to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement ... by making binding decisions, as he judges necessary, on the following issues: ... b. interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned; c. other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the institutions. Such measures may include actions against persons holding public offices or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation."

¹⁰ For a cautious approach of the Security Council in interpreting the powers of the High Representative, see Res. 1088 (1996) of 12 December 1996, whereby the Council reaffirms that the HR may, in case of dispute "give his interpretation and make his recommendations, including to the authorities of Bosnia and Herzegovina or its Entities, and make them known publicly." However, in para. 2 of Res. 1144 of 19 December 1997, the Security Council "expresses its support for the conclusions of the Bonn Peace Implementation Conference" (emphasis added). For a reaffirmation of the "final authority" of the HR, see para. 4 of Res. 1256 of 3 August 1999.

¹¹ For the list of laws and decisions adopted by the HR, see <http://www.ohr.int>.

¹² For a survey of the particularities of the Bosnian constitutional system, see C. Stahn, Die verfassungsrechtliche Pflicht zur Gleichstellung der drei ethnischen Volksgruppen in den bosnischen Teilrepubliken – Neue Hoffnung für das Friedensmodell von Dayton?, in: *ZaöRV* 60 (2000), 663 et seq.

¹³ See Decision on Amending the Law on Filing a Vacant Position of the Member of the Presidency of Bosnia and Herzegovina of 7 August 2000, available under <http://www.ohr.int>.

Sarajevo¹⁴ and by establishing Constitutional Commissions in both Entities¹⁵, in order to guarantee the immediate implementation of a ruling of the BiH Constitutional Court in the so-called “constituent peoples” case¹⁶, requiring the Entities to modify certain provisions of their constitutions.

The legal order of BiH which derives from an international agreement is one of the most striking examples of an “internationalized” state system. The far-reaching influence of the international community on BiH’s state system is reflected in a number of provisions of the DPA other than its Annex 10. The commander of SFOR, for example, enjoys equally extensive powers as the HR with regard to the implementation of the military related provisions of the peace settlement. He is “the final authority in theatre” regarding military aspects of the DPA.¹⁷ In addition, the constitutive instruments formulated at Dayton have established a set of international institutions with jurisdiction to protect and enforce human rights, such as the Human Rights Chamber or the Commission for Displaced Persons and Refugees.¹⁸

The United Nations Interim Administration in Kosovo (UNMIK)¹⁹ has more extensive authority than any previous UN peacekeeping mission, and even more powers than the HR in BiH. The Security Council, by its resolution 1244 (1999) of 10 June 1999, authorized the Secretary-General to establish an international civil presence in Kosovo, in order to provide an interim administration under which the people of Kosovo could enjoy substantial autonomy. The first regulation passed by UNMIK, in July 1999, vested “all legislative and executive authority, including the administration of the judiciary” in the hands of the Special Representative of the Secretary-General (SRSG).²⁰ The SRSG may change, repeal or

¹⁴ See the Decision imposing Arbitration in Dobrinje I and IV of 5 Feb. 2001, by which the OHR has substituted the Entities agreement to a procedure specified under Annex 5 of the DPA. The decision is available under <http://www.ohr.int>.

¹⁵ Cf. Decision establishing interim procedures to protect vital interests of Constituent Peoples and Others, including freedom from Discrimination of 11 Jan. 2001. The substantive role of the HR in the work of these Commissions is reflected in para. 10 of the decision, which reads: “In the event that the Constitutional Commission concerned fails ... to reach an Agreement supported by a majority of the delegates of each of the constituent peoples and Others, the said Commission shall ... lodge with the Office of the High Representative an application for the High Representative to resolve the issue finally in a manner as he deems to be appropriate, in accordance with the mandate given to him by the international community.” The decision is available under <http://www.ohr.int>.

¹⁶ See on this ruling, Stahn, note 12, at 679 et seq.

¹⁷ See Art. XII of the Agreement on the Military Aspects of the DPA.

¹⁸ For the competences of the Human Rights Chamber, see Arts. VII-XII of Annex 6 to the DPA, for the Commission for Displaced Persons and Refugees, see Arts. VII-XVIII of Annex 7.

¹⁹ See generally on UNMIK, E. Lagrange, *La mission intérimaire des Nations Unies au Kosovo, nouvel essai d’administration directe d’un territoire*, in: AFDI 1999, 335 et seq.; T. García, *La mission d’administration intérimaire des Nations Unies au Kosovo*, RGDIP 104 (2000), at 61 et seq.; Lawyers Committee for Human Rights, *A Fragile Peace: Laying the Foundations for Justice in Kosovo*, in: East European Human Rights Review 5 (1999), 1 et seq.; E. Pichl, *Kosovo – “Kriegsrecht”*, *Faustrecht und UN-Recht, Rechtliche Aspekte des Wiederaufbaus*, in: Südosteuropa 48 (1999), 646 et seq.; M. Wagner, *Das erste Jahr der UNMIK*, in: Vereinte Nationen 4 (2000), at 132 et seq.

²⁰ See Section 1, para. 1 of Reg. No. 1999/1 of 25 July 1999.

suspend existing laws which are incompatible with the mandate, aims or purposes of UNMIK.²¹ He is also entitled to issue new legislative acts in the form of regulations, which remain in force until repealed by UNMIK or superseded by rules subsequently issued by the future political institutions of Kosovo.²² The Special Representative may, furthermore, “appoint any persons to perform functions in the civil administration of Kosovo, including the judiciary”, and remove them from office.²³

These few examples demonstrate that the degree of governmental authority exercised by the SRSG and the HR differs considerably. The UN assumes full and exclusive responsibility for conducting the affairs of state in Kosovo, whereas the High Representative in BiH exercises his authority in a joint form of administration, sharing this responsibility with the constitutional organs of the state of BiH.²⁴

Nonetheless, both types of territorial administration are built upon the same basic premises. In both cases, agents of the international community perform governmental functions with the authorization of the Security Council and “in trust”, that is, in the interests of the territory in question. The exercise of administrative powers therefore differs significantly from a colonial or imperial rule, where administrative tasks were carried out in the individual interests of the administering state. Moreover, the nature of authority exercised by the administrators is in both cases of an international character. In the case of Kosovo, the Special Representative acts directly as an organ of the UN. Accordingly, his actions and decisions are attributed to the UN organization as a whole and not to individual states. The HR derives his authority from several sources: partly from the parties to the DPA, partly from the PIC, which is a group of states acting on behalf of the international community²⁵, and partly from the Security Council.²⁶ When studying the wording of the DPA, one might be tempted to conclude that the HR is not an institution created by the parties to the DPA, but rather a subsidiary organ of the Security Council, because Art. I, para. 2 of Annex 10 reads:

²¹ See Report of the Secretary-General on the United Nations Interim Administration in Kosovo of 12 July 1999, UN-Doc. S/1999/779, at 39.

²² See Section 4 of Reg. No. 1999/1 of 25 July 1999.

²³ See Section 1, para. 2 of Reg. No. 1999/1 of 25 July 1999.

²⁴ For a detailed comparison of the different models of international administration in BiH and in Kosovo, see N. Maziau/L. Pech, *L'administration internationale de la Bosnie-Herzégovine: un modèle pour le Kosovo?*, in: *Civitas Europa* (4), March 2000, 51 et seq.

²⁵ The PIC acts as the “overall structure supervising peace implementation in BiH”. See conclusions of the PIC Conference in London, 4–5 December 1996, in particular, the decisions concerning co-ordination structures. The fact that PIC conceives its role as a task exercised on behalf of the international community follows from the frequent references to this notion in the documents issued by the PIC. See, for example, para. 3, 4, 19, 28, 31 of the Conclusions of the PIC Conference in London, 8–9 December 1995, and para. 5 and 6 of the Conclusions of the PIC Conference in Florence, 13–14 June 1996.

²⁶ See also O. Dörr, *Die Vereinbarungen von Dayton/Ohio*, in: *Archiv des Völkerrechts* (1997), 129 et seq, at 137; L. Pech, *La garantie internationale de la Constitution de Bosnie-Herzégovine*, in: *Revue Française de Droit Constitutionnel* 42 (2000), 421 et seq., at 431.

“the Parties request the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties’ own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations involved in the civilian aspects of the peace settlement by carrying out, as entrusted by a United Nations Security Council resolution, the tasks set out below” (emphasis added).

International practice has, however, developed in a slightly different way. The Security Council has delegated most of its tasks to the states actively involved in the peace process, leaving it to the PIC to nominate the HR and to elaborate on his mandate, while maintaining its role of final authorization²⁷ exercised on the basis of reports by the HR²⁸ and the PIC²⁹ to the Security Council.

Furthermore, both types of governance seem to reflect different models of administration. The Rambouillet Agreement³⁰, which was based on the assumption that the Federal Republic of Yugoslavia (FRY) would continue to exercise governmental authority in Kosovo, was in large parts modelled after the Dayton Agreement.³¹ A particularly striking parallel to the DPA may be found in the role assigned to the Chief of the Implementation Mission (CIM), who under Chapter 5 Art. II of the Rambouillet Agreement was supposed to “supervise and direct the implementation of the civilian aspects of the agreement pursuant to a schedule” that he should specify. According to Art. V, the CIM should have been “the final authority in theatre regarding the civilian aspects of the agreement”, vested with the power to issue binding decisions and dismiss officers. The framework of the United Nations Transitional Administration East Timor (UNTAET), designed to facilitate the territory’s transition to independence, was clearly inspired by UNMIK’s regulatory structure. The UN Security Council endowed UNTAET with the “overall responsibility for the administration of East Timor” and the powers “to exercise all legislative and executive authority, including the administration of justice”.³²

These developments raise several questions. From a theoretical point of view, one may ask, if the interim administration systems currently deployed in BiH and in Kosovo follow the historical tradition of territorial administration under inter-

²⁷ See, for example, para. 2 of Res. 1144 of 19 December 1997, quoted above, and most lately, para. 1 of SC Res. 1256 of 3 August 1999, whereby the Security Council “agrees to the designation by the Steering Board of the Peace Implementation Council on 12 July 1999 of Mr. Wolfgang Petritsch as High Representative in succession to Mr. Carlos Westendorp.”

²⁸ The Security Council has requested the Secretary-General to submit reports from the High Representative, in accordance with Annex 10 of the DPA and the conclusions of the London PIC Conference, see para. 32 of SC Res. 1031 of 15 December 1995. The reports of the HR are available under <http://www.ohr.int>.

²⁹ See, for example, UN-Doc. S/1995/1029 by which the Conclusions of the PIC Conference in London, 8–9 December 1995, were reported to the Security Council.

³⁰ Interim Agreement for Peace and Self-Government in Kosovo of 23 February 1999, UN Doc. S/1999/648 of 7 June 1999, available under <http://www.un.org/peace/kosovo>.

³¹ For a comparison of the institutions, see International Crisis Group (ICG), Kosovo: Let’s Learn from Bosnia, Report of 17 May 1999, available under <http://www.crisisweb.org>.

³² See SC Res. 1272 of 25 October 1999.

national rule, which began with the League of Nations Mandates System and its responsibilities under the Treaty of Versailles and which was later continued by the UN within the framework of the Trusteeship System and UN peacekeeping; or if they mark, on the contrary, the beginning of a new form of internationally authorized transitional governance, a modern type of trusteeship (I).

A second issue (II), which is more practical in nature and which has been under debate recently³³, is the question to what extent acts of institutions such as the HR or the SRSG, are subject to judicial review. One may, on the one hand, doubt, whether acts of these organs may be repealed by national institutions of the territories concerned because the HR and the SRSG derive their authority from international law. But it is also evident that the legitimate exercise of legislative or executive authority in the interest of the territories concerned requires some form of accountability of the administering authorities.³⁴ The purpose of the international administrations in Bosnia and in Kosovo is to build up post-civil-war societies based on democracy and human rights. This goal cannot be achieved if the administering authorities are vested with unlimited powers, comparable to those of an absolute sovereign. The absence of any form of control or accountability would not only weaken legitimacy of the governing authorities but also run counter the mandate of the interim administrators which is to protect and promote human rights and the rule of law.³⁵

These arguments show that question I, concerning the legal nature of the international territorial administration, and question II, addressing the issue of legal protection, are linked. Both questions shall be dealt with in the following.

II. International Territorial Administration in Kosovo and Bosnia: A new Model of Trusteeship Administration?

1) Historical Precedents

International territorial administration under the authorization of international organizations is basically a twentieth-century development. Before the creation of the League of Nations, groups of states – usually victors after a war – entered into

³³ The issue of legal protection against acts of the HR and regulations of the SRSG has recently been addressed in two cases, see Constitutional Court of Bosnia and Herzegovina, *Decision No. U 9/00* of 3 November 2000, annexed to this article and available under <http://www.ustavnisud.ba>, and Kosovo Media Appeals Board, *Decision Beqaj & Dita v. Temporary Media Commissioner*, available under <http://www.osce.org/kosovo>.

³⁴ The principle of accountability is a concept which is inherent in the idea of a trust. It was realized in the mandates system of the League of Nations and the UN Trusteeship System which encompassed a mechanism of international accountability. See on this aspect, D. Rauschnig, in: B. Simma, *Charter of the United Nations*, 1994, Art. 75, at 933.

³⁵ See on the role of the UN in enhancing the rule of law, H. Corell, *International Rule of Law and the Mandate of the United Nations*, Address at the Conference on "Entering the 21st Century": Towards the Rule of Law in International Relations, Moscow, 2 Nov. 2000, available under <http://www.un.org>.

different forms of joint administrations, but they acted in their individual interests. The emergence of more formal collective arrangements of international organizations such as the League of Nations Covenant signified a fundamental change because, when assuming functions of local administration, the organization or its members did not act as sovereigns but as representatives of the international community. This is also clearly the idea underlying the exercise of authority by the current international administrations in the former Yugoslavia.

a) International protectorates

Occasionally, the term “international protectorate” is used in order to describe the system of governance established by the international community in Kosovo and in Bosnia.³⁶ However, this notion does not fully match the characteristics of the interim administration in these territories. By definition, an international protectorate is a legal relationship between a “protector” state and a “protected” state or group of states, whereby the latter gives up all or part of its control over foreign affairs while retaining a large measure of independence in internal matters.³⁷ The extent, to which the dominant state may interfere in local affairs was usually governed by a treaty between the two states.³⁸ Although the term “protectorate” covers a great variety of relations resulting in different degrees of dependence³⁹, it is, in the usual sense, restricted to state-to-state relations.⁴⁰ This is why, technically, neither UNMIK nor the international administration in Bosnia qualify as protectorates. This is obvious in the case of Kosovo, where the Security Council

³⁶ See Part 4 of the Report of the Independent International Commission on Kosovo (“For the moment, at any rate, Kosovo – legally still part of the FRY – is unmistakably a protectorate”), see also Part 9 of the same report which speaks of “the protectorate established by Res. 1244”. The report is accessible under <http://www.kosovocommission.org>. Judge Kréca qualifies Bosnia and Herzegovina in its dissenting opinion in the case concerning the application of the Genocide Convention as “a combination of a contractual relationship of two entities with a strongly installed element of an international protectorate.” See ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), judgment of 11 July 1996, Dissenting Opinion of Judge Kréca, ICJ Rep. 1996, 659 et seq., at 684, para. 24.

³⁷ See G. Hoffmann, “Protectorates”, in: R. Bernhardt (ed.), EPIL 3 (1987), at 1153 et seq. In case of a complete protectorate, the protected state has to refrain from all activities in the field of foreign affairs. In a “restricted protectorate” the protected state is still entitled to act in these matters, but subject to approval by the protector.

³⁸ See also W. M. Reisman, Reflections on State Responsibility for Violations of Explicit Protectorate, Mandate and Trusteeship Obligations, in: Michigan Journal of International Law 10 (1989), 231 et seq., at 233. One example for a protectorate by unilateral declaration is Egypt after 1914. For the non-compatibility of protectorates with the principle of sovereign equality enshrined in Art. 2 (1) of the UN Charter, see A. Verdross/B. Simma, Universelles Völkerrecht (1984), at 596.

³⁹ Crawford distinguishes entities which, despite protection, qualify as states (the so-called “protected states”) and entities, which, while not so qualifying enjoy some separate legal personality (the so-called “international protectorates”). See J. Crawford, The Creation of States in International Law, 1979, at 188 et seq.

⁴⁰ For a detailed description of the common features of protectorates, see A. Kamanda, A Study of the Legal Status of Protectorates in Public International Law, 1961, at 155 et seq.

has conferred⁴¹ crucial aspects of governmental authority such as the control over the internal and external affairs of the territory on the UN. It is less clear in the case of Bosnia, because the HR is not an organ of the UN, but an international agent nominated by the Steering Committee of a group of states, whose mandate has been approved by the Security Council. Nevertheless, what distinguishes both types of administration from the classical protectorate system is the fact that the “protecting powers” act on behalf of the international community, and not on behalf and in the interests of an individual state.⁴² Furthermore, despite the military presence of KFOR and SFOR in Kosovo and BiH, the overall objective of these missions is less the control of the external relations of the territories concerned, but rather the promotion of their internal reconstruction, which is atypical of a protectorate.⁴³

b) The Mandates System of the League of Nations and the UN Trusteeship System

The territorial administration in Kosovo and in Bosnia bears some resemblance to the mandate system of the League of Nations and the UN Trusteeship System. The League of Nations initiated the Mandates System to deal with the former colonies and dependent territories of the German and the Turkish Empires. The territories were administered as mandates of the League. The main characteristics of the Mandates System that were to differentiate it from classical European colonialism⁴⁴ were the international character of authority and the purpose of the foreign rule. The territories were meant to be administered in trust and in transition, with a view to preparing the indigenous population for eventual self-rule and independence. The main principle governing the Mandates System, that is tempo-

⁴¹ The consent of the Federal Republic of Yugoslavia to the establishment of UNMIK is expressly stated in the Preamble of SC Res. 1244. Furthermore, the implementation of the military aspects of the mission are governed by the Military Technical Agreement between the International Security Force (“KFOR”) and the governments of the Federal Republic of Yugoslavia and the Republic of Serbia, available under <http://www.kforonline.com>. However, despite these consensual attributes, the establishment of the international presence in Kosovo cannot be qualified as an operation by agreement. The deployment of UNMIK and of KFOR in Kosovo is in essence unilaterally determined by a Chapter VII Res. of the Security Council, which remains the main source of authority. See also Tomuschat, note 4. For a critical analysis of the concept of “consent” within the context of the law of occupation, see J. Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, in: *EJIL* 2001 (forthcoming).

⁴² A parallel may be drawn to the situation under the mandates of the League of Nations or the UN Trusteeship System, which both did not create an international protectorate between the administering state and the administered territory since the governing authority exercised its powers on behalf of the organization. See Hoffmann, note 37, at 1154.

⁴³ See also Maziau/Pech, note 24, under II, using the French terms “tutelle” (Kosovo) and “curatelle” (BiH) in order to describe the system of international administration established in Kosovo and BiH.

⁴⁴ Trust or mandate status was an improvement on colonial status. Colonies explicitly lacked international personality and could not legally contest their treatment by the colonizer. Both the Mandates System and the UN Trusteeship System, however, gave international status to the administered territories and provided for a supervision mechanism.

rary administration on behalf of the international community and in the interest of the local population, is also inherent in the current model of administration used in Kosovo and in BiH.

However, one fundamental difference is that the system of governance, laid down in Art. 22 of the Covenant of the League, was not a truly international administration of territory. The mandated territories were not administered by an international institution but by mandatory states who were obliged to promote the well-being and development of the territories.⁴⁵ Tutelage was entrusted to advanced nations acting as mandataries on behalf of the League. The League, in turn, exercised some kind of control over the mandataries through annual reports submitted to the Permanent Mandates Commission and general information provided by the administering states. But the League could demand little accountability from its members. Neither the Covenant nor the mandates contained any provisions concerning visits of inspection to the territories. Moreover, in case of a violation of provisions of the mandate, the mandatory state could veto any decision of the Council of the League because of the prevailing unanimity rule.

The Trusteeship System, established by Chapter XII and XIII of the UN Charter, replaced and extended the Mandates System. It applied to three different categories of territories: the former mandate territories, territories detached from enemy states after the Second World War⁴⁶ and territories voluntarily placed in the system by the states responsible for their administration.⁴⁷ Trusteeship was again designed to guide the administered territories toward self-government and independence. Extending the powers of the Permanent Mandates Commission, the Trusteeship Council was given power to directly receive oral and written petitions, and to send visiting missions which it did every three years until all Trust Territories became independent. The provisions governing the administration of the territories were contained in trusteeship agreements. The powers of the administering state included full legislative, administrative, and judicial authority, and, in certain cases, the right to treat the territory as if it were part of the administering state.

A significant difference between the system under the Covenant and the UN Trusteeship System is that the UN Charter provides for a direct form of territorial administration by the organisation. Art. 81 of the Charter permits the admin-

⁴⁵ In his separate opinion in the *South West Africa* Case, Judge Sir McNair noted that in one of the earliest documents of the Mandates System, the authority, control or administration of territories should be vested with the League, but because "joint international administration" of territories had "been found wanting wherever it has been tried", it was preferable that instead of exercising these powers itself, the League "should delegate them to a mandatory state." See ICJ, *International Status of South West Africa*, Advisory Opinion of 11 July 1950, Separate Opinion of Sir A. McNair, ICJ Rep. 1950, 146 et seq., at 147.

⁴⁶ The former Italian colony of Somaliland was the only territory detached from an enemy state as a result of World War II.

⁴⁷ See Art. 77 of the UN Charter.

istering authority to be one or more states or the UN itself.⁴⁸ The concept of governance, underlying Chapters XII and XIII of the Charter, is therefore more flexible than the Mandates System. In practice, however, the UN has never exercised this function.⁴⁹ In 1947, the Trusteeship Council drafted a trust agreement for the City of Jerusalem designating the UN as the administering authority, with the Trusteeship Council administering the territory through a governor acting on behalf of the UN.⁵⁰ But the agreement was never implemented due to the outbreak of the 1948 war.⁵¹

With the independence of Palau in 1994, the classical UN Trusteeship System, marking the transition from colonial rule to self-government or statehood has found its preliminary end. All territories formerly under trusteeship have attained self-government or independence, either as separate states or by joining neighbouring independent countries. The Trusteeship Council therefore suspended operation on 1 November 1994.⁵² Nevertheless, building on the assumption that the "Trusteeship Council is one of the lesser known success stories of the United Nations", it has been suggested that the Council be used as a means of resolving self-determination disputes or dealing with "failed states".⁵³ Objectives of the Council would remain as in Art. 76 of the Charter, "to further international peace and security, to promote progressive development toward self-government or independence, to encourage respect for human rights and fundamental freedoms, and to ensure equal treatment in social, economic, and commercial matters for UN Member States and their nationals."⁵⁴ New "trust territories" would be voluntarily placed into trusteeship by the states responsible for their administration, as

⁴⁸ The idea that the UN itself should become an administering authority was based on the belief that, in some cases, the organization might be more impartial or would have a broader outlook than a single member state. See L. M. Goodrich [et al.], *Charter of the United Nations, Commentary and Documents*, 1969, at 501.

⁴⁹ The organization has never acted as an administering authority under the Trusteeship System. Usually, single states have been appointed as administering authorities, with the exception of Nauru where the UK, Australia and New Zealand became the official administrators. See Rauschnig, note 34, Art. 81, at 956.

⁵⁰ The executive functions of the governor included preservation of public order, operation of a government, conduct of foreign affairs, supervision over religious bodies, and special authority over the holy places. He could veto any bills inconsistent with the statute and was given power to conclude treaties. See Statute for the City of Jerusalem (Draft Prepared by the Trusteeship Council), UN TCOR, 2nd Sess., Third Part, Annex, p. 4., UN Doc T/118/Rev.2, 1948.

⁵¹ See C. Toussaint, *The Trusteeship System of the United Nations*, 1956, at 208. The city was then divided between Israel and Jordan between 1949 and 1967.

⁵² By a resolution adopted on 25 May 1994, the Council amended its rules of procedure to drop the obligation to meet annually and agreed to meet as occasion required – by its decision or the decision of its president, or at the request of a majority of its members or the General Assembly or the Security Council.

⁵³ See M.H. Halperin/D.J. Scheffer/P.L. Small, *Self-Determination in the New World Order*, 1992, at 113.

⁵⁴ See Halperin/Scheffer/Small, *ibid.*, at 113. Others have suggested to extend the notion of trusteeship even further to include "common heritage". De Marco and Bartolo propose that "the Trusteeship Council should hold in trust for humanity its common heritage and its common concerns: the environment, the protection of the extra-territorial zones and the resources of the sea

provided for in Art. 77 al.1 c of the Charter. The administering authority could be either the UN, or one or more states.

Unfortunately, the problems connected with such an approach are numerous. A first hurdle is the wording of the UN Charter which precludes application of the Trusteeship System to member states of the United Nations because the relationship between these states is based on respect for the principle of sovereign equality. The text of Art. 78 of the Charter provides that "the trusteeship system shall not apply to territories which have become Members of the United Nations". Thus, in principle, Art. 78 of the Charter would have to be amended, or the Organization would have to determine that a state is no longer a member of the United Nations, in order to apply the Trusteeship System to UN member states.

Given Arts. 77 and 78 of the Charter, it is also unclear whether the Security Council might simply impose a trusteeship status on a state. Forcibly placing a state under the UN Trusteeship System might go beyond what is permitted even by Chapter VII, because Art. 77 of the Charter makes it clear that territories can only be administered under the system when they have been placed there by means of an individual agreement with the UN. One may therefore argue that by imposing trusteeship status the Security Council would directly contravene express provisions of the Charter thereby violating Art. 24 (2) of the Charter which states that the Council "shall act in accordance with the Purposes and Principles of the United Nations" when carrying out its duties.⁵⁵

It would seem though that the Charter allows UN member states to voluntarily place parts of their territory under the Trusteeship System. Technically, Art. 78 of the Charter is not an obstacle here, because the conflict which it seeks to prevent, namely a violation of the principle of sovereign equality, cannot arise in this situation.⁵⁶ Furthermore, given its historical context, Art. 78 of the Charter must be interpreted restrictively. The provision had a purely declaratory function when it was adopted. It was only added to the UN Charter in order to indicate that Syria and Lebanon, who had become legitimate members of the UN founding conference by declaring war on Germany in February in 1945, could not be placed under UN Trusteeship.⁵⁷

But the efforts to remobilize the Trusteeship System established by the UN Charter have been very modest. In 1993, the UN Secretary-General considered the establishment of a trusteeship for Somalia. The idea was finally given up, however, when it became clear that such a step would raise significant political diffi-

and of the sea-bed, the climate and the rights of future generations, as well as the rights of peoples where there has been a complete breakdown of the State." See G. de Marco/M. Bartolo, *A Second Generation United Nations*, 1997, at 70.

⁵⁵ See R. Gordon, *Some Legal Problems with Trusteeship*, *Cornell International Law Journal* 28 (1995), 301 et seq., at 326, who observes that "unlike the domestic jurisdiction exception, there is no exception in the Charter permitting the imposition of trusteeship where there is a threat to the peace." She finds that "the Council may not strip a state of its statehood, sovereignty or government".

⁵⁶ In this sense G.B. Helman/S.R. Ratner, *Saving Failed States*, *Foreign Policy* 89 (1992-1993), 12 et seq., at 16.

⁵⁷ See Rauschnig, note 34, Art. 78, at 951.

culties. Regardless of its merits, the trusteeship regime is ideologically still linked to the political and historical context of the decolonization process.⁵⁸ Even a revised trusteeship practice with the UN acting as administering authority would, most likely, be viewed by many states as a new form of “benevolent colonialism”. In the cases of Kosovo and East Timor, the possibility of reactivating the “dormant powers” of the Trusteeship Council has not even been discussed. Instead, a different technique of territorial administration was used, a technique which has its origins in the early practice of the organization and which has, in recent years, reemerged under the label of second-generation peacekeeping.⁵⁹

c) Second-generation peacekeeping

UN peacekeeping has, in fact, proved to be adaptable and quite useful in a number of very different situations. Originally, peacekeeping was invented for managing certain kinds of inter-state conflicts. Classical peacekeeping was a consensual form of crisis management, in which the UN role was restricted to interposing its forces between two parties who had decided to terminate hostilities and who had agreed on an international presence to keep the peace.⁶⁰ But with the surge of civil wars in many parts of the world the UN has been called upon to deal with increasingly complex and difficult tasks, involving the exercise of governmental authority and police power in states where years of war have destroyed large parts of the civil society and the political institutions of the country. In these situations, the international community has gone beyond the simple mediation effort of Chapter VI operations to enforcement actions under Chapter VII, combining elements of peacemaking and peacebuilding. In countries such as Cambodia, Namibia or Somalia, internationally created and authorized forces have come to exercise the classic police power of the state, including the establishment of civil authority in the form of civilian police, a judiciary, and prison services.

These developments lend support to the claim that by performing governmental functions within the framework of complex peacekeeping operations or post-war agreements, the UN has, without consciously saying so, revived the trusteeship idea inherent in the Charter.⁶¹ The concept deployed within the framework of second-generation peacekeeping is similar to the mechanism established under Chapter XII and XIII of the Charter. A trustee is appointed to manage affairs in the interest of the local population, until a functioning local government is constituted and assumes control of the territory. Only the setting is different, namely reconstruction instead of national independence.

⁵⁸ See on this aspect, R. Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, *American University Journal of International Law and Policy* 12 (1997), 903, at 926 et seq.

⁵⁹ For the attributes of second-generation peacekeeping operations, see Ratner, note 1, at 21 et seq.

⁶⁰ See M. Bothe, *Peacekeeping*, in: Simma, note 34, at 572 et seq.

⁶¹ See also Hufnagel, note 1, at 212 et seq.

Even though second-generation peacekeeping emerged only in the late 1980's, its roots are comparatively old.⁶² An example of what today might be qualified as second-generation peacekeeping may even be found in the history of the League of Nations.

(1) The Saar Administration

The Treaty of Versailles entrusted the League with the administration of the coal and iron-rich Saar, between Germany and France. The territory was administered by a five-member Governing Commission from 1920 to 1935, until the inhabitants voted in a referendum for immediate reunification with Germany. The treaty of Versailles endowed the League's Governing Commission with "all the powers of government hitherto belonging to Germany, including the appointment and dismissal of officials, and the creation of such administrative and representative bodies as it may deem necessary."⁶³ Legally the territory remained under German sovereignty, but the Commission was entitled to enact legislation as needed, which it did by issuing decrees concerning matters such as police, public property, transportation or the collection of revenues. The Commission reported regularly to the Council of the League, which did not intervene in the administration of the Saar Basin except for reasons of highest importance.⁶⁴

(2) Guardianship over the City of Danzig

Another case which is comparable to some of the UN's most recent undertakings in the field of territorial administration, is the League's interim administration of the autonomous city of Danzig, which was also placed under the League's guarantee by the Treaty of Versailles. The League was assigned the task of establishing a constitution for the city of Danzig and guaranteeing it. Moreover, it should "deal ... in the first instance with all disputes between Danzig and Poland."⁶⁵ In contrast to the administration of the Saar territory, in the case of Danzig, the League did not assume full governance of the territory but only the functions assigned to the League by the treaty. The League had to approve amendments of the Consti-

⁶² Ratner writes: "While neither the League of Nations nor the United Nations affirmatively sought to establish foundations for second-generation peacekeeping, a review of their activities since 1920 provides ample evidence that the expansive missions since 1989 did not constitute completely *sui generis* undertakings." See note 1, at 132.

⁶³ Treaty of Peace between the Principal Allied and Associated Powers and Germany (Treaty of Versailles), 28 June 1919, Part III, Section IV, annex, Art. 19, Consol. T.S.225, 219.

⁶⁴ See Saar Basin Governing Commission, Report presented by the Greek Representative and adopted by the Council of the League of Nations, 20 September 1920, LNOJ I (1920), 400, at 403. In one case, the Council reviewed a decision by the French Chairman of the Commission who had issued a decree restraining civil liberties and extending the size of the French garrison. See Ratner, note 1, at 93.

⁶⁵ See Arts. 102 and 103 of the Treaty of Versailles; see also M. Ydit, *Internationalised Territories: From the "Free City of Cracow" to the "Free City of Berlin"*, 1961, 194-197.

tution, and could veto any treaties incompatible with the city's autonomous status. Its guardianship over Danzig ended with Germany's annexation of the city in 1938.

The first efforts of the UN to take charge of governmental functions in disputed territories proved to be less successful than the experiences of the League.

(3) The proposed UN Administration of the Territory of Trieste

In 1947, the UN Security was requested to assume certain responsibilities relating to the Free Territory of Trieste, "whose integrity and independence" should be "ensured by the Security Council of the United Nations" in accordance with the 1947 peace treaty between the Allies and Italy.⁶⁶

One of the first problems arising in this context was the question whether the Security Council was authorized by the UN Charter to discharge itself of the new duty. Some members of the Council were of the opinion that the Council was not entitled to act as supreme governing body of the territory with the ultimate authority over its functioning, because these functions would have no direct connection with the maintenance of peace and security.⁶⁷ In response to these objections, attention was drawn by other representatives either to implicit powers of the Council or to the spirit of the Charter. The Secretary-General held the opinion that the words "primary responsibility for the maintenance of international peace and security" in Art. 24 of the Charter, coupled with the phrase "acts on their behalf", constitute a sufficiently wide grant of power, because the UN members had thereby conferred upon the Council "powers commensurate with its responsibility for the maintenance of peace and security", limited only by the fundamental principles and purposes of the Charter.⁶⁸ The Security Council took a decision in line with this view and adopted a Permanent Statute for the Free Territory of Trieste⁶⁹, designating the Security Council as the supreme administrative and legislative authority of the territory with the power to ensure the maintenance of public order and security and good conduct of its government in the ordinary domestic affairs.⁷⁰ However, just like the proposed UN administration of Jerusalem, the plan for UN oversight of Trieste was never realized because the United States

⁶⁶ See Treaty of Peace with Italy of 10 February 1947, 49 UNTS 3, 137.

⁶⁷ See the statements of the Representatives of Australia and Syria on the question of the Statute of Free Territory of Trieste, *Repertoire of the Practice of the Security Council, 1946–1951*, at 482.

⁶⁸ See statement made by the Secretary-General on 10 January 1947, *Repertoire of the Practice of the Security Council, 1946–1951*, at 483.

⁶⁹ See SC Res. 16 of 10 January 1947, UN SCOR, 2nd Year, Res. and Dec., p. 1, UN-Doc. S/INF/2/Rev. I (II).

⁷⁰ Art. 2 of the Permanent Statute provided as follows: "The integrity and independence of the Free Territory shall be assured by the Security Council of the United Nations Organization. This responsibility implies that the Council shall: (a) ensure the observance of the present Statute and in particular the protection of the basic human rights of the inhabitants; (b) ensure the maintenance of public order and security in the Free Territory." Art. 19 of the Statute also recognised the right of the Security Council to disallow legislation which in his view, was in contradiction to the Statute.

and the Soviet Union disagreed on the appointment of a governor of the territory.⁷¹

(4) The UN Assistance Mission in Libya

A more successful case of early UN involvement in civil administration was its assistance mission in Libya. The Allies had agreed in the 1947 Peace Treaty with Italy to determine the status of Libya. However, when no agreement was reached, the Allies referred the matter to the UN General Assembly, which decided on 21 November 1949 to appoint a UN Commissioner for Libya who assisted the two administering powers, France and Britain, in preparing Libya for independence.⁷² The UN Commissioner arranged the creation of a unified central government and the drafting of a Constitution for Libya, which became independent on 24 December 1951.

The first two major operations of the UN, which laid the foundations for modern second-generation peacekeeping, were the United Nations Operation in Congo (ONUC), conducted under the supervision of the Security Council between 1960 and 1964, and the United Nations Temporary Executive Authority (UNTEA) in West New Guinea (West Irian), established by the UN General Assembly on the basis of an agreement between the Netherlands and Indonesia.

(5) The United Nations Operation in Congo

Similar to the 1992 operation in Somalia, ONUC confronted the UN with the task of rebuilding a country devastated by a civil war. The Security Council responded to a request by the newly independent Congo to restore order in Congo and to assist the Congolese government in constructing a functioning civilian administration after the pullout of the Belgian colonial authorities. A special representative of the UN Secretary-General was appointed and charged with a military and a civilian mission.⁷³ Acting with the consent of the Congo government, but under the sole authority of the UN, ONUC prevented the breakdown of the country by forcibly putting down a secessionist movement and taking charge of

⁷¹ The territory was divided between Italy and Yugoslavia in 1954.

⁷² See GA Res. 289, UN Doc. A/1251, p. 10, 1949.

⁷³ The Security Council vested the Special Representative with a vast, but imprecise mandate. ONUC was to provide "technical assistance" to help the government restore order and thus permit the departure of Belgian military forces and the end of UN military assistance. See SC Res. 143 (S/4387) of 14 July 1960, UN SCOR, 15th Year, Res. and Dec., p. 6, UN Doc. S/INF/15/Rev.1. The Secretary-General noted in his first report to the Security Council: "The United Nations must in the situation now facing the Congo go beyond the time-honoured forms of technical assistance in order to do what is necessary, but it has to do it in forms which do not in any way infringe upon the sovereignty of the country or hamper the speedy development of the national administration." See Memorandum by the Secretary-General on the Organization of the United Nations Civilian Operation in the Republic of Congo, 11 August 1960, UN SCOR, 15th Year, Supp. for July, August and September 1960, p. 60, UN Doc. S./4417/Add.5.

the economic policy of Congo. UN personnel provided direct technical assistance by taking charge of services such as civil aviation, customs and excise, immigration, postal services and telecommunications. But ONUC also assumed governmental functions by setting up a Monetary Council which acted as a Central Bank and by helping to draft a constitution and to set up a new educational system.⁷⁴ The tasks performed by ONUC mirror some of the functions later exercised by UNMIK in Kosovo.⁷⁵ However, a high number of casualties, the death of Secretary-General Hammarskjöld in a plane crash and the continued economic difficulties of Congo illustrated the obstacles and dilemmas of expansive peacekeeping operations in the early history of the UN.

(6) The United Nations Temporary Executive Authority
in West New Guinea

UNTEA constituted the first true case of UN second-generation peacekeeping and was a rather successful UN administration. The peace accord between the Netherlands and Indonesia⁷⁶ provided for a six-month UN administration of West New Guinea, after which governing authority would be turned over to Indonesia. The agreement gave UNTEA full powers to appoint government officials, to legislate for the territory and to guarantee law and order.⁷⁷ UNTEA transferred administrative and police responsibilities from the Dutch to the Indonesian authorities, established a court system, set up new regional councils and dealt with public health and educational issues, until the territory was handed over to Indonesia on 1 May 1963. Factors that contributed to the success of the mission were its relatively short mandate, a stable internal situation within the territory and the centralized exercise of governmental authority by the UN. However, the second stage of the UN mission (1968 to 1969)⁷⁸, in which UNTEA was supposed to assist the government of Indonesia in holding an “act of self-determination” determining the free will of the Papuan people, proved to be less successful because the Special UN Representative served only as an advisor of the Indonesian government which ignored his suggestions.

For a period of twenty years the UN did not act again as an administrator, mediator and guarantor of complex political settlements. The late 1980s marked the beginning of a new series of modern peacekeeping operations.

⁷⁴ For a description of ONUC, see G. Abi-Saab, *The United Nations Operation in Congo, 1960–1964*, 1978; S. Morphet, *Organizing Civil Administration in Peace-Maintenance*, in: J. Chopra (ed.), *The Politics of Peace-Maintenance*, 1998, 41 et seq., at 43; Ratner, note 1, at 102 et seq.

⁷⁵ See, e.g., Regulation 1999/3 on the Establishment of the Customs and other related services in Kosovo, Regulation 1999/20 on the Banking and Payments Authority in Kosovo and Regulation 2000/51 on the Age of Compulsory School Attendance in Kosovo.

⁷⁶ See Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), 15 August 1962, 437 UNTS, at 273.

⁷⁷ See Arts. IV to VI of the Agreement.

⁷⁸ For further details, see Ratner, note 1, at 111–112.

(7) The United Nations Transition Group in Namibia

The first steps were taken in 1989 by the United Nations Transition Group in Namibia (UNTAG), which had officially been established in 1978, but started to operate only more than ten years later, because the former mandatory power, South Africa, had refused to cooperate with the UN.⁷⁹ UNTAG was vested with the mandate to “ensure the independence of Namibia through free and fair elections”. It carried out a variety of tasks that went well beyond those undertaken by traditional peacekeeping missions.⁸⁰ While the South African authorities maintained legislative and executive responsibilities for Namibia during the transition period, UNTAG was given the power to repeal all discriminatory laws or regulations that might abridge the objective of free and fair elections.⁸¹ It was also responsible for overseeing the repatriation of refugees and the release of political prisoners and detainees by the South African government, in order to facilitate their participation in the electoral process. UNTAG thus expanded the concept of peacekeeping to include electoral matters, police tasks and the protection of human rights. After the peaceful transition of Namibia to independence on March 21, 1990, Secretary-General Perez de Cuellar concluded in his 1990 Report:

“The United Nations Transition Assistance Group in Namibia (UNTAG) turned out to be something far more than its somewhat pedestrian name implied. It ... proved the executive ability of the United Nations in successfully managing a complex operation.”⁸²

(8) The United Nations Transitional Authority in Cambodia

The next important step in the era of second-generation peacekeeping was the establishment of the United Nations Transitional Authority in Cambodia (UNTAC). UNTAC derived its mandate from the 1991 Paris Peace Agreements which were signed by the four Cambodian factions (including the Party of Democratic Kampuchea representing the Khmer Rouge) in the presence of the Secretary-General after 20 years of civil strife. The agreement entrusted the UN with key aspects

⁷⁹ In 1967, the General Assembly had created the UN Council for Namibia, which exercised only limited powers, because South Africa refused to accept it. In order to implement the goal of holding free elections in Namibia under the supervision and control of the United Nations, the Security Council formally established UNTAG under Res. 431 of 1978. See SC Res. 431, UN SCOR, 33rd Sess., Res. and Dec., at 12, UN Doc. S/INF/34 (1978). South Africa finally agreed to the operation in late 1988. See Agreement Among the People's Republic of Angola, the Republic of Cuba, and the Republic of South Africa of 22 December 1988, in: I.L.M. 28, at 957.

⁸⁰ According to para. 5–7 of the Settlement Plan, the UN Special Representative had “to satisfy himself at each stage as to the fairness and appropriateness of all measures affecting the political process at all levels of administration before such measures took effect. Moreover the Special Representative could make proposals in regard to any part of the political process. See letter dated 10 April 1978 from the Representative of Canada, France, Germany, the Federal Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the Security Council, UN SCOR, 33rd Sess., Supp. for April–June 1978, at 17, UN Doc. S/12636 (1978).

⁸¹ See SC Res. 643, UN SCOR, 44th Sess., Res. and Dec., at 6, UN Doc. S/INF/45 (1989).

⁸² See Report of the Secretary-General on the Work of the Organization, UN GAOR, 45th Sess., Supp. No. 1, at 2, UN Doc. A/45/1 (1991).

of the civil administration of a UN Member State. The four factions agreed to form the Supreme National Council (SNC) as the “unique legitimate body and source of authority in which ... the sovereignty, independence and unity of Cambodia ... [would be] embodied”, but delegated to UNTAC at the same time “all powers necessary to ensure the implementation” of the Comprehensive Peace Settlement.⁸³ UNTAC had to comply with the SNC’s “advice” only if (1) the SNC adopted a unanimous decision, or if its president, Prince Sihanouk, spoke on behalf of the Council; and if (2) the advice was “consistent with the objectives” of the Agreement “as determined by the chief of UNTAC”. If the SNC was unable to reach a decision, the UN Special Representative retained the prerogative to act as he wished.⁸⁴

The UN Special Representative was therefore empowered to overrule decisions of the Cambodian factions, which he considered to be inconsistent with the settlement. But he could also adopt decisions in situations, in which the SNC was unable to reach a decision. Finally, UNTAC was entitled to legislate on its initiative in electoral matters. This situation matches, to a great extent, the role assigned to the HR in BiH by the DPA five years later.

UNTAC’s authority actually extended even further. The areas of foreign affairs, national defence, finance, public security and information were all placed “under the direct control of UNTAC”.⁸⁵ Moreover, UNTAC bore responsibilities for maintaining law and order, namely to “supervise or control” the police in order to ensure that public order was maintained effectively and that human rights and fundamental freedoms were protected.⁸⁶ In the area of human rights, the Special Representative had a broad mandate to “foster ... an environment in which respect for human rights [is] ensured”.⁸⁷ This included the investigation of human rights complaints and, where necessary, “corrective action” when human rights had been abused.⁸⁸ Finally, the Comprehensive Peace Settlement vested the Special Representative with the authority to remove Cambodian personnel from office and to insert UN personnel in any governmental entity.

With the implementation of the Paris Accords, modern peacekeeping reached new limits.⁸⁹ The civilian mandate encompassed tasks that are comparable only to the powers given to the Saar administration or to UNTEA in West Irian, but included, by the same token, a greater variety of matters, such as repatriation, economic rehabilitation and protection of human rights. The assignment of extensive governmental powers to the UN was, as later in the Balkans, the result of a great deal of pressure exercised on the combatants and of the mistrust among the Cambodian factions. However, despite its ambitious mandate, UNTAC did not com-

⁸³ See Art. 6 of the Comprehensive Peace Settlement.

⁸⁴ See Annex 1, Sec. A, para. 2 of the Comprehensive Peace Settlement.

⁸⁵ See Annex 1, Sec. B, para. 1 of the Comprehensive Peace Settlement.

⁸⁶ See Comprehensive Peace Settlement, Annex 1, Sec. B, para. 5 (b).

⁸⁷ See Art. 16 of the Comprehensive Peace Settlement.

⁸⁸ See Annex 1, Sec. E of the Comprehensive Settlement Agreement.

⁸⁹ See Ratner, note 1, at 152.

plete all of its tasks.⁹⁰ The organization of free and fair elections leading to the adoption of a new constitution in September 1993 was a great achievement. But due to the unstable political climate and the lack of cooperation by the Khmer Rouge, hostilities and human rights abuses never ceased.

(9) The United Nations Operation in Somalia

Two years after the conclusion of the Paris Accords, the UN has undertaken the attempt to assume full governance in Somalia, acting this time not on the basis of a peace agreement, but by means of an enforcement mission authorized under Chapter VII of the UN Charter. In 1992, after the collapse of governmental authority⁹¹, the situation in Somalia was, in some ways, similar to that of Germany after World War II.⁹² The operation was therefore meant to go far beyond the delivery of humanitarian assistance. UN activity in Somalia should, in the words of the Secretary-General, “pave the way for large-scale rehabilitation and reconstruction” in the country. Apart from the law and order mandates and continuing relief efforts, the expanded United Nations Operation in Somalia (UNOSOM II) was tasked to: “... assist the people of Somalia to promote and advance political reconciliation, through broad participation by all sectors of Somali society, and the re-establishment of national and regional institutions and civil administrations in the entire country” and to “create conditions under which Somali society may have a role, at every level, in the process of political reconciliation and in the formulation and realisation of rehabilitation and reconstruction programmes.”⁹³

According to the Addis Ababa Agreement of 8 January 1993⁹⁴, the so-called Transitional National Council (TNC) was formally vested with the administrative and legislative authority in Somalia. But the UN assumed these functions until the creation of the TNC, over one year after the conclusion of the agreement.⁹⁵ Before the establishment of the TNC, UNITAF (United Task Force) and UNOSOM II acted as the primary governmental authorities in Somalia⁹⁶, supported by a national “consultative body”.⁹⁷ The UN mission did not, however, fully accomplish all of its goals. UNOSOM II had some success in stabilizing the

⁹⁰ See on this aspect, S.K. Han, *Building a Peace that Lasts: The United Nations and Post-Civil War Peace Building*, in: *N.Y.U. Journal of International Law and Politics* 26 (1994), 837 et seq., at 849.

⁹¹ See on the UN operation in Somalia, M.J. Kelly, *Restoring and Maintaining Order in Complex Peace Situations*, 1999, at 65 et seq.; Chopra, note 3, at 123 et seq.; see also D. Thürer, *The “Failed State” and International Law*, *RICR* 81 (1999), 731 et seq.

⁹² In this sense Hufnagel, note 1, at 173.

⁹³ See SC Res. 814, UN Doc. S/RES/814 of 26 March 1993, para. 4 c) and g).

⁹⁴ See Art. 1 Sec. 4 of the General Agreement signed in Addis Ababa on 8 January 1993, UN Doc. S/25168 Annex II (1993).

⁹⁵ See the Reports of the Secretary-General on the situation in Somalia, Report of 12 Nov. 1993, UN Doc. S/26738, para. 28 and Report of 6 Jan. 1994, UN Doc. S/1994/12, para. 14.

⁹⁶ See Hufnagel, note 1, at 175 and 185.

⁹⁷ See UN Doc. S/26738, para. 28.

security situation in Somalia and in reconstructing the Somali judicial⁹⁸ and penal system⁹⁹. Yet the major goals of disarmament, repatriation of refugees and recreation of the Somali state were not accomplished. After a series of Somali attacks on UNOSOM II forces, all international forces departed the country in 1995 leaving no recognized authority in place.

(10) The United Nations Transitional Administration for Eastern Slavonia

A more recent but less well-known UN operation, vesting an international administrator with extensive powers over the civilian and military affairs of a territory, was the United Nations Transitional Administration for Eastern Slavonia (UNTAES).¹⁰⁰ In terms of its objective, UNTAES may be best compared to the UN Mission in West Irian. UNTAES was a short-lived, two year project with a very specific goal, namely the peaceful transition of Eastern Slavonia from Serb to Croatian administrative rule. A UN Transitional Administrator maintained complete control over both, the civilian and the military components of the operation. UNTAES accomplished its mandate with great success. Most notably, UNTAES negotiated several agreements with Croatia providing comprehensive political and institutional guarantees for the people of the formerly UN administered region under Croatian rule.¹⁰¹

2) Second-Generation Peacekeeping: Trusteeship Administration
by other Names

While neither the League of Nations nor the United Nations affirmatively sought to establish foundations for second-generation peacekeeping, a review of their activities, beginning with the League's responsibilities under the Treaty of Versailles and continuing with the UN's efforts in nation-building, provides evi-

⁹⁸ Following the UN involvement in this field, there were 11 Appeal, 11 Regional and 46 District Courts in Somalia by March 1995. See Kelly, note 91, at 77.

⁹⁹ UNOSOM defined the applicable criminal law and adjusted it to the standards of international human rights law. See Report of the Security-General on the situation in Somalia of 17 August 1993, UN Doc. S/26317, Annex I, para. 29–39.

¹⁰⁰ In January 1996, the UN established a peacekeeping operation in the region within Croatia consisting of Eastern Slavonia, Baranja and Western Sirmium. The Security Council authorized the operation, in order to help the parties implement the Basic Agreement on the region signed on 12 November 1995 between the Croatian Government and the local Serb authorities. Acting under Chapter VII of the Charter, the Security Council adopted resolution 1037 (1996) on 15 Jan. 1996, creating UNTAES. Its mandate ended on 15 January 1998, when the Croatia Government resumed control over the UNTAES region.

¹⁰¹ Among these agreements are: The Agreement by the Croatian Pension Fund on Pension Services of 29 May 1997, the Declaration on Educational Certificates of 11 March 1997, the Declaration on Minority Education Rights of 6 August 1997, the Joint Statement on Reintegration of the Employment System of 11 September 1997, the Organization of Joint Council of Municipalities of 23 May 1997 and the Declaration on Conditions for Judicial Reintegration of 30 September 1997. See Report of the Secretary-General to the Security Council of 4 December 1997, UN Doc. S/1997/953.

dence that the administration of territories has become an important element of complex peacekeeping and peace-enforcement operations. In these situations, the UN has not only acted as a mediator or as a guarantor of peace agreements but has actively engaged in a process of administering states. The degree of authority exercised by the organization varies from case to case, reaching from a simple assistance mandate to the performance of specific governmental functions.

a) Models of UN involvement

Analysing the practice of the UN and drawing on a classification proposed by Helman and Ratner in 1992¹⁰², one may distinguish three different models of involvement.

First, a role of “governance assistance” built upon the premise that the final governmental authority remains with the administered state while international agents help administer the territory (such as in the cases of Libya or Namibia)¹⁰³; second, a provisional delegation of parts of governmental powers to the UN based on the principle that the organization acts as the final authority in the areas entrusted to it (such as in the case of Cambodia, e.g.)¹⁰⁴; and third, a temporary but complete take-over of governmental functions by the organization guaranteeing a normal functioning of the state until national reconstruction has advanced to a point where democratically elected institutions may resume their functions.¹⁰⁵ It should be noted, however, that until the recent operations in Kosovo and East Timor, this last, and most intensive form of territorial administration has been practiced by the UN only on rare and very short-lived occasions, such as in West Irian or Eastern Slavonia or in the context of Somalia, where the UN exercised full governmental powers until the establishment of the TNC.¹⁰⁶

Even though the exercise of governmental powers by the UN has been discussed at the San Francisco Conference¹⁰⁷, the UN Charter provides no specific basis for the direct territorial administration of a territory through the UN.

b) Legal basis in the Charter

A constructive interpretation of the Charter based on a wide understanding of “measures necessary for the maintenance of peace and security” may serve as a justification for the practice adopted by the UN. The provisional exercise of gov-

¹⁰² See Helman/Ratner, note 56, 3 et seq.

¹⁰³ See Helman/Ratner, *ibid.*, at 13. A typical task is the organization of free elections, combined with a mandate to assist the national state in rebuilding its political or judicial system.

¹⁰⁴ See also Helman/Ratner, *ibid.*, at 14.

¹⁰⁵ In their proposal, Helman and Ratner suggested the application of “direct UN trusteeship” to failed states. But this approach has not been adopted by the UN.

¹⁰⁶ In this regard, UNOSOM II differs from UNTAC. In Cambodia, the SNC delegated part of its authority to the UN, which created UNTAC. In Somalia, however, the UN presence facilitated the creation of the TNC by maintaining law and order until (and after) the TNC was established.

¹⁰⁷ Cf. UNCIO XII, 354–5, Doc. 539 III/3/24.

ernmental authority within the framework of Chapter VI or Chapter VII operations does not collide with the Charter. The early statement made by H. Kelsen in 1951¹⁰⁸, according to which “the Organization is not authorized by the Charter to exercise sovereignty over a territory, which has not the legal status of a trust territory”, is open to criticism for a number of reasons.

First, the protection of sovereignty and the prohibition of interference in the domestic affairs of a state (Art. 2 (7) of the Charter), can hardly be invoked against territorial administration under UN rule. This is evident in cases in which the UN exercises governmental functions on the basis of an agreement with the territorial state, since even sovereign rights are generally disposable. In its *Wimbledon* ruling, the Permanent International Court of Justice stated in 1923 that the voluntary surrender of sovereign rights by way of an international agreement is not unlawful per se, but rather a legitimate act by which the contracting state makes use of its sovereign powers.¹⁰⁹ Furthermore, Art. 2 (7) second sentence of the Charter allows the infringement on “the domestic jurisdiction” of a state even against its will, if the state is subject to measures under Chapter VII. In the remaining cases, covering situations in which the UN establishes interim administrations without expressly invoking Chapter VII, the violation of the sovereign rights of the territorial state is a rather weak argument because the main purpose of the UN presence is precisely to restore an institutional framework on the territory and thus permit the exercise of sovereign powers by the territorial state.

It also seems not very convincing to argue that the provisions on the UN Trusteeship System, namely Arts. 77 and 81 of the Charter, constitute a conclusive set of rules precluding *e contrario* the exercise of trusteeship authority in any other form than the UN Trusteeship System. Such a restrictive systematic interpretation of the Charter would not be in line with the concept of implied powers governing the interpretation of competences accorded by the Charter.¹¹⁰ Moreover, the absolute requirement of a “trusteeship agreement” with the territorial state, contained in Art. 78 of the Charter, cannot be interpreted as a limitation to unilateral action by the Security Council in the context of the maintenance of international peace and security, since the preservation of national sovereignty, which Art. 78 seeks to protect, may be overcome in situations qualifying as a threat to the peace.¹¹¹

Technically, several provisions of the Charter may be invoked in order to justify the establishment of UN territorial administrations outside the context of the

¹⁰⁸ Cf. H. Kelsen, *The Law of the United Nations*, 1950, at 651.

¹⁰⁹ See PCIJ, *Case of the S.S. Wimbledon*, Ser. A, Vol. 1 (1923–1927), at 25: “No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.”

¹¹⁰ See ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Rep. 1949, 174, at 179, 182, and ICJ, *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Rep. 1954, 47, at 56. See on the concept of implied powers, ICJ.

¹¹¹ See also Hufnagel, note 1, at 304.

Trusteeship System. In most cases such a measure will be taken in response to a "threat to the peace" within Art. 39 of the UN Charter which has been interpreted broadly as to encompass situations of civil strife and grave violations of human rights.¹¹² Should the Security Council authorize the establishment of territorial authority under these circumstances, a number of different situations must be distinguished. If the UN administering authority is established with the consent of the state concerned, it would seem that a legal basis for the civil administration component of the operation may be found in Art. 39 in conjunction with Art. 29 or Art. 98 of the Charter, which allow the delegation of powers from the Security Council to subsidiary organs of the Council or to the Secretary General¹¹³; otherwise, the creation of civilian institutions may fall within the ambit of Art. 41 which covers a wide range of measures not involving the use of force.¹¹⁴ The military components of the operation, however, can only be based on Art. 42¹¹⁵ which, in turn, applies in conjunction with Art. 48, if the Council authorizes individual states to use force.

The situation is less clear when action is taken by the General Assembly, such as in the case of West Irian. It has been clearly established by the jurisprudence of the ICJ that the General Assembly does generally have the authority to initiate peace operations with the consent of the government on whose territory the mission shall be stationed.¹¹⁶ Art. 98 of the Charter allows for functions to be entrusted to the Secretary-General by the General Assembly. However, a substantial limitation on the General Assembly's powers is that it cannot authorize Chapter VII operations which fall exclusively in the competence of the Security Council.¹¹⁷ Action involving the creation of military organs would therefore have to be effected through the Council.¹¹⁸

It is, in sum, hardly questionable that the UN may generally assume tasks of temporary governance in the context of peace-maintenance. The main problem is rather the implementation of these functions and, in particular, the question as to where the limits of UN law-making can and should be drawn (see on this aspect part III).

A partial answer to this question may be found in the special nature of territorial administration under UN rule.

¹¹² Cf. J.A. Frowein, in: Simma, note 34, Art. 39, at 610 et seq.

¹¹³ The organizational power to create subsidiary organs (Art. 29) or to entrust certain functions to the Secretary-General (Art. 98) is applicable to both, Chapter VI and Chapter VII operations. See Bothe, note 60, at 590.

¹¹⁴ See also Frowein, note 1.

¹¹⁵ See also Bothe, note 60, at 590.

¹¹⁶ Cf. ICJ, *Certain Expenses of the United Nations*, ICJ Rep. 1962, 151 et seq., at 163.

¹¹⁷ The main problem lies in the limitation which Art. 11 (2) of the Charter imposes on the powers of the General Assembly. For a discussion of what constitutes "action" which has to be referred to the Security Council, see Bothe, note 60, at 591-592.

¹¹⁸ Cf. Bothe, *ibid.*, at 592: "... the exclusion of the GA from the creation of such military organs now seems to be an established rule ... But this does not preclude the GA from authorizing the inclusion of some kind of security element in an essentially non-military mission, e.g. human rights or election monitoring."

c) *Fiduciary authority as the overarching principle of second-generation peacekeeping*

It seems fair to conclude that the UN has implicitly resurrected the concept of trusteeship, embodied in UN Chapter, by conducting peacekeeping-operations involving the administration of territories through international agents, acting either solely or as co-administrators of the national governments in place.¹¹⁹

In its modern form, trusteeship administration is detached from the context of decolonialization and placed in a new setting, namely the maintenance of peace and security. However, the principles guiding the exercise of governmental authority are largely identical. The authority assumed by the UN is exercised “in trust”, that is in the interests of the inhabitants of the territory, and on behalf of the international community¹²⁰. Furthermore, the purpose of temporary international governance is to rebuild war-ravaged territories and to enable them to manage their own affairs in accordance with the basic principles of “good governance”.

In its separate opinion in the *South West Africa Case*, Judge McNair¹²¹ has described the general idea underlying the notion of trusteeship¹²², which is

“(a) that the control of the trustee, *tuteur* or *curateur* over the property is limited in one way or another; he is not in the position of the normal complete owner who can do what he likes to with his own, because he is precluded from administering the property for his own benefit;

(b) that the trustee, *tuteur* or *curateur* is under some kind of legal obligation, based on confidence and conscience, to carry out the trust or mission confided to him for the benefit of some other person or for some public purpose;

(c) that any attempt by one of these persons to absorb the property entrusted to him into his own patrimony would be illegal and would be prevented by law.”

In the context of territorial administration, trusteeship means essentially that the trustee acquires only a limited title to the territory entrusted to it and that its powers should be limited only to what is necessary for the benefit of the administered population. The administering authority possesses therefore sufficient personality to exercise jurisdiction and control over the administered territory, but it is not a sovereign who may dispose freely over the territory.

¹¹⁹ For a similar view, see Han, note 90, at 869, stating that UNTAC “was given such broad powers that the ensuing operation resembled a de facto UN trusteeship”. See also M. Reisman/M. Hakimi/R. Sloane, *Procedures for Resolving the Kosovo Problem*, 2000, at: <http://www.unausa.org>, arguing that “the circumstances of Kosovo’s interim administration are analogous to a trustee occupancy, whereby the territory is administered first and foremost for the benefit of the inhabitants.”

¹²⁰ For the Mandates System see ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (hereinafter Status of Namibia)*, ICJ Rep. 1971, at 29: “The mandate was created, in the interests of the inhabitants of the territory, and of humanity in general, as an international institution with an international object – a sacred trust of civilisation.”

¹²¹ Cf. Sir McNair, *Separate Opinion in the Status of South-West Africa case*, note 45, at 149.

¹²² On the legal concept of the trust, see also H.A. Schwarz-Liebermann v. Wahlen-dorf, *Vormundschaft und Treuhand des römischen und englischen Privatrechts in ihrer Anwendbarkeit auf völkerrechtlicher Ebene*, 1951, 88 et seq.

These criteria were not only at the heart of the UN Trusteeship System¹²³ but serve also as a guideline for peacekeeping operations involving the provisional transfer of governmental powers to the UN.

Moreover, UN governance in the framework of comprehensive peacekeeping operations shares many of the features which are typical of the UN Trusteeship System.¹²⁴ It is temporary in nature¹²⁵ and designed to create a stable political and legal environment which allows the local authorities to resume their governmental functions once an appropriate institutional system is in place and which operates in accordance with the purposes of the UN Charter.¹²⁶ The objectives of both forms of territorial administration differ only slightly. While the charter-based trusteeship administration is headed towards a concrete result, namely self-government or independence, UN involvement in rebuilding post-civil war societies is somewhat less ambitious because it is not necessarily dependent on the achievement of a certain territorial status but may be restricted to the internal reconstruction of the territory "in trust" through the reform of the local institutions, the protection of human rights and the establishment of formal and informal processes of political participation.¹²⁷

All these findings indicate that the concept of trusteeship has become one of the overarching principles governing extensive forms of UN territorial administration within the framework of complex peacekeeping operations.¹²⁸

¹²³ Cf. E. Lauterpacht, *The International Personality of the United Nations, Capacity to Administer Territory*, in: ICLQ 5 (1956), 409 et seq., at 411. The issue of where sovereignty resides under the Mandate and the Trusteeship has never been definitely resolved. Some authors have claimed that the concept of sovereignty is inapplicable to international regimes of divided competencies. They argued that the mandatory or the trusteeship territories were not under the sovereignty of any state, but were of a status that was new in international law. See Crawford, note 39, at 366, and Sir McNair, *Separate Opinion in the Status of South-West Africa case*, note 45, at 146, 150, who found that the Mandate and Trusteeship systems were new institutions with a new relationship between the territory and its inhabitants on the one hand, and the government which represented them internationally on the other. Others have argued that in the case of the Trusteeship System sovereignty vested in the UN because of the Organization's right to approve trust agreements and to determine the final disposition of the territories. However, this view seems little convincing, since the authority of the UN was based on a trusteeship agreement. The organization could not establish itself as an administering authority or confer trusteeship administration upon a state unilaterally. It is also questionable whether the UN can have territorial sovereignty while not being a state. Another concept, which has been expressed very early in the context of trusteeship administration, namely the Mandates System, is the idea that sovereignty lies within the people of a territory. See ICJ, *Status of Namibia, Separate Opinion of Judge Ammon*, ICJ Rep. 1971, at 69. See for the concept of "popular sovereignty" also M. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, AJIL 84 (1990), 866 et seq., at 875 et seq.

¹²⁴ See also Hufnagel, note 1, at 212 et seq.

¹²⁵ For the temporal limitation of UN Trusteeship, see Rauschnig, note 34, Art. 76, para. 1.

¹²⁶ Under the UN Trusteeship System, states were bound by the minimum standards listed in Art. 76 of the Charter. The same reasoning applies, *a fortiori*, to the UN if it assumes similar tasks in the context of peacekeeping operations.

¹²⁷ For the scope of post-conflict peace building, see *An Agenda For Peace: Preventive Diplomacy, Peacemaking, and Peace-Keeping*, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 3 Jan. 1992, Un Doc. A/47/277-S/24111 (1992), at 16.

¹²⁸ For a similar view, see Hufnagel, note 1, at 216. See also the Report of Amnesty International on the situation in East Timor of July 2000, *East Timor: Building a new country based on*

3) Features of the International Administrations in Kosovo and in Bosnia and Herzegovina

The types of international administration, which are currently deployed in BiH and in Kosovo follow this tradition. The SRSG and the HR are entrusted with the exercise of extensive legislative and executive powers, first and foremost for the benefit of the local population. Furthermore, they both operate under the auspices of the Security Council, the SRSG deriving its full authority from the Council, the HR parts of it. Yet both cases are unprecedented in the practice of international territorial administration.

a) UNMIK: a new dimension of territorial administration

UNMIK is a unique example of UN trusteeship administration.¹²⁹ The tasks of UNMIK go far beyond the scope of past UN peacekeeping operations because it is acting fully as an interim government in Kosovo. Its multidimensional role covers all aspects of governance and public administration except for the overall security mandate which is assigned to KFOR, the NATO led security force in Kosovo.¹³⁰ The SRSG has adopted far-reaching decisions at the political, economic, legal and social level. The regulations issued by the SRSG extend to all areas of public concern such as the tax and customs system, the media, education, the judicial system, the legislative law or international affairs. Given the dimension of these tasks, UNMIK's mandate seems to reach a depth which resembles more the Allied control over Germany¹³¹ than the powers of a peacekeeping-force.¹³²

Moreover, UNMIK has both immediate and long-term objectives. Paragraph 10 of SC Res. 1244 specifically refers to the UN administration in Kosovo as "transitional", while paragraph 11 b charges the SRSG with the performance of "basic civilian administrative functions where and as long as required", thus allowing great flexibility with regard to term of the mandate. Paragraphs 11 c and f

human rights: "The effect of the 5 May 1999 Tripartite Agreement and the result of the 30 August 1999 vote was to entrust legal responsibility for East Timor to the UN in a relationship that is analogous to a Trusteeship under the UN Charter."

¹²⁹ See also Maziau/Pech, note 24, under II; H. Corell, *The Role of the United Nations in Peacekeeping – Recent Developments from a Legal Perspective*, Address of 1 December 2000 at the Conference: National Security Law in a Changing World, The Tenth Annual Review of the Field, at 7, available under <http://www.un.org>.

¹³⁰ SC Res. 1244 charges KFOR with the military aspects of international administration in Kosovo. KFOR operates under its own command. Its tasks include the deterrence of renewed hostilities, the demilitarization of the Kosovo Liberation Army and the establishment of a secure environment in which refugees and displaced persons can return home in safety. See on the responsibilities of KFOR, Cerone, note 41; M. Guillaume/G. Marhic/G. Etienne, *Le cadre juridique de l'action de la KFOR au Kosovo*, in: AFDI 1999, 308 et seq.

¹³¹ Cf. Declaration of Berlin of 5 June 1945: "The Governments ... hereby assume supreme authority with respect to Germany ... The assumption ... of the said authority and powers does not effect the annexation of Germany".

¹³² See also Tomuschat, note 4, under 5.2, who notes that "the establishment of an occupation regime in Germany ... remains the closest parallel to what is currently going on in Kosovo."

of the resolution spell out a more detailed timetable. They provide, in a first stage, for “the development of provisional institutions for democratic and autonomous self-government”. Once these institutions are established, UNMIK is required to transfer its administrative responsibilities to these institutions. In a final stage, the mission is to supervise “the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement” determining the final status of Kosovo. Given the experience in post-Dayton BiH, it is obvious that UNMIK is not a short-term operation.

The work of UNMIK is further complicated by the fact that, unlike in previous situations, the UN has to deal with a territory which forms part of another state and whose future status is uncertain. The FRY’s sovereignty over Kosovo was not formally abrogated by SC Res. 1244, but it was, obviously to the surprise of the FRY¹³³, suspended under UN rule. One of the main tasks of UNMIK is to initiate negotiations on the final status of the province. In that regard, UNMIK’s mandate is more difficult to accomplish than the task of the UN Transitional Administration in East Timor which is also vested with the overall responsibility over the administered territory but charged with a very specific mission, namely the implementation of the popular consultation of 30 August 1999, in which the East Timorese voted for independence from Indonesia.

Furthermore, what makes the case of UNMIK so special, is the fact that in this case the Security Council has used its powers under Chapter VII in order to actively shape the system of governance within a territory, thus breaking with the traditional principle of restraint and neutrality towards the internal organisation of a state.¹³⁴ Even more surprisingly, the Council has done so without expressly recurring to the principle of self-determination. Instead, it has chosen a different path, namely the establishment of a framework which allows the development of a system of internal self-government and self-administration, irrespective of the option of independence.¹³⁵ This has created a hybrid situation. Kosovo has been transformed into an “internationalized” territory, which is *de facto* a “sovereignty-free-zone”.¹³⁶ Neither the FRY, nor the UN exercise sovereignty in the

¹³³ The FRY has argued in two Memoranda that both UNMIK and KFOR have gone beyond the mandate conferred upon them by SC Res. 1244, see First Memorandum of 5 Nov. 1999 and Second Memorandum of 6 March 2000, available under <http://www.serbia-info.com>.

¹³⁴ However, a number of earlier examples (South Africa, Haiti) show that the Council has never been fully indifferent towards the internal regime of a state. For a discussion of the earlier practice of the Security Council, see Tomuschat, note 4, under 5.2.

¹³⁵ Although the text of SC Res. 1244 remains unclear, one cannot help feeling reminded of the idea of “internal self-determination”, which has been discussed lately. Cf. P. Thornberry, *The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism*, in: C. Tomuschat (ed.), *Modern Law of Self-Determination*, 1993, 101 et seq.; O. Kimminich, *A “Federal” Right of Self-Determination?*, in: Tomuschat, *ibid.*, 83 et seq.

¹³⁶ See note 123 for the corresponding legal situation of the territories under the Mandates or the Trusteeship System. The same problem arises in East Timor.

true sense.¹³⁷ The UN acts only as a fiduciary administrator without unilateral decision-power concerning the final status of Kosovo, while the FRY has no legislative or judicial authority over Kosovo, because UNMIK and KFOR have temporarily displaced its sovereign rights over the territory.¹³⁸

UNMIK is therefore a landmark operation in many ways reflecting a new dimension of international trusteeship administration.¹³⁹

b) The international civilian presence in BiH: A variation on the theme of UNTAC

The “joint administration” of BiH through national and international authorities is, in terms of its legal construction, a *sui generis* undertaking of the UN. It cannot be placed in the direct context of second-generation peacekeeping because the HR is not a UN body but rather the representative of the states involved in the Bosnian peace process. However, the institutional system established by the DPA may be qualified as an indirect model of UN territorial administration, because the HR performs its tasks under the authorization of the Security Council. The DPA creates a multi-layered system of international supervision, under which an internationally appointed agent carries out extensive executive functions in the name of the international community, while the UN Security Council assumes the role of an ultimate guarantor and thereby a function which is rather typical of the early practice of the organization.¹⁴⁰

However, in terms of legal and administrative authority, the tasks performed by the international administrator are comparable to the functions exercised by UN organs in the realm of the UN’s most recent experiences in the administration of territories. A number of interesting parallels exist between the role of the HR in BiH and the corresponding function of the UN Special Representative under the United Nations Transitional Authority in Cambodia, because both organs have been vested by international peace agreements with the legal ability to exercise significant control over governmental regimes in place.

The power to veto legislation of the national institutions was expressly assigned to UNTAC by Annex 1, Section A of the Agreement on a Comprehensive Settlement of the Cambodian Conflict. The HR has derived similar authority from An-

¹³⁷ Sovereignty is traditionally understood as the highest jurisdictional power of a state. In the *Island of Palmas Case (Netherlands v. the United States)*, the arbitral tribunal defined sovereignty as “the right to exercise therein, to the exclusion of any other State, the functions of a state”. See Arbitration Award, 4 April 1928, in: United Nations Reports of International Arbitral Awards 2 (1949), 831, at 838.

¹³⁸ The FRY’s influence on Kosovo is currently limited to the cooperation with UNMIK and KFOR in the framework of common committees, such as the “Committee for Cooperation with UNMIK” or the “Joint Implementation Committee”. Furthermore, the FRY conducted elections for the central organs of Yugoslavia on the territory of Kosovo.

¹³⁹ UNTAET falls in the same category. See also Corell, note 129: “It is true that the United Nations also performed administrative functions in West Irian, in Namibia and in Cambodia. However, the two missions in Kosovo and East Timor are unprecedented.”

¹⁴⁰ See on the role of the UN as a guarantor, Ratner, note 1, at 48 et seq.

nex 10 of the DPA by acting as a guarantor of the Bosnian constitution. Furthermore, both organs have been empowered, either by the agreement itself¹⁴¹ or by subsequent international practice¹⁴², to take positive action in situations, in which the national institutions prove deadlocked and fail to act. The HR in particular has made extensive use of this practice, in order to overcome impasses in the Bosnian peace process. In addition, both UNTAC and the HR, have been authorized to remove national public officials from office.

Admittedly, models of conflict management following the Cambodian or the BiH example cannot be conceived as trusteeship administrations in the strict sense because the national institutions remain ultimately responsible for the governance of the countries concerned. Nonetheless, it seems reasonable to argue that they fall under a wider concept of trusteeship administration, encompassing not only fully UN-governed territories but also cases of international co-administration in which international agents assume key aspects of the civilian administration of a territory for the benefit of the local population.

III. Replacing the Law of Rulers by the Rule of Law: Legal Accountability of UNMIK, KFOR and the HR

The take-over of trusteeship functions by international administering authorities such as UNMIK or the HR involves not only special international obligations, but also the establishment of certain forms of control.

1. Principles Governing the Exercise of Trusteeship Authority

A system of territorial administration, under which the administering authority is vested with complete and unrestricted powers which are not subject to any form of legal control, is not in line with the basic principle of the responsibility of the trustee. The principle that accountability is inherent in the idea of a trust can be traced back to the 18th century¹⁴³. On the international level, it was first realized under the Mandates System. In the context of a growing "constitutionalization" of international law¹⁴⁴ it is becoming even more important.

¹⁴¹ See Annex 1, Sec. A, para. 2 of the Comprehensive Peace Settlement of the Cambodian Conflict.

¹⁴² See paragraph XI of the conclusions of the PIC Council in Bonn and para. 2 of SC Res. 1144 of 19 December 1997.

¹⁴³ This principle can be traced back to the 18th century. E. Burke conceived national accountability as a corollary of the responsibility of a trustee. See C. Little/J. Brown, *The Works of Edmund Burke*, Vol. 2, 1839, at 296.

¹⁴⁴ See J.A. Frowein, *Konstitutionalisierung des Völkerrechts*, in: *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System – Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen*, 2000, 427 et seq.; H. Mosler, *The International Society as a Legal Community*, 1980; P.-M. Dupuy, *The Constitutional Dimension of the Charter of the United Nations Revisited*, *Max Planck Yearbook of United Nations Law* 1 (1997), 1 et seq.; B. Fassbender, *The United Nations Charter as Constitution of the International Community*, in: *Columbia Journal of Transnational Law* 36 (1998), 530 et seq.; C. Tomuschat, *Obligations Arising for States Without or Against their Will*, *Recueil des Cours/Académie de Droit International de la Haye* 241, 1993-IV, 195 et seq., at 211 et seq.

a) *General obligations of international trusteeship authorities*

An international trusteeship authority is the servant of both an international and locally supported rule of law and order. The international administrator assumes transitional responsibility for the reconstitution of local authority and institutions. Thus, unlike a truly sovereign legislator, the administrator is not free to legislate in whatever manner and for whatever purpose he chooses. The limits of his authority are defined by his rights and obligations towards the inhabitants of the administered territory.¹⁴⁵ In his capacity as an authority-in-trust, the administrator may only exercise his powers for the benefit of the population. The adoption of legislation which has no connection with the welfare of the population would exceed his powers.¹⁴⁶

In addition, in an era in which the legitimacy of governmental authority is essentially based on the citizen's consent to governmental rule, an internationally appointed administrator must increasingly involve the local population in the process of political participation.¹⁴⁷ This requirement follows not only from modern trends towards the emergence of an internal right of self-determination¹⁴⁸ or the development of a right to political participation¹⁴⁹ and to democratic governance¹⁵⁰, but also from the objective of trusteeship administration which is to foster the development of self-rule. In cases where the UN assumes responsibility as an administrator of territory, an express normative guideline for the exercise of governmental powers may be found in Art. 76 of the Charter which contains a *magna charta* of principles applicable to trusteeship administration and should be applied beyond the direct context of Chapter XII of the Charter.

¹⁴⁵ See also Amnesty International, East Timor: Building a New Country Based in Human Rights, July 2000: "The responsibility of UNTAET as trustee of the human rights of the East Timorese people requires that UNTAET itself does not violate their human rights."

¹⁴⁶ See for a corresponding jurisprudence of the Israeli Supreme Court in the context of the legislative powers of a military government under Art. 43 of the Hague Regulations, E. Nathan, The Power of Supervision of the High Court of Justice over Military Government, in: M. Shamgar (ed.), Military Government in the Territories Administered by Israel 1967–1980, Vol. 1, 1982, 109 et seq., at 163 et seq. The Court held in two cases (*Almakadssa v. Ministry of Defence*, *Electricity Company for the Jerusalem District v. Ministry of Defence*) that the powers and rights of military governments are defined by the need to ensure as far as possible the ordinary life of the local population. In order to determine, whether a Military Commander had exceeded his authority when enacting legislation, the Court analysed whether he had acted to promote his own interests or to the welfare of the civilian population.

¹⁴⁷ See also Tomuschat, note 4, under 3, noting that "both the right to democracy, which has been proclaimed as a human right, and the principle of self-determination, prohibit keeping a group of human beings under a system of governance imposed upon them from above by foreign institutions, which cannot be linked to their own free will."

¹⁴⁸ Cf. note 135.

¹⁴⁹ See G. H. Fox, The Right to Political Participation in International Law, *Yale Journal of International Law* 17 (1992), at 539 et seq.

¹⁵⁰ See T. M. Franck, The Emerging Right to Democratic Governance, *AJIL* 46 (1992), at 86 et seq. For the proclamation of the right to democracy as a human right, see UN Commission on Human Rights, Res. 1999/57 of 27 April 1999.

Furthermore, as a legal subject deriving its authority from international law, a trusteeship administration cannot be configured as an institution which is above that law.¹⁵¹ A transitional peace-maintenance authority, vested with the mandate to re-establish local law and order, is not an ultimate source of law – as the authority of statehood is considered to be. Rather, it functions within the framework of existing international laws, including the UN Charter provisions and international customary law. Therefore, while devolving responsibility to the developing local authorities, the international administration will, most notably, need to comply with the standards of international human rights law and humanitarian law.

Of course, administrative and legislative functions are mainly carried out by non-state entities such as organs of international organizations or *sui generis* institutions created by an international agreement. This is not, however, an obstacle to the application of international law. The UN Charter obliges UN bodies to act in conformity with universally accepted standards of human rights. Furthermore, the same obligation will, in most cases, follow from the mandate assigned to the administering authorities either by a UN resolution or by an international agreement, consisting precisely in the protection and promotion of human rights.¹⁵² There is also authority to argue that the human rights treaties in force in the administered territory before the take-over of governmental functions by the international administrator continue to apply even in relation to the new public authority, since the rights enshrined in these treaties belong to the persons living in the territory notwithstanding a change in government.¹⁵³ Moreover, the application of customary law to non-state entities seems particularly plausible in the context of international trusteeship administrations because the administering authority assumes functions which are, under normal circumstances, exercised by the organs of a state.¹⁵⁴

With regard to international humanitarian law, it would seem safe to say, at minimum, that UN-commanded or UN-authorized operations are subject to the principles laid down in the Regulations annexed to the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land (“the Hague Regulations”) and to the basic provisions of the 1949 Geneva Convention No. IV Relative to the Protection of Civilians in Time of War¹⁵⁵ which addresses the issue of

¹⁵¹ Cf. Chopra, note 3, at 54 (“the peace-maintenance authority must be accountable itself, and not in some way above the law”), and at 55 (“Consequently, civil officials and military contingents participating in peace-maintenance operations are subject to an interim rule of law, no less than is the local population”).

¹⁵² For UNMIK, see SC Res. 1244. For a discussion of the problem, to which extent KFOR has been mandated by the UN to act in conformity with human rights law, see Ceroe, note 41.

¹⁵³ For the territorial application of the International Covenant on Civil and Political Rights, see General Comment 26 of the Human Rights Committee, CCPR General comment 26 (Continuity of obligations), contained in UN. Doc A/53/40, annex VII.

¹⁵⁴ See on the concept of a “functional succession” (*Funktionsnachfolge*) in customary law obligations, A. Bleckmann, Zur Verbindlichkeit des allgemeinen Völkerrechts für internationale Organisationen, in: ZaöRV 37 (1977), 107 et seq., at 119.

¹⁵⁵ The predominant opinion today is that these laws do apply to UN-commanded or authorized operations. See Y. Dinstein, War, Aggression and Self-Defence, 1994, at 162; A. Roberts, What

accountability in the management of the public security function and applies to military forces that have temporarily supplanted or assumed the authority of the sovereign state in the territory they control.¹⁵⁶

b) Obligations arising from the laws of occupation

The law relating to the rights and duties of occupying powers is of particular interest here because the issue of the reviewability of acts of the occupying power by domestic courts has been raised in that context. The principles governing the situation of occupied territories might also shed a light on corresponding obligations within the framework of trusteeship administrations.

Both the Hague Regulations and the Fourth Geneva Convention have established rules governing the conflict of interests between a foreign governing power and the administered territory. These rules are designed to address a temporary state of affairs with no impact on the ultimate issue of sovereignty and are therefore relevant to the circumstances of intervention scenarios witnessed in recent times. The Hague Regulations and the 1949 Geneva Convention IV can even be interpreted as putting the occupant in a quasi-trustee role, since he assumes temporary rights of administration on behalf of the sovereign until a peaceful solution is reached.¹⁵⁷ It should be remembered that the concept of trusteeship has, most notably, been invoked, in order to explain the Allied powers over Germany after 1945.¹⁵⁸ However, to regard the occupation as a whole as a form of trusteeship is

is a Military Occupation?, *BYIL* 55 (1984), 257 et seq., at 289–291; Kelly, note 91, at 167 et seq. The adoption of the Secretary-General's Bulletin on the Observance by United Nations forces of international humanitarian law lends support to the proposition that humanitarian law is applicable in peace-keeping-operations. See UN Doc. ST/SGB/1999/13 (1999), reprinted in: *I.L.M.* 38 (1999), at 1656. Many provisions of the Fourth Geneva Convention have attained the status of customary law. See J.S. Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary IV* (1958), at 9; Y. Dinstein, *The International Law of Belligerent Occupation and Human Rights*, in: *Israel Yearbook on Human Rights* 8 (1978), 107.

¹⁵⁶ The broad terms of common Art. 2 establish that the 1949 Geneva Conventions apply to a wide range of occupations – including occupations in times of peace. For a detailed analysis, see M. Kelly, *Non-Belligerent Occupation*, in: *Israel Yearbook on Human Rights* 28 (1998), 17 et seq.

¹⁵⁷ See. E. Benvenisti, *The International Law of Occupation* (1993), at 6; Roberts, note 156, at 295 (“temporary right of administration on a sort of trusteeship basis”). On the separate branch of law known as “trustee occupation”, see also A. Gerson, “Trustee Occupant: The Legal Status of Israel's presence in the West Bank”, *Harvard International Law Journal* 14 (1973), at 1 et seq.

¹⁵⁸ See, e.g., M. Reinstein, *The Legal Status of Occupied Germany*, *Michigan Law Review* 47 (1948), 23 et seq.: “Having assumed supreme authority with respect to Germany, a country having no government able to speak for herself and her people, the occupants are finding themselves in a fiduciary position. Fiduciary duties are well recognized already in international law even for a belligerent occupant. The existence of far-reaching fiduciary duties is recognized to be incumbent upon countries exercising powers not only over the inhabitants of trusteeship territories, but over all dependent peoples. The German people is at present a dependent people and as such is entitled to the observance of fiduciary duties by its guardian powers.” For a critical appraisal of trusteeship over Germany after 1945, see C. Tomuschat, *Die Kapitulation: Wirkung und Nachwirkung aus völkerrechtlicher Sicht*, in: R. Schröder (ed.), *8. Mai 1945 – Befreiung oder Kapitulation*, 1997, 21 et seq.

inappropriate because the foundation of the occupant's authority in the occupied territory is the successful use of force, whereas trusteeship is an institution founded upon law.¹⁵⁹

Moreover, the duties imposed by the laws of occupation are more limited than those under any concept of trusteeship, because the laws of occupation seek to regulate the conflict between the military interests of the occupant, the humanitarian needs of the population and the prohibition to take measures which would pre-empt the final disposition of the territory at the end of the conflict. There is no general rule requiring the occupant to act as a desinterested administrator for the benefit of the population or to further the creation of a democratic system of governance.¹⁶⁰

The main obligation of the occupying power is to administer the occupied territory and to respect the existing law, unless absolutely prevented from doing so.¹⁶¹ The legislative competences of the occupant are therefore limited. The occupying power is generally not entitled to suspend or repeal existing laws or to introduce permanent changes in the constitutional and institutional framework of the occupied territory, unless they are required for the legitimate needs of the occupation such as the security of the armed forces or the functioning of the administration.¹⁶²

It is clear that these rules leave room to deal with situations where either the local law is silent, or where the local system of justice has broken down or cannot be relied upon. Of particular relevance in this context is the question of whether domestic courts are competent to review and adjudicate upon the validity or inva-

¹⁵⁹ International law makes no distinction between a lawful and an unlawful occupant. The laws of occupation apply whenever one state occupies, in the course of an armed conflict, territory which was previously under the control of another party to the conflict, irrespective whether the displaced power was the lawful sovereign in that territory. See C. Greenwood, *The Administration of Occupied Territory in International Law*, in: E. Playfair (ed.), *International Law and the Administration of Occupied Territories*, 1992, 241 et seq., at 243.

¹⁶⁰ See also J. M. Mosner, "Military Government", in: R. Bernhardt (ed.), *EPIL* 3 (1997), at 391 ("The occupying power has the right to choose the organizational structure which seems best to fit it needs.").

¹⁶¹ Art. 43 of the Hague Regulations reads: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." Similarly, Art. 64 (1) of the Fourth Geneva Convention provides that the "penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention". Art 64 (2) reads: "The Occupying power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."

¹⁶² An occupant may therefore suspend the operation of certain constitutional guarantees and the functioning of the political organs of the constitution for the duration of the occupation. Furthermore, at the end of World War II, the allied powers maintained rightfully that they were not obliged to comply with the racially discriminatory laws and institutions created under the NS regime.

lidity of the acts of the occupying power according to the rules of the laws of occupation. In principle the occupying power must allow the municipal courts to continue to function with regard to the application of domestic law.¹⁶³ But the problem of judicial review of an occupant's orders by domestic courts has not been finally solved by the Hague Regulations or the Fourth Geneva Convention. Both instruments are silent on this question.

The views expressed in legal doctrine are divided. Some authors doubt whether the domestic courts are the proper agencies of review¹⁶⁴ or whether the Hague Regulations allow for a review of measures taken by the military occupant.¹⁶⁵ Others point out that there would be no objection to the exercise of the power of review when evidence of illegality is manifest.¹⁶⁶ It is further contended that, under certain circumstances, a review of the measures taken by the occupant might be required by the "intent and purpose" of the Hague Regulations, such as in cases of long-lasting and incisive occupations.¹⁶⁷

The practice of domestic courts¹⁶⁸ has not been more uniform than the various opinions expressed by legal scholars. The right of review, as such, has been asserted by municipal courts in some of the occupied territories during World War I and World War II, such as Norway¹⁶⁹, Greece¹⁷⁰ and Belgium¹⁷¹, whilst other courts¹⁷² under German occupation have refused to review the acts of the occu-

¹⁶³ An exception may be found in Art. 64 (1) of the Fourth Geneva Convention which makes the requirement that the local courts be allowed to function "subject to the necessity for ensuring the effective administration of justice".

¹⁶⁴ See E. Fraenkel, *Military Occupation and the Rule of Law – Occupation Government in the Rhineland 1918–1923* (1944), 224.

¹⁶⁵ See E.H. Schwenk, *Legislative Powers of the Military Occupant under Article 43 of the Hague Regulations*, in: *Yale Law Journal* 54 (1944–1945), 393, at 412. This argument seems to be based on Art. 3 of the Hague Convention No. IV under which a state in breach of the provisions of the Regulations is obliged to pay compensation to the state injured by the breach.

¹⁶⁶ See G. von Glahn, *The Occupation of Enemy Territory*, 1958, at 110.

¹⁶⁷ Cf. A. Randelzhofer, *Untersuchung über die Möglichkeiten des Rechtsschutzes der Einwohner Berlins gegen Akte der Alliierten*, in: *Die Verwaltung* 19 (1986), 9 et seq., at 30.

¹⁶⁸ For a survey of the practice, see F. Morgenstern, *Validity of the Acts of the Belligerent Occupant*, in: *BYIL* 28 (1951), at 291 et seq. See also Randelzhofer, note 167, at 32.

¹⁶⁹ In its decision of 10 February 1941, the Norwegian Supreme Court expressed the view that it might be able to annul, on the ground of its illegality by international law, a legislative measure of the occupant which plainly transgressed the bounds of the discretionary authority conferred on the occupant by Art. 43 of the Hague Regulations, see *ZaöRV* 11 (1942–43), at 604. The Norwegian District Court held in the *Overland* case, decided on 25 August 1943, that a decree of the occupant which set aside the allodial laws of Norway could not be enforced, see *Annual Digest and Reports of Public International Law Cases*, 1943–1945, Case No. 156.

¹⁷⁰ The Greek Court of Cassation held in a decision of 1944 that the judgment of a military court of the occupant which violated Art. 43 of the Hague Regulations "must be treated by Greek courts as null and of no effect", see *Annual Digest and Reports of Public International Law Cases*, 1943–1945, Case No. 150.

¹⁷¹ Belgian Courts declined during World War I to give effect to acts of the occupant which they regarded as exceeding his powers under Hague Regulations. See Court of Cassation, *Decisions of 20 May 1916 and 14 June 1917*, in: *Law Quarterly Review* 34 (1918), 81 and 292.

¹⁷² Dutch courts refused to review acts of the German occupant in the light of Art. 43 of the Hague Regulations during World War II, see *Annual Digest and Reports of Public International Law*

pant. After World War II, the competence of domestic courts to review acts of the military authorities was the subject of a decision by the Court of Appeal of Ramallah which asserted its competence to determine the validity of acts issued by the Israeli military authorities, but found that the challenged decree was in line with international law.¹⁷³

The main argument invoked by national courts to review acts of the occupying power appears to be that the enactments of the occupant do not have the same legal force as those of the sovereign legislative of the country because the occupant does not exercise sovereignty over the administered territory¹⁷⁴ or represent the sovereign. Generally, the legislative powers of a state are exercised by virtue of its sovereignty, which also determines the extent of their exercise. It may therefore be argued that when the “sovereignty” of a legislator is only temporary and conferred on him by virtue of international law, as in the case of occupation, he is not free to act as he wishes to but is subject to control of the legality of his acts, i.e. whether his legislation is in violation of some prohibitory rule of law or in excess of the powers vested under international law.

However, even though the practice of courts in the occupied territories appears to show a tendency towards admitting the review of measures taken by the military occupant, such a right of control cannot be considered as a rule of customary law because there is not sufficient evidence for a corresponding *opinio juris* of the occupying power considering itself bound by that rule.¹⁷⁵ It is therefore difficult to argue that trusteeship authorities are generally under a legal obligation to accept the judicial review of their acts by native courts when exercising powers in a position similar to that of an occupant.

c) *Access to court as a minimum standard of human rights law*

Nevertheless, the minimum standards of international human rights law might oblige international trusteeship authorities to create a legal forum in which their acts may be challenged by independent judicial organs. Such a duty could be derived from the fundamental rights guarantee to provide access to court as is provided for in many human rights instruments.¹⁷⁶

Cases, 1919–1942, Case No. 161. They held that “neither the history nor the wording of Art. 43 of the Regulations of 1907 afford any foundation for the assumption that the framers of the Convention intended to confer on the Courts which had remained in function in an occupied territory in conformity with the purport of that Article, jurisdiction to judge the measures taken by the occupant for the promotion of the interest therein set forth”.

¹⁷³ The judgment is reprinted in: *International Law Reports* 42 (1971), at 484 et seq.

¹⁷⁴ Cf. *Morgenstern*, note 168, at 302–303.

¹⁷⁵ See *Randelzhofer*, note 167, at 33; *J. Herbst*, *Gerichtlicher Rechtsschutz gegen Hoheitsakte der Alliierten in Berlin (West)*, 1991, 77.

¹⁷⁶ See, e.g., *Herbst* who finds in his study on legal protection against acts of the Allied Powers in Berlin that the Western Allies were under the obligation to create a legal remedy against their acts in accordance with the right of access to court, see *Herbst*, *ibid.*, at 82.

In most legal systems the deprivation of access to the regular courts in disputes concerning the civil rights and obligations of individuals poses serious constitutional problems. On the level of international law, there is a growing consensus that access to court can be regarded as a fundamental right. The fair trial provisions of the Universal Declaration of Human Rights (UDHR)¹⁷⁷, the International Covenant on Civil and Political Rights (ICCPR)¹⁷⁸ and the European Convention on Human Rights (ECHR)¹⁷⁹ are almost identically worded. They provide that “in the determination of his civil rights and obligations” everyone shall have recourse to a fair judicial proceeding. Admittedly, the wording of these provisions leaves some doubts as to whether they merely contain procedural guarantees in relation to judicial proceedings or whether they also grant a right to a judicial procedure. But it is now generally accepted that the right of access to court forms part of the fair trial guarantee.¹⁸⁰

More controversial is the question of what kind of legal disputes come within this protection. The right of access to court extends, without any doubt, to civil and criminal proceedings. In addition, the present international case-law presents the picture that the term “civil rights” cannot be equated with the notion of private rights.¹⁸¹ It follows from the legal history of Art. 14 ICCPR that it was not the intention of the drafters of the Covenant to restrict the scope of Art. 14 to rights and obligations of a private law character.¹⁸² Accordingly, the Human Rights Committee has adopted a broad interpretation of the term “suit at law” contained in Art. 14 ICCPR.¹⁸³

¹⁷⁷ Art. 10 reads: “Everyone is entitled in full equality to a fair public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

¹⁷⁸ Art. 14 (1) provides that: “All persons are equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

¹⁷⁹ Art. 6 (1) states that: “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

¹⁸⁰ See European Court of Human Rights, Judgment of 21 February 1975, *Golder*, Series A, No. 18, para. 36. The Court held that Art. 6 of the ECHR must be read in the light of the principle whereby a civil claim must be capable of being submitted to a judge, as one of the universally recognized fundamental principles of law; and the principle of international law which forbids the denial of justice. This approach is also in line with the draft wording of Art. 10 UDHR, which reads: “Everyone shall have access to independent and impartial tribunals in the determination of any criminal charge against him, and of his rights and obligations.”

¹⁸¹ See for the practice under European Convention on Human Rights, P. van Dijk, Access to Court, in: R. Macdonald/F. Matscher/H. Petzold (eds.), *The European System for the Protection of Human Rights*, 1993, 345 et seq., at 360; see also P. van Dijk/G. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 1980, Art. 6, 294 et seq.

¹⁸² See P. van Dijk, The Interpretation of “Civil Rights and Obligations” by the European Court of Human Rights – One More Step to Take, in: F. Matscher/H. Petzold (eds.), *Protecting Human Rights: The European Dimension*, Studies in Honour of G. Wiarda, 1988, 131 et seq., at 137.

¹⁸³ See M. Nowak, UN Covenant on Civil and Political Rights, CCPR-Commentary, 1996, Art. 14, at 242.

Under the ECHR, the words "civil rights and obligations" have been interpreted as to encompass proceedings which have a public character according to their form and subject, but the outcome of which is of direct interest for the determination or the content of a private right or obligation.¹⁸⁴ It is therefore clear that the mere fact that the right at issue is governed by public law does not exclude the applicability of Art. 6.¹⁸⁵ In their dissenting opinion in the *Bentham* case, European Commission Members Melchior and Frowein defined as "civil rights" within the meaning of the Convention all subjective rights of the individual in the area of individual liberty, with the exception of those rights which the individual does not have as a private person, but as a citizen, i.e. where a special status or a specific legal relation with the public institutions of the state as such is at issue.¹⁸⁶ The European Court on Human Rights has drawn on this distinction in the *Feldbrugge* and the *Deumeland* judgment¹⁸⁷ by stating in each of these cases that the applicant "was not affected in her relations with the public authorities as such, acting in the exercise of discretionary powers, but in her personal capacity as a private individual." Unfortunately, it is not fully clear from the Strasbourg case-law to what exact extent member states are under an obligation to grant access to a court vis-à-vis legal acts of a public law character.¹⁸⁸ But many scholars claim that Art. 6 (1) ECHR allows a comprehensive judicial control over areas of public law.¹⁸⁹ Such an approach is in line not only with Art. 8 of the Inter-American Convention on Human Rights¹⁹⁰ but also with the jurisprudence of the European Court of Human Rights in the *Klass* case, where the Court held that "the rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantee of independence, impartiality and a proper procedure."¹⁹¹

¹⁸⁴ See, e.g., European Court of Human Rights, Judgment of 23 October 1985, *Bentham*, Series A, No. 97 (1986) and Judgment of 29 May 1986, *Feldbrugge*, Series A, No. 99 (1986).

¹⁸⁵ See European Court of Human Rights, Judgment of 28 June 1978, *König*, Series A, No. 17, 30.

¹⁸⁶ See European Commission on Human Rights, *Bentham*, Series A, No. 97 (1986), Dissenting Opinion, at 36–37.

¹⁸⁷ Cf. European Court of Human Rights, *Feldbrugge*, note 184, 36, *Deumeland*, Series A, No. 100 (1986), 24.

¹⁸⁸ See for the case-law under Art. 6 (1), W. Peukert, in: J.A. Frowein/W. Peukert, Article 6, at 185 et seq., 198 et seq.; van Dijk/van Hoof, note 181, at 302.

¹⁸⁹ See Peukert, note 188, Art. 6, at 174, who argues that Art. 6 should be applied to all claims, which have a legal basis established by law. See also van Dijk, note 181, at 141, who suggests that "Article 5 could be clearly established as the expression of the human right to fair administration of justice also in the relations between the individual and the government."

¹⁹⁰ Art. 8 of the Convention gives "every person ... the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature".

¹⁹¹ See European Court of Justice, Judgment of 6 Sept. 1978, *Klass and Others*, Series A 28, 25–26.

If one accepts that domestic courts are under a human rights obligation and often also under an additional constitutional obligation to grant access to the judicial determination of one's civil rights, the question arises whether international administrators who act in the place of a national government or in collaboration with the latter may be exempted from these principles. A legal obligation to provide a forum which allows the reviewability of acts of international administrators before national courts may, *prima facie*, collide with the rules of immunity.¹⁹²

According to usual state practice, acts of international organizations or institutions are, in principle, rarely reviewable by national courts due to the jurisdictional immunity of these actors.¹⁹³ The basic rationale for immunity or other legal techniques removing subjects of international law from the adjudicative power of domestic courts is that these institutions have a legitimate interest in being able to fulfil their tasks and carry out their functions without undue interference from outside, including from domestic courts of member or non-member states.¹⁹⁴ However, the principle according to which individuals may not seek redress against foreign states or international organizations in matters concerning their "civil rights and obligations" has not remained unchallenged.¹⁹⁵ The fundamental question, whether and how far international organizations are restrained in their actions by the rule of law has frequently been discussed in cases in which the organizations engaged in activities that were likely to infringe upon member states' or even individual's rights¹⁹⁶. It seems justified to state that, within the context of these claims, the question of accountability as such has rarely been an issue¹⁹⁷; the problem focused rather on the search for an adequate forum to adjudicate disputes involving international organizations.¹⁹⁸

¹⁹² The European Court of Human Rights has stated in a number of judgments that the right of access to court is "not absolute" and acknowledged "implicit limitations" to this right. Although it has never been explicitly said by the Court, the principle of immunity has been interpreted as one of these implicit limitations. See Peukert, note 188, at 205.

¹⁹³ For an excellent analysis of this problem, see A. Reinisch, *International Organizations before National Courts* (2000), 127 et seq., 233 et seq.

¹⁹⁴ A good example is the case before a U.S. District Court, in which the plaintiff based his claim for damages on the argument that "the United Nations did not have the authority to adopt the resolution passed in connection with the peacekeeping operation in Somalia", *Abbi Hosh Askir v. Boutros Boutros-Ghali, Joseph E. Connor et al.*, U.S. District Court SDNY, 29 July 1996, 933 F. Supp. 368, at 373.

¹⁹⁵ Member states of the European Convention on State Immunity and all other countries adhering to a restrictive immunity concept have allowed a large number claims concerning the civil rights of individuals, by permitting suits against states in certain types of actions, generally relating to their *jure gestionis* activities.

¹⁹⁶ Persons, who seek legal redress against international organizations before domestic courts are mainly their employees, persons who render services to the organization and individuals who have suffered harm by the action of the organization.

¹⁹⁷ With the growing acceptance of international organizations as subjects of international law, doubts, whether they can become internationally responsible, have largely been removed. See K. Ginther, "International Organizations", in: R. Bernhardt (ed.), *EPIL* 2 (1995), 1336-1340. The crucial question is which organs may be competent to determine and enforce legal accountability.

¹⁹⁸ At the international level, courts often lack competence to adjudicate disputes involving international organizations. See, e.g., Art. 34 of the Statute of the International Court of Justice, which does not allow claims against international organizations.

There is international practice which indicates that the organization itself might be required to provide legal redress for claims against it.¹⁹⁹ Furthermore, while a specific obligation of states to provide access to its courts in disputes involving international organizations as defendants has not yet been stated, there is a trend towards introducing a balancing approach, making the availability of alternative dispute settlement fora to be the crucial element within a process of outweighing the conflicting interests, namely immunity on the one hand, and access to court on the other. A remarkable example are two cases before the European Commission of Human Rights concerning the immunity of the European Space Agency (ESA) from German jurisdiction (*K. Beer and P. Regan v. Germany*, *R. Waite and T. Kennedy v. Germany*²⁰⁰), in which the Commission found that “the legal impediment to bringing litigation before the German Courts, namely the immunity of the European Space Agency from German jurisdiction [was] only permissible under the Convention if there [was] an equivalent legal protection”.²⁰¹ Contrary to its earlier jurisprudence²⁰², the Commission considered a possible violation of Art. 6 (1) of the Convention by the German grant of immunity and stated that any limitation on the right of access to court would have “to pursue a legitimate aim and [that there had to be] a reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.²⁰³ This approach was then followed by the European Court of Human Rights, which examined, whether the immunity granted to ESA was proportionate in the light of Art. 6 (1) ECHR, while giving particular weight to the question “whether the applicants had available to them reasonable alternative means to protect effectively their rights under

¹⁹⁹ See the Effect of Awards advisory opinion of the ICJ, according to which it would “hardly be consistent with the expressed aim of the Charter to provide freedom and justice for individuals ... that [the United Nations] should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.” ICJ, *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, ICJ Rep. 1954, 47 et seq., at 57.

²⁰⁰ See European Commission of Human Rights, Application No. 28934/95, 2 December 1997 and Application No. 26083/94, 2 December 1997.

²⁰¹ See para. 79.

²⁰² In its *Spaans v. the Netherlands* decision, the Commission had to deal with an application, in which the applicant claimed that the immunity of the Iran-United States Claims Tribunal violated his right of access to court. The Commission declared the application inadmissible. It found: “Because of the immunity enjoyed by the Tribunal, the administrative decisions of the Tribunal are not acts which occur within the jurisdiction of the Netherlands within the meaning of Article 1 of the Convention and therefore do not engage the responsibility of the Netherlands under the Convention”. See European Commission of Human Rights, Application No. 12516/86 of 12 Dec. 1988, *Ary Spaans v. the Netherlands*, Decisions and Reports 58 (1982), 119, at 122.

²⁰³ However, the Commission concluded that while the applicants “did not ... receive a legal protection within the European Space Agency which could be regarded as equivalent to the jurisdiction of the German labour courts”, it could not “apply the test of proportionality in such a way as to enforce an international organization to be a party to domestic litigation on question of employment governed by domestic law.” See para. 80. Despite this limitation, the jurisprudence of the Commission may be interpreted as a new tendency in the law of immunity. See also Reinisch, note 193, at 312.

the Convention".²⁰⁴ This new "proportionality test" is fully in line with the basic approach of the European Court of Human Rights which held in the *Golder* case that "in civil matters one can scarcely conceive of the rule of law without there being a possibility of access to courts".²⁰⁵

Within the framework of international trusteeship administrations, a number of arguments support the view that the obligation to provide access to court places limits on the jurisdictional immunity of international administrators. Firstly, there is a constitutional argument. Every modern system of governance is built upon law-making, administration and adjudication. If international institutions assume functions and powers which are usually those of a state, they require similar checks and balances and in particular the protection of persons affected by the activities of these institutions. Secondly, in modern immunity doctrine, it is not the person, but rather the act of a person which is exempted from the jurisdiction of national courts. Immunity is not granted because the defendant in legal proceedings is a subject of international law and therefore supposed to be beyond the jurisdictional reach of a court, but rather because the act in question is performed by a "foreign" actor in the course of its official functions. However, an international administrator who exercises his powers in replacement of the national authorities normally representing the territory concerned, cannot be fully equated to a foreign public authority. Since a conflict of sovereignty between two equal actors cannot arise in this situation, the scope of immunity should remain limited to those functions which are necessary for the fulfilment of the administrator's mandate.²⁰⁶

Perhaps the most fundamental task of international trusteeship authorities is to prepare the local institutions for self-government and this, under normal circumstances includes, the establishment of a system of governance based on a separation of powers. The fulfilment of this purpose requires not only an increasing participation of the local population in its own governmental affairs but also a possibility to reverse acts of the administering authorities which are not in line with

²⁰⁴ See European Court of Human Rights, Judgment of 18 Feb. 1999 in the case of *Waite and Kennedy v. Germany*, Application No. 26083/94, para. 59 et seq., at para. 68. The Court shared the Commission's view that granting ESA immunity from German jurisdiction was not disproportionate, in particular because of the alternative means of legal process available to the applicants. See para. 73 of the judgment.

²⁰⁵ See European Court of Human Rights, *Golder*, para. 34. See also the early statement by the European Commission of Human Rights in the case *Dyer v. United Kingdom*: "Were Article 6 (1) to be interpreted as enabling a State party to remove the jurisdiction of the courts to determine certain classes of civil claims or to confer immunities from liability on certain groups in respect of their actions, without any possibility of control by the Convention organs, there would exist no protection against the danger of arbitrary power." European Commission of Human Rights, Application No. 10475/83, *Graham Dyer v. United Kingdom*, 9 Oct. 1984, Decisions and Reports 39 (1987), 246, at 252.

²⁰⁶ See for the "functional necessity standard" within the context of international organizations, Reinisch, note 193, 338 et seq.; P. Bekker, The Work of the International Law Commission on "Relations between States and International Organizations" Discontinued: An Assessment, *Leiden Journal of International Law* 6 (1993), 3 et seq., at 9.

internationally recognized standards. Admittedly, a full concentration of powers within the hands of the international administering authority may be acceptable in the first months after the take-over of the mandate or in a state of emergency; yet, a growing stabilization of law and order on the territory and progress in the development of national governmental institutions must go hand in hand with greater direct accountability towards these institutions and the individuals affected by the acts of the international administration.

Moreover, in situations, in which the domestic courts still lack the capacities or the impartiality to exercise jurisdiction, which may be the case just after the end of a conflict, an international review mechanism should be established to control the law-making and administrative activities of the administering authority. A lack of any review forum in this stage seems hardly compatible with the role of the administrator as an authority-in-trust and the guarantee of respect for the law, which may be considered a general principle of law.²⁰⁷

2) The Implementation of these Principles in the former Yugoslavia

The implementation of the above-mentioned principles has posed some difficulties in Kosovo and in BiH. While great care was devoted, in both cases, to the applicability of comprehensive human rights guarantees to the territories concerned²⁰⁸, less attention was given to the control of the international administering authorities. The mandates entrusted to UNMIK and the HR were broadly defined right from the beginning. But they were subsequently interpreted in even broader terms by these institutions in the course of their action.

In Kosovo, the heart of the problem seems to be related to the fact that UNMIK exercises mainly unrestricted executive and legislative powers. The absence of effective checks and balances, which are typical of modern democracies, has in some cases led to the adoption of legislation, which is hardly

²⁰⁷ Comparative studies of "judicial review" show that, on the national level, most countries have accepted judicial power over the constitutionality of legislative acts. See generally M. Capellati, *Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International and Social Trends*, *Stanford Law Review* 25 (1973), 651 et seq.; A. Brewer-Carias, *Judicial Review in Comparative Law* (1989); A. Stone, *Abstract Constitutional Review and Policy Making in Western Europe*, in: *Comparative Judicial Review and Public Policy* 41 (1992), 41 et seq. The motivating rationale for the increasing control of decisions of political organs by an independent judicial organ is the need to legitimate the exercise of political power. Similar evolutionary processes have taken place in international adjudicative fora. A good example is the system of legal protection developed within the European Union or the GATT dispute settlement. See on the comprehensive discussion of the issue of the reviewability of Security Council Resolutions by the ICJ, *inter alia*, Jose E. Alvarez, *Judging the Security Council*, *AJIL* 90 (1996), 1-39; M. Bedjaoui, *The New World Order and the Security Council, Testing the Legality of its Acts* (1994); E. de Wet, *Judicial Review as an Emerging General Principle of Law and its Implications for the International Court of Justice*, *Netherlands International Law Review*, 2000, 181 et seq.

²⁰⁸ See Art. II and Annex I of the Constitution of Bosnia and Herzegovina, contained in Annex IV of the DPA. See also Section 1.3 of UNMIK Regulation 1999/24.

compatible with the standards of the ICCPR and the ECHR. Furthermore, the uncertainty as to whether domestic courts may adjudicate upon the validity or invalidity of such legislation has added to the confusion. It also appears that KFOR, which contributes to the administration of Kosovo by assuming military and police functions, has on several occasions arrested and detained persons without granting them the right to be brought promptly before a judicial authority.

Similar to the situation in Kosovo, the issue of limitations to the powers of the HR has not been addressed by the framers of his mandate. While it was rather clear that the HR is bound by international law, there were some doubts as to whether his acts could be challenged for non-conformity with the BiH constitution. The question was finally answered by the BiH Constitutional Court which had to decide a case, in which the claimant argued that a law adopted by the HR violated the BiH constitution.²⁰⁹

a) The situation in Kosovo

UN Security Council Res. 1244 has authorized two entities to exercise public authority in Kosovo. UNMIK, the international civil presence, is charged with the overall mandate to establish an "interim administration" for Kosovo. KFOR, the international security presence, carries out military tasks, such as the deterrence of hostilities or the demilitarization of armed groups; in addition, it assumes police tasks, in cooperation with the UNMIK police force. Though primarily a military force, KFOR has not only frequently responded to breaches of law and order, but also investigated crimes and arrested persons.

As entities deployed under UN auspices, both UNMIK and KFOR, are bound to comply with international human rights standards such as the guarantees contained in the ECHR and the ICCPR.

(1) The law applicable to UNMIK and KFOR

This obligation is easy to establish in the case of UNMIK. UN SC Resolution 1244 expressly mandates UNMIK to protect and promote human rights. Furthermore, UNMIK Regulation 1999/24, which defines the applicable law in Kosovo, requires "all persons undertaking public duties or holding public office in Kosovo" to observe internationally recognized human rights standards.²¹⁰ It is hard to imagine why the SRSG, who is vested with all legislative and executive powers, should be exempted from this obligation. Last doubts have been removed by Regulation 2000/38 setting up the Ombudsperson. Section 3.1 of the Regulation provides that "the Ombudsperson shall have jurisdiction to receive and investigate

²⁰⁹ See Constitutional Court of Bosnia and Herzegovina, Decision No. U 9/00 of 3 November 2000, annexed to this article.

²¹⁰ See UNMIK Regulation 1999/24, Sec. 1.3. The Regulation then adds a long list of international human rights instruments, such as the Universal Declaration on Human Rights, the ECHR and its protocols, the ICCPR and the Convention on the Elimination of All Forms of Racial Discrimination.

complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution.”

Some more efforts must be made, in order to show that KFOR is required to adhere to the standards of international human rights laws. Under Security Council Res. 1244, KFOR is given its own area of responsibility. It is therefore questionable, whether the applicable law as defined by Regulation 1999/24 is binding upon KFOR. Regulation 2000/47 states that KFOR shall respect applicable law and UNMIK regulations only “in so far as they do not conflict with the fulfilment of the mandate given under Security Council Resolution 1244”. Furthermore, according to Section 3.4 of Regulation 2000/38, the Ombudsperson is in principle not authorized to receive complaints of abuses committed by KFOR.²¹¹

However, a number of factors indicate that internationally recognized human rights standards apply to KFOR. First, it cannot be assumed that Res. 1244 authorizes KFOR to breach such standards in the fulfilment of its mandate. On the contrary, as a force, deployed under UN auspices and assigned with the task “to operate towards the same goals” as UNMIK, KFOR must be guided by the same principles as UNMIK, at least as long as it assumes functions, which are of a civilian rather than of a military nature. This was also confirmed by a statement of the former SRSG, S.Vieira de Mello, who emphasized that while ensuring public safety and order in Kosovo, KFOR would be bound by internationally recognized human rights standards.²¹²

Furthermore, when conducting operations in Kosovo, the forces constituting KFOR may be bound by the provisions of the major international human rights treaties by way of an extraterritorial application of the obligations of their sending states. While it is true that this issue has not been finally solved yet, there is court practice which indicates that states can be held responsible for actions committed by their own nationals on foreign territory against foreign nationals.²¹³ Finally, states cannot escape their obligations under customary law, when acting in the framework of international organizations.

The applicability of internationally recognized standards of human rights law to KFOR and UNMIK cannot be challenged with the argument that the rules of the Fourth Geneva Convention would contain a body of more specific rules for deal-

²¹¹ Section 3.4 reads: “In order to deal with cases involving the international security presence, the Ombudsperson may enter into an agreement with the Commander of the Kosovo Forces (COMKFOR).”

²¹² See “Statement on the Right of KFOR to Apprehend and Detain” of 4 July 1999, UNMIK, Office of the SRSG.

²¹³ The European Court of Human Rights held in the *Loizidou* Case that “the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory”. See *Loizidou v. Turkey* (Preliminary Objections), 23 Feb. 1995, Series A, No. 310, para. 62. Moreover, the Inter-American Commission on Human Rights found in *Coard et al. v. United States* that the US were bound by humanitarian law and human rights law during their military intervention in Grenada. See *Coard et al. v. the United States*, Case 10.951, Report No. 109/99, 29 Sept. 1999.

ing with situations such as in Kosovo.²¹⁴ International humanitarian law does not generally rule out the applicability of human rights treaties. It rather provides a justification for interferences within specific human rights.²¹⁵ Moreover, according to its Art. 6, the rules of the Convention apply “from the outset of any conflict or occupation” until there has been a “general close of military operations”. If the territory in question is an occupied territory, the laws of occupation apply fully for one more year beyond the general close of military operations. After that period, a limited set of provisions continues to govern the relations between the administered territory and the “occupant”. In the case of Kosovo, a “general close of military operations” has been brought about by the Military-Technical Agreement, concluded on 9 June 1999 between NATO military authorities and the government of the FRY.²¹⁶ The current hostilities in Kosovo between Serb and Albanian groups cannot be regarded as a continuation of the conflict between NATO and FRY forces; if one considers Kosovo an “occupied territory” within the meaning of the Fourth Geneva Convention despite the FRY’s consent to the presence of UNMIK and KFOR²¹⁷, there is authority to argue that the precedence of the laws of occupation would have ended in June 2000 at the latest.

(2) Non-observance of human rights standards by UNMIK and KFOR

Both UNMIK and KFOR, have in the course of their action, violated some of the human rights standards set forth in the ECHR and the ICCPR.

(a) *Unlawful KFOR detentions*

KFOR has carried out a number of legally questionable detentions.²¹⁸ In several cases, persons have been arrested and held “by order of the commander of

²¹⁴ While international humanitarian law does not generally rule out the applicability of human rights treaties in situations of armed conflict, it may be contended that it provides a justification for interferences with individual rights protected under the human rights treaties. This is obvious with respect to the detention rules concerning prisoners of war and internment under the Fourth Geneva Convention. Unfortunately, there is little case-law on the question. One illustration of this principle, however, is an interstate application of *Cyprus v. Turkey* before the European Commission of Human Rights in which the Commission refused to examine the question of a breach of Art. 5 of the ECHR with regard to persons accorded the status of prisoners of war. See Report of the European Commission of Human Rights of 10 July 1976, Applications 6780/74 and 6950/75, Council of Europe Doc. 45.82306.2, at 108 et seq. See generally on the relationship between international humanitarian law and human rights law J.A. Frowein, *The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation*, *Israel Yearbook on Human Rights* 28 (1998), 1 et seq.

²¹⁵ Cf. Frowein, *ibid.*, at 16.

²¹⁶ For a dissenting view, see Cerone, note 41, at note 71.

²¹⁷ Although the presence of UNMIK and KFOR is ultimately based on a determination by the UN Security Council, it is questionable whether the FRY has been displaced from the exercise of public authority “without its consent”.

²¹⁸ See OSCE, Legal Systems Monitoring Section, *Review of the Criminal Justice System* (hereinafter “OSCE, Justice System”), 24 et seq., available under <http://www.osce.org/kosovo>.

KFOR” without opportunity to challenge their detention. This is a clear breach of the ECHR and ICCPR which provide that all persons detained shall have the right to challenge the lawfulness of their arrest and detention at any time.²¹⁹ Moreover, in other cases, KFOR has continued to detain individuals despite a lawful order of release by a judge, arguing that UN Security Council Res. 1244 has provided KFOR with the authority to detain persons without safeguards for the purpose of ensuring public safety and order.

This justification is only partly convincing. The Security Council may, in theory, exempt forces of member States from the observance of certain human rights standards under a Chapter VII Resolution, in particular, if they are derogable in a state of emergency²²⁰ such as the right to challenge the lawfulness of a detention before a court. However, the proclaimed adherence of the UN to international human rights instruments and standards within the framework of international UN Peace Operations²²¹ and the general obligation to notify derogations from human rights law under the relevant international treaty law²²² require that such an exemption be declared expressly by the Council.²²³ Yet, this has not been the case.²²⁴

Moreover, it can hardly be invoked that a state of “public emergency” in Kosovo would allow KFOR to impose temporary restrictions on the freedom of movement of individuals without granting a legal remedy.²²⁵ First, under Art. 15 (1) ECHR and Art. 4 (1) ICCPR, derogations from these obligations must be “strictly required by the exigencies of the situation”. After the establishment of local courts and trial panels in Kosovo, there is no plausible reason why individuals should be denied access to these institutions. Second, no declarations of derogation have been made for armed forces in Kosovo, although this is a general requirement for the derogation of human rights in situations of emergency. It is furthermore significant that UNMIK has abstained from derogating certain human rights guarantees when defining the applicable law in Kosovo. Regulation 24/1999 declares the ECHR and the ICCPR applicable in their entirety.²²⁶

²¹⁹ See Art. 5 (4) ECHR and Art. 9 (4) ICCPR.

²²⁰ See Art. 15 ECHR and Art. 4 ICCPR.

²²¹ See para. 6 of the recent report of the Panel on UN Peace Operations, which stressed “the essential importance of the United Nations system adhering to and promoting international rights instruments and standards and international humanitarian law in all aspects of its peace and security activities”.

²²² See Art. 15 (3) ECHR and Art. 4 (3) ICCPR.

²²³ See also *Cerone*, who argues that this duty would derive from “the general principle of interpretation that obligations should be construed, where possible, so as to avoid conflicting obligations”. Cf. *Cerone*, note 41, at note 51.

²²⁴ Para. 7 of SC Res. 1244 authorizes “Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9”. But this cannot be interpreted as a blanket permission for KFOR to use whatever method required to carry out its mandate.

²²⁵ See on the absence of a derogation of human rights law in Kosovo also *Cerone*, note 41, under VI.

²²⁶ See Sec. 1.3 of the regulation.

When faced with an illegal detention order by KFOR, one trial panel has even gone so far as to declare the detention unlawful, basing its decision on Art. 5 (4) ECHR. The trial panel ruled that, on the basis of Regulation 1999/24 and the ECHR, only a court had the legal authority to deprive persons of their liberty.²²⁷

(b) Flaws in UNMIK law-making

When examining UNMIK Regulations, one cannot fail to note that the current UN legislation has failed to implement important standards of international human rights law.²²⁸ The normative framework established by Regulations of the SRSG is, in particular, characterized by providing limited access to court and modest fair trial guarantees. In addition, the existing legislation gives the local judiciary little opportunities to review action taken by UNMIK or KFOR. Inconsistencies with human rights obligations under the ECHR and the ICCPR may be found in all areas of law, namely private law, criminal law and public law.

(aa) UN Regulations in the field of civil law:

In Kosovo, efforts to re-establish a functional judiciary have, in the first instance, concentrated on the criminal law system.²²⁹ This seems to have led to shortcomings in another area, which is particularly important for the reconstruction of a stable and peaceful environment in Kosovo: the protection of property rights. Many properties in Kosovo have multiple claimants.²³⁰ As of 1989, Kosovo Albanians have lost their occupancy rights to socially owned properties, due to discriminatory property laws imposed by the government in Belgrade. Furthermore, during the war and even after the arrival of UNMIK and KFOR, many properties were destroyed and/or abandoned. In many cases, this property was then illegally occupied. The legal framework, set up by UNMIK, in order to deal with these problems, is insufficient.

According to the law in force in Kosovo in 1989, the municipal courts dealt with most property issues. UNMIK, however, has decided to establish a quasi-judicial body operating outside the normal judicial system. On 15 November 1999, UNMIK Regulation 1999/23, established a Housing and Property Directorate (HPD), and a Housing and Property Claims Commission (HPCC). The Directorate is an administrative organ, which mediates solutions to property claims in lieu of a formal judgment and acts as registrar of claims for the Commission. The Commission is vested with judicial powers. It is designed to resolve legal disputes over residential property claims and to issue binding and enforceable decisions, which "are not subject to review by any other judicial or administrative authority

²²⁷ See OSCE, Justice System, 18 and 25.

²²⁸ For a previous analysis of UNMIK Regulations, see Frowein, note 1.

²²⁹ For a survey of the problems arising in the context of the establishment of a criminal justice system in Kosovo, see OSCE, Justice System, 11 et seq.

²³⁰ The estimated number of property claims to be resolved amounts to a total of minimum 62,000 and maximum 106,000.

in Kosovo".²³¹ The exclusive jurisdiction of the Commission covers the most controversial cases of residential property claims, including claims for restitution of property lost through discrimination, claims for registration of informal property transactions, and claims by refugees who have lost their homes and wish to return or transfer their property.

The decision to create claims commissions which operate outside the normal judicial system was clearly inspired by the model of the Commission for Real Property Claims of Displaced Persons and Refugees in BiH.²³² The idea behind that approach is that quasi-judicial bodies, which are composed of one local and two international members, might be more immune from pressures of the local community than municipal courts. To ensure that tribunals are not overly influenced by powerful groups is generally a legitimate purpose.²³³ However, in the case of Kosovo, this decision had some negative implications. Until the promulgation of Regulation 2000/60 of 31 October 2000, the Commission was not able to begin hearing claims. Since no effective mechanism existed to deal with the majority of property claims, complaints were lodged before the local courts, which have not always been aware of their lack of jurisdiction.²³⁴ Moreover, since neither the HPD nor the HPCC were operational, the municipalities and security forces assumed the competence to determine on an ad hoc basis what should be classified as illegal occupancy.²³⁵ The failure to provide an adequate system for the resolution of property claims, while removing jurisdiction from the local courts, is hardly compatible with the right to have civil disputes decided by a judicial body.²³⁶

In addition, one may also have doubts, whether the system currently in place meets the requirements of internationally recognized human rights standards. By establishing quasi-judicial organs with exclusive jurisdiction over the majority of property disputes, Regulation 1999/23 denies claimants the right of access to an independent tribunal. The standing of a Commission Member is not comparable to the legal position of an independent judge. Section 17.3 of Regulation 2000/60 limits the mandate of a Commission Member to renewable terms of one year. Furthermore, Section 17.4 of the same Regulation provides that "a member of the Commission may be removed from office by the Special Representative on the recommendation of a majority of the members of the Commission for failure to meet the qualifications for office or for persistent and unjustified refusal to perform the duties of office". This standard comes not even close to the strict require-

²³¹ See Section 2.7 of Reg. 1999/23 and Sec. 3.1 of Reg. 2000/60.

²³² See Annex 7 of the DPA and the Rules and Regulation of the Commission, adopted on 4 March 1999, available under <http://www.crpc.org.ba>.

²³³ See Nowak, note 183, Art. 14, at 245.

²³⁴ See OSCE, *The Impending Property Crisis in Kosovo* (hereinafter "OSCE, Property Crisis"), Report of 25 Sept. 2000, 2, available under <http://www.osce.org/kosovo>.

²³⁵ This has led to instances, in which illegal flat evictions were legitimized by mistake. See OSCE, *Property Crisis*, at note 9.

²³⁶ See also OSCE, *Property Crisis*, 4.

ments, which a judge must meet in order to qualify as being independent of the executive under Art. 6 (1) of the ECHR.²³⁷

It is also doubtful, whether the proceedings before the Claims Commission may be considered as a fair trial within the meaning of Art. 6 ECHR.²³⁸ According to jurisprudence of the European Court of Human Rights, Art. 6 (1) gives a party to proceedings within the scope of Art. 6 a right to present his case to the court under conditions “which do not place him at substantial disadvantage vis-à-vis his opponent”.²³⁹ The right to an “adversarial proceeding” requires that a party be given the opportunity “to make known any evidence needed for his claim to succeed.”²⁴⁰ However, the claims before the Commission are, in principle, decided on the basis of written submissions, including documentary evidence.²⁴¹ Section 19.2 of Regulation 2000/60 expressly prevents any party from giving oral evidence or argument before the Commission, unless it is invited to do so by the Commission.²⁴²

(bb) UN Regulations in the field of criminal law:

The UN legislation in the area of criminal law raises even greater concerns. An issue of particular concern is lack of clarity over the applicable law. Regulation 1999/24 has defined four sources of applicable law in Kosovo: The law in Kosovo, as it existed on 22 March 1989, UNMIK Regulations, the law applied in Kosovo between 22 March 1989 and 12 December 1999 (the date Regulation 1999/24 came into force) if it is more favourable to a criminal defendant or fills a gap in the law of March 1989 and international human rights standards. Unfortunately, UNMIK has failed to define a clear hierarchy between these sources of law. Section 1.1 of Regulation 1999/24 states that regulations “shall take precedence” over 1989 law. But the hierarchy between the other sources of law remains unclear under the regulation concerning the applicable law. In particular, it has not been specified whether human rights law takes precedence over domestic laws or UNMIK regulations. Section 1.3 of Regulation 1999/24 confines itself to the statement that “in exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognised human rights standards” as defined in the regulation. Section 2 adds that “courts in Kosovo may request

²³⁷ See European Court of Human Rights, Judgment in the Case *Campbell and Fell*, Series A, No. 80, para. 80, where the Court states that “irremovability of judges by the executive during their term of office must be in general considered as a corollary of their independence”. If not formally recognized by law, it must at least be “recognized in fact” and be accompanied by “other necessary guarantees”. See generally on the guarantee of independence under Art. 6 (1) ECHR, Peukert, note 188, at 252.

²³⁸ See for the applicability of fair trial standards to civil claims, Peukert, *ibid.*, at 224 et seq.

²³⁹ See European Court of Human Rights, *Delcourt v. Belgium* (1970) EHRR 1, 355 et seq., at para. 28.

²⁴⁰ See European Court of European Rights, *Mantovanelli v. France* (1997), EHRR 24, 370 et seq., at para. 33.

²⁴¹ See Sect. 19.1 of Reg. 2000/60.

²⁴² The provision reads: “No party may give oral evidence or argument before the Commission unless invited to do so by the Commission”.

clarification from the Special Representative of the Secretary-General in connection with the implementation of the present regulation”.

This lack of certainty concerning the applicable law is highly problematic, especially in the field of criminal law, where the principle of specificity (*nullum crimen sine lege stricta*) requires a particularly high standard of legal clarity.²⁴³ The SRSG was even forced to set out the meaning of Section 1.3 of Regulation 1999/24 in a letter to the Belgrade Bar Association, confirming thereby that human rights law take precedence over the provisions of the domestic law.²⁴⁴ But this clarification has not solved all of the problems. It is in fact difficult to conceive, how a delinquant could possibly foresee what is criminal behaviour, if professional judges have not been able to do so.

Furthermore, UNMIK regulations themselves have failed to comply with human rights guarantees enshrined in the ECHR and the ICCPR. One example is Regulation 1999/26 on the extension of pre-trial detention. Under the applicable FRY Code of Penal Procedure, the maximum time an individual can spend in pre-trial detention is six months.²⁴⁵ UNMIK Regulation 1999/26 authorizes a panel of the Kosovo Supreme Court to extend pre-trial custody by two additional periods of three months.²⁴⁶ The regulation itself and the practice of pre-trial detention pursuant to that regulation violates both the ECHR and the ICCPR.

Art. 5 (3) of the ECHR and Art. 9 (3) of the ICCPR require that anyone who has been arrested or detained be brought promptly before a judge in order to determine the lawfulness of the arrest or the detention. In addition, Art. 5 (4) of the ECHR and Art. 9 (4) of the ICCPR demand that all persons, who have been deprived of their liberty by arrest or by detention be entitled to take proceedings by which the lawfulness of their detention may be decided speedily by a court. National authorities are therefore under an obligation to provide a forum by which the lawfulness of a detention may be challenged during the entire period of pre-trial detention. This includes, *inter alia*, the duty to secure a periodic review of the detention order within short intervals.²⁴⁷ UNMIK Regulation 1999/26 fails to provide for a mechanism which allows a detainee to challenge the lawfulness of an order for continued detention during the period covered by the Regulation. It is thus in clear breach of international human rights standards.²⁴⁸

²⁴³ See also the critical comments by Frowein, note 1, under 6.

²⁴⁴ Cf. OSCE, Justice System, 15.

²⁴⁵ The initial time limit set for pre-trial detention is one month. It may be extended for a further two months. After three months indictment or release must follow. However, if the crime concerned carries a sentence of more than five years or a more severe penalty, a decision may be taken to extend pre-trial detention by another three months. See Art. 191 (2) of the FRY Code of Penal Procedure.

²⁴⁶ See Section 1.1 of Reg. 1999/26.

²⁴⁷ See European Court of Human Rights, Judgment of 25 Oct. 1989, *Bezicheri*, Series A, No. 164, para. 24 et seq. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also provide for a right to a review of continued detention by a court or other authority at reasonable intervals. See Principles 11 (3) and 39.

²⁴⁸ Cf. OSCE, Report No. 6, Extension of Custody Time Limits and the Rights of Detainees: The Unlawfulness of Regulation 1999/26, 29 April 2000, available under <http://www.osce.org/kosovo>.

(cc) Regulations in the field of public law:

Inconsistencies between UN legislation and the provisions of the ECHR and the ICCPR have also arisen in the area of public law. One of the first regulations of UNMIK at all, namely Regulation 1999/2 on the prevention of access by individuals and their removal to secure public peace and order, is incompatible with the standards of the European Convention. The regulation provides for a temporary detention or restriction on the freedom of movement of individuals who may pose a "threat to public peace and order".²⁴⁹ Section 2 reads:

"The relevant law enforcement authorities may temporarily detain a person, if this is necessary in the opinion of the law enforcement authorities and in the light of the prevailing circumstances on the scene, to remove a person from a location, or to prevent access by a person to a location in accordance with Section 1 of the present regulation."

However, under Art. 5 (1) ECHR, a threat to public order is not a sufficient ground to justify the detention of a person, unless there is a concrete suspicion that the person will commit an offence.²⁵⁰ On the contrary, a "preventative detention" for security purposes is a clear violation of Art. 5 (1) of the ECHR.²⁵¹

Another violation of the ECHR has been identified by the Kosovo Media Appeals Board²⁵² which in its decision on the appeal by Belul Beqaj and the newspaper Dita against a decision of the Temporary Media Commissioner (TMC)²⁵³ found that the conditions justifying the infliction of sanctions against the media under Regulation 2000/37²⁵⁴ did not satisfy the procedural guarantees required by

See also Amnesty International, Federal Republic of Yugoslavia (Kosovo), Amnesty International's Recommendations to UNMIK on the judicial system, Feb. 2000, available under <http://www.amnesty.org>.

²⁴⁹ According to Section 1.2 of the Regulation 1999/2 such a threat to public peace and order may be posed by any act that jeopardizes the rule of law, the human rights of individuals, public and private property and the unimpeded functioning of public institutions.

²⁵⁰ See Art. 5 (1) *lit. c* "No one shall be deprived of his liberty save in the following cases ... c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

²⁵¹ See most recently ECHR, *Jecius v. Lithuania*, Appl. No. 34578/97, 31 July 2000. See on the case law also Peukert, note 188, Art. 5, at 111.

²⁵² The Media Appeals Board is competent to uphold, modify or rescind decisions of the Temporary Media Commissioner. It was established by UNMIK Regulation 2000/36 on the Licensing and Regulation of the Broadcast Media in Kosovo. Section 4 of this regulation lays down the composition and the responsibilities of the Media Appeals Board. Section 4.2 provides that "the Board is an independent body which shall hear and decide on appeals by a person or entity against any of the following decisions by the Temporary Media Commissioner: a) refusal to issue a broadcast licence; or b) the conditions attached to a broadcast licence; or c) sanctions imposed by the Temporary Media Commissioner."

²⁵³ The TMC was established by the SRSG on 17 June 2000 by UNMIK Regulation 2000/36. As a temporary media regulatory authority, the TMC is responsible for the "implementation of a temporary regulatory regime for all media in Kosovo". See Section 1.1.

²⁵⁴ UNMIK Regulation 2000/37 on the Conduct of Print Media in Kosovo provides that the TMC may impose sanctions "on owners, operators, publishers, editors-in-chief ... who operate in violation of the applicable law ...". Section 4.1 of Regulation 2000/37 states that "owners, operators, publishers and editors shall refrain from publishing personal details of any person, including name,

internationally recognized human rights.²⁵⁵ The Media Appeals Board based its reasoning on the procedural guarantees established by Art. 6 of the ECHR and noted that the principle of “equality of arms” required not only that decisions be taken by an impartial and independent tribunal, but also that parties to proceedings be given an opportunity to present their case, and to know and to “comment on all evidence adduced or observations filed with a view to influencing the court’s decision”.²⁵⁶ The Board observed that Regulation 2000/37 makes very little provision on the procedure to be followed by the TMC in determining the existence of a violation and imposing a sanction, providing merely for a “reasonable opportunity to reply prior to the imposition of any sanction”.²⁵⁷ It argued that the terms of the regulation therefore present the Media Commissioner with a predicament, effectively making him judge in his own cause. The Board concluded:

“Although the TMC is described as and required to be ‘independent’..., Regulation 2000/37 does not permit the TMC to be an independent and impartial tribunal which is required by international human rights standards whenever civil rights and obligations or criminal charges are determined.”²⁵⁸

Moreover, it added in a footnote²⁵⁹ that “in the view of the Board, it would be better if the Regulation were amended to ensure a fair hearing from the start.” Following that decision, the TMC created the Media Hearing Board, an independent administrative panel, allowing publishers to present their case before the infliction of a sanction.²⁶⁰

It is hardly surprising that one general characteristic of UN legislation in the field of public law is the wide discretion given to the SRSG or UNMIK in administrative application procedures²⁶¹, making it basically impossible to exercise any form of judicial control over the decision. Regulations 2000/8 (on the Registrations of Businesses in Kosovo) and 2000/33 (on Licensing of Security Services Providers in Kosovo) illustrate this practice. Section 4 of Regulation 2000/8 lists a number of concrete grounds upon which applications for the registration of businesses may be rejected; however, it then adds a general clause, which permits the

address or place of work, if the publication of such details would pose a serious threat to the life, safety or security of any such person through vigilante violence or otherwise.”

²⁵⁵ See *Media Appeals Board, Kosovo, Beqaj & Dita v. Temporary Media Commissioner*, Decision of 16 Sept. 2000, available under <http://www.osce.org/kosovo>.

²⁵⁶ See para. 63 of the *Dita* decision.

²⁵⁷ Section 2.3 of Regulation 2000/37.

²⁵⁸ See para. 67 of the *Dita* decision.

²⁵⁹ Cf. note 13 of the *Dita* decision.

²⁶⁰ The Media Appeals Board considers that “these new arrangements have largely remedied the situation.” See *Media Appeals Board, Kosovo, Alin & the Newspaper Bota Sot v. Temporary Media Commissioner*, Decision of 10, 11 January 2001, 19 February 2001, para. 71, available under <http://www.osce.org/kosovo>.

²⁶¹ See also Section 2.4 of Regulation 2000/16 on the Registration and Operation of Political Parties in Kosovo, which reads: “The minimum number of registered supporters required for a valid application for registration shall be 4,000. The Special Representative of the Secretary-General may, in his sole discretion, grant a political party exemption from the requirement of the minimum number of registered supporters (e.g. if such political party represents a relatively small ethnic community in Kosovo).”

rejection of an application on “any other legitimate reason pertaining to public peace and order which the Special Representative of the Secretary-General deems sufficient.”²⁶² Regulation 2000/16 provides that “any business providing security services in Kosovo is required to be registered with and issued a business license by UNMIK.” Section 4.1, which regulates the refusal, suspension or revocation of security service licenses and weapon permits, states: “The [UNMIK] Department or the [UNMIK Police] Commissioner may, in their sole discretion, refuse to issue a license or permit to an applicant. The reason for the decision shall be communicated to the applicant.” Furthermore, Section 5.1 of Regulation 2001/7 on the Authorization of Possession of Weapons in Kosovo goes even further by providing that “[t]he UNMIK Police Commissioner may, in his or her sole discretion, refuse to issue a Weapon Authorization Card to an applicant. No reason for refusal need be given to the applicant.”²⁶³

The regulations on the appointment and removal from office of judges and prosecutors raise even greater concerns. They depict a rather curious understanding of what is commonly referred to as an “independent judiciary”. Both, Art. 6 (1) of the ECHR and Art. 14 (1) of the ICCPR provide that in the determination of his civil rights and criminal charges, everyone is entitled to a fair and public hearing by an “independent and impartial tribunal established by law”. The requirement of an independent judiciary is one of the cornerstones of the separation of state powers. It usually relates primarily to the executive but also to a lesser extent to the legislative branch of a state. However, under the rule of UNMIK, it has received little attention. A particularly alarming example is Section 4 of Regulation 2000/6 on the Appointment and Removal from Office of International Judges and International Prosecutors. It contains almost no safeguards for international judges and prosecutors against their removal from office. The removal from office does not even require a specific procedure; it is merely based on a decision by the SGSR, which may be justified by such indeterminate grounds as “serious misconduct” or “failure in the due execution of office”. Section 4.1 reads:

“The Special Representative of the Secretary-General may remove from office an international judge or international prosecutor on any of the following grounds: a. physical or mental incapacity which is likely to be permanent or prolonged; b. serious misconduct; c. failure in the due execution of office; or d. having been placed, by personal conduct or otherwise, in a position incompatible with the due execution of office”.

The very same vague criteria apply to the removal from office of national judges and prosecutors. In this case, however, the SRSG shall “consult” the Advisory Judicial Commission²⁶⁴ before taking his decision. According to Section 7 of Regulation 1999/7²⁶⁵, the Commission is supposed to make “an appropriate recom-

²⁶² See Section 4.1 *lit. d*).

²⁶³ See Reg. No. 2001/7 of 21 February 2001.

²⁶⁴ The Commission is composed of eight local and three international experts. See Section 2 of Regulation 1999/7.

²⁶⁵ Regulation 1999/7 on Appointment and Removal from Office of Judges and Prosecutors, as amended by Regulation 2000/57 of 6 October 2000.

mentation” to the SRSG, who may then remove a judge or prosecutor from office “after taking into account the recommendation of the Commission”. It is obvious that this procedure does not offer significantly greater safeguards. Surprisingly, under both regulations, the persons concerned must not even be heard by the SRSG before their removal from office. Such a lack of minimum standards of rule of law is hardly acceptable, even under special circumstances such as those in Kosovo.

(3) Lack of adequate mechanisms of control

It is also objectionable that there are hardly any institutions, which are authorized to review whether action taken by UNMIK or KFOR is in conformity with the standards of the ECHR or the ICCPR. It is clear that an organ like the Security Council cannot take charge of such tasks arising in the every-day-context of a UN operation. But little efforts have been made, in order to establish mechanisms that could ensure such a control.

UNMIK Regulation 47/2000 on the Status, Privileges and Immunities of KFOR and UNMIK and their personnel in Kosovo confers wide immunities upon UNMIK and KFOR, thus depriving the local courts of significant parts of their jurisdiction. Independent review mechanisms composed of national and international members have only been established in special cases.²⁶⁶

(a) *Legal protection against executive acts of UNMIK and KFOR*

A matter of serious concern is the apparent lack of fora, in which individuals may challenge executive decisions of UNMIK or KFOR personnel. The far-reaching immunities provided to UNMIK and KFOR make it very difficult, if not impossible, for individuals to defend their rights against these authorities. In a democratic state, immunity is normally conferred upon individuals who act as members of the government or members of parliaments. In Kosovo, however, immunity is granted to UNMIK as an institution.²⁶⁷ Moreover, UNMIK enjoys immunity for all of its activities. Therefore, parts of the executive branch of power are exempted from the jurisdiction of the national courts. Section 3 of Regulation 2000/47 provides that:

“3.1. UNMIK, its property, funds and assets shall be immune from any legal process.

3.2. The Special Representative of the Secretary-General, the Principal Deputy, and the four Deputy Special Representatives of the Secretary-General, the Police Commissioner, and other high-ranking officials as may be decided from time to time by the Special Representative of the Secretary-General, shall be immune from local jurisdiction in

²⁶⁶ See, e.g., Reg. 2000/36 establishing the Media Appeals Board or Reg. 2000/20 creating an Independent Review Board in the area of Tax Administration.

²⁶⁷ See also Section 6.1 of Reg. 2000/47, which reads “The immunity from legal process of KFOR and UNMIK personnel and KFOR contractors is in the interests of KFOR and UNMIK and not for the benefit of the individuals themselves.”

respect of any civil or criminal act performed or committed by them in the territory of Kosovo.

3.3. UNMIK personnel, including locally recruited personnel, shall be immune from legal process in respect of words spoken and all acts performed by them in their official capacity.”

It follows from these provisions that there is currently no legal remedy to challenge the legality of executive decisions taken by the SRSG or by his personnel, unless the Secretary-General of the UN decides to waive the immunity a case “where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interest of UNMIK.”²⁶⁸ With the progressive transfer of administrative powers from UNMIK to the municipalities²⁶⁹, this severe restriction to the right of access to court has been attenuated, since decisions of a municipality may be challenged before the local courts.²⁷⁰ However, in all areas, which do not fall in the sphere of competence of the municipalities, attempts to seek justice in the courts are usually frustrated by UNMIK’s claim of immunity.²⁷¹ For example, a temporary removal of a person from a location for the prevention of a threat to public peace and order under Regulation 1999/2 may in principle not be challenged before a court, if this measure is taken by the Civilian Police of UNMIK.²⁷²

²⁶⁸ See Section 6.1 of Reg. 2000/47.

²⁶⁹ For the responsibilities and powers of the municipalities, see Section of Reg. 2000/45 on Self-Government of Municipalities in Kosovo.

²⁷⁰ See Section 36 of Reg. 2000/45, which provides that “[a] person may seek relief in a court of law against decisions of a municipality, in accordance with the rules and procedures of the relevant court.”

²⁷¹ For an example, see the suspension of the operations of the newspaper *Dita* by UNMIK before the creation of the Kosovo Media Appeals Board. The Board was not competent to deal with this claim, because its authority is limited exclusively to the appeals against decisions of the TMC. Nonetheless, the Board adds in para. 55 of the *Dita* decision: “The Board observes, however, that the present proceedings are deeply coloured by earlier events, and that the Applicant continues to be sincerely concerned by the apparent lack of any forum in which to pursue a challenge to the earlier closure.”

²⁷² See *e contrario* Reg. 2000/62, which provides expressly for a review of an exclusion order, while emphasizing in Section 6.2. that “[n]othing in the present regulation shall affect the power of the relevant law enforcement authorities to temporarily remove a person from a location or prevent access by a person to a location in accordance with UNMIK Reg. No. 1999/2. Another case, in which, judicial review is restricted, is regulated by UNMIK Reg. 1999/21 on Bank Licensing and Regulation. Section 48 of the regulation states that “[i]n any proceeding in any court, arbitration court or administrative body in any jurisdiction brought against the Banking and Payments Authority of Kosovo for any action taken in its capacity as supervisor or receiver, or against any of its officials, employees or agents: (a) The sole question before the court or body in determining whether a defendant acted unlawfully, wrongfully or negligently shall be whether a defendant exceeded clear authority or acted in an arbitrary or capricious manner in light of all the facts and circumstances, the provisions and intent of the present regulation, rules, orders and applicable law; (b) No actual or former official, employee, or agent of the Banking and Payment Authority shall be liable for damages or otherwise liable for acts or omissions performed in good faith in the course of his or her duties. ...” A similar provision is also contained in Section 66 of Reg. 1999/20 on the Banking and Payments Authority of Kosovo.

As in the case of UNMIK, the immunities accorded to KFOR preclude a review of its actions before the local courts. Section 2 of Regulation 2000/47 states:

“2.1. KFOR, its property, funds and assets shall be immune from any legal process.

2.3. Locally recruited KFOR personnel shall be immune from legal process in respect of words spoken or written and acts performed by them in carrying out tasks exclusively related to their services to KFOR.

2.4. KFOR personnel other than those covered under Section 2.3 above shall be: a. immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo. Such personnel shall be subject to the exclusive jurisdiction of their respective sending states; ...”.

The residents of Kosovo are therefore left without access to a remedy against acts of KFOR before their own courts. This is particularly delicate in the context of detentions where internationally recognized human rights standards require a legal mechanism whereby a detainee can challenge the lawfulness of his detention.²⁷³

Due to the absence of effective alternative review mechanisms, the wide immunities granted to KFOR and UNMIK under Regulation 2000/47 are highly questionable from a human rights perspective. However, a cautious²⁷⁴ change of direction is reflected in Regulation 2000/62, which allows for a judicial review of exclusion orders issued by KFOR or the UNMIK police. Section 2 of the regulation provides that:

“[t]he relevant law enforcement authorities²⁷⁵ may issue an exclusion order requiring a person to leave and/or stay away from any area under their authority if there are grounds to suspect that such a person is or has been involved in the commission, preparation or instigation of acts of violence which may affect public peace and order within or beyond the territory of Kosovo.”

Section 3 adds:

“3.1. A person who is the subject of an exclusion order issued pursuant to section 2 of the present regulation may petition for review of the order in the district court of any region from which he or she is not excluded ...

3.2. An international judge in the competent district court shall review an exclusion order, upon a petition brought by the persons referred to in section 3.1.”

When reviewing the order, the judge shall convene a public hearing permitting “an adversarial debate” between the parties. Section 3.3. grants him the authority to either “approve, rescind or amend the order”. This procedure is a novelty in the context of the previous UNMIK law-making. It reveals a growing awareness of the necessity to pay greater respect to the right of access to court.

²⁷³ See also OSCE, Justice System, 19 and 26.

²⁷⁴ It is expressly mentioned in the preamble of Reg. 2000/62 that it shall not prejudice “any actions that may be taken by KFOR pursuant to United Nations Security Council Resolution 1244 (1999).”

²⁷⁵ Section 1 of the regulation reads: “For the purposes of the present regulation: (a) ‘relevant law enforcement authority’ shall mean the international security presence in Kosovo, known as KFOR and the Civilian Police of the United Nations Interim Administration in Kosovo (UNMIK), also known as the United Nations International Police or as UNMIK Police.”

(b) Reviewability of UNMIK legislation

It does not come as a surprise that UNMIK is also the “final arbiter” of the lawfulness of its own legislation. While the precedence of the applicable human rights law above UNMIK regulations may be inferred from Section 3 of Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo, the problems remain in ensuring that this supremacy is implemented by UNMIK.

UNMIK legislation is not subject to control procedures which are equivalent to those of a functioning state system. In the preparatory stage, UNMIK legislation is not presented to a parliament for adoption but submitted to a joint consultative body that merely examines and provides opinions on the legislation. In addition, some UN internal control seems to be exercised by the Office of Legal Affairs at the United Nations Headquarters.²⁷⁶ But there is no separate international expert body, which supervises the adoption of legislation.

Furthermore, a number of reasons suggest that the courts in Kosovo are generally not competent to declare UNMIK regulations “null and void” and therefore inapplicable on the ground of their non-conformity with the human rights instruments listed in Section 1.3. of Regulation 1999/24. First, there is no direct remedy against UNMIK regulations. The right to file complaints concerning an abuse of authority by UNMIK is restricted to the procedure before the Ombudsperson.²⁷⁷ Second, it is difficult to establish that the courts may exercise an incidental right of control over regulation promulgated by UNMIK. Such a right is not expressly provided for under the existing legislation. Moreover, a close reading of Regulations 1999/1 and 1994/24 reveals that the local courts are not entitled to nullify UN legislation.

Section 1.3. of Regulation 1999/24 obliges all persons undertaking public duties to observe these human rights standards in exercising their functions, which implies that courts must be guided by these principles when applying the law. However, this obligation cannot be interpreted as a permission to pass over regulations promulgated by UNMIK.²⁷⁸ Section 1 of Regulation 1999/1 provides that “all legislative and executive authority” including “administration of the judiciary” is vested in UNMIK. Section 4 of the same regulation states that UNMIK regulations “shall remain in force until repealed by UNMIK or superseded by such rules as are subsequently issued by the institutions established under a political settle-

²⁷⁶ See Corell, note 129, at 5, who points out that the UN Secretariat tries to assist UNMIK “in particular by reviewing the constitutional elements of the legislations, i.e. that the regulations conform to the Charter of the United Nations, to the mandates given to UNMIK by the Security Council and also respect internationally recognized standards, in particular in the field of human rights.”

²⁷⁷ See Sections 3 and 4 of Reg. 2000/38.

²⁷⁸ See also para. 55 of the *Dita* decision. “As noted above, the Media Appeals Board has been established to consider appeals against certain decisions of the Temporary Media Commissioner. It may ‘affirm, modify or rescind’ such decisions, but it is not competent to review the legality or ‘constitutionality’ of Regulations promulgated by the Special Representative of the Secretary-General: see section 1 and section 4, Regulation 1999/1 on the Authority of the Interim Administration in Kosovo.”

ment, as provided for in United Nations Security Council Resolution 1244 (1999).” In addition, Section 2 of Regulation 1999/23, according to which the courts in Kosovo are authorized (“may”), but *e contrario* not obliged to request clarification from the SGSR concerning the applicable law may, at the utmost, be regarded as an affirmation of the interpretative powers of the courts, allowing them to interpret UNMIK regulations in accordance with the human rights standards set forth in Section 1.3. of Regulation 1999/24. But it can, under no circumstances, be conceived as an authorization to invalidate legislation adopted by UNMIK.

One must rather infer from the existing legislative framework that the Ombudsperson is intended to be the institution, which shall issue guidance on the compatibility of UNMIK Regulations with international standards. Section 4.3. of Regulation 2000/38 reads:

“... the Ombudsperson may provide advice and make recommendations to any person or entity concerning the compatibility of domestic laws and regulations with recognized international standards.”

This approach is only partly satisfying, since the Ombudsperson institution²⁷⁹ will be hardly in a position to assume a role, which is under normal circumstances exercised by a national Constitutional Court.²⁸⁰ Nonetheless, the creation of the Ombudsperson constitutes an important step for the development of the Kosovo legal system filling the gap between UNMIK’s commitment to the observance of internationally recognized human rights standards and its lack of accountability for the violation of the latter. The Ombudsperson may prove to be a useful organ for detecting flaws and inconsistencies in UN law-making.

b) The situation in BiH

The system of territorial administration in BiH differs in several ways from the transitional administration of Kosovo. The basic constitutional framework of the territory has been established by the Dayton Peace Agreement. The task of the international actors has therefore focused on the supervision of the national institutions rather than on the re-establishment of governmental structures.

(1) The system of administration under the DPA

A complex international monitoring system has been established in order to implement the constitutional provisions and human rights guarantees enshrined in the DPA. Accordingly, the HR exercises his powers not only in a system of co-administration with existing governmental authorities, but also in collaboration

²⁷⁹ According to Section 6 of Regulation 2000/38, “the Ombudsperson institution shall be composed of the Ombudsperson, at least three Deputy Ombudspersons and a professionally competent staff.”

²⁸⁰ A Constitutional Court for Kosovo was envisaged under the Rambouillet Agreements. It remains to be seen if the recommendations of the Ombudsperson will be treated as binding by UNMIK or the local courts.

with several international institutions such as the Human Rights Chamber, the Ombudsperson and, most importantly, the Constitutional Court of BiH, which is composed of six national and three international judges.²⁸¹

Originally, the main function of the HR has been to supervise the implementation of the DPA. However, by his extensive legislative and executive action, the HR has grown into the most important actor for the functioning of the state. The far-reaching use of the powers as “final authority” regarding the civilian implementation of the DPA was primarily a reaction to a paralysis of the national institutions of BiH caused by the weak powers of the central government and the incorporation of ethnically based checks and balances into the decision-making structure on the national level. But this decision-making practice of the HR which turned out to have more and more severe impacts on the institutions at the national and at the entity-level also raised the question as to where the limits of the HR’s powers lie.

(2) Constitutional control of acts adopted by the HR

Unfortunately, this question has not been addressed explicitly by the DPA or the subsequent Security Council Resolutions. Some important clarification was given by a decision of the BiH Constitutional Court in the case concerning the Law of State Border Service, in which the Court established its competence to examine the “constitutionality” of laws enacted by the HR by holding that the Constitution of BiH confers on the Constitutional Court the right to control the conformity of laws with the Constitution, regardless of their author.

Given the particular status of the HR under the DPA, the divergent judicial practice on the control of acts of international administrators and even the previous jurisprudence of the BiH Constitutional Court, the solution adopted by the Court has not been self-evident.

(a) Arguments against a review of constitutionality

To assert that the control over acts adopted by the HR exceeds its own competence would have been an easy task for the court. The HR is, above all, an institution which derives its authority from international law. Accordingly, it is not unreasonable to qualify his decisions as acts which emerge from a different legal order and which are therefore not subject to review by the national institutions of BiH. Several arguments may be invoked in support of this position. The HR expressly bases his decisions on his authority under Annex 10 of the DPA and Art. XI of the Bonn Declaration of the PIC. Furthermore, the HR is not a constitutional organ of the state of BiH. His role is not even mentioned by the Bosnian

²⁸¹ See generally on the BiH Constitutional Court L. Favoreu, *La Cour constitutionnelle de Bosnie-Herzégovine*, in: *Mélanges P. Gélard* (1999), 273 et seq.

Constitution contained in Annex 4 of the DPA. It is solely defined by Annex 10 of the same agreement which is purely international in nature.²⁸²

Finally, in the context of the occupation of Germany after 1945, German courts refused to exercise control over acts of the Allied powers justifying their lack of jurisdiction mainly by the international character of their authority and the international legal nature of their acts. The courts argued that such acts were not reviewable, because they did not stem from a German public authority.²⁸³ Building on this practice, the BiH Constitutional Court could have easily declined its authority arguing that the decisions of the HR are international in character and thus exempted from the jurisdiction of the courts of BiH.

The court has even used a similar line of argument in its judgments concerning the reviewability of decisions of the Human Rights Chamber²⁸⁴. In these judgments the court found that the framers of the DPA “did not intend to give one of the institutions competence to review decisions of the other, but rather considered that, in regard to human rights issues, the Constitutional Court and the Human Rights Chamber should function as parallel institutions, neither of them being competent to interfere in the work of the other ...”. The court based its lack of jurisdiction on the argument that the Human Rights Chamber is “an institution of a special nature” which cannot be compared to “a court or an institution of BiH”. It also placed considerable weight on the fact that the decisions of the Chamber are declared “final and binding” under Art. XI (3) of Annex 6 of the DPA. The same reasoning could have been applied to the HR who is vested with the “final authority” regarding the civilian aspects of the DPA.

(b) The “functional duality” approach adopted by the BiH Constitutional Court in its U 9/00 decision

However, in what might be called a Bosnian version of the US Supreme Court’s *Marbury v. Madison* decision²⁸⁵, the Constitutional Court decided to follow a different path. By introducing the notion of “functional duality”, the Court recognized the competences of the HR in principle while upholding its own role as the final arbiter of the BiH Constitution. The court held that the HR acts both as a

²⁸² Annex 10 of the DPA was signed by the former Republic of Bosnia and Herzegovina, the Republic of Croatia, the FRY and both entities of BiH, namely the Federation of BiH and the Republika Srpska.

²⁸³ For a survey of the German practice, see Randelzhofer, note 167, at 14 et seq.; H. Freitag, *Rechtsschutz der Einwohner Berlins gegen hoheitliche Akte der Besatzungsbehörden gemäß Art. 6 Abs. 1 EMRK* (1989), at 24 et seq.; Herbst, note 175, at 112 et seq.

²⁸⁴ See Constitutional Court of Bosnia and Herzegovina, Decisions U 7/98, U 8/98, U 9/98 of 26 Feb. 1999, reprinted in Constitutional Court of Bosnia and Herzegovina, Decisions 1997–1999, 227 et seq., 249 et seq., 273 et seq.

²⁸⁵ In *Marbury v. Madison* (1803), the US Supreme Court held that it was competent to declare acts of Congress, and by implication acts of the President, unconstitutional if they exceeded the powers granted by the Constitution. The Supreme Court thereby assumed its role as arbiter of the Constitution.

national organ of BiH and as an international authority when adopting decisions in the form of national law of BiH.²⁸⁶ A description of this concept is given in para. 5 of the judgment where the court notes that

“... the legal role of the High Representative, as agent of the international community is not unprecedented ... Pertinent examples are the mandates under the regime of the League of Nations and, in some respects, Germany and Austria after the Second World War. Though recognised as sovereign, the States concerned were placed under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision. Such situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual.”

In the following, the court drew a clear distinction between the international and the national authority of the HR. The court found that as a national organ of the state of BiH, it was not authorized to determine, whether the HR had exceeded his mandate under Annex 10 of the DPA; however, the Court considered itself competent to examine whether acts of the HR are in conformity with the Constitution of BiH.²⁸⁷

The right to judicial review was mainly derived from the concept of representation. Building on the idea that the HR fulfills his task not only on behalf of the international community but essentially as a substitute to the national institutions of BiH, the Court conceives the HR as a representative of the local authorities, whose acts may be equated to acts of these institutions.²⁸⁸ The Court held that

“[i]n the present case, the High Representative ... intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acts as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina.”

Furthermore, in determining the legal nature of the legislation adopted by the HR, the Court paid little attention to the fact that the act had been issued by an

²⁸⁶ The same idea has been expressed by some authors with reference to the authority of the Allied powers in Germany after 1945. They argued that the occupying powers exercised both military and public authority in Germany. See W. Grewe, *Ein Besatzungsstatut für Deutschland* (1948), 82. See on the fiduciary character of the occupation of Germany also R.Y. Jennings, *Government in Commission*, in: *BYIL* 23 (1946), 112 et seq.

²⁸⁷ See para. 5 of the judgment, where the Court notes that the powers of the HR under Annex 10 of the DPA, the relevant resolutions of the Security Council and the Bonn Declaration of the PIC are not subject to its review.

²⁸⁸ In one of its judgments, the German Constitutional Court has taken the position that acts of the occupying powers might be qualified as national acts only, if they have been adopted in the exclusive interest of the administered state and to the benefit of the latter. See *BVerfGE* 27, 293, at 297. For a rejection of the idea of representation, see *Badischer Staatsgerichtshof*, Judgment of 15 Jan. 1949, in: *Archiv des öffentlichen Rechts* (1949), 477, at 478: “Anstelle der deutschen Regierung, doch nicht als Stellvertreter, sondern kraft unmittelbar aus dem Völkerrecht fließenden eigenen Rechts übte die Besatzungsmacht vorübergehend die volle deutsche Staatsgewalt und damit auch das Recht der Gesetzgebung aus.”

international authority. The Court took the view that the decisive criterion was not the author, but the content of the adopted act.²⁸⁹ This is clearly expressed in para. 6 of the judgment, which reads:

“... the fact that the Law on State Border Service was enacted by the High Representative and not by the Parliamentary Assembly does not change its legal status, either in form – since the Law was published as such in the Official Gazette of Bosnia and Herzegovina on 26 January 2000 – or in substance, since, whether or not it is in conformity with the Constitution, it relates to a field falling within the legislative competence of the Parliamentary Assembly according to Article IV.4 (a) of the Constitution.”

How welcome this result may be, it is not above criticism. It is questionable whether the form and content of a legal act alone suffice to determine its legal nature. German courts, e.g. have taken a different position when examining the legal nature of acts implementing the law established by the occupying powers.²⁹⁰ Furthermore, it may be argued that the approach adopted by the BiH Constitutional Court has brought about a partial revision of the powers of the HR, limiting his “final authority” in the field of normative action. By assuming a right to control legislation enacted by the HR, the Constitutional Court has implicitly determined the limits of Annex 10 of the DPA. This interference may be justified by the fact that the Constitutional Court is the “guardian” of the constitutional legal order of BiH,²⁹¹ in which the HR intervenes by adopting national legislation. But this reasoning is, of course, visibly guided by the intention to put an end to the apparently unlimited extension of powers by the HR. Or, as one commentar has put it: The Court wanted *Kelsen* rather than *C. Schmitt*.²⁹²

(c) *Consequences of the judgment*

The main consequence arising from the decision of the BiH Constitutional Court is that henceforth a distinction must be drawn between the normative and

²⁸⁹ See on this approach also *Pech*, note 26, at 435.

²⁹⁰ See for the non-reviewability of regulations which have been adopted on the basis of laws issued by the occupying powers, *Badischer Staatsgerichtshof*, Judgments of 15 Jan. 1949, 27 Nov. 1948 and 31 August 1949, in: *Archiv des öffentlichen Rechts* (1949), 477 et seq. See in particular, *Badischer Staatsgerichtshof*, Judgment of 27 Nov. 1948, 486 “Stellt die Anordnung über den Arbeitseinsatz ... somit ihrer äußeren Form nach badisches Recht, ihrem materiellem Gehalt nach aber Recht der französischen Militärregierung dar, so ist sie einer Nachprüfung durch den Staatsgerichtshof entzogen. Maßstab für eine solche Nachprüfung könnte nur die Badische Verfassung sein ... Die Badische Verfassung kann aber nicht den Maßstab für die Gültigkeit von Besatzungsrecht abgeben. Dieses letztere bemißt sich allein nach völkerrechtlichen Gesichtspunkten und auf einer völkerrechtlichen Ebene, die dem Staatsgerichtshof verwehrt ist.”

²⁹¹ See Art. VI.3 of the Bosnian Constitution, which provides that the Constitutional Court “shall uphold the Constitution”.

²⁹² As is well known, *C. Schmitt* repeatedly emphasized that in any system of law what ultimately matters is not so much what legal provisions proclaim, but rather what those entitled to interpret these provisions decide. See *C. Schmitt*, *Politische Theologie, Vier Kapitel zur Lehre von der Souveränität* (1922), 40–46. In BiH, the “real powers” in the hands of the HR seemed to gain too much ground over the rule of law.

the interpretative powers of the HR. Even according to the “dual authority”-approach adopted by the court, the HR remains in principle the final arbiter over the interpretation of Annex 10 of the DPA. Acts issued in this capacity are therefore generally not reviewable. However, in the eyes of the court, Annex 10 cannot be interpreted as conferring on the HR a final and unlimited decision-making power in the sphere of competence of the national legislative. If the HR acts in this area his decisions share, in the view of the court, the same legal nature as laws adopted by the national institutions and must, accordingly, receive an equivalent legal treatment. They must, in particular, comply with the constitution of BiH and with the legal guarantees enshrined in the ECHR, which has “priority over all other law”.²⁹³ Furthermore, the court seems to apply the *lex posterior*-rule if a law adopted by the HR is not in accordance with legislation adopted by the national parliament. Para. 6 of the judgment states:

“The Parliamentary Assembly is free to modify in the future the whole text or part of the text of the Law [on State Border Service], provided that the appropriate procedure is followed.”

It follows from the decision of the court that laws enacted by the HR may, just like any other national law, be challenged directly by the constitutional organs of BiH listed in Art. VI.3 (a) of the BiH Constitution.²⁹⁴ Individuals, on the contrary, do not have a direct legal remedy against legislative action before the Constitutional Court. But it would seem that they are entitled to claim incidentally in disputes before other courts that a law adopted by the HR violates the Constitution of BiH or the ECHR.

Unfortunately, it is not fully clear from the judgment in how far the right of review of the court extends to other acts of the HR such as the removal from office of government officials, which has been practiced by the HR on various occasions.²⁹⁵ A strict interpretation of the “functional duality”-approach would suggest that the control of the Constitutional Court is limited to the review of legislation adopted by the HR. Para. 7 of the judgment, however, may be interpreted as indicating the exercise of a more comprehensive control. It provides that

“[t]he competence given to the Constitutional Court to ‘uphold the Constitution’ ... confers on the Constitutional Court the control of the conformity with the Constitution of all acts, regardless of the author, as long as this control is based on one of the competences enumerated in Article VI.3 of the Constitution (emphasis added).”

Despite this uncertainty, the judgment marks an important step towards the establishment of the rule of law in a country, which tends to be governed more and more by an internationally appointed administrator who acts as the supreme au-

²⁹³ See Art. II 2 of the Bosnian Constitution.

²⁹⁴ See para. 6 of the judgment, according to which the Constitutional Court is entitled to exercise its right of control “as long as this control is based on one of the competences enumerated in Article VI.3 of the Constitution of Bosnia and Herzegovina.”

²⁹⁵ See, e.g., the Decision of 7 March 2001 removing A. Jelavic from his position as the Croat member of the BiH presidency and further banning Jelavic from holding public offices, available under <http://www.ohr.int>.

thority of the country and intervenes in the internal legal order “as he deems necessary”.

IV. Conclusions

The ethnic conflicts in the former Yugoslavia have revived an old phenomenon: the administration of territories through the international community. What began as a colonial enterprise and as a means of decolonization has gradually developed to a model of conflict resolution within the context of complex peace operations. The cases of BiH and Kosovo are some of the most striking examples of this new trend. The call for a temporary take-over of fiduciary authority by international administrators is based on the insight that, under some circumstances, only a temporary internationalization of the governmental system of a state may reestablish the environment in which a comprehensive peace settlement may emerge.

In BiH and in Kosovo, the international community reacted to the continuing tensions between the different ethnic groups by charging international administrative authorities with the task to establish a stable social and legal order, based on democratic institutions and the protection of the human rights of the inhabitants. When implementing their ambitious mandates, both UNMIK and the HR have taken significant legal action in order to shape the political and legal system of the administered territories. However, the experience in BiH and in Kosovo shows that the transfer of almost unlimited powers to a centralized international institution is not an ideal solution. Both systems of administration are presently characterized by a concentration of powers within the hands of two perhaps all too mighty institutions.²⁹⁶ Such an approach may increase the efficiency of governance. Yet, this seems unlikely to be a winning strategy, because the international community thereby risks to build a state and a democracy without the participation or the consent of the governed.²⁹⁷ It should be clear, however, that even a cause of the international community cannot be imposed through the establishment of a “dictatorship of virtue”. Furthermore, a lack of accountability raises the issue of legitimacy. In fact, the more the international community ignores the need for a control of its own governing authorities, the less legitimate it is likely to be in the eyes of the governed.

In Kosovo, the lack of checks and balances in the institutional system and the general mistrust in the national institutions have not only led to the adoption of some rather critical legislation, but have also left the local population without a legal remedy against acts of the international administrators. In BiH, the unlimited

²⁹⁶ For a similar conclusion with regard to the UN transitional administration in East Timor, see J. Chopra, *The UN's Kingdom of East Timor*, in: *Survival* 42, no. 3 (2000), 27–39. Chopra states at p. 29: “The organisational and juridical status of the UN in East Timor is comparable with that of a pre-constitutional monarch in a sovereign kingdom. UNTAET is in all aspects the formal government of the country.”

²⁹⁷ For an evaluation of the situation in BiH, see R.M. Hayden, *Bosnia: The Contradictions of “Democracy” without Consent*, in: *EECR* 7, no. 2 (1998), 47 et seq.

exercise of powers by the HR seems to have conveyed the message that Bosnia is less a state of the Bosnian people than of the international community itself. This has created a situation, in which the two entities are often little inclined to solve their disagreements in a constructive debate, leaving it to the HR to settle their dispute.

However, both in Kosovo and in BiH, an important step towards greater accountability of the international administrators has been the establishment of mechanisms of judicial or quasi-judicial control. UNMIK has taken more than symbolic action by adopting Regulation 2000/38 on the Establishment of the Ombudsperson, which has not only created an independent monitoring body for the supervision of UN-law-making but also clarified that UNMIK is bound by international human rights law. Moreover, the "functional duality" approach adopted by the BiH Constitutional Court provides a theoretical basis for the establishment of internal forms of control in systems of international administration. It may serve as a precedent for other courts.

These developments show that there is generally a need for a balancing of powers in systems of international administration, even under special circumstances such as in the Balkans. Some "real powers" may be necessary to create the conditions for democracy. But they must, in the long run, be integrated into an institutional system based on accountability and consent of the governed.

Annex

Constitutional Court of Bosnia and Herzegovina

Case No. U 9/00²⁹⁸

Request for evaluation of constitutionality of the Law on State Border Service

Having regard to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Articles 54 and 56 of the Court's Rules of Procedure, at its session held on 3 November 2000, the Constitutional Court adopted the following

DECISION

The Law on State Border Service is hereby declared to be in conformity with the Constitution of Bosnia and Herzegovina.

This Decision shall be published in the Official Gazette of Bosnia and Herzegovina, the Official Gazette of the Federation of Bosnia and Herzegovina and the Official Gazette of Republika Srpska.

REASONS

I. The Procedure

1. On 13 January 2000, the High Representative for Bosnia and Herzegovina enacted the Law on State Border Service of Bosnia and Herzegovina, published in the Official Gazette on 26 January 2000 (Official Gazette of Bosnia and Herzegovina, No. 2/2000). On 7 February 2000, eleven members of the House of Representatives of the Parliamentary Assembly initiated proceedings before the Constitutional Court of Bosnia and Herzegovina according to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina for the evaluation of the constitutionality of the Law on State Border Service.

2. The applicants contend, on the one hand, that the High Representative does not have normative powers to impose a law in the absence of a vote by the Parliamentary Assembly, since neither Annex 10 of the General Framework Agreement nor Chapter XI.b.2 of the Bonn Declaration confers such powers upon him; on the other hand, the applicants also contest the constitutionality of the procedure followed by the Presidency of Bosnia and Herzegovina prior to the adoption of the Law on State Border Service, particularly with regard to Articles III.4, III.5 (a) and V.3 as well as the conformity of the Law on State Border Service with Articles III.2 (c) and III.3 (a) of the Constitution of Bosnia and Herzegovina.

3. In a letter of 21 February 2000, the Constitutional Court communicated the request to the High Representative and gave him the opportunity to respond to it. By a memorandum dated 2 May 2000, the Office of High Representative submitted comments on the request.

²⁹⁸ Text of the decision, as available on the homepage of the Constitutional Court of Bosnia and Herzegovina under <http://www.ustavisud.ba>.

II. Admissibility

4. According to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina, the Constitutional Court has “exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina”. Article VI.3 (a) adds that “disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity”.

5. The Law on State Border Service was enacted by the High Representative for Bosnia and Herzegovina on 13 January 2000 following the failure of the Parliamentary Assembly to adopt a draft law proposed by the Presidency of Bosnia and Herzegovina on 24 November 1999. Taking into account the prevailing situation in Bosnia and Herzegovina, the legal role of the High Representative, as agent of the international community, is not unprecedented, but similar functions are known from other countries in special political circumstances. Pertinent examples are the mandates under the regime of the League of Nations and, in some respects, Germany and Austria after the Second World War. Though recognised as sovereign, the States concerned were placed under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision.

Such situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual. The same holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character. In the present case, the High Representative – whose powers under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina.

6. Thus, irrespective of the nature of the powers vested in the High Representative by Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, the fact that the Law on State Border Service was enacted by the High Representative and not by the Parliamentary Assembly does not change its legal status, either in form – since the Law was published as such in the Official Gazette of Bosnia and Herzegovina on 26 January 2000 (O.G. No. 2/2000) – or in substance, since, whether or not it is in conformity with the Constitution, it relates to a field falling within the legislative competence of the Parliamentary Assembly according to Article IV.4 (a) of the Constitution. The Parliamentary Assembly is free to modify in the future the whole text or part of the text of the Law, provided that the appropriate procedure is followed.

7. The competence given to the Constitutional Court to “uphold the Constitution” according to the first paragraph of Article VI.3 of the Constitution, as further specified by subparagraphs (a), (b) and (c) and as read in conjunction with Article I.2 of the Constitution, which provides that “Bosnia and Herzegovina shall be a democratic state, which shall

operate under the rule of law and with free and democratic elections”, confers on the Constitutional Court the control of the conformity with the Constitution of all acts, regardless of the author, as long as this control is based on one of the competences enumerated in Article VI.3 of the Constitution.

8. The constitutionality of the Law on State Border Service of 13 January 2000 has been challenged by eleven members of the House of Representatives of the Parliamentary Assembly, i.e. one quarter of the latter, on the basis of Article VI.3 (a) of the Constitution of Bosnia and Herzegovina.

9. The competence of the Constitutional Court to examine the conformity with the Constitution of the Law on State Border Service enacted by the High Representative acting as an institution of Bosnia and Herzegovina is thus based on Article VI.3 (a) of the Constitution. Consequently, the request is admissible.

III. The Merits

10. The applicants contest the conformity with the Constitution of the Law on State Border Service in regard to Article III.5 (a) of the Constitution, which provides:

“Bosnia and Herzegovina shall assume responsibility for such other matters as are agreed by the Entities; are provided for in Annexes 5 through 8 to the General Framework Agreement; or are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina. Additional institutions may be established as necessary to carry out such responsibilities.”

The applicants are not justified in claiming that, according to Article III.5 (a), the Presidency of Bosnia and Herzegovina required the prior consent of the National Assembly of Republika Srpska to submit a proposal for the Law on State Border Service to the Parliamentary Assembly of Bosnia and Herzegovina. Indeed, the above Article distinguishes between three mutually independent hypotheses: Bosnia and Herzegovina shall assume responsibility for such other matters as (1) are agreed by the Entities; (2) are provided for in Annexes 5 through 8 to the General Framework Agreement; or (3) are necessary to preserve the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina, in accordance with the division of responsibilities between the institutions of Bosnia and Herzegovina according to the provisions of Articles III.3 and III.5 of the Constitution. It is in application of the last of these three cases that the Law on State Border Service was proposed by the Presidency of Bosnia and Herzegovina to the Parliamentary Assembly. In this context, only Article IV.4 (a), which provides that the Parliamentary Assembly shall enact legislation as necessary to implement decisions of the Presidency, needs to be considered. As this Article does not require the consent of the Entities, the procedure followed by the Presidency of Bosnia and Herzegovina prior to the adoption of the Law on State Border Service is not in conflict with the Constitution of Bosnia and Herzegovina.

11. The applicants also contest the conformity of the Law on State Border Service with the provisions of Article III.2 (c) of the Constitution, which sets out responsibilities of the Entities. Article III.2 (c) provides that “the Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for the internationally recognized human rights and fundamental freedoms referred

to in Article II above, and by taking such other measures as appropriate". Article III.2 (c) cannot be interpreted as establishing an exclusive responsibility of the Entities for control of the international State borders, but it authorizes the Entities to assume tasks of law enforcement "in their respective jurisdictions". Moreover, the Law on State Border Service, in its Articles 2, 4 and 5, upholds this responsibility of the Entities and provides for a policy of cooperation and assistance between the State Border Service and the Entities' police forces, which should improve the guarantee of public order in the jurisdictions of the Entities.

12. The Constitution of Bosnia and Herzegovina enumerates, *inter alia* in Article III.1, the exclusive responsibilities of the institutions of Bosnia and Herzegovina. The Article entrusts the latter with all external activities of Bosnia and Herzegovina, e.g. foreign policy, foreign trade policy, customs policy, monetary policy, establishment and operation of common and international communications facilities and air traffic control. More specifically, Article III.1 (f) and (g) provide that immigration, refugee, and asylum policy and regulation, as well as international and inter-Entity criminal law enforcement, including relations with Interpol, fall within the responsibilities of the institutions of Bosnia and Herzegovina.

13. Furthermore, the fundamental right of a State to self-protection, inherent in the notion of State sovereignty, includes the right of a State to take all necessary actions for the protection of its territorial integrity, its political independence and its international personality, while respecting other general principles of international law. In the context of Bosnia and Herzegovina, the establishment of a State border service contributes to the guarantee of this fundamental principle. The Law on State Border Service, which ensures the right of the institutions of Bosnia and Herzegovina to carry out their responsibilities, is thus not in contradiction with Article III.2 of the Constitution and is in conformity with the responsibilities laid down in Article III.1 of the Constitution and supplemented in Article III.5 of the Constitution.

14. The Constitutional Court concludes that the Law on State Border Service is not inconsistent with the Constitution of Bosnia and Herzegovina.

The Court ruled in the following composition:

President of the Court: Prof. Dr. Kasim Begić,

Judges: Hans Danelius, Prof. Dr. Louis Favoreu, Prof. Dr. Joseph Marko, Dr. Zvonko Miljko, Azra Omeragić Prof. Dr. Vitomir Popović, Prof. Dr. Snežana Savić, Mirko Zovko.

The present decision was adopted by seven votes to two.

The two dissenting judges, Prof. Dr. Vitomir Popović and Prof. Dr. Snežana Savić will set out their reasoning in a separate opinion.

U 9/00
3 November 2000
Banja Luka

President of the Constitutional Court
of Bosnia and Herzegovina
Prof. Dr. Kasim Begić