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Accountability for United Nations Civilian Operations in Post-Conflict Kosovo

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Master of Jurisprudence

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2003



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Accountability for United Nations Civilian Operations in Post-Conflict Kosovo

**Master of Jurisprudence
University of Durham, 2003.**

Sarah Williams

The current United Nations peacekeeping mission in Kosovo is not merely assisting and advising a State in post-conflict peace-building, it is acting as a transitional international administration. UNMIK is charged with the provision of civil administration services and the design and development of civilian structures with the support of a military force, KFOR, authorised by the Security Council.

The extensive mandate and wide powers of the international administration raise many legal issues, including the status of Kosovo in international law, the consent of the legal sovereign and the competence of the Security Council to authorise such an extensive mission, even pursuant to Chapter VII of the United Nations Charter.

This thesis examines these issues, before considering the application of international human rights standards to the international administration in Kosovo. There are several possible bases for this, including human rights as obligations binding upon the Security Council and UNMIK by virtue of both international and domestic law. However, none of them clearly establishes legal obligation on the part of the international administration to observe international human rights standards. Further, the wide immunities granted to the international administration, and the limitations of the domestic judicial and human rights institutions, preclude persons obtaining an effective legal remedy. The possibility of obtaining a remedy outside the domestic legal systems is similarly limited.

This thesis also considers how international human rights standards should apply in post-conflict situations, taking into account the possibility of derogation from international human rights standards in the difficult circumstances in which the initial steps of peace-building take place.

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Table of Abbreviations

Badinter Commission	The International Conference on the Former Yugoslavia, Arbitration Commission
Brahimi Report	Report of the Panel on United Nations Peace Operations
Charter	United Nations Charter
Constitutional Framework	Regulation 2001/9 <i>Constitutional Framework for Provisional Self-Government</i> of 15 May 2001
CSCE	Conference on Security and Co-operation in Europe
DPA	Dayton Peace Agreement
EC	European Community
ECHR	European Court of Human Rights
EPO	European Patent Office
EU	European Union
EUAM	European Union Administration Mission for Mostar
European Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
FRY	Federal Republic of Yugoslavia
FYROM	Former Yugoslav Republic of Macedonia

ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ITS	International Trusteeship System
KFOR	International Security Force in Kosovo
KLA	Kosovo Liberation Army
MINURSO	United Nations Mission for the Referendum in Western Sahara
MRT	Moldovan Republic of Transdniestria
MTA	Military Technical Agreement
NATO	North Atlantic Treaty Organisation
OHR	Office of the High Representative (Bosnia and Herzegovina)
OLA	Office of the Legal Adviser in Kosovo
OMIK	OSCE Mission in Kosovo
OMIK Report 1	OMIK Report <i>Emergency Measures for legal systems</i> , 7 November 1999
OMIK Report 2	OMIK Report <i>The Development of the Kosovo Judicial System (10 June through 15 December 1999)</i> , 17 December

	1999
OMIK Report 7/00	OMIK Report 8 <i>A Review of the Criminal Judicial System – February to July 2000</i>
OMIK Report 2/01	OMIK Report <i>Kosovo – A Review of the Criminal Justice System 1/9/00 – 28/2/01</i>
OMIK Report 10/01	OMIK Report <i>Kosovo: Review of the Criminal Justice System</i> October 2001
OMIK Report 2/02	OMIK Report <i>Kosovo: Review of the Criminal Justice System</i> September 2001 – February 2002
ONUC	United Nations Operation in the Congo
OSCE	Organisation for Security and Cooperation in Europe
Peace Plan	Principles for Peace formally approved by the Serbian Parliament on 3 June 1999
Rambouillet Accords	Proposed Interim Agreement for Peace and Self-Government in Kosovo
Regulation 1	UNMIK Regulation No 1999/1 <i>On the Authority of the Interim Administration in Kosovo</i> dated 25 July 1999
Regulation 2000/38	UNMIK Regulation 2000/38 <i>On the Establishment of the Ombudsperson in Kosovo</i> of 30 June 2000
Regulation 2000/47	Regulation 2000/47 <i>On the Status, Privileges and Immunities of KFOR, UNMIK and their Personnel in Kosovo</i>
Resolution 1244	Security Council Resolution 1244, 10 June 1999

RTS	Radio-Television of Serbia
SFRY	Socialist Federal Republic of Yugoslavia
SG Report 12/6/1999	Report of the Secretary-General pursuant to Paragraph 10 of Security Council Resolution 1244 (1999), 12 June 1999
SG Report 12/7/1999	Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999
SG Report 6/6/2000	Report of the Secretary-General on the United Nations Interim Administration in Kosovo of 6 June, 2000
SG Report 15/12/2000	Report of the Secretary-General on the United Nations Interim Administration in Kosovo of 15 December 2000
SG Report 7/6/2001	Report of the Secretary-General on the United Nations Interim Administration in Kosovo of 7 June 2001
SG Report 2/10/2001	Report of the Secretary-General on the United Nations Interim Administration in Kosovo of 2 October 2001
SOFA	Status of Forces Agreement
SRSG	Special Representative of the Secretary-General
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission for Human Rights
UNDPKO	United Nations Department of Peacekeeping Operations
UNHCR	United Nations High Commission for Refugees
UNHRC	United Nations Human Rights Committee

UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNMIK	United Nations Mission in Kosovo
UNPROFOR	United Nations Protection Force
UNSOM II	United Nations Operation in Somalia II
UNTAC	United Nations Transitional Authority in Cambodia
UNTAES	United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium
UNTAET	United Nations Transitional Administration in East Timor
UNTAG	United Nations Transition Assistance Group
VCLT	Vienna Convention on the Law of Treaties
VCSS	Vienna Convention on Succession of States in Respect of Treaties

Chapter 1 – Resolution 1244

A. Introduction

In June 1999, following the cessation of a military campaign by the North Atlantic Treaty Organisation (NATO) against the Federal Republic of Yugoslavia (FRY), the United Nations Security Council authorised the deployment of international civilian and military presences to Kosovo¹. The international civil presence is led by the United Nations Interim Administration Mission in Kosovo (UNMIK) and is mandated ‘to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia’². The International Security Force (KFOR) is to perform military functions, support UNMIK and to establish a secure environment within which UNMIK can operate³.

In adopting Resolution 1244, the Security Council ‘mandated the United Nations with an unprecedented challenge in Kosovo’⁴. Administration of territory by an international organisation, either individually or collectively, is not a novel concept. However, the extent of the powers granted to the international administration in Kosovo is innovative⁵. All ‘legislative and executive authority with respect to Kosovo’ is vested in UNMIK, including ‘the administration of the judiciary’⁶, while KFOR is responsible for law and order. Together, UNMIK and KFOR undertake a wide range of functions normally associated with the government of a State.

¹ See Security Council Resolution 1244, 10 June 1999 (**Resolution 1244**).

² Paragraph 10, Resolution 1244.

³ Paragraph 9, Resolution 1244.

⁴ Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999 UN Doc S/1999/779 (**SG Report 12/7/99**), paragraph 120.

⁵ Only a few months following the adoption of SCR 1244, the Security Council authorised the deployment of a mission to East Timor, with a similarly expansive mandate. The United Nations Transitional Administration in East Timor (UNTAET) was authorised to establish an interim administration in East Timor pending the transition to independence. See Security Council Resolution 1272, 25 October 1999.

⁶ UNMIK Regulation No 1999/1 *On the Authority of the Interim Administration in Kosovo* of 25 July 1999, section 1.1 (**Regulation 1**).

While the UN has performed such governance functions in previous post-conflict missions⁷, it has generally done so only with the consent of the host government or pursuant to a comprehensive peace agreement, neither of which are present in Kosovo. The extensive powers granted to the international administration in Kosovo are such that, although Kosovo remains legally a part of the FRY⁸, it is *de facto* an international territory⁹. It is the first example of a UN peacekeeping mission where the UN exercises government authority to the exclusion of the legal sovereign¹⁰. The Charter of the United Nations (**Charter**) does not include an express power to administer territory, raising the preliminary question as to whether the Security Council may lawfully establish UNMIK and KFOR.

This requires an examination of the nature and powers of, and the legal basis for, both UNMIK and KFOR within the UN system, including the existence of any limits upon the powers of the Security Council itself. UNMIK is a peacekeeping mission operating under the authority of the Security Council and is a subsidiary organ of the UN. Its staff and personnel contributed to it by member States are officials of the UN and are subject to the command and control of the UN. In contrast, KFOR is a multinational peacekeeping force authorised by the Security Council to use force, but comprised of national contingents, which remain subject to national control and responsibility.

Human rights 'have become an integral component of every UN field mission, in particular UN peacekeeping operations'¹¹. However, progress in developing a framework for human

⁷ For the purpose of this thesis, the term conflict will refer to the period of armed conflict (as understood in international law), and the term post-conflict to the period after the conflict.

⁸ The Security Council recognised and confirmed the territorial integrity and sovereignty of the FRY in Resolution 1244, thereby recognising that Kosovo forms part of the FRY.

⁹ See Zimmermann & Stahn, 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo' (2001) 70(4) *Nordic Journal of International Law* 423, Ringelheim, 'The Legal Status of Kosovo' in *Kosovo 1999-2000: The Intractable Peace*, Research paper produced by the European University Institute, available at www.iue.it and Stahn, 'The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis' (2001) 5 *Max Planck Yearbook of United Nations Law* 105.

¹⁰ Resolution 1244 'transfers the exercise of State sovereignty over the territory of Kosovo in its entirety to UNMIK', suggesting that the FRY is not intended to exercise power in respect of Kosovo during the interim administration.

¹¹ Brand, 'Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation' (2001) 70 *Nordic Journal of International Law* 461 at 465.

rights protection where the UN administers territory has been limited. Therefore, once the Security Council's competence to establish UNMIK and KFOR is confirmed, the human rights obligations and structures of the international administration must be considered. Whilst similar principles apply to both UNMIK and KFOR, their application and the nature of any obligations under international human rights law¹² (IHRL) may vary due to the different legal basis and competencies of UNMIK and KFOR. There are several possible bases upon which it may be argued that IHRL applies to the actions of UNMIK and KFOR in Kosovo. First, IHRL may bind UNMIK as a subsidiary organ of the Security Council, which is itself possibly bound to observe IHRL either under the Charter, as customary law or as part of 'UN law'. KFOR, a military force under UN auspices, may be bound by that part of customary IHRL that applies to peacekeeping forces. Second, IHRL may apply in Kosovo as part of the applicable domestic law provisions, including applying directly through Resolution 1244 and UNMIK regulations that define the applicable law and standards governing the territory during the course of the international administration. Alternatively, IHRL may continue to apply in Kosovo by virtue of the law of State succession. Finally, individual States may be bound by IHRL in relation to the actions of their troops or civilian personnel through a notion of extra-territorial jurisdiction, particularly in relation to national contingents participating in KFOR.

Even if IHRL applies to the international administration in Kosovo, the inhabitants of Kosovo cannot obtain an individual judicial remedy in respect of a violation of IHRL by the international administration or its personnel. As the UN is not, and cannot be, a party to international human rights instruments, it is not subject to their regulatory and enforcement mechanisms. The Charter does not provide for a general right of review of Security Council resolutions or a right of individual petition before the International Court of Justice (ICJ). Within the domestic legal system of Kosovo, individuals are precluded from seeking a judicial remedy due to the absence of a functioning, independent and impartial judicial system and the extensive immunities accorded to UNMIK and KFOR both institutionally and to their personnel. Other domestic human rights institutions, such as the

¹² This thesis is limited to considering the application of IHRL and does not consider international criminal law or the possible application of international humanitarian law to Kosovo.

Ombudsperson, do not provide a judicial remedy. In any event, the protection of human rights must be balanced against the 'enormity and multiplicity of challenges facing a mission'¹³. The major international human rights instruments provide for derogation from human rights standards in times of emergency. If the international administration is to comply with international human rights standards as if it was a government, it must also be given the same allowances even though it does not have the same formal capacity to make a notice of derogation from the international human rights instruments.

B. Background to Resolution 1244

Following World War II, the territory of Kosovo was included as part of Yugoslavia, as an autonomous constituent part of Serbia, one of the Republics of the Socialist Federal Republic of Yugoslavia (SFRY)¹⁴. Under the 1974 Constitution of the SFRY, Kosovo was granted the privileged status of an autonomous province. While still formally part of the Republic of Serbia, Kosovo had its own administration, assembly and judiciary and was entitled to participate in both the Serbian parliament and the Federal parliament, in which it had a right of veto. The rise of Serbian nationalism during the 1980s led to the Republic of Serbia gradually exerting greater control over institutions in Kosovo, including the police and security forces, the judiciary and financial institutions. Serbian authorities enacted discriminatory legislation directed against Kosovo Albanians in the areas of property ownership, education, language, public services and employment. In July 1990, the Republic of Serbia forced through amendments to the Serbian Constitution, effectively revoking the territory's autonomy and reducing its status to a level below that of a municipality. During this period, there was also a significant increase in human rights abuses perpetrated against Kosovo Albanians by Serbian and local authorities, including arbitrary arrests, torture and detention without trial.

¹³ Strohmeyer, 'Making Multilateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor' (2001) 25 *Fletcher Forum of World Affairs Journal* 107 at 121.

¹⁴ This discussion is drawn from a number of sources. For further information see: Report of the Independent International Commission on Kosovo, *Kosovo: From Crisis to Crisis* (2000) and supplement, available at <http://www.kosovocommission.org>; Amnesty International Country reports available at <http://www.amnesty.org>; Campbell, *The Road to Kosovo – A Balkan Diary* (2000); Judah, *Kosovo: War and Revenge*, (2000); Malcolm, *Kosovo* (1998); Stahn, 'Constitution without a State? Kosovo under the United Nations Constitutional Framework for Self-Government' (2001) 14 *Leiden Journal of International Law* 531; and O'Neill, *Kosovo: An unfinished peace* (2001).

Kosovo Albanians responded to these acts by adopting a strategy of passive, non-violent resistance. On 2 July 1990, before the Kosovo Assembly was dissolved, a majority of the Albanian delegates declared that the Albanians had the status of a nation entitled to its own republic. This was followed by a proclamation of a new constitution for a Kosovo republic, including a new assembly and presidency, on 7 September 1990. The demand for a republic was subsequently amended to a call for independence, which was supported by 99 per cent of voters in a self-organised referendum on independence held in September 1991. In May 1992, Kosovo-wide elections were held for a new republican government and assembly. Doctor Rugova, the leader of the Democratic Union, was elected president and his party enjoyed an overwhelming majority of votes. Due to Serbian opposition, the elected parliament was never convened and the Rugova Government concentrated on maintaining an unofficial, parallel structure of administration for Kosovo. This shadow government was largely unsuccessful in its attempts to secure international support for independence for Kosovo as a separate republic. While the SFRY disintegrated over a period from 1991-1992, States outside the SFRY showed no inclination to recognise Statehood for Kosovo and, after the internationally sponsored Dayton Settlement of 1995, its position as part of the FRY was not contested.

Due to both the increasingly serious human rights violations within Kosovo and the perceived failure of the United Nations to address their claim for self-determination, Kosovo Albanians turned to more violent means. In particular, the Kosovo Liberation Army (KLA) emerged in opposition to the Serbian authorities. Initially small, decentralised and ill equipped for war, the KLA grew in strength, co-ordination and support from 1997 onwards. As the KLA became more active, the harassment of the Kosovo Albanian population intensified, targeting not just KLA members, but leading politicians, activists and civilians. Facing an expanding KLA presence, the FRY army entered Kosovo commenced large-scale operations with police and paramilitary units. This campaign targeted both the KLA and Albanian civilian populations in rural areas, resulting in the displacement of hundreds of thousands of Kosovo Albanians together with human rights abuses and violations of civil rights. The conflict escalated from early 1998 to March 1999, eventually engulfing the entire province.

An agreement between the US Special Envoy¹⁵ and the FRY President, Slobodan Milosevic, resulted in a temporary cease-fire in October 1998, permitting the deployment of an observer mission to the territory¹⁶. However, the KLA used the cease-fire to consolidate and renewed military action, leading to a new cycle of hostilities. Peace negotiations were held in early February 1999, resulting in the proposed Interim Agreement for Peace and Self-Government in Kosovo (**Rambouillet Accords**)¹⁷. The Rambouillet Accords would have granted Kosovo self-government and substantial autonomy, while remaining within the territory of the Republic of Serbia. Although still formally part of Serbia, Kosovo would have had powers and responsibilities equivalent to the two republics of the FRY¹⁸. The FRY authorities declined to sign the Rambouillet Accords and, on 24 March 1999, NATO commenced a bombing campaign against the FRY and its forces within Kosovo¹⁹. In response, FRY military and paramilitary units attacked the Kosovo Albanian population, with devastating consequences²⁰.

Diplomatic efforts continued during the NATO campaign, culminating in a peace plan formally approved by the Serbian Parliament on 3 June 1999 (**Peace Plan**)²¹. These principles required the immediate and verifiable end to the violence and repression in

¹⁵ Richard Holbrooke, representing the Contact Group for Kosovo.

¹⁶ The agreement was never published, but its main points addressed a reduction in the number of forces and deployment of monitors. The Security Council affirmed the agreement by Security Council Resolution 1203, 24 October 1998, which authorised the deployment of 2,000 civilian monitors (combined OSCE/UN mission known as OSCE-Kosovo Verification Mission).

¹⁷ UN Doc S/1999/648 of 7 June 1999.

¹⁸ Chapter 1 of the Rambouillet Accords sets out a draft Constitution that provides for democratic self-government for Kosovo, while respecting the sovereignty and territorial integrity of the FRY. The Constitution lists the powers of the domestic institutions and the arrangements between Kosovo and the Republics of Serbia and Montenegro. See: Weller, 'The Rambouillet Conference on Kosovo' (1999) 75 *International Affairs* 211.

¹⁹ This thesis will not consider the legality of this action, which triggered a vigorous debate. However, see: Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *EJIL* 1; Gowlland-Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance' (2000) 11 *EJIL* 361; Henkin, 'Kosovo and the Law of 'humanitarian intervention'' (1999) 93 *AJIL* 828; Duursma, 'Justifying NATO's use of force in Kosovo?' (1999) 12 *Leiden Journal of International Law* 287; and Neuhold, H, 'Collective Security after Operation Allied Force' (2000) 4 *Max Planck Yearbook of International Law* 73.

²⁰ The devastation inflicted upon the Kosovo Albanian population between March and June of 1999 has been well-documented (see for example reports by the OSCE, Human Rights Watch and Amnesty International from that period). It is estimated that approximately 10,000 people were killed, mainly Kosovo Albanians killed by FRY forces, and 3,000 people missing, the majority either in Serbian prisons or presumed dead.

²¹ Diplomatic efforts were conducted under the auspices of the Contact Group for Kosovo and the European Union.

Kosovo; the withdrawal of FRY military, police and paramilitary forces; the deployment of international civil and security presences pursuant to a Security Council resolution; and the return of all refugees to Kosovo. The Peace Plan proposed substantial autonomy within the FRY for Kosovo, but did not include a mechanism to resolve the issue of the territory's future status²². On 10 June 1999, the Security Council adopted Resolution 1244, which implements the principles of the Peace Plan, and provides the framework for both UNMIK and KFOR. KFOR deployed to Kosovo on 12 June 1999, with the Special Representative of the Secretary-General (SRSG) and the UNMIK advance team arriving a day later.

C. Mission Mandate and Structure

The responsibilities of the international civil presence include: promoting the establishment of substantial autonomy and self-government in Kosovo; performing basic civilian administration functions for as long as required; organising and overseeing the development of provisional institutions for democratic and autonomous self-government, and maintaining civil law and order²³. The UNMIK mission is complex, and requires 'an unprecedented form and extent of collaboration with external organizations'²⁴. The Secretary-General has emphasised that 'the structure of UNMIK must ensure that all of its activities are carried out in an integrated manner with a clear chain of command', recognising that each component would be unable to 'span the wide range of complex activities on its own'²⁵. The SRSG has 'overall authority to manage the mission and to coordinate the activities of all UN agencies and other international organizations operating as part of UNMIK'²⁶.

²² Unlike the mandate for UNTAET, Resolution 1244 does not provide that the territory is being prepared for independence, nor does the resolution refer to the right of self-determination of the people of Kosovo.

²³ Paragraph 11, Resolution 1244.

²⁴ Griffen & Jones, 'Building Peace through Transitional Authority: New Directions, Major Challenges', (2001) 7(4) *International Peacekeeping* 75 at 85.

²⁵ SG Report 12/7/99, paragraph 118. See also Wouters & Naert, 'How Effective is the European Security Architecture? Lessons from Bosnia and Kosovo' (2001) 50 *ICLQ* 540.

²⁶ Report of the Secretary-General pursuant to Paragraph 10 of Security Council Resolution 1244 (1999) of 12 June 1999, UN Doc S/1999/672 (SG Report 12/6/1999), paragraph 3.

The civilian component was divided into four pillars²⁷, with civilian efforts assigned to a lead agency by sector. UNMIK was responsible for the provision of interim civil administration services, including interim police services, overseeing and conducting civil affairs functions and the organisation and oversight of the judicial system. The humanitarian affairs component, including the repatriation of refugees and the provision of emergency relief, was led by United Nations High Commission for Refugees (UNHCR), with the assistance of several international organisations. The mandate of UNHCR was fulfilled by the end of June 2000 and the humanitarian pillar disbanded, with any residual functions transferred to UNMIK²⁸. Institution-building, including the conducting of elections, human resources capacity building, human rights monitoring and democratisation and governance were the responsibility of the Organisation for Security and Cooperation in Europe (OSCE) to be performed by the OSCE Mission in Kosovo (OMIK). The European Union (EU) was responsible for rebuilding the physical, economic and social infrastructure of Kosovo. Following concerns that the mandates of the OSCE and UNMIK overlapped, resulting in duplications and omissions, a new police and justice pillar was launched on 21 May 2001²⁹. The objectives of the police and justice pillar include 'to consolidate a law and order structure that is responsive to peacekeeping and peace-building objectives...and to establish an unbiased judicial process through initial international participation and reform of the judicial system'³⁰.

Resolution 1244 defined KFOR's mandate to include responsibility for: deterring renewed hostilities; maintaining and where necessary enforcing a ceasefire; supervising the withdrawal of FRY police and forces; demilitarising the KLA; establishing a secure environment within which the civil presence can operate and a transitional administration may be established; ensuring public order and safety until UNMIK can perform this task; supporting and co-ordinating closely with the work of the international civil presence; and

²⁷ SG Report 12/7/99, paragraph 43 and SG Report 12/6/99, paragraphs 2-14.

²⁸ Report of the Secretary-General on the United Nations Interim Administration in Kosovo of 6 June, 2000, UN Doc S/2000/538 (SG Report 6/6/2000), paragraph 66 and Report of the Secretary-General on the United Nations Interim Administration in Kosovo of 15 December 2000, UN Doc S/2000/1196 (SG Report 15/12/2000), paragraph 51.

²⁹ Report of the Secretary-General on the United Nations Interim Administration in Kosovo of 7 June 2001, UN Doc S/2001/565 (SG Report 7/6/01), paragraph 38-9.

³⁰ SG Report 7/6/01, paragraph 39.

ensuring the protection and freedom of movement of itself, the international civil presence and other international organisations³¹. KFOR remains outside the mission structure of UNMIK, although the SRSG cooperates and coordinates with the KFOR Commander 'to ensure that both presences operate towards the same goals and in a mutually supportive manner'³². Importantly, KFOR does not operate under the authority of the SRSG, but relies upon its own authority deriving from Resolution 1244 and the Military Technical Agreement (MTA)³³ and is the ultimate authority for security matters in Kosovo³⁴. KFOR was initially organised into five multinational brigades, each assigned to a brigade commander³⁵. The central leadership of KFOR resides in the KFOR Commander, and rotates among NATO countries on a biannual basis. Russian troops participating in KFOR operate under a special status, being under the command of their representatives at NATO and, in theatre, under the tactical control of the sector commanders³⁶.

The mission was to be implemented in a series of phases³⁷. In its first phase, the mission was to restore order to the territory following the armed conflict, and to establish and consolidate its own authority. During this phase the interim administration would essentially operate as a government, with all regulatory and executive power, and performing all civilian administrative functions. Once basic stability was achieved, efforts would be directed towards the administration of social services and utilities, and the consolidation of the rule of law. Subsequent phases would require the interim administration to conduct elections for an indigenous transitional authority and to develop provisional institutions for self-government. UNMIK would gradually transfer its remaining administrative responsibilities to these institutions, subject to continued

³¹ Paragraph 9, Resolution 1244.

³² Paragraph 6, Resolution 1244.

³³ Military Technical Agreement between the International Security Force (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, 10 June 1999, UN Doc S/1999/682.

³⁴ MTA, Article V.

³⁵ KFOR was restructured into four brigades in late 2002: see Report of the Security Council Mission to Kosovo and Belgrade, Federal Republic of Yugoslavia, 19 December 2002, UN Doc S/2002/1376, paragraph 30.

³⁶ Helsinki Agreement – *Agreed Points on Russian Participation in KFOR*, 18 June 1999 available at www.nato.int/kfor.

³⁷ SG Report 12/7/99, paragraphs 110-6.

oversight and support. A final phase will require UNMIK to oversee and facilitate a political process to determine the future status of the territory.

Chapter 2 – Security Council Competence

A preliminary legal question that arises about Resolution 1244 is whether the Security Council has the legal competence to authorise the extensive powers it has granted to UNMIK and KFOR in Kosovo. This chapter considers whether the Security Council has the power to administer territory based on State practice and whether, in the absence of consent, the administration of territory must be authorised pursuant to Chapter VII of the Charter. If so, does the administration of territory fall within the measures available to the Security Council?

A. Does the Security Council have the power to administer territory?

The Charter does not contain an express power for the UN to administer territory, although the power may be implied ‘by necessary implication as being essential to the performance of its duties’¹. That a particular power is essential does not equate to the power being indispensable to the performance of the UN functions; rather the implied power must promote the efficiency of the organisation and enable the UN to function to its full capacity as expressed in its objects and purposes². Provided international territorial administration is connected to restoring or maintaining international peace and security, the power to administer territory may be implied from this function of the UN³. Alternatively, the power to administer territory may be based upon the notion of the inherent power of the UN to perform any act related to the fulfilment of the aims of the organisation⁴.

The power to administer territory could also be based on the ‘general power’ theory. Article 24(1) of the Charter allocates to the Security Council primary responsibility for the

¹ *Reparations for Injuries Suffered in the Service of the United Nations* (1949) ICJ Reports 174 at 182-183 (**Reparations for Injuries**) and *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (1962) ICJ Reports at 213 (**Certain Expenses**).

² Akande, ‘The Competence of International Organisations and the Advisory Jurisdiction of the International Court of Justice’ (1998) 9 *EJIL* 437-467 at 444 and the sources cited.

³ See Campbell, ‘The Limits of the Powers of International Organisations’ (1983) 32 *ICLQ* 523.

⁴ Seyersted, ‘United Nations Forces: Some Legal Problems’ (1961) 37 *BYBIL* 351 at 453-60 and Seyersted, *United Nations Forces in the Law of Peace and War* (1966) at 155. Compare: Montaldo, ‘International Legal Personality and Implied Powers of International Organisations’ (1970) 44 *BYBIL* 111 at 118-124. See also Akande, note 2 above, and White, ‘The UN Charter and Peacekeeping Forces: Constitutional Issues’ in *The UN, Peace and Force* (Pugh ed) (1997).

maintenance of international peace and security. In carrying out this responsibility the Security Council acts on behalf of member States. Proponents of the 'general power' theory argue that this is an express grant of a general power in addition to the specific powers granted in Article 24(2)⁵, which enables the Security Council to undertake any activity it considers appropriate for the maintenance of international peace and security, including the administration of territory. The general power to take measures not specifically referred to in the Charter has proved controversial and its limits are uncertain⁶.

The test for an implied or general power is 'the willingness of the member States of the UN to acknowledge such a power within the broad competence of the Council in the maintenance of international peace and security'⁷. The practice of the UN is determinative. Commentators consider that the scope and extent of the governance functions currently being performed by the UN in Kosovo and East Timor are groundbreaking, a relatively recent development for the organisation⁸. Consequently, there is no precedent for these missions, and hence no body of accepted UN practice that demonstrates acceptance of the power to administer territory. If so, it is possible that these missions do not evidence an existing power acknowledged by States, but rather may violate existing principles of international law.

However, UN practice reveals otherwise. Wilde comments that 'the involvement of international organisations in varying degrees of territorial administration has a long

⁵ Article 24(2) grants specific powers to the Security Council to perform the duties laid out for the Security Council in Chapters VI, VII, VIII and XII. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (1971) ICJ Reports 341 (*Namibia Advisory Opinion*).

⁶ Gill, 'Legal and some Political Limitations on the Power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter' (1995) XXVI *Netherlands Yearbook of International Law* 33 at 69.

⁷ Ciobanu, 'The Power of the Security Council to Organise Peace-Keeping Operations', in *United Nations Peace-Keeping: Legal Essays* (Cassese ed) (1978) at 24-5. See also Franck, 'Legitimacy in the International System' (1988) 82 *AJIL* 705.

⁸ For example: Griffin & Jones describe the mission as 'unprecedented in scope and complexity': Griffin & Jones, 'Building Peace through Transitional Authority: New Directions, Major Challenges' (2001) 7(4) *International Peacekeeping* 75 at 77. See also Strohmeier, 'Making Multilateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor' (2001) 25 *Fletcher Forum of World Affairs Journal* 107 at 108.

history, stretching back to the start of the League of Nations⁹. Following World War I, several colonies and territories of the defeated States were subject to a mandate system administered by the League of Nations, whereby 'advanced nations' were entrusted with the tutelage of the inhabitants of the former colony or territory. The League of Nations exercised governmental prerogatives in respect of the Free City of Danzig from 1920 to 1939, and the Saar Territory from 1920 to 1935. The Charter provides for the International Trusteeship System (ITS) 'for the administration and supervision' of territories¹⁰. It was contemplated that the UN itself could administer a territory pursuant to a trusteeship agreement.

The UN was first authorised to exercise limited governmental powers in 1947 in relation to the Free Territory of Trieste¹¹. The organisation performed various administrative functions in the Congo from 1960 to 1964¹², and provided overall administration and security in West New Guinea (West Irian) for a seven-month period from October 1962 through April 1963 as part of the territory's transition to independence¹³. In 1967, the General Assembly established the Council for South West Africa (later Namibia) and conferred on the Council authority 'to administer South West Africa until independence' and 'to promulgate such laws, decrees and administrative regulations as are necessary for

⁹ Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration' (2001) 95 *AJIL* 583 at 583. See also Stahn, 'The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis' (2001) 5 *Max Planck Yearbook of United Nations Law* 105; Wilde, 'From Bosnia to Kosovo and East Timor: The Changing Role of the United Nations in the Administration of Territory' (2000) 6 *ILSA Journal of International and Comparative Law* 467; Verdirame, 'Compliance with Human Rights in UN Operations' (2002) 2(2) *Human Rights Law Review* 265; Chopra, *Peace Maintenance: The evolution of international political authority* (1999) especially Chapter 3; and Ruffert, 'The Administration of Kosovo and East Timor by the International Community' (2001) 50 *ICLQ* 613.

¹⁰ Article 75. Under the International Trusteeship System, territories previously held by member States under mandates and the territories formerly held by defeated States, were allocated an administering State, Article 77.

¹¹ See Wilde, note 9 at 586, although the plan for the free territory was not implemented.

¹² A main objective of United Nations Operation in the Congo (ONUC) was to provide technical assistance for the smooth operation of all essential services and the continued development of the economy to the Congolese Government. During the period where there was no clear sovereign government, ONUC carried out these functions with local authorities exercising de facto control in various provinces. In addition, the UN provided approximately 600 experts and technicians to perform the civil administration functions of departing Belgian administrators: See: United Nations Department of Public Information, *The Blue Helmets: A Review of United Nations Peace-keeping Third Edition* (1996).

¹³ See Agreement Concerning West New Guinea (West Irian) (Indonesia-Netherlands) (1963) *AJIL* 493.

the administration of the territory until a legislative assembly is established¹⁴. This action followed a General Assembly resolution¹⁵ terminating South Africa's mandate, originally granted pursuant to the League of Nations mandating system, and placing the territory under the direct responsibility of the UN¹⁶. However, while the Council introduced measures to protect natural resources¹⁷ and issued travel and identity documents for residents of Namibia¹⁸, South Africa's continued occupation rendered the Council largely unable to perform administrative functions¹⁹.

More recently, the UN has participated in the government of a territory as a means of implementing a peace agreement. The United Nations Transitional Authority in Cambodia (UNTAC)²⁰ was charged with the task of assisting the implementation of the Paris Agreements²¹, intended to end the internal conflict in Cambodia. During the transitional period, the legal sovereignty of Cambodia resided in the Supreme National Council, which delegated to the UN the authority to perform various functions allocated to the UN. UNTAC's mandate encompassed five key areas including security arrangements and civil

¹⁴ General Assembly Resolution 2248 of 19 May 1967.

¹⁵ General Assembly Resolution 2145 of 27 October 1966. The termination of the mandate was recognised by the Security Council in Security Council Resolutions 264 and 269 of 1969, which declared South Africa's continued occupation illegal and called for South Africa's withdrawal from the territory. The ICJ also endorsed the revocation of the mandate in its 1971 Advisory Opinion.

¹⁶ The ICJ subsequently confirmed the legality of the General Assembly's actions, although it did not consider the extent of the General Assembly's power to administer territory. For further discussion see Herman, 'The Legal Status of Namibia and of the United Nations Council for Namibia' (1975) *CYBiL* 306.

¹⁷ The Council enacted a Decree on the Natural Resources of Namibia on 27 September 1974 (UN Doc A/C.131/33), which regulated the exploration and exploitation of natural resources, including the grant of mining concessions and licences. The United Nations Commissioner for Namibia was granted the authority to enforce the provisions of the decree.

¹⁸ Engers, 'The United Nations Travel and Identity Documents for Namibians' (1971) 65 *AJIL* 571.

¹⁹ See Security Council Resolutions 435 of 29 September 1978; 629 of 16 January 1989 and 632 of 16 February 1989, implementing the peace plan; Fortna, 'United Nations Transition Assistance Group' in *Evolution of UN Peacekeeping* (Durch ed) (1993); and *Blue Helmets*, note 11 at 201-30.

²⁰ Cambodia sources: Doyle, *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate* (1995); Doyle, 'Peacebuilding in Cambodia: Legitimacy and Power' in *Peacebuilding as Politics* (Cousens and Kumar eds) (2000); United Nations Department of Public Information Blue Book Series, *The United Nations and Cambodia 1991-1995* (1995); Ratner, 'The Cambodia Settlement Agreement' (1993) 87 *AJIL* 1; Thayer, 'The United Nations Transitional Authority in Cambodia: The Restoration of Sovereignty' in *Peacekeeping and Peacemaking: towards effective intervention in post-Cold War conflicts* (Woodhouse and Dando eds) (1998); and Berdal and Leifer, 'Cambodia' in *The new interventionism, 1991-1994* (Mayall ed) (1996).

²¹ The Paris Agreements consist of four documents: (1) Agreement on Comprehensive Political Settlement of the Cambodian Conflict; (2) Agreement Concerning the Sovereignty, Independence, Territorial Integrity, Inviolability and Neutrality and National Unity of Cambodia (Guarantees Agreement); (3) Declaration on the Rehabilitation and Reconstruction of Cambodia; and (4) Final Act of Paris Conference.

administration functions. UNTAC was not authorised to 'govern' Cambodia, but to monitor and control existing administrative systems, with the strictest level of scrutiny being directed at five key areas deemed likely to affect the outcome of the elections. UNTAC's authority was subordinate to unanimous decisions of the Supreme National Council in all areas other than the electoral mandate. Consequently, UNTAC's civil administration was effected mainly through the issue of codes of practice and management guidelines, was and dependent on the co-operation of the parties. Despite the qualified failure of UNTAC to exercise true control over the administrative processes, 'it moved beyond monitoring the actions of the parties to the establishment of a transitional authority that actually implemented directly crucial components of the mandate'²². In this sense, it was a landmark mission for the UN.

In Western Sahara, the United Nations Mission for the Referendum in Western Sahara (MINURSO) was authorised to provide assistance to the administering power in conducting a popular consultation involving the determination of territorial status²³. Such assistance included the 'exercise of all necessary administration, including changing laws and maintaining law and order, to ensure that the consultation operated properly and was free and fair'²⁴. Disagreements between the parties resulted in MINURSO being largely unable to implement its mandate, its efforts being restricted to issuing criteria for identification of those persons eligible to vote in the consultation.

In the Balkans, the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) implemented the provisions of a basic agreement for the region. The parties requested that the Security Council establish a transitional administration to govern the region for a twelve-month period, which could be extended to two years at the request of one of the parties, and the provision of an international force. The transitional administration was to prepare the region for re-integration into Croatia's legal and constitutional system. Its main tasks included recreating a political and

²² Doyle (1995) note 20 at 79.

²³ Durch, 'UN Temporary Executive Authority' in *Evolution of UN Peacekeeping* (Durch ed) (1993); Security Council Resolution 690 of 29 April 1991; Reports of UN Secretary-General UN Docs S/22464 (1991); S/21360 (1990) and S/2001/613 (2001); and *Blue Helmets* (note 12) at 279-83.

²⁴ Wilde (2001), note 9 at 598.

institutional framework for the reintegration of civil administrative and public services into the Croatian system, and organising local elections. All executive power was vested in the hands of the UN transitional administrator²⁵. The mission was successfully conducted with the territory reintegrated into Croatia in January 1998²⁶.

The Dayton Peace Agreement (DPA)²⁷ created a single Bosnian state comprised of two entities, with power shared between joint institutions at the national and 'entity' level. It also allocated a significant role to the international community in implementing its provisions. The Office of the High Representative (OHR), an international civilian appointee, is responsible for coordinating international activities, including authority as the 'interpreter of last resort of the Dayton Peace Agreement's civilian provisions and a capacity to establish new mechanisms (such as commissions or task forces) to help him execute his mandate'²⁸. As difficulties in implementing the DPA have become increasingly apparent²⁹, the OHR gradually began 'to assert administrative authority to ensure the continuation of Bosnia and Herzegovina as a state'³⁰ including dismissing local elected representatives³¹, governing certain areas³² and introducing international appointees to ensure that domestic institutions perform their functions in accordance with the DPA³³.

The UN was also mandated to perform administrative functions in Somalia³⁴, including 'the re-establishment of national and regional institutions and civil administration in the entire country'³⁵, and the establishment of a judiciary and police service. As part of its mandate, the SRSG promulgated the former Somali Penal Code of 1962 as the criminal law

²⁵ Basic Agreement: (1996) 35 *ILM* 184. See also the sources cited at footnote 30 in Wilde (2001), note 9.

²⁶ Security Council Resolution 1145 (1997).

²⁷ The General Framework Agreement for Peace in Bosnia and Herzegovina, 4 December 1995, and Annexes.

²⁸ Cousens 'Building Peace in Bosnia', in *Peacebuilding as Politics* (Cousens and Kumar eds) (2000) at 128.

²⁹ For an analysis of the implementation of the DPA, see Cousens, above, and Aolain, 'The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis' (1998) 19 *MJIL* 957.

³⁰ Wilde (2001), note 9 at 596.

³¹ The OHR dismissed the elected Croat representative of the State presidency in March 2001 and banned him from holding public office and party offices.

³² Following the above dismissal, the OHR exercised governance functions in relation to Herzeg-Bosna to prevent the Federation from collapsing.

³³ See, for example, the measures introduced in Mostar, where the OHR has asserted administrative functions to promote the operation of unified structures.

³⁴ Addis Ababa Agreement March 1993.

³⁵ Security Council Resolution 814 of 26 March 1993, paragraph 4.

in force in Somalia, although commentators have questioned whether this exceeded the authority delegated to the SRSG by the Security Council³⁶. Unfortunately, implementation of the civilian mandate was largely overshadowed by military initiatives and the subsequent withdrawal of the mission³⁷.

Shortly after passing Resolution 1244, the Security Council authorised a similarly extensive mission to East Timor, 'endowed with overall responsibility for the administration of East Timor and ...empowered to exercise all legislative and executive authority, including the administration of justice'³⁸. The SRSG, as the transitional administrator, had the power to enact new laws and regulations and to amend, suspend or repeal existing ones. UNTAET was required to cooperate closely with the multinational force previously deployed to East Timor³⁹. While an extensive mandate was granted to both missions, UNTAET may be distinguished from UNMIK on legal status, as East Timor was a non-self-governing territory while Kosovo part of the FRY, an independent State⁴⁰. Following the transfer of power to indigenous institutions⁴¹, the mandate of UNTAET was terminated and the independent State of Timor-Leste became a member of the UN in 2002⁴².

The above practice demonstrates sufficient examples of the administration of territory by the UN such that States accept this power as an implied or general power of the UN. However, all the missions discussed above, with the exception of East Timor and possibly Somalia, involve territorial administration with the consent of the State concerned, or at least the consent of the parties in *de facto* control of the territory to a peace agreement. This is consistent with traditional peacekeeping missions that are predicated upon three

³⁶ Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (1999) at 187.

³⁷ For Somalia, see Jan, 'Somalia: Building Sovereignty or Restoring Peace?' in *Peacebuilding as Politics* (Cousens and Kumar eds) (2000) at 53; Lewis and Mayall, 'Somalia' in *The new interventionism, 1991-1994* (Mayall ed) (1996); and Makinda, 'Somalia: Lessons from the UN Experience' in *Peacekeeping and Peacemaking: towards effective intervention in post-Cold War conflicts* (Woodhouse and Dando eds) (1998).

³⁸ Security Council Resolution 1272 of 25 October 1999, paragraph 1.

³⁹ Deployed pursuant to Security Council Resolution 1264 of 15 September 1999.

⁴⁰ See: Rothert, 'UN Intervention in East Timor' (2000) 39 *Columbia Journal of Transnational Law* 257; Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *AJIL* 46; and Stahn, note 9.

⁴¹ Resolution 1272 provided for the transfer of administrative functions from UNTAET to local democratic institutions.

⁴² See General Assembly Resolution A/Res/57/3 of 27 September 2002.

important principles: the consent of all the parties concerned; impartiality on the part of UN forces; and resort to the use of force only in self-defence. The practice of obtaining the consent of the parties is required for two reasons⁴³. Legally, consent to the presence of the UN mission is required by Article 2(7) of the Charter, which provides that the organisation must not intervene in matters that are essentially the domestic jurisdiction of any State, although excluding enforcement measures under Chapter VII. Practically, consent is required to ensure the continued cooperation of the government of the host State and other parties to the conflict in implementing the mandate.

During the 1990s, the UN was increasingly involved in intra-State disputes, sometimes in situations where governments had ceased to function⁴⁴. Humanitarian tasks, organising and monitoring elections and civilian administration functions have been brought within the ambit of peacekeeping as the UN struggled to confront the issue of 'failed States'. Helmer and Ratner first posed the problem of the failed State in 1992 – a State utterly incapable of sustaining itself as a member of the international community due to civil strife, government breakdown and economic privation⁴⁵. The failed State presented new challenges, including the collapse of State institutions, especially the police and the judiciary, and the failure of government and law and order. This necessitated the UN extending its tasks to include the re-establishment of effective government and government structures, which became known as post-conflict peace building⁴⁶. Where there was a failed State, the UN was required to

⁴³ Annan, K 'Challenges of the New Peacekeeping' in *Peacemaking and Peacekeeping for the New Century* (Otunnu and Doyle eds) (1998) at 169.

⁴⁴ The developments in peacekeeping from the end of the Cold War have produced numerous accounts. See for example, Greenwood, 'The United Nations as Guarantor of International peace and security: Past, present and future – A United Kingdom view' in *The United Nations at Age Fifty- A Legal Perspective* (Tomuschat ed) (1995); Kühne, 'The United Nations, Fragmenting States, and the Need for Enlarged Peacekeeping' in *The United Nations at Age Fifty – A Legal Perspective* (Tomuschat ed) (1995); Boutris-Ghali, 'Peacemaking and Peacekeeping for the New Century' in *Peacemaking and Peacekeeping for the New Century* (Otunnu and Doyle eds) (1998) at 21; Miller, 'Recent Developments in East Timor: East Timor, Collective Action, and Global Order' (2000) 14 *Temple International and Comparative Law Journal* 89; Hampson, 'Can Peacebuilding Work?' (1997) 30 *Cornell Int'l LJ* 701; and Lee, 'The Historical Evolution of the United Nations in Global Conflict: Creating, Defining and Expanding the Role of the United Nations: United Nations Peacekeeping: Development and Prospects' (1995) 28 *Cornell International Law Journal* 619.

⁴⁵ Helman & Ratner, 'Saving Failed States' *Foreign Policy* Winter 1992-93 at 3.

⁴⁶ Post-conflict peacebuilding refers to 'action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict': *An Agenda for Peace* paragraph 21, UN Doc S/24111 of 27 June 1992. The term was further developed in the *Supplement to An Agenda for Peace*:

negotiate with several combatant organisations, generally small militia groups with no central command⁴⁷, thus making it very difficult to obtain consent in a traditional peacekeeping sense and blurring the distinction between peacekeeping and peace enforcement⁴⁸.

B. Chapter VII

In the absence of clear consent, and without a detailed peace agreement, the practice is for the Security Council to authorise the international administration pursuant to Chapter VII of the Charter⁴⁹. Where consent is non-existent or doubtful, the civilian aspects of the mission must be supported by a security force with a clear enforcement mandate and authorised to use force⁵⁰. In order to act under Chapter VII, the Security Council must determine that the situation in question constitutes a threat to the peace, breach of the peace or an act of aggression⁵¹. As a principal organ of the UN, the Security Council must, at least in the first instance, determine its own competence in specific matters, including the circumstances that may attract its Chapter VII powers. In making this determination, the Security Council enjoys a wide discretion⁵², and has the benefit of a presumption of legality for such determinations a presumption that can only be rebutted by proof that the resolution

paragraphs 47-54, UN Doc S/1995/1. See also Franck, 'A Holistic Approach to Building Peace' in *Peacemaking and Peacekeeping for the New Century* (Otunnu and Doyle eds) (1998) at 275.

⁴⁷ See Roberts, 'Communal Conflict as a Challenge to International Organization: The Case of the Former Yugoslavia' in *Peacemaking and Peacekeeping for the New Century* (Otunnu and Doyle eds) (1998) at 27.

⁴⁸ See Fink, 'From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security' (1995) 19 *Maryland Journal of International Law and Trade* 1.

⁴⁹ Such practice is supported by the subsequent actions of the Security Council regarding East Timor, where the continued consent and cooperation of the Indonesian Government was doubtful. As with Resolution 1244, both the transitional administration and the multinational security force were authorised by the Security Council acting pursuant to Chapter VII, following a determination that the situation represented a threat to the peace and security: see Security Council Resolution 1272 (1999).

⁵⁰ In *An Agenda for Peace*, the then Secretary-General recognised that a clear mandate and the consent, or at least co-operation, of the relevant parties was essential for UN peacekeeping missions. However, in *The Supplement to An Agenda for Peace*, the then Secretary-General emphasised that where traditional peacekeeping forces did not, or will not, have the support of the parties, the mission should be mandated as a peace enforcement mission and clearly authorised to use force other than in self-defence (paragraphs 34-6).

⁵¹ Article 39. Although the Security Council rarely invokes specific articles of the Charter, it is accepted that there must be a determination that the factors required for Article 39 exist. See Gill, note 6 at 39.

⁵² See Gill, note 6 at 40 and Kelsen *The Law of the United Nations* (1950) at 733-7.

is *ultra vires* or contrary to the Charter⁵³. In recent years, the Security Council has adopted a more flexible interpretation of what may constitute a threat to the peace, including recognition that threats to the peace are not confined to inter-State situations but extend to internal situations such as civil wars and coups⁵⁴. Further, the Security Council has stated that situations with serious humanitarian repercussions⁵⁵, support of terrorist activities⁵⁶ and production of weapons of mass destruction⁵⁷ may constitute a threat to international peace and security.

The deteriorating situation in Kosovo had attracted the Security Council's attention from as early as 1998⁵⁸. Subsequent resolutions confirmed that the Security Council perceived the situation in Kosovo to be a threat to peace and security in the region⁵⁹. Resolution 1244 confirms that this threat that was continuing and now of a sufficiently international character⁶⁰. The Balkans has traditionally been an area of instability, as evidenced by the three conflicts in the former Yugoslavia which had resulted in international intervention. The conflict threatened to trigger hostilities in neighbouring States, while creating a significant number of refugees and displaced persons, together with systematic violence and human rights abuses perpetrated by all parties to the conflict. Further, Resolution 1244 was passed on the same day the NATO bombing campaign against the FRY, an international armed conflict, ceased.

⁵³ *Certain Expenses* at 168, *Namibia Advisory Opinion* and *Lockerbie* order, paragraph 42, discussed in Bowett, 'Judicial and Political Functions of the Security Council and the International Court of Justice' in *The Changing Constitution of the United Nations* (Fox ed) (1997).

⁵⁴ The Security Council has acted under Chapter VII with respect to civil wars in Liberia, Angola and Somalia and coups in Haiti and Sierra Leone: See *Blue Helmets*, note 12.

⁵⁵ See, for example, Security Council Resolution 794 (1992) relating to 'the magnitude of the human tragedy caused by the conflict in Somalia' and Resolution 918 (1994) concerning the 'magnitude of the human suffering caused by the conflict' in Rwanda.

⁵⁶ The Council has taken action against Libya (Resolution 748), Sudan (Resolution 1054) and Afghanistan (Resolution 1267).

⁵⁷ For example, Security Council Resolution 1441 (2002) in relation to Iraq.

⁵⁸ On 31 March 1998, the Security Council imposed an arms embargo on the FRY: Resolution 1160 (1998), paragraph 8. While not stating that the situation constituted a threat to international peace and security, this determination was implicit in the Council's statement that it was acting pursuant to Chapter VII.

⁵⁹ See Security Council Resolution 1199 (1998) and Security Council Resolution 1203 (1998), both 'affirming that the deterioration of the situation in Kosovo...constitutes a threat to peace and security in the region', again acting under Chapter VII.

⁶⁰ Resolution 1244 provides 'determining that the situation in the region continues to constitute a threat to international peace and security'.

Resolution 1244 is not based upon a comprehensive peace agreement, but on the general principles set out in the Peace Plan. While Resolution 1244 requires the relevant parties to have regard to the Rambouillet Accords, this document has no legal force and is best considered a negotiation document⁶¹. The MTA provides that the governments 'understand and agree' that KFOR will deploy and operate within Kosovo 'with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and to otherwise carry out its mission'⁶². The parties to the MTA clearly considered that the international security force would be a peace enforcement force authorised by the Security Council pursuant to Chapter VII. Even if the MTA evidences the consent of the FRY to the deployment of KFOR, such consent is irrelevant, as to enable KFOR to use force other than in self-defence, KFOR had to have a Chapter VII mandate. In addition, as KFOR is essentially a coalition of member States, a Security Council resolution under Chapter VII was required to authorise member States to exercise delegated power to use force other than in self-defence⁶³.

The MTA provides that part of the KFOR mission is to protect, and to provide assistance to, the international civil presence⁶⁴. While the MTA is primarily concerned with security issues, the parties clearly contemplate the deployment of the international civil mission. However, neither the acceptance of the Peace Plan or the execution of the MTA by the FRY would equate to consent by the FRY to the effective suspension of its sovereign rights in respect of Kosovo. Even if this did comprise consent, such consent is arguably vitiated as having been obtained by duress by military means due to the threat of continued aerial strikes and a possible ground campaign⁶⁵. The better view is that the FRY did not consent

⁶¹ The Rambouillet Accords were never accepted by the FRY government. See characterisation of peace agreements in Bell, *Peace Agreements and Human Rights* (2000) at 19-32.

⁶² Article I(2).

⁶³ See for example, Blokker, N., 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'' (2000) 11 *EJIL* 541.

⁶⁴ Annex B

⁶⁵ Cerone uses this argument in the context of international humanitarian law applying to the situation in Kosovo, as consent would prevent the mission being characterised as an occupation for the purposes of international humanitarian law; Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' (2001) 12 *EJIL* 469. The issue of consent also arose in relation to the imposition of the Iraq-Kuwait boundary pursuant to Security Council Resolution 687 of 3 April 1991, suggesting that the Security Council may still act in the absence of a valid or certain consent, provided it does so pursuant to Chapter VII.

to the suspension of its sovereign powers in relation to Kosovo and the exercise of civilian functions by UNMIK. Accordingly, the Security Council was required to authorise UNMIK as an enforcement measure pursuant to Chapter VII of the Charter.

C. Measures available to the Security Council

Once the Security Council has determined the existence of a threat to the peace, breach of the peace or act of aggression, the Security Council may then either make recommendations or decide which measures, military or non-military, shall be taken to maintain or restore international peace and security. Both Articles 41 and 42 confer upon the Security Council 'a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken'⁶⁶. These powers are coercive against a culprit State or entity, and are mandatory for other member States, which are under an obligation to cooperate with the UN and other States in implementing the measures determined by the Security Council⁶⁷.

1. Non-military measures – UNMIK

The establishment of the international civilian presence, as distinct from a security presence, is not a military measure. Nor is it a provisional measure pursuant to Article 49, which is intended to be a short-term measure, 'without prejudice to the rights, claims, or positions of the parties concerned'⁶⁸. Administration of territory is not listed in Article 41. However, Article 41 is a non-exclusive list and is merely illustrative of possible measures available to the Security Council. The only requirement is that such measures do not involve the use of force⁶⁹. Particularly since 1990, the Security Council has demonstrated a tendency to utilise a variety of non-military measures under Article 41 more frequently

⁶⁶ *Prosecutor v Dusko Tadic*, IT-94-1-AR72, 2 October 1995, (1996) 35 *ILM* 32 (*Tadic*), paragraph 31. For an analysis of the decision refer to King, 'Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's powers under Chapter VII of the Charter' (1996) 10 *Emory International Law Review* 509.

⁶⁷ Article 27.

⁶⁸ *Tadic*, paragraph 33. See also Gill, note 6 at 46-7. For a contrary view see Kirgis, 'Security Council Governance of Post-conflict Societies: A Plea for Good Faith and Informed Decision Making' (2001) 95 *AJIL* 579.

⁶⁹ *Tadic*, paragraph 35.

than those using armed force under Article 42, including the use of economic sanctions⁷⁰ and arms embargoes⁷¹. The Security Council has established international tribunals to prosecute war criminals⁷² and has determined the legal responsibilities of States, including guaranteeing the inviolability of an international boundary⁷³ and the invalidation of a repudiation of foreign debt⁷⁴. More recently, the Security Council has called on States to take action to restrict terrorism⁷⁵. From its actions in relation to Kosovo and East Timor, the Security Council perceives international administration of territory as falling within the measures available to it under Article 41 for the maintenance of international peace and security. The absence of protest on the part of States to Resolution 1244 and Resolution 1272 suggests that States generally accept this interpretation.

Article 29 of the Charter authorises the Security Council to establish such subsidiary organs as it deems necessary for the performance of its functions, although arguably this power only authorises the establishment of a subsidiary organ to perform the functions of the Security Council itself⁷⁶. In contrast, Article 7(2) of the Charter provides that ‘such subsidiary organs as may be found necessary may be established in accordance with the present Charter’, thus providing a general authority to establish subsidiary organs. Therefore, as a principal organ of the UN, the Security Council is not limited to creating subsidiary institutions within its own competence⁷⁷. Instead, it is sufficient that the establishment of the subsidiary organ is ‘an instrument for the exercise of [the Security Council’s] own principal function of maintenance of peace and security’⁷⁸. For example,

⁷⁰ Economic sanctions were first imposed against Rhodesia in 1966 pursuant to Security Council Resolution 221 (1966). The most comprehensive sanctions to date are those adopted against Iraq pursuant to Security Council Resolution 661 (1990).

⁷¹ An arms embargo was also imposed on Rhodesia pursuant to Security Council Resolutions 216 (1965) and 217 (1965). A more recent example is the arms and air embargo upon Libya following Libya’s refusal to oppose terrorism and to extradite suspected bombers: see Security Council Resolution 731 (1992).

⁷² See Security Council Resolutions 808 (1992) and 827 (1992) for the ICTY and 955(1994) for the ICTR.

⁷³ See Security Council Resolution 687 (1991) – guaranteeing the inviolability of the border between Iraq and Kuwait.

⁷⁴ Security Council Resolution 687 (1991) – nullifying Iraqi statements repudiating its foreign debt.

⁷⁵ For example, in Security Council Resolution 1373 (2001), the Security Council confirms that international terrorism comprises a threat to international peace and security.

⁷⁶ Sarooshi, ‘The Legal Framework Governing United Nations Subsidiary Organs’ (1996) 67 *BYBIL* 413 at 422-423.

⁷⁷ Sarooshi, above, at 425.

⁷⁸ *Tadic*, paragraph 38.

the international criminal tribunals established by the Security Council perform a judicial function that the Security Council, a political body, cannot perform under the Charter. In *Tadic*, the Appeals Chamber held that to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY) was lawful as a necessary measure to restore and maintain international peace and security⁷⁹. Therefore, although the Security Council itself may not possess the power to perform the various executive, legislative or judicial functions required to administer territory, it is not precluded from establishing a subsidiary organ that is authorised to perform such functions.

It is generally accepted that UN peacekeeping missions are subsidiary organs that are established under the authority of either the Security Council or the General Assembly⁸⁰. In constituting a peacekeeping mission, the Secretary-General is exercising powers delegated to him by the Security Council under Chapter VII pursuant to the relevant Security Council resolution; the Secretary-General does not himself possess the authority under the Charter to establish UN peacekeeping forces. Resolution 1244 is consistent with this practice, requesting the Secretary-General to appoint the SRSG to control the implementation of the civil presence⁸¹ and authorising him to establish the interim administration⁸². The Secretary-General designed the structure and role of the civilian presence although his reports were subject to approval by the Security Council⁸³.

UNMIK is therefore a lawfully constituted subsidiary organ of the Security Council and, as such, remains under the authority and command of the Security Council. The Security Council possesses the competence to determine the membership, structure, mandate and the duration of existence of UNMIK⁸⁴. UNMIK is established to restore and maintain international peace and security and is therefore subject to an important functional

⁷⁹ *Tadic*, paragraph 38.

⁸⁰ Sarooshi, note 76 at 437.

⁸¹ Paragraph 6, Resolution 1244

⁸² Paragraph 10, Resolution 1244

⁸³ For example, SG Report 12/7/99 was submitted to and approved by the Security Council. For an analysis of the roles of the Secretary-General and the Security Council see: Akashi, 'Managing United Nations Peacekeeping' in *United Nations Peacekeeping in Trouble: lessons learned from the former Yugoslavia* (Biermann and Vadset eds) (1998).

⁸⁴ Sarooshi, note 76 at 448-9.

limitation, as its mandate may be revoked once the Security Council determines⁸⁵ that the threat to international peace and security has ceased or that the mission has fulfilled its mandate⁸⁶. The administration itself, the laws it promulgates and the institutions it creates are all subject to an imposed time limit⁸⁷. Further, UNMIK must perform its functions for the purpose, and possibly even in the manner, specified in Resolution 1244⁸⁸. As the Security Council is legally required to supervise UNMIK in performance of its mandate, if UNMIK is required to observe IHRL⁸⁹, accountability for any violation of IHRL by UNMIK or its personnel resides ultimately with the Security Council.

However, the Security Council is a political organ which does not have the practical capacity to micro-manage peacekeeping missions, particularly those involving the complex task of administering a territory. Supervision of UNMIK by the Security Council is limited to a reporting requirement⁹⁰ and the dispatch of Security Council missions to Kosovo to monitor progress and to meet with members of the international civil presence, local political and civil society leaders and other interested parties⁹¹. The international administration must justify its actions to the Security Council and donor countries in order to ensure its continued mandate and, significantly, the political, financial and other resources it requires⁹². In this sense, the international administration remains politically accountable to local stakeholders, and must be seen to be responding to the needs of the

⁸⁵ As with the original determination of the existence of a threat to international peace and security, it is for the Security Council to determine when the threat has ceased to exist and consequently, when the mission under Chapter VII must terminate.

⁸⁶ These events may not coincide as the Security Council may decide to terminate the mission's mandate earlier due to resource or other constraints. However, note the discussion in Sarooshi, note 76 at 449-451.

⁸⁷ Both UNMIK and KFOR were established for an initial period of 12 months, to continue until the Security Council determines otherwise. While this avoids having to reassess the mission's status on a regular basis, it also exposes the termination of the mission's mandate to a veto by one of the permanent members of the Security Council.

⁸⁸ Sarooshi, note 76 at 448-9.

⁸⁹ See Chapter 4, *Application of IHRL to Kosovo*.

⁹⁰ Paragraph 20, Resolution 1244 requires the Secretary-General to report to the Security Council at regular intervals on the implementation of the mandate by the international civil presence.

⁹¹ Security Council missions have visited Kosovo on several occasions, resulting in the following mission reports: UN Docs S/2000/363 (April 2000) S/2001/600 (June 2001) and S/2002/1376 (December 2002).

⁹² See Caron 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 *AJIL* 551 at 558 who argues that accountability is important for the Security Council to retain its legitimacy. Without legitimacy, the Security Council will have difficulty in building the support necessary to implement a resolution.

local population⁹³. The danger inherent in such macro-level supervision is that reports tend to emphasise the successful elements of mission implementation, while dismissing or failing to highlight the failures or difficulties.

The measures that the Security Council may take if it disagrees with a decision or action of UNMIK are uncertain. It may, subject to the veto, revoke its mandate or issue guidance or instructions to the SRSG. It is arguable that the Security Council may exercise the delegated functions itself to substitute its own decision for that of the SRSG or UNMIK. However, Sarooshi argues that where the Security Council has delegated powers that it itself does not possess, it cannot replace the decision of the subsidiary with its own determination⁹⁴. For example, in creating the ICTY the Security Council established a subsidiary organ to perform judicial functions, a function which it cannot itself perform. As a result, the Security Council cannot override a judicial determination of the ICTY. The independence of the ICTY as a judicial body is an inherent feature of the subsidiary organ. As discussed above, it is not clear that the Security Council itself has the power to administer territory. If it may not perform governance functions itself, then the Security Council could not substitute its own decisions for those of UNMIK. If, however, the delegation of authority to the Secretary-General and UNMIK is a practical matter, the Security Council would retain the ultimate decision-making authority. It is also arguable that, like the ICTY, the creation of a subsidiary organ for governance functions requires a similar degree of independence from the Security Council. However, governance functions are not analogous to judicial functions and do not require the same degree of independence from the Security Council.

The Security Council bases its decisions on political concerns, following substantial negotiations between its members and with interested parties. Reviewing the day-to-day decisions taken by UNMIK in the course of the administration is both practically and politically unfeasible. The Security Council is not a judicial body and thus cannot provide an avenue of legal redress for individuals aggrieved by acts of peacekeeping missions. The

⁹³ See, in relation to East Timor, Beauvais, 'Benevolent Despotism: A Critique of UN State-Building in East Timor' (2001) 33 *NYUJ Int'l L & Pol* 1101.

⁹⁴ Sarooshi, note 76 at 453.

Security Council recognises the difficult circumstances⁹⁵ under which UNMIK is operating, and would be reluctant to intervene in response to allegations of systematic violations, unless those violations were so extreme as to generate sufficient concern amongst States, funding bodies and non-governmental organisations to force the Security Council to respond.

2. *Further delegation – the OSCE*

A distinct, but related, issue is whether the Secretary-General and/or UNMIK can further delegate Chapter VII powers to other entities, including international organisations outside the UN system⁹⁶. Under the mission structure, responsibility for civil administration is shared between UNMIK and the OSCE⁹⁷. There is express authorisation for this delegation in Resolution 1244, which refers to ‘the assistance of relevant international organizations’⁹⁸ and in the approval of the mission structure by the Security Council. However, as the OSCE is an organisation external to the UN system, it is not within the political control of the Security Council and is not under a legal obligation to operate towards the same objectives. Therefore, while the Security Council has a general competence to delegate its Chapter VII powers to organs within the UN system, in order to delegate power to the OSCE, the Security Council must rely upon a specific competence within the Charter⁹⁹.

Article 53 provides that the Security Council shall, where appropriate, utilise regional arrangements or agencies for enforcement action under its authority. Neither the Charter, nor UN practice, have produced a definition of a regional arrangement¹⁰⁰. The Conference on Security and Co-operation in Europe (CSCE), the predecessor to the OSCE¹⁰¹, had

⁹⁵ For example, the Security Council ‘notes the enormity of the tasks facing UNMIK’: UN Doc S/2001/600, paragraph 39.

⁹⁶ Sarooshi, note 36, Chapter 6.

⁹⁷ SG Report 12/6/99 and SG Report 12/7/99.

⁹⁸ Paragraph 10, Resolution 1244.

⁹⁹ Sarooshi, note 36 at 18-19.

¹⁰⁰ It is generally accepted that a regional agency is ‘simply a more highly developed form of an arrangement’, that possesses an ‘institutional superstructure’.

¹⁰¹ The discussion of the CSCE/OSCE is based on the following: McGoldrick, ‘The Development of the Conference on Security and Co-operation in Europe (CSCE) After the Helsinki 1992 Conference’ (1993) 42 *ICLQ* 411; Sapiro, ‘Changing the CSCE into the OSCE: Legal Aspects of a Political Transition’ (1995) 89 *AJIL* 631; Meyer, ‘OSCE Missions of Long Duration – Evaluating a Multifunctional Instrument of

declared its 'understanding that the CSCE is a regional arrangement in the sense of Chapter VIII of the Charter of the UN'¹⁰², and had stated that the CSCE is competent to undertake peacekeeping where certain conditions are satisfied¹⁰³. The UN has not passed a formal resolution acknowledging the status of the CSCE as a regional arrangement, however, acceptance of the CSCE's declaration is implicit in the subsequent conduct of the UN. For example, the Security Council has recognised CSCE and OSCE activities in the region of the former Yugoslavia in several resolutions relating to the region¹⁰⁴, and had requested that the OSCE undertake a key role in implementing several provisions of the DPA¹⁰⁵. The OSCE had also been given a considerable role in managing the Kosovo crisis through the Kosovo Verification Mission¹⁰⁶, which operated from 25 October 1998 to 19 March 1999. The practice of both organisations suggests that the OSCE is a regional arrangement for the purpose of Chapter VIII of the Charter.

Article 53 permits the Security Council to utilise regional arrangements, such as the OSCE, for enforcement action under the authority of the Security Council. If the Security Council is to rely upon Article 53 to justify a delegation of its power of territorial administration to the OSCE, it must establish that the functions allocated to the OSCE may be characterised as 'enforcement action'. The critical issue is whether the term is limited to military action under Article 42¹⁰⁷. Arguably, UN practice suggests that non-military measures, particularly economic sanctions and arms embargoes, do not constitute enforcement action. However, these non-military measures may be distinguished from the administration of

Peacekeeping' (2000) 6 (2/3) *International Peacekeeping* 77; Sapiro, 'The OSCE: an Essential Component of European Security', *ASIL Insights* March 1997, available at www.asil.org/insights

¹⁰² Helsinki Declaration 1992, paragraph 25.

¹⁰³ Helsinki Declaration 1992, paragraph 20.

¹⁰⁴ See for example Security Council Resolution 1160 (1998), paragraph 7, where the Security Council 'expresses its support for the efforts of the OSCE for a peaceful resolution of the crisis in Kosovo'.

¹⁰⁵ For a further discussion of the role of the OSCE in Bosnia and Kosovo, see Wouters and Naert 'How Effective is the European Security Architecture? Lessons from Bosnia and Kosovo' (2001) 50 *ICLQ* 540.

¹⁰⁶ Established by Permanent Council Decision 263, 25 October 1998.

¹⁰⁷ For more detailed discussion on regional arrangements see Gray, 'Regional Arrangements and the United Nations Collective Security System' in *The Changing Constitution of the United Nations* (Fox ed) (1997); Gaga, 'Use of Force Made or Authorised by the United Nations', in in *The United Nations at Age Fifty – A Legal Perspective* (Tomuschat ed) (1995); Akehurst, 'Enforcement Action by Regional Agencies, with special reference to the Organisation of American States' (1967) 42 *BYBIL* 175; Kelsen, 'Is the North Atlantic Treaty a Regional Arrangement?' (1951) 44 *AJIL* 162; Blokker, note 53; and Schachter, 'Authorized Uses of Force by the United Nations and Regional Organisations' in *Law and Force in the New International Order* (Fisler-Damrosch and Scheffer eds) (1991).

territory in that arms embargos and economic or diplomatic sanctions may be imposed by an individual state at any time, whether or not as part of a regional arrangement. Traditional peacekeeping is also not enforcement action in this sense, as it is based on the consent of the parties concerned, this may be carried out even by an individual State¹⁰⁸. In contrast, an individual State could not administer territory absent the consent of the host State without breaching Article 2(7) of the Charter. In this sense, where a regional arrangement seeks to perform functions its member States could not perform individually, the better view is that this constitutes enforcement action¹⁰⁹. In addition, such action has the coercive element generally associated with enforcement action¹¹⁰. To conclude, the Security Council may authorise the OSCE, as a regional arrangement, to carry out enforcement action, in Kosovo governance functions, under its authority¹¹¹.

3. Use of Force - KFOR

Turning now to KFOR, Security Council practice demonstrates that force may be used pursuant to Article 42 in order to execute a peacekeeping mandate or to achieve an object that the Security Council considers appropriate or desirable for the restoration or maintenance of peace and security¹¹². In the absence of its own military enforcement capacity¹¹³, the Security Council has resorted to authorising the use of force by member

¹⁰⁸ Akehurst, above.

¹⁰⁹ This view is supported by the wide interpretation currently given to the term 'enforcement measures' in Article 2(7), whereby any action taken by the Security Council pursuant to Chapter VII is regarded as an enforcement measure.

¹¹⁰ See Gill, note 6 at 52.

¹¹¹ However, the delegation to the OSCE may be *ultra vires* in relation to the constituent document of the OSCE itself, as the Helsinki Declaration limits the peacekeeping functions of the OSCE to situations where the consent of the host State is obtained.

¹¹² See for example: Resolution 678 (1990) in respect of Iraq and Kuwait, authorising the force 'to use all necessary means to uphold and implement Resolution 660...and to restore international peace and security in the area'; Resolution 836 (1993) in respect of Bosnia, authorising 'all necessary measures, through the use of air power' to protect United Nations-declared safe areas the to support the United Nations Protection Force in the performance of its mandate; Security Council Resolution 1031 (1995) authorising an international security force to implement the provisions of the Dayton Peace Agreement; and Security Council Resolutions 1270 and 1289 authorising an international security presence to assist the government and to protect civilians in Sierra Leone.

¹¹³ As originally conceived, Article 43 of the Charter provided for States to enter into binding agreements with the Security Council for the provision of national forces as part of a United Nations force. However, such standing arrangements were never entered into and such agreements may be a precondition for the exercise of power pursuant to Article 42, although this limit is not generally accepted. See Kirgis, 'The Security Council's First Fifty Years' (1995) 89 *AJIL* 506 at 520-1, Gill note 6 at 54-5, White and Ülgen, 'The

States to achieve its objectives¹¹⁴. The effect of such resolutions is to delegate the Security Council's enforcement powers under Chapter VII to member States individually, collectively, or as part of regional organisations. Such 'franchising' is not without its own concerns: franchises tend to be dominated by a single State that may act to maximise national interests, not those of the UN, or may attempt to claim legitimacy for actions not contemplated by the Security Council when it gave its authorisation¹¹⁵. Despite this, franchising is preferable to unilateral action by States. As the Charter does not confer on the Security Council an express power to delegate its Chapter VII powers, the power of the Security Council to adopt resolutions delegating enforcement powers to coalitions of member States is probably an implied power¹¹⁶. Member States appear to consider the practice of utilising such resolutions as generally acceptable, even if not ideal, and debate has increasingly concentrated on ensuring greater UN control of, and accountability for, such operations¹¹⁷.

It is difficult to characterise precisely the nature of the delegation of powers set out in Resolution 1244. KFOR may use 'all necessary means to fulfil its responsibilities'¹¹⁸, which, according to UN practice authorises the use of force other than in self-defence. However, it is not clear to which entity this power is delegated. Resolution 1244 authorises member States and other relevant international organisations to establish the international security presence, which must be 'under unified command and control'. This suggests that the delegation of enforcement powers is to a coalition of member States willing and able to participate in the mission and subject to central control, a force under UN auspices. However, Resolution 1244 also states that the security presence must have 'substantial

Security Council and the Decentralised Military Option: Constitutionality and Function' (1997) *NILR* 378 at 385.

¹¹⁴ See Blokker, note 53 and Sarooshi, note 36, Chapters 5 and 6.

¹¹⁵ Franck, 'The United Nations as Guarantor of International Peace and Security: Past, Present and Future' in *The United Nations at Age Fifty – A Legal Perspective* (Tomuschat ed) (1995) at 32. See also Quigley, 'The Privatization of Security Council Enforcement Action: A Threat to Multilateralism' (1996) 17 *MJIL* 249, Sarooshi note 36 at 153-4.

¹¹⁶ See Kirgis, note 113 at 521; Blokker, note 53 at 547, White and Ülgen, note 113 at 387; and White, note 4 at 44.

¹¹⁷ For discussion of the views of members and of Security Council practice leading to these conclusions, see Blokker, note 53.

¹¹⁸ Paragraph 7, Resolution 1244.

North Atlantic Treaty Organisation participation'. This may indicate that the KFOR is essentially a NATO force, under NATO command¹¹⁹. NATO is a regional arrangement for the purposes of Chapter VIII of the Charter¹²⁰, therefore the delegation of enforcement power by the Security Council may be authorised pursuant to Article 53. Gill asserts that the essential question in determining whether a force is under UN auspices is 'what the source or authority for the operation is and whether it is carried out with the object and purpose of maintaining or restoring international peace and security'¹²¹. On this test, KFOR is a military force authorised by the Security Council and operating under UN auspices¹²².

The main concern is the level of control and/or supervision that the Security Council must retain in respect of military forces exercising delegated Chapter VII powers. Military enforcement action must remain under the overall command and control of the Security Council, an obligation recognised both by member States and the Security Council itself¹²³. Further, general principles of delegation require that accountability for the performance of delegated Chapter VII functions cannot be delegated and remains with the Security Council¹²⁴. In terms of responsibility for the actions of KFOR, there is a distinction between a UN force and a force authorised by the UN¹²⁵. However, even if the NATO leadership has the responsibility for operational control of KFOR, including the ability to determine the appropriate level of force used to fulfil the mandate¹²⁶, this does not definitively determine that NATO is responsible for the actions of KFOR. Sarooshi

¹¹⁹ See Wouters, & Naert, note 105.

¹²⁰ The argument that NATO is not a regional arrangement but purely an arrangement for collective self-defence has been overshadowed by the assumption by NATO of responsibilities in areas such as the Former Yugoslavia suggesting that the organisation has assumed for itself functions relating to the maintenance of regional peace and security. See on this issue: Kelsen, note 107 and Akehurst, note 107. For the contrary view see Stein, 'Kosovo and the International Community. The Attribution of Possible Internationally Wrongful Acts: The Responsibility of NATO or of its Member States?' in *Kosovo and the International Community* (Tomuschat ed) (2002) at 186-8.

¹²¹ Gill, note 6 at 58.

¹²² This is the view advanced in the MTA, which states that the international civil and security presences deploy under UN auspices: Article I(1). For a contrary view, see White, note 4 at 60.

¹²³ See Quigley, note 115; Sarooshi, note 36 at 159, White and Ülgen, note 113 at 387.

¹²⁴ See Sarooshi, note 36, Chapter 1.

¹²⁵ Blokker, note 53 at 546.

¹²⁶ Although States cannot avoid their obligations under customary law, treaty law or international humanitarian law by acting under UN auspices: See Chapter 5, *Individual State responsibility*.

distinguishes between operational authority and overall authority, with the latter being more significant. Where the Security Council authorises a force, the force is under the political and legal authority of the Security Council, and the Security Council accepts primary responsibility for the acts of the force¹²⁷. However, it is possible that the Security Council would not be accountable where the UN has been prevented from exercising its supervisory role in respect of the force, or where States have acted *ultra vires* when exercising delegated Chapter VII powers and have not acted in reasonable pursuit of their mandate and the Security Council's objectives¹²⁸.

This requirement imposes three conditions on the delegation of a military enforcement power¹²⁹. First, the Security Council resolution¹²⁹ must state a clear objective. Second, the Security Council must require some form of supervision over the exercise of the delegated power. Third, the Security Council must impose a duty to report on the member States exercising the delegated enforcement powers. Resolution 1244 attempts to comply with these requirements. As with the civil presence, KFOR is deployed for an initial 12-month period, to be renewed unless determined otherwise¹³⁰ and the force commander report to the Security Council, via the Secretary-General, on a regular basis¹³¹. Of course, this reporting requirement is subject to the limitations discussed above in relation to UNMIK and it is unlikely that the attention of the Security Council would be drawn to incidents involving KFOR or its personnel unless such violations were severe and systematic.

D. Restrictions on Chapter VII

The ability of the Security Council to authorise the international administration is subject to two possible restrictions: the principle of sovereign equality and the right to self-determination. Sovereign equality is reflected in Articles 2(1) and 2(7) of the Charter. The former recognises that the UN is based on the principle of the sovereign equality of its members, while the latter provides that prohibits interference in the domestic affairs of a

¹²⁷ Sarooshi, note 36 at 163-4. For a discussion of whether NATO could be responsible if the force was a NATO force, see Stein, note 120.

¹²⁸ Sarooshi, note 36 at 165.

¹²⁹ Sarooshi, note 36 at 155-163. For a similar discussion of conditions, see White and Ülgen, note 113.

¹³⁰ Paragraph 19, Resolution 1244.

¹³¹ Paragraph 20, Resolution 1244.

State other than enforcement measures pursuant to Chapter VII. Resolution 1244 'transfers the exercise of State sovereignty over the territory of Kosovo in its entirety to UNMIK', suggesting that the FRY is not intended to exercise sovereign power in respect of Kosovo during the interim administration¹³².

Given the expansive interpretation of Article 39 and the willingness of the Security Council to act in areas traditionally within the jurisdiction of a State, authorising international administration as an enforcement measure under Chapter VII avoids the application of Article 2(7)¹³³. However, modern notions of sovereignty are inappropriate to the failed or 'pre-modern' State, which 'may be too weak even to secure its home territory, let alone pose a threat internationally, but [it] can provide a base for non-State actors who may represent a danger to the post-modern world'¹³⁴.

The principle of sovereign equality is also found in Article 78 of the Charter, which prohibits the UN from applying the ITS system to member States. Gordon argues that even the widest interpretation of the Security Council's Chapter VII powers would preclude it acting in direct contravention of an express provision of the Charter¹³⁵. However, Resolution 1244 does not consider the application of Article 78, suggesting that the Security Council views Article 78 as limited to the ITS system. In any event, the powers of the Security Council under Chapter VII are wider than the powers of the ITS and can override State sovereignty¹³⁶.

¹³² The Russian Federation and the FRY have protested against this interpretation of Resolution 1244, asserting that at least residual rights remain with the FRY. However, UNMIK exercises authority independently of the FRY and any discourse emphasises the FRY's obligation to co-operate with, as opposed to consent to or approve of, various measures. In addition, KFOR and UNMIK have entered into agreements with the FRY on matters such as economic co-operation, refugee repatriation and border controls, signalling the FRY's acceptance of UNMIK's authority for Kosovo during the international administration.

¹³³ See Matheson, 'United Nations Governance of Postconflict Societies' (2001) 95 *AJIL* 76. Contrast Kirgis, note 68.

¹³⁴ Cooper, 'The new liberal imperialism' *The Guardian* 7 April 2002.

¹³⁵ Gordon, 'Some Legal Problems with Trusteeship' (1995) 28 *Cornell International Law Journal* 301.

¹³⁶ See Stahn, note 9 at 138-9.

Writing in 1995, Gill commented that the right to self-determination¹³⁷ ‘precludes the imposition of any form of government by the United Nations on the population of a State or other entity’¹³⁸. Even when acting under Chapter VII, there is no legal basis for the imposition of a trusteeship or UN administration. Similarly, the right to self-determination precludes the imposition by the UN of any particular form of government upon a population. Although the concept of self-determination is a recognised right under international law, it is an evolving concept, and its extent and application, particularly in the post-decolonisation era, is still uncertain¹³⁹. The right to self-determination may be limited to internal matters, including political participation in the peacebuilding process, the protection of certain group rights and autonomy within the established State, but no right of secession. Alternatively, it could be argued that a coherent, territorially-centred group has the right to determine whether to remain part of the State or to choose independence¹⁴⁰. If the latter view is correct, the imposition of an international administration without the direct consent of the population would violate the right to self-determination¹⁴¹.

Resolution 1244 adopts a cautious approach to self-determination. It does not implement a right to external self-determination, as Kosovo has not achieved independent statehood. However, external self-determination is still possible: one of UNMIK’s tasks is to facilitate a political process to determine Kosovo’s future status¹⁴². This process is likely to involve a popular consultation¹⁴³, and therefore promotes the exercise of self-determination, albeit

¹³⁷ This right is derived from Article 1(2) of the Charter, which provides for the respect of the principle of equal rights and the self-determination of people, and affirmed by other Charter articles on economic, social and human rights (for example, Article 55).

¹³⁸ Gill, note 6 at 75. See also Herdegen, ‘The Constitutionalization of the UN Security System’ (1994) 27 *Vanderbilt Journal of Transnational Law* 135 at 156-7.

¹³⁹ See Charney, ‘Self-determination: Chechnya, Kosovo and East Timor’ (2001) 34 *Vanderbilt Journal of Transnational Law* 455; Epps, ‘Self-Determination after Kosovo and East Timor’ (2000) 6 *ISLA Journal of International & Comparative Law* 445; and Grant, ‘Extending Decolonization: How the United Nations Might Have Addressed Kosovo’ (1999) 28 *The Georgia Journal of International and Comparative Law* 9

¹⁴⁰ Charney, above.

¹⁴¹ See Gordon, note 135 at 322.

¹⁴² Paragraph 11(e), Resolution 1244.

¹⁴³ The final status of Kosovo has not been decided – with Resolution 1244 merely providing that UNMIK must facilitate ‘a political process designed to determine Kosovo’s future status, taking into account the Rambouillet Accords’. The Rambouillet Accords provide that three years after the commencement of their provisions, ‘an international meeting shall be convened to determine a mechanism for a final settlement for

delayed¹⁴⁴. During the international administration, Kosovo is to have substantial autonomy within the FRY, which is aimed at promoting internal self-determination¹⁴⁵. However, Resolution 1244 does not recognise the Kosovo population as a people entitled to self-determination, referring only to human rights and minority protection. Internal self-determination is progressed through the creation of indigenous institutions. Arguably, this cautious approach is warranted by the volatile nature of the conflict, for if the conflict was to become one relating to external self-determination, the divisive nature of the issue could deepen the divisions between the ethnic communities¹⁴⁶.

Critics of UNMIK suggest that, while the UN's intentions are benevolent, its goals are often unattainable and its methods questionable, tending to paternalism¹⁴⁷. The ideology of compassion emphasises centralising and externalising decision-making at the expense of promoting indigenous participation. Referring to the concepts of occupation, protectorates and trusteeship which are still ideologically linked to colonialism produces fears that the UN provides 'benevolent colonialism'¹⁴⁸. Cooper argues for a new form of liberal imperialism, 'one acceptable to a world of human rights and cosmopolitan values'¹⁴⁹. States would voluntarily accept international administration for a period of time and in order to obtain certain benefits, including membership of various international organisations such as the EU. If international administrations are 'viewed as necessary to confidence-build and empower local voices, to provide institutional capacity building and

Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of [this] Agreement, and the Helsinki Final Act': Chapter 8, Article I (3). This is in contrast to other missions where the legal status of the territory had been settled as part of the peace agreement.

¹⁴⁴ Epps, note 139. See also Wilde, 'International territorial administration and human rights' in *The United Nations, Human Rights and Post-Conflict Societies* (White, N. and Klaasen, D. eds) (forthcoming 2003).

¹⁴⁵ Wilde above at 9.

¹⁴⁶ See generally Bothe & Marauhn, 'UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration' in *Kosovo and the International Community* (Tomuschat ed) (2002) at 238-9.

¹⁴⁷ See Beauvais, note 93. In the context of East Timor, see Chopra, 'The UN's Kingdom of East Timor' (2000) 42(3) *Survival* 27.

¹⁴⁸ Stahn, 'International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead' (2001) 61 *ZaōRV* 105. See also Gordon, note 135 at 926-8 and Bothe & Marauhn, note 146 at 218.

¹⁴⁹ Cooper, note 134.

support the lengthy process of democratisation and civil society building¹⁵⁰, the negative association of colonialism is avoided. International administration should be viewed as part of 'a more refined concept of peacekeeping'¹⁵¹. A consequence of this view is that international administration of territory would be consistent with promoting the right to self-determination, whether it is internal or external¹⁵². However, the rights of the former sovereign power (in Kosovo, the FRY) where a territory is placed under international administration are not clear. The former sovereign may have forfeited its rights in relation to the territory due to gross violations of human rights; or its rights may be suspended or held in trust for the course of the international administration or pending a popular consultation¹⁵³. In any event, the right to self-determination does not preclude the Security Council from authorising the administration of territory.

¹⁵⁰ Chandler, 'Imperialism may be out, but aggressive wars and colonial protectorates are back' *The Guardian* 14 April 2002.

¹⁵¹ Bothe & Marauhn, note 146 at 220.

¹⁵² Wilde, note 144 at 10-12. See also Ruffert, note 9 at 626.

¹⁵³ For further discussion, see Gordon, note 135.

Chapter 3 - Application of IHRL to Kosovo

A. UN Law

As a subsidiary organ of the Security Council, UNMIK is subject to any limits placed on the powers of its principal organ¹. In discharging its duty under the Charter, the Security Council is required to act in accordance with the principles and purposes of the UN. For present purposes, the relevant issue is whether any of these principles and purposes creates a legal obligation on the Security Council, and therefore UNMIK, to observe IHRL.

Article 1(1) of the Charter provides that one of the purposes of the UN is to settle or adjust international disputes or situations that may lead to a breach of the peace *in conformity with the principles of justice and international law*². As the UN is not a party to the main international human rights instruments, IHRL binds it if, and to the extent that, the principles of such treaties reflect customary international law³. However, the Security

¹ This discussion of the possible limits of the Security Council is based on the following: Akande, 'The International Court of Justice and the Security Council: Is there room for judicial control of decisions of the political organs of the UN' (1997) 46 *ICLQ* 309; Akande, 'The Competence of International Organisations and the Advisory Jurisdiction of the International Court of Justice' (1998) 9 *EJIL* 437; Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993) 87 *AJIL* 551; Crawford, 'The Charter of the UN as a Constitution' in *The Changing Constitution of the United Nations* (Fox ed) (1997); D'Angelo, 'The Check on International Peace and Security Maintenance: The International Court of Justice and Judicial Review of Security Council Resolutions' (2000) 23 *Suffolk Transnational Law Review* 561; Franck, 'The Powers of Appreciation: Who is the Ultimate Guardian of UN Legality?' (1992) 86 *AJIL* 519; Franck, 'The UN as Guarantor of International Peace and Security: Past, Present and Future' in *The United Nations at Age Fifty - A Legal Perspective* (Tomuschat ed) (1995); Gardam, 'Legal Restraints on Security Council Military Enforcement Action' (1996) 17 *MJIL* 285; Gill, 'Legal and some Political Limitations on the Power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter' (1995) *Netherlands Yearbook of International Law* 33; Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 *ICLQ* 55; Herdegen, 'The Constitutionalization of the UN Security System' (1994) 27 *Vanderbilt Journal of Transnational Law* 135; Reisman, 'The Constitutional Crisis in the UN' (1993) 87 *AJIL* 83; and Watson, 'Constitutionalism, Judicial Review, and the World Court' (1993) 34(1) *HILJ* 1.

² The general sources of international law are international treaties, international custom as evidence of a general practice accepted as law, and the general principles of law recognised by civilised nations: Article 38 of the Statute of the International Court of Justice.

³ The view that international customary law binds the Security Council has received judicial support: see *Reparations for Injuries Suffered in the Service of the United Nations* (1949) ICJ Reports 174. Records of the San Francisco Conference also suggest that delegates assumed that the enforcement powers of the Security Council were to be limited by international law. Further, where the Charter gives the Security Council the power to derogate from international law, the power is expressly stated. Accordingly, where such a power is not stated, the power to derogate does not exist. For example, the power of the Security Council to use force

Council is not required to conform to international law when acting under Chapter VII. This recognises that the 'very notion of enforcement measures implies that the Council has the authority to infringe upon, restrict or suspend the rights that States normally are entitled to exercise'⁴. If the Security Council can restrict the rights of States under international law, it will also 'inevitably impact upon and restrict the rights of individuals both under public and private law'⁵. Consequently, the Security Council is not subject to international law, including IHRL, when utilising Chapter VII enforcement powers. White suggests that the part of IHRL that is comprised in the Charter and instruments developed or sponsored by the UN also binds the Security Council as part of the constitutional laws of the organisation, even if those principles are not accepted by States and do not form part of customary international law⁶. With respect, this view over-emphasises the constitutional nature of the Charter and ignores the priority given to the restoration and maintenance of international peace and security under Chapter VII. There is recognition of a legal obligation on the Security Council to observe essential human rights and humanitarian principles⁷. In the context of Kosovo, UNMIK and KFOR must observe such fundamental principles. However, the difficulty remains in identifying which norms of international law are accepted as being peremptory in nature and, at present, the category of peremptory

other than in self-defence in order to restore or maintain international peace and security does not relieve the Security Council of its obligation to respect the international humanitarian laws applicable to the conflict (the *jus ad bello*). See Akande (1997), note 1 at 317-21 and Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989).

⁴ See Gill, note 1 at 61-2 and Kelsen, *The Law of the United Nations* (1950) at 294. A textual analysis of Article 1(1) supports this view as only measures to bring about settlement of disputes by peaceful means are required to conform to principles of justice and international law. See also Article 103, which provides that the Charter will prevail where the obligations of member States under the Charter are in conflict with a treaty but not other sources of international law.

⁵ Gill, note 1 at 73.

⁶ White and Klaasen 'The UN and the Protection of Human Rights in Post-Conflict Situations' in *The United Nations, Human Rights and Post-Conflict Societies* (White, N. and Klaasen, D. eds) (forthcoming 2003).

⁷ Judge Lauterpacht, in the *Bosnia Genocide Convention* case, recognised that where a Security Council resolution 'began to make members of the UN accessories to genocide it ceased to be valid and binding in its operation against Bosnia Herzegovina and that members of the UN then became free to disregard it'. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (1971) ICJ Reports 341, Herdegen, note 1, and Watson, note 1 at 37-8.

norms is narrow, including the right to life, freedom from torture and genocide and the rights from which there can be no derogation under IHRL⁸.

Two other relevant purposes of the United Nations are the protection of human rights and the right to self-determination. Articles 1(3) and 55 state that one of the purposes of the UN is to promote and encourage respect for human rights and fundamental freedoms, arguably imposing an obligation on the UN to observe IHRL. While the UN has recognised that it should be guided by IHRL in all aspects of its operations⁹, this is a political and not a legal commitment, and certainly does not restrain the Security Council when acting pursuant to Chapter VII. In the context of the international criminal tribunals, Kirgis suggests that the power to create war crimes tribunals to provide justice and resolve issues after an armed conflict will exist 'if the conditions for applying chapter VII are met *and principles of fundamental adjudicatory fairness are followed*'¹⁰. This suggests that the power is conditional upon basic procedural safeguards applying to the international tribunal. A similar argument could be developed in relation to governance functions. If the inherent feature of a democratic system of government is the ultimate accountability of the government to the electorate, an implied power to administer territory may be conditional upon basic democratic safeguards, including the obligation to comply with IHRL, applying to the international administration. However, not all international legal tribunals have incorporated procedural safeguards¹¹. Post-conflict international administrations are necessarily non-democratic in nature and the power to administer territory is not restrained by a requirement for basic democratic safeguards.

Given that States have apparently accepted the competence of the United Nations to administer territory, the issue is now not whether the right to self-determination precludes administration, but rather whether the right imposes any obligation on UNMIK in the conduct of the international administration. Bothe and Marauhn argue that the right to self-

⁸ See Chapter 6.

⁹ *Report of the Panel on United Nations Peace Operations (Brahimi Report)*, paragraph 6(e).

¹⁰ Kirgis, 'The Security Council's First Fifty Years' (1995) 89 *AJIL* 506 at 522.

¹¹ The UN Compensation Commission created by Security Council Resolution 687 (1991) lacks independence from the Security Council as its supervisory body consists of representatives of the Security Council acting in their governmental capacity.

determination, including the right to political participation, together with the right to democratic governance, is incorporated in the principle of democracy that functions as a limit on the power to administer territory¹². While the UN has emphasised that good governance principles should be incorporated into peacekeeping missions¹³, there is not yet a recognised right to democratic governance¹⁴. Even if the right to good or democratic governance did exist, there is a lack of practice establishing a clear and consistent application of this standard. Accordingly, the obligation to utilise principles of good governance is a moral or political, as opposed to a legal, obligation¹⁵. In essence, a court which does not provide a fair trial is not a court¹⁶, but it is not certain that a 'government' which does not comply with IHRL is not a 'government'.

B. Resolution 1244

Resolution 1244 is a legal instrument of the UN that contains the mandate of UNMIK and KFOR and provides the reference for the lawfulness of their acts. Unlike other Security Council resolutions, Resolution 1244 does not require the implementation of a comprehensive peace agreement, which would encompass the consent of the governments of the FRY and the Republic of Serbia, together with the KLA. A peace agreement would

¹² Bothe and Marauhn, 'UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration' in *Kosovo and the International Community* Tomuschat (ed) (2002) at 238-9.

¹³ For example, in an *Agenda for Peace*, the former Secretary-General stated that 'there is an obvious connection between the democratic practices – such as the rule of law and transparency in decision making – and the achievement of true peace and security in any new and stable political order', paragraph 59. The current Secretary-General has asserted that good governance should be a component of UN missions as 'in post conflict settings, good governance can promote reconciliation and offer a path for consolidating peace': Annan, 'The Quiet Revolution' (1998) 4 *Global Governance* 123.

¹⁴ The Charter does not refer to good or democratic governance, although several international human rights instruments provide for the right of a citizen to participate in government, either directly or through elected representatives (For example, Article 21 of the Universal Declaration of Human Rights, Article 25 of the ICCPR and Article 5 of the Charter of the Organisation of American States). Franck argued that there is an emerging right to democratic governance, yet was unable to conclude that such a right already exists in international law: Franck, 'The Emerging Right to Democratic Governance' 86 *AJIL* 46 (1992).

¹⁵ See also Kondoch, 'Human Rights Law and UN Peace Operations in Post-Conflict Situations' in *The United Nations, Human Rights and Post-Conflict Societies* (White, N. and Klaasen, D. eds) (forthcoming 2003).

¹⁶ See *Tadic*.

have provided an opportunity for the parties to have a degree of political control over the human rights obligations in the post-conflict stage. As Bell states¹⁷:

The typical peace blueprint involves a central deal on democratic access to power (including minority rights where relevant), with a human rights framework including measures such as bills of rights, constitutional courts, human rights commissions, reforms of policing and criminal justice, and mechanisms to address past human rights violations.

A peace agreement may provide little basis for human rights norms, as in Afghanistan¹⁸, or may provide a comprehensive framework, as in Bosnia and Herzegovina¹⁹. In Kosovo, the absence of a peace agreement has resulted in the mission's human rights mandate remaining largely undefined and lacking guidance²⁰. Resolution 1244 specifically mandates UNMIK to protect and promote human rights²¹, although fails to specify how this objective is to be achieved. The ambiguity of its mandates, inconsistency within mandates and the failure to take into account practical considerations has been a constant criticism levelled at the Security Council that is linked to the overall success of individual missions. The Brahimi Report²² recommended that future Security Council resolutions should consider the operation of prevailing standards of IHRL and ensure that tasks undertaken by the United Nations are 'operationally achievable'²³.

This open authorisation results in the framework for the emerging order being developed largely by UNMIK itself, based on *ad hoc* decision-making, often reactively, and depending on the leadership style of the SRSG²⁴. UNMIK also defines the limits of the necessary measures to be taken to achieve its mandate. The SRSG is the 'final authority of

¹⁷ Bell, *Peace Agreements and Human Rights* (2000) at 1.

¹⁸ See Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, UN Doc S/2001/1154, 5 December 2001.

¹⁹ DPA, especially Annex 10. See also Cousens 'Building Peace in Bosnia' in *Peacebuilding as Politics* and Bell, note 17, Chapter 4.

²⁰ See Berdal, 'The Security Council, Peacekeeping and Internal Conflict after the Cold War' (1996) 7 *Duke Journal of Comparative and International Law* 71.

²¹ Paragraph 11(j) states that 'the main responsibilities of the civil presence will include...protecting and promoting human rights'. A similar provision is not included in relation to KFOR.

²² Brahimi Report, paragraph 58.

²³ Brahimi Report, paragraph 58.

²⁴ See Korhonen, 'International Governance in Post-Conflict Situations' (2001) 14(3) *Leiden Journal of International Law* 495 at 500.

interpretation'²⁵ in relation to Resolution 1244 and hence his mandate. While 'the Security Council has clearly established the jurisdiction of UNMIK...over the human rights situation in the province, in the interests of the people residing there'²⁶, it has not established how this is to be achieved in practice and has not made IHRL directly applicable to UNMIK.

Resolution 1244 does not similarly mandate KFOR with the protection and promotion of human rights. It does provide that KFOR has to support the international civil presence and 'to operate towards the same goals and in a mutually supportive manner'. UNMIK argued that, if UNMIK's mandate includes the protection and promotion of human rights, KFOR must, as a minimum, refrain from undermining that objective and must comply with IHRL²⁷. UNMIK has also indicated that it considers that KFOR is obliged to observe IHRL in maintaining law and order until UNMIK can take responsibility for the task²⁸.

C. UNMIK Regulations

Resolution 1244 is the 'constitutional' instrument for Kosovo on a domestic level yet is silent as to the laws that apply to the international administration and in Kosovo during the duration of the mission. The SRSG may 'change, repeal or suspend existing laws to the extent necessary for the carrying out of its functions, or where the existing laws are incompatible with the mandate, aims and purposes of the interim civil administration'²⁹. The SRSG may issue legislative acts, known as UNMIK regulations, to enable UNMIK to perform its functions³⁰. Regulation 1, the first legislative act attempts to clarify the overall authority of UNMIK, left vague by Resolution 1244, and defines the law applicable in Kosovo during the international administration³¹. Regulation 1 was subsequently amended

²⁵ SG Report 12/7/99, paragraph 44.

²⁶ Ombudsperson Institution in Kosovo Special Report No 2 on *Certain Aspects of UNMIK Regulation 2000/59 Amending UNMIK Regulation No 1999/24 on the Law Applicable in Kosovo* 27 October 2000, paragraph 7.

²⁷ OMIK, *Kosovo: Review of the Criminal Justice System* October 2001 (OMIK Report 10/01) at 39.

²⁸ See 'Statement on the Rights of KFOR to Apprehend and Detain', Office of the Acting SRSG, UNMIK 4 July 1999.

²⁹ SG Report 12/7/99, paragraph 40.

³⁰ SG Report 12/7/99, paragraph 41.

³¹ Section 3, Regulation 1.

by a separate regulation³² and a revised regulation³³ and is deemed to enter into force on 10 June 1999, the date that UNMIK deployed in Kosovo.

It establishes three sources of law in Kosovo. The primary sources of law are UNMIK regulations and subsidiary instruments, such as administrative directions, and the law in force in Kosovo on 22 March 1989³⁴. It was generally understood by UNMIK that this did not include SFRY Federal and Serbian constitutional laws, although this was not clarified by subsequent UNMIK regulations³⁵. The third source of law is the law in force in Kosovo after 22 March 1989³⁶. This may include laws enacted by Serbia before and after its new constitution in 1990, laws of the SFRY until its dissolution, as well as laws enacted by the FRY. Such laws are relevant only if the law prior to 22 March 1989 or UNMIK regulations do not cover a subject matter or situation and where the later law is not discriminatory and complies with international human rights standards³⁷.

In terms of the direct application of international human rights standards to Kosovo, Regulation 1 originally provided that³⁸:

In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognised human rights standards and shall not discriminate against any person on any ground such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property birth or other status.

³² Regulation 1999/24 *On the Law Applicable in Kosovo* of 12 December 1999 – effectuated through Regulation 1999/25 – and amended by Regulation 2000/54 *Amending UNMIK Regulation No 1999/1 as amended On the Authority of the Interim Administration in Kosovo* of 27 September 2000.

³³ Regulation 2000/54.

³⁴ Section 1(1). In its original form, Regulation 1 provided that the relevant date would be 24 March 1999, the day preceding the commencement of the NATO bombing campaign. However, the selection of this date was controversial. Kosovo Albanian judges and legal professionals disagreed with the selection of this date, claiming that the legal regime operating following the revocation of autonomy was unlawful. In protest, many judges and prosecutors refused to apply the applicable law. In order to resolve the deadlock, the SRSG promulgated Regulation 1999/24, which decreed that the key date for the applicable law would be 22 March 1989, the day prior to the revocation of autonomy. See Lorenz, 'The Rule of Law in Kosovo: Problems and Prospects' (2000) 11 *Criminal Law Forum* 127 at 128 and Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *AJIL* 46.

³⁵ Brand, 'Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation' (2001) 70 *Nordic Journal of International Law* 461-488.

³⁶ Section 1(2), Regulation 1.

³⁷ Section 1(2), Regulation 1.

³⁸ Section 2, Regulation 1.

Regulation 1999/24 restates this commitment, but elaborates upon the applicable international human rights standards by providing that the standards are those reflected in specified international human rights conventions³⁹. These instruments include the International Covenant on Civil and Political Rights (**ICCPR**), the European Convention for the Protection of Human Rights and Fundamental Freedoms (**European Convention**) and the Universal Declaration of Human Rights (**UDHR**)⁴⁰. This list is not exhaustive and other human rights standards or instruments may be invoked pursuant to the section. However, Regulation 1 does not make IHRL directly applicable to Kosovo. The use of the words 'shall observe' does not suggest that the international instruments have direct effect in domestic law⁴¹. Further, Regulation 1999/24 does not provide that either UNMIK regulations or the law applicable prior to 22 March 1989 must comply with IHRL. In practice, the two primary sources of law are preferentially applied without any review of their compatibility with IHRL or without any procedure for applying such standards to the relevant issue⁴². This is based on the assumption that these laws, in particular UNMIK regulations are, or will be, compatible with IHRL, an assumption that has not always been proven accurate⁴³. Despite consistent calls for a thorough review of the domestic legal provisions against international human rights standards, a review of the criminal justice legislation was only concluded in February 2002⁴⁴.

The commitment of UNMIK to observe IHRL is a political commitment only. Even if IHRL did form part of the applicable law in Kosovo, domestic legal provisions do not apply to KFOR, UNMIK and their personnel. Only 'persons undertaking public duties or holding public office' are required to observe international human rights standards.

³⁹ Section 1(3), Regulation 1999/24.

⁴⁰ The list also includes The International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment and the International Convention on the Rights of the Child.

⁴¹ This is in contrast to the language used in the DPA, which had the clear effect of directly incorporating human rights law into the law applicable in post-conflict Bosnia and Herzegovina: see Bell, note 17.

⁴² OMIK, *Kosovo: Review of the Criminal Justice System September 2001 – February 2002 (OMIK Report 2/02)* at 16.

⁴³ For example, OMIK identified UNMIK Regulation 1999/26, *On the Extension of Periods of Pre-Trial Detention*, as breaching both the European Convention and the ICCPR in that it fails to adequately allow for an independent and adversarial review of detention by a judicial officer.

⁴⁴ New legislation on criminal law and procedure was to be introduced in late 2002.

UNMIK personnel do not hold public office in the traditional sense, as they are employees of an international organisation and not of the State. Similarly, the duties undertaken by UNMIK personnel are not tasks performed for the benefit of the 'public'; they are tasks UNMIK is required to fulfil by virtue of its Security Council mandate. It is even more difficult to establish that KFOR performs public duties as its mandate is as an international security force, not as a national army or police force. Regulation 1 is also of an interim nature, it can be repealed or amended by the SRSG at any moment, thus it lacks the protected status of a constitutional document.

Several other UNMIK regulations reaffirm the commitment to protecting human rights; yet also fail to make such provisions directly applicable to the international administration⁴⁵. Regulation 2000/47⁴⁶ provides that UNMIK personnel must respect the applicable law and UNMIK regulations in the fulfilment of their mandate under Resolution 1244, and must refrain from any action or activity incompatible with that mandate⁴⁷. It is unclear whether IHRL forms part of the applicable law. Similarly, 'all KFOR personnel shall respect the laws applicable in the territory of Kosovo and regulations issued by the SRSG insofar as they do not conflict with the fulfilment of the mandate given to KFOR' under Resolution 1244⁴⁸. The KFOR Commander is the final authority on the interpretation of the mandate and determines when KFOR personnel are required to respect the applicable law⁴⁹.

Apart from Regulation 1, the most significant development for the protection of human rights was the promulgation of the Constitutional Framework⁵⁰ in May 2001. This document outlines the creation and powers of provisional institutions of self-government⁵¹ and provides that the provisional institutions shall 'observe and ensure internationally

⁴⁵ For example, the Municipal Law Regulation 2000/45 *On Self-Government of Municipalities in Kosovo* of 11 August 2000 includes a commitment to observe international human rights standards as a basic principle of the administration of the municipalities.

⁴⁶ Regulation 2000/47 *On the Status, Privileges and Immunities of KFOR, UNMIK and their Personnel in Kosovo* of 18 August 2000 (**Regulation 2000/47**).

⁴⁷ Section 3.5, Regulation 2000/47.

⁴⁸ Section 2.2, Regulation 2000/47.

⁴⁹ MTA, Article V.

⁵⁰ Regulation 2001/9 *Constitutional Framework for Provisional Self-Government* of 15 May 2001 (**Constitutional Framework**).

⁵¹ The provisional institutions include the Assembly, President of Kosovo, the Government, the Courts and other bodies and institutions set forth in the Constitutional Framework – Section 1.5.

recognised human rights and fundamental freedoms'⁵². Again, an extensive list of international human rights instruments is set out in the regulation, including the European Convention and the ICCPR⁵³. The provisions of these international instruments are now clearly directly applicable in Kosovo⁵⁴ but only to the provisional institutions, and not to UNMIK, KFOR and their personnel. Interestingly, the Constitutional Framework also provides that 'All persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms'⁵⁵. This provision does not specify which entity is responsible for securing the human rights and fundamental freedoms to the people of Kosovo and supports an argument that both the international administration and the provisional institutions are required to secure those rights. However, this obligation would arise only from the date of promulgation of the Constitutional Framework⁵⁶.

D. SOFA's and Participation Agreements

Traditionally the Status of Forces Agreement (SOFA), entered into by the UN and the government of the host country, sets out the extent to which peacekeeping forces are to comply with the laws of the host country and the immunities and privileges of the UN and its personnel within the host country. The model UN SOFA⁵⁷ requires the peacekeeping mission and its personnel to respect and observe all local laws and regulations, with the SRSG or the force commander to take all appropriate measures to ensure the observance of such laws, yet does not include a commitment to observe IHRL⁵⁸. In any event, neither the UN nor KFOR have entered into a SOFA with the FRY Government relating to their

⁵² Section 3.2, Constitutional Framework.

⁵³ The list is identical to that set out in Regulation 1999/24, with the exception of the inclusion of the European Charter for Regional or Minority Languages and the Council of Europe's Framework Convention for the Protection of Minorities and the exclusion of the International Covenant on Economic, Social and Cultural Rights.

⁵⁴ Section 3.3, Constitutional Framework.

⁵⁵ Section 3.1, Constitutional Framework.

⁵⁶ For a discussion of the Constitutional Framework, refer to Stahn, 'Constitution Without a State? Kosovo Under the United Nations Constitutional Framework for Self-Government' (2001) 14(3) *Leiden Journal of International Law* 531 and Brand, note 35 at 473-4.

⁵⁷ Model Status of Forces Agreement for Peacekeeping Operations, UN Doc No A 45/594 of 9 October 1990.

⁵⁸ The model NATO SOFA is similarly worded: North Atlantic Treaty Organization Status of Forces Agreement, TIAS 2846, 4 UST 1792 of 23 August 1953, Article VII. For a discussion of the immunity accorded to international peacekeepers under these model SOFAs, refer to Amnesty International, *International Criminal Court: US efforts to obtain immunity for genocide, crimes against humanity and war crimes*, AI Index IOR 40/025/2002, August 2002.

activities in Kosovo⁵⁹. The model participation agreement between the UN and States contributing forces provides only that troops 'shall observe the principles of and respect the general international conventions applicable to the conduct of military personnel', in particular the Geneva Conventions⁶⁰. It does not contain a commitment to observe IHRL.

The terms of the MTA are also relevant to KFOR's human rights obligations, as this is the closest agreement to a SOFA. The KFOR Commander has⁶¹:

the authority, without interference or permission, to do all that he judges necessary and proper, including the use of military force, to protect the international security force (KFOR), the international civil implementation presence, and to carry out the responsibilities inherent in this Military Technical Agreement and the Peace Settlement which it supports.

This authority is not restricted to those actions that comply with IHRL. Most significantly, the MTA provides that the KFOR Force Commander is 'the final authority regarding interpretation of this agreement [the MTA] and the security aspects of the peace settlement it supports' and 'his determinations are binding on all Parties and persons'⁶². Arguably, it is for the KFOR Commander to determine if and to what extent IHRL applies to KFOR.

All States participating in KFOR have rules of engagement that provide the parameters within which the peacekeeping personnel may use force. These documents are operational guidelines based on international law, particularly international humanitarian law, and reflect such principles as proportionality and distinction, not IHRL. The armed forces of individual States are also subject to national regulations governing conduct of operations, which may also include provisions relating to IHRL⁶³. The Department of Peace Keeping Operations also issues all military and civilian personnel with guidelines for conduct of peacekeeping missions⁶⁴. The code of conduct is not legally binding, but requires that all personnel must respect the human rights of all individuals concerned, and provides that

⁵⁹ This is due to concerns that entering into a SOFA would confirm FRY sovereignty and result in a Kosovo Albanian political backlash.

⁶⁰ Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations, paragraph 28.

⁶¹ Annex 2, paragraph 2, MTA.

⁶² Article V, MTA.

⁶³ For example, British peacekeepers are subject to the Armed Forces Act 2001. See Chapter 4.

⁶⁴ UN DPKO *Ten Rules of Personal Conduct for Blue Helmets*, see Kondocho, note 15 at 17.

peacekeepers should not indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or other UN personnel.

E. Succession to international treaties

Certain international human rights instruments may apply directly to Kosovo pursuant to the law relating to State succession⁶⁵ to international treaties. In relation to successor States⁶⁶, the Vienna Convention on Succession of States in Respect of Treaties⁶⁷ (VCSS) adopts the universal automatic succession theory⁶⁸ that provides that international treaty rights and obligations continue to apply to the successor State without modification⁶⁹. This general rule will not apply where the States have otherwise agreed or where it appears from the treaty or otherwise that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions of its operation⁷⁰.

Although the VCSS is based on an International Law Commission draft⁷¹, it is not a codification of the existing customary law principles⁷². Mullerson suggests that the VCSS contains 'more clauses pertaining to the progressive development of existing customary law

⁶⁵ 'the replacement of one State by another in the responsibility for the international relations of territory': Article 2(b) VCSS

⁶⁶ International law distinguishes between successor States, which are considered 'new' States and continuing States, which are a continuation of the State and remain bound by the obligations of their predecessor state. See Crawford, *The Creation of States in International Law* (1979)

⁶⁷ Vienna Convention on Succession of States in Respect of Treaties (1978).

⁶⁸ There are two major theories of State succession to international treaties for successor States. The contrary, clean slate theory, asserts that the State has ceased to exist and that the rights and obligations of the extinguished State are without a subject, and therefore do not bind the successor State. See generally: O'Connell, *The Law of State Succession* (1956); Beato, 'Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union' (1994) 9 *Am UJ Int'l L & Policy* 525; Shaw, *International Law* Fourth Edition (1997) Chapter 17; and Williamson and Osborn 'A US Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia' (1993) 33 *Vanderbilt Journal of International Law* 261.

⁶⁹ Article 34(1) VCSS.

⁷⁰ Article 34(2) VCSS.

⁷¹ ILM (1978) 1488. Despite requiring only fifteen ratifications, it did not come into force until 6 November 1996.

⁷² See Aust *Modern Treaty Law and Practice* (2000), Chapter 22 and Williams, 'The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?' (1994) 23 *Denv J Int'l L & Policy* 1.

than to its codification'⁷³. However, recent State practice indicates that the interest of preserving the stability of international relations will encourage States to adopt a principle of continuity in the future, suggesting that the VCSS increasingly represents accepted principles⁷⁴. For example, the Guidelines adopted by the European Community on recognition of former European States link recognition to the acceptance by new States of certain treaty obligations⁷⁵. Similarly, the United States took the position that the former Soviet States continued to be bound by treaties relating to nuclear weapons, even though Russia was considered the continuing State to the USSR and its treaty obligations⁷⁶.

There is growing evidence of the emergence of an accepted principle in relation to succession to multilateral human rights and humanitarian law treaties. Mullerson asserts that such instruments 'encompass not only reciprocal commitments of States but also rights and freedoms of the individuals within their jurisdiction. In a sense these rights and freedoms constitute "acquired rights" which the new State is not at liberty to remove'⁷⁷. These rights attach to the individuals within a specific territory, not to the sovereign power itself and continue to bind the entity exercising sovereign power in respect of that territory, including a successor State. To permit successor States to elect not to participate in such international human rights treaties would result in the population of the successor State ceasing to enjoy the protections previously afforded to them⁷⁸.

The United Nations Human Rights Committee (UNHRC) considers that the rights in the ICCPR attach to the individuals within the territory and that 'such protection devolves with the territory and continues to belong to them, notwithstanding...State succession'⁷⁹. In the *Bosnia Genocide Case*⁸⁰, the ICJ was faced with the question of whether the FRY was a

⁷³ Mullerson, 'The Continuity and Succession of States, By Reference to the Former USSR and Yugoslavia' (1993) *ICLQ* 473 at 473.

⁷⁴ See Beemelmans, 'State Succession in International Law: Remarks on Recent Theory and Statepraxis' (1997) 15 *BU Int'l LJ* 71

⁷⁵ EPC Press Release 128/91 (16 December 1991). Discussed in Mullerson, note 72 at 489.

⁷⁶ See Williamson & Osborn, note 68. However, the US entered into separate negotiations with each former Soviet State regarding the 1968 Non-Proliferation Treaty.

⁷⁷ Mullerson, note 73 at 490.

⁷⁸ See Mullerson, note 73 and Shaw, note 68.

⁷⁹ General Comment no 26(61); ILM (1995) 839.

⁸⁰ *Application of the Genocide Convention (Bosnia-Herzegovina v Yugoslavia)* (1996) ICJ Reports.

party to the Genocide Convention in accordance with principles of State succession. The ICJ concluded that the FRY was a party, but based this conclusion on the FRY Government's declaration of its intention to remain bound by the international treaties to which the SFRY had been a party⁸¹. In a separate opinion and after a thorough analysis of the underlying principles, Judge Weeramantry concluded that there is 'a principle of contemporary international law that there is automatic state succession to so vital a human rights convention as the Genocide Convention'. To find otherwise would be to create a gap in the system of human rights protection⁸².

There is so far only limited authority for the principle of automatic succession to human rights instruments and, while the area is under consideration, the level of authority is insufficient to support a principle of customary law. The better view is that the principles in such instruments bind successor States as the principles themselves represent accepted principles of customary law⁸³. This view is consistent with the opinion of the ICJ in the *Bosnia Genocide Case*, which recognised that the Genocide Convention is of an *erga omnes* nature and that its application is not determined by the structure of an individual state⁸⁴. This distinction is significant: if the human rights instruments are binding as customary law only, the State party is not subject to the reporting or monitoring obligations imposed by treaty bodies.

The SFRY began to disintegrate during the early 1990s, following declarations of independence by four of its constituent republics: Slovenia, Croatia, Macedonia and Bosnia and Herzegovina. The two remaining constituent republics, Serbia and Montenegro, formed the FRY. The International Conference on the Former Yugoslavia, Arbitration Commission (**Badinter Commission**) was formed to consider the various issues arising

⁸¹ Paragraphs 17 and 23.

⁸² Page 4-11 of separate opinion. See also the separate opinion of Judge Shahabuddeen, who found that there would be an implied unilateral undertaking by each party to the Convention to treat successor States as continuing the status and obligations of the predecessor state, paragraph 23.

⁸³ See Aust, note 21.

⁸⁴ See Grant, 'Territorial Status, Recognition and Statehood: Some Aspects of the Genocide Case' (1997) 33 *Stan J Int'l L* 305 at 307-8.

from the disintegration of the SFRY⁸⁵. In its first opinion, the Badinter Commission indicated that the SFRY was in the process of disintegrating into its constituent elements⁸⁶. On 4 July 1992, it concluded that the process of dissolution of the SFRY was complete, that the SFRY no longer existed and that the former national territory and population of the SFRY were entirely under the sovereign authority of the new States⁸⁷.

The Badinter Commission rejected the FRY Government's claim to the continuing State to the SFRY⁸⁸, stating that the FRY 'cannot be considered as the sole successor to the former state'⁸⁹. Instead, the FRY was regarded as a new successor State to the SFRY, along with the other former republics, and would have to apply for membership in its own right of the UN⁹⁰, the CSCE and other international organisations. The SFRY was a party to a number of important international human rights treaties, including the ICCPR, although it was not a party to Optional Protocol 1 to the ICCPR.

The dissolution of the SFRY occurred prior to the entry into force of the VCSS, and thus questions of succession were subject to customary international law. The SFRY had been a party to the 1978 ILC Convention, and the four new States all deposited notices of succession to it. The Badinter Commission considered that the VCSS applied to the disintegration of the SFRY, and that the settlement of the issues of succession arising from

⁸⁵ In a Declaration of 27 August 1991, the European Community and its Member States announced that they were convening a peace conference that would bring together the Federal Presidency and Government of Yugoslavia, the Presidents of the six Republics and representatives of the EC and Member States. An arbitration procedure would be provided as part of the Conference to which the parties could submit their differences.

⁸⁶ Opinion No 1, 29 November 1991, Reported in 1991 ILM 162, at 163

⁸⁷ Opinion No 8, 4 July 1992, Reported in 1992 31 ILM at 199-202.

⁸⁸ The FRY claimed to be the continuing State of the SFRY, entitled to the continued membership of the SFRY in the UN and the CSCE, an argument rejected by the other former republics.

⁸⁹ Opinion No 9, 4 July 1992, Reported in 1992 31 ILM 203.

⁹⁰ The issue of continued membership of international organisations and succession to treaty obligations is different. However, the UN Security Council in the preamble to Security Council Resolution 757 noted that the claim of the FRY to the continued membership of the SFRY 'has not been generally accepted'. In 1992, the UN General Assembly determined that the FRY could not continue the membership of the SFRY; that it should apply for membership; and that it could not participate in the working of the General Assembly. General Assembly Resolutions 47/1, 47/229 and 48/88. See also Security Council Resolutions 757, 777, 821 and 1074. For a discussion, see Blum, 'UN Membership of the 'New' Yugoslavia: Continuity or Break?' (1992) 86 *AJIL* 830. The FRY subsequently applied, and was admitted, as a member of the UN in its own right: General Assembly Resolution 55/12 of 1 November 2000 UN Doc A/RES/55/12. See also the recommendation of the Security Council at UN Doc A/55/535

the SFRY would be reached by drawing upon the provisions of the VCSS⁹¹. The former republics accepted this view. The Badinter Commission considered that, pursuant to Article 34(1), the successor States to the SFRY, including the FRY, were responsible for implementing the international human rights obligations of the SFRY. It recognised that 'the peremptory norms of international law, in particular those concerning respect for human rights and the rights of peoples and minorities, were binding on all the parties to the succession'⁹². Being a monist system, no action on the part of the FRY government would be required to import the norms into FRY domestic law.

The FRY, based on its claim to be the continuing state of the SFRY, issued a formal declaration stating that the FRY 'shall strictly abide by the commitments that the SFRY assumed internationally'⁹³. It was not certain whether these obligations include the acceptance by the FRY of international human rights monitoring. Interestingly, the Office of the United Nations Commissioner for Human Rights (**UNCHR**) list of signatories and ratifications to human rights instruments contains no entry for the FRY. Instead, the entry is under 'Yugoslavia' with a date of 12 March 2001 being recorded as the date of ratification of the ICCPR, achieved through succession and a date of 6 September 2001 for the Optional Protocol, but not through succession. Separate entries are included for Bosnia and Herzegovina, Croatia, Slovenia and the Former Yugoslav Republic of Macedonia (**FRYOM**)⁹⁴. The UNHRC has requested special reports from Croatia, Bosnia and Herzegovina and the FRY relating to issues including allegations of ethnic cleansing, arbitrary detention, and torture, stating in its request that 'all the peoples within the territory of the former Yugoslavia are entitled to the guarantees of the Covenant'⁹⁵. All three States appeared before the UNHRC without questioning its competence. In its comments on the

⁹¹ Note 89 at 203

⁹² 29 November 1991, at 163.

⁹³ Formal FRY declaration of 27 April 1992.

⁹⁴ UNHCHR – *Status of Ratifications of the Principal International Human Rights Treaties* as of 21 August 2002, available at <http://www.un.org/humanrights>.

⁹⁵ CCPR/C/SR.1178/Add.1, at 2-3.

three reports submitted, the UNHRC emphasised the continued application of the ICCPR to the people within the former territory of the SFRY⁹⁶.

If the emerging principle of automatic succession for human rights treaties is accepted, all inhabitants within the territory of the FRY, including Kosovo, are entitled to the protection of the ICCPR. Alternatively, the FRY has accepted the international obligations of its predecessor State by its participation in the arbitration process established by the Badinter Commission. At least up until 10 June 1999, the date the international administration commenced, the FRY was obliged to secure to the inhabitants of Kosovo the rights contained in the ICCPR. While the FRY Government had declared martial law in Kosovo in 1989, it had not filed a formal derogation notice as required by the ICCPR and its human rights obligations remained.

Kosovo remains legally part of the territory of the FRY during the course of the international administration. Accordingly, its inhabitants continue to enjoy the protection of their human rights under the ICCPR during the international administration. The FRY Government is, at least *prima facie*, responsible for securing ICCPR rights to individuals within the territory. However Resolution 1244, the assumption of legislative and executive power by UNMIK in Regulation 1 and the presence of the international administration effectively prevent the FRY Government from securing ICCPR rights and from meeting its international obligations. This raises the question of whether the FRY Government could be held ultimately accountable for this failure, even though it lacks control of the territory and actors concerned.

Authority for 'residual' responsibility in such circumstances may be drawn from the admissibility decision of the European Court of Human Rights (ECHR) in *Ilaşcu and Others v Moldova and the Russian Federation*⁹⁷. Part of the territory of the Republic of Moldova, a strip of land on the left bank of the river Dniester called Transdnestrria, is subject to a secessionist movement, the self-proclaimed Moldovan Republic of

⁹⁶ Croatia UN Doc CCPR/C/87, FRY CCPR/C/88 and Bosnia and Herzegovina UN Doc CCPR/C/89.

⁹⁷ Admissibility Decision, Application No 48787/99 of 4 July 2001.

Transdnistria (MRT)⁹⁸. From 2 to 4 June 1992, individuals claiming to represent the MRT authorities arrested the applicants. The applicants were detained and tried by a bench of three judges appointed by the MRT authorities for several offences under the criminal code of the Soviet Socialist Republic of Moldova. On being found guilty, the first applicant was sentenced to death, and the remaining applicants sentenced to imprisonment. The conditions endured during their arrest, detention, trial and eventual imprisonment were alleged to fall beneath the minimum standards required by the European Convention.

The President of the Republic of Moldova decreed that the applicants' conviction and imprisonment was unlawful, as the court that convicted the applicants was unconstitutional. The Deputy Procurator-General of the Republic of Moldova ordered a criminal investigation concerning the judges, prosecutors and others involved in the prosecution and conviction of the applicants. The Supreme Court of Moldova examined the judgment of the 'Supreme Court of the MRT' of its own motion, quashing the conviction on the basis that it was unconstitutional and ordered a fresh investigation into the allegations. The Supreme Court of Moldova dismissed an order for the applicants' detention pending trial and ordered their release. The authorities of the MRT took no action in response.

Upon their eventual release by the authorities of the MRT⁹⁹, the applicants claimed against the Government of the Republic of Moldova and the Government of the Russian Federation¹⁰⁰. The applicants alleged violations of various provisions of the European Convention, including Articles 5 (unlawful detention), 2 (unlawful sentence to death - first applicant only) and 6 (absence of a fair trial in the Supreme Court of the MRT)¹⁰¹. The applicants alleged that the Moldovan authorities were responsible for the violations, since they had not acted to end them.

⁹⁸ The following is a summary of the facts as set out in the Admissibility Decision.

⁹⁹ See judgment for details of eventual arrest.

¹⁰⁰ The applicants argued that the responsibility of the Russian Federation was engaged by virtue of the of the alleged actions of Russian troops in assisting the authorities of the MRT. Further, the applicants considered that the Russian Federation, through its troops and influence over the MRT, exercised *de facto* control of the territory. This issue is discussed in Chapter 5.

¹⁰¹ At 12-13.

In response, the Moldovan Government relied on its reservation to the European Convention that¹⁰²:

The Republic of Moldova declares that it will be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Trans-Dniester republic within the territory actually controlled by such organs, until the conflict in the region is finally definitively resolved.

The Moldovan Government maintained that its State organs did not control the territory known as Transdnistria, where the acts complained of had been committed, and that *de facto* the applicants did not come under the jurisdiction of the Moldovan authorities. The State's agreement to be bound by the European Convention was on the basis that it did not recognise the Court's jurisdiction for acts committed by persons and bodies not under its authority and where the territory in question, although *de jure* part of its territory, was not under its control. The limited cooperation by the Republic of Moldova with the MRT authorities did not mean that it controlled the territory¹⁰³. The ECHR dismissed the preliminary objections of the Moldovan Government to its jurisdiction based on the purported reservation to the European Convention¹⁰⁴, as the declaration in question 'is of general scope, unlimited as to the provisions of the Convention but limited in space and time'¹⁰⁵. It was therefore invalid. However, the Court left for the merits the issue of whether Moldova's responsibility could be engaged where it did not control the territory concerned¹⁰⁶.

The situation is analogous to that of the FRY in Kosovo. Legally, Kosovo is within the jurisdiction of the FRY which is required to secure to the inhabitants of Kosovo the full range of ICCPR rights. However, the FRY does not have actual control over the territory, the international actors operating within it or exercise any authority in respect of the inhabitants of the territory. Yet, were the inhabitants of Kosovo to allege violations of

¹⁰² At 11.

¹⁰³ The Government's arguments are summarised at pages 14-15 of the Court's judgment.

¹⁰⁴ At 21-22.

¹⁰⁵ At 20.

¹⁰⁶ See page 21.

human rights by UNMIK or KFOR within Kosovo, such actions may engage the responsibility of the FRY under the ICCPR. Of course, the FRY is not currently a party to the European Convention, nor was the SFRY a party, and the FRY cannot be required to secure rights under the European Convention system, nor can individuals bring complaints before the ECHR. However, the FRY has lodged an application to join the Council of Europe, which will require the FRY to accede to the European Convention as part of its membership requirements. It will be interesting to see whether it attempts to lodge a reservation in respect of that part of its territory that is under international administration.

The nature of the consent of the FRY to the international administration is relevant to the possible residual responsibility of the FRY for violations of human rights in Kosovo. As outlined above¹⁰⁷, the FRY accepted the Peace Plan that proposed the deployment of the international civil and security presences. Setting aside the issue of whether the consent was obtained by duress, it is still uncertain as to whether the FRY consented to the extent of the authority to be exercised by the international administration. It is certainly arguable that the FRY did not consent to the effective transfer of all public authority or to its total exclusion from legislative and executive functions within the territory. If the FRY is considered to have consented and to have agreed to suspend its own sovereign rights for the duration of the international administration, does the act of suspending sovereign rights also suspend its obligations to secure human rights? If rights attach to the territory and its inhabitants, the FRY, even by consenting to the international administration, cannot suspend its international obligations. If the FRY cannot suspend its obligations, is it possible for the FRY to transfer its obligations to the international administration, a transfer that may be implicit in the Peace Plan and Resolution 1244?

The respondents in *Ilascu* asserted that the limited cooperation with the separatist movement did not equate to control of the organisation¹⁰⁸. It would be interesting to see whether the FRY would raise similar arguments that its cooperation with the international administration on issues such as border control, refugee return, trade and detainees does not

¹⁰⁷ See Chapter 1, *Resolution 1244*.

¹⁰⁸ At 15.

engage its responsibility. If the responsibility of the FRY were engaged, what would be the nature of its obligations? Would its obligations be proportionate to the amount of control (if any) it exercises in relation to Kosovo¹⁰⁹? Is its duty limited to protesting against violations by the international administration? Alternatively, is the FRY required to monitor the performance of the international administration and to take action to prevent violations? Is the FRY required to compel the international administration to take steps to secure the human rights of the inhabitants of Kosovo? The FRY government initially protested the lack of any opportunity to review, discuss or be informed of the activities of the international administration¹¹⁰, although there was little response. Following the change in the FRY government on 5 October 2000¹¹¹, relations between the FRY and UNMIK improved, culminating in the signature of a Common Document by the SRSG and the Deputy Prime Minister of Serbia in his capacity as the Special Representative of President Kostunica to Kosovo. The Common Document has two purposes: to provide a list of measures taken by UNMIK to assist the Kosovo Serb community and to provide a solid basis for a cooperative relationship with the authorities of the FRY, including the establishment of a High-ranking Working Group as official forum for dialogue and cooperation¹¹². This group has resulted in several agreements between the FRY and UNMIK¹¹³. However, it is understood by UNMIK that it has no obligations or vertical connections to the FRY, and that such measures are examples of cooperation on regional issues only¹¹⁴.

The international administration exercises public authority and traditional sovereign rights in relation to the territory of Kosovo and its inhabitants. Kosovo is not a state, and therefore the international administration cannot be considered a successor state to the

¹⁰⁹ A similar argument based on proportionate responsibility was rejected by the ECHR in *Bankovic*. See Chapter 5.

¹¹⁰ See the Memorandum by the Government of Yugoslavia on the Implementation of the United Nations Security Council Resolution 1244 (1999), Yugoslav Daily Survey No. 2710 (5 December 1999).

¹¹¹ International Crisis Group *Reaction in Kosovo to Kostunica's Victory*, 10 October 2000.

¹¹² SG Report 15/1/02, paragraphs 16 and 17.

¹¹³ For example, a Protocol on Police Cooperation with the Governments of Serbia and the FRY signed on 31 May 2002 aimed at organised crime and terrorism and the Agreement on the Transfer of Sentenced Persons between UNMIK and the FRY signed on 3 April 2002.

¹¹⁴ See discussion by Brand, note 35 at 463.

FRY, therefore the law of state succession will not apply. However, administration of territory by an international organisation, particularly where the international organisation exercises functions normally exercised by organs of the State, could be considered a change of government. Accepting that the protection of human rights law attaches to territory, and the population of a territory, such protection should continue notwithstanding a change in the entity that exercises authority over the territory and the individuals. International human rights obligations would then continue to bind the international administration for the benefit of the inhabitants of the administered territory. Applying this argument to Kosovo, UNMIK and KFOR in administering the territory, are required to secure for the inhabitants of Kosovo those international human rights obligations applicable in the FRY proper. While this obligation may exist in law, the difficulty lies in enforcing it against the international administration. As noted above, the SFRY was not a party to the Optional Protocol, and therefore the right of individual complaint to the UNHRC is not available. Nor is the FRY currently a party to the European Convention, so an individual cannot bring an application before the ECHR.

If the UN, its member States or NATO member States are bound by the ICCPR in relation to their activities in Kosovo, the question thus becomes what happens to the reporting obligations of the FRY? The ICCPR will apply to people in Kosovo as part of the FRY due to the emerging principle of automatic succession to human rights instruments. Yet the FRY is not exercising sovereign powers in respect of those individuals during the international administration, therefore it cannot violate the human rights of those individuals. If UNMIK or KFOR act in a way incompatible with their (the people of Kosovo) rights, does the FRY have either a right or a duty to complain? These people are FRY nationals: that would be a sufficient basis for the FRY to bring an inter-State complaint against the member States of NATO or the UN, at least in relation to grievous violations of IHRL. It is also possible that the UNHRC would recognise Kosovo as being analogous to a sub-State component of the FRY and request a report directly from the authorities responsible for administration of that component. However, this is not the practice of the UNHRC even in relation to federal States and there is no mechanism by which the UNHRC may force a sub-State entity to comply with the request or the obligation to respect IHRL.

The people of Kosovo may also utilise any domestic remedies available through the FRY to challenge or obtain redress for violations of convention rights by the international administration. This would require domestic FRY courts being willing to assert jurisdiction over the international administration based on the argument that the act of administering the territory signals acceptance of that jurisdiction. It is highly unlikely that the UN or the States participating in KFOR would accept such an argument. Neither the UN nor NATO considered the direct applicability of the ICCPR to Kosovo. Resolution 1244 and Regulation 1 do not clarify whether human rights instruments binding over the FRY automatically apply in Kosovo. Regulation 1 does not specify whether the former Yugoslav or Serbian constitutional provisions and institutional arrangements, including any right of review, continue to apply, although the general understanding was that the applicable body of law excluded constitutional arrangements¹¹⁵. Further, the immunities of UNMIK set out in Regulation 2000/47 apply to the domestic courts of Kosovo only and do not specifically exclude the jurisdiction of the FRY courts. The absence of any SOFA with the FRY Government leaves the application of FRY domestic legal provisions and structures to the international administration uncertain.

To the extent that IHRL imposes obligations on the international administration, the actual rationalisation may not matter if the human rights are protected. However, it appears that whatever the legal basis for the application of IHRL to people within Kosovo, there is no right of individual action.

¹¹⁵ Brand, note 35.

Chapter 4 - Individual judicial remedy

If it can be established that UNMIK and/or KFOR are obliged to comply with IHRL, the next issue is whether there is an enforceable individual right of review. Under IHRL, States are required to ensure that victims of violations have a right to a real and effective remedy, which is generally equated to a right to judicial review of the alleged action, together with a right to compensation. However, the prospects for judicial review of the acts of UNMIK and KFOR are bleak, both within the UN system and the domestic Kosovo legal system. Regulatory mechanisms designed to provide individual remedies for violations of international human rights law do not apply to international organisations. The contracting States to the various international instruments did not undertake to secure the protection of human rights of persons throughout the world and their accountability for such actions is limited by the notion of extra-territorial jurisdiction. The catalogue of rights in Regulation 1 'can only be seen as a declaratory political commitment to a high standard of human rights, yet without putting the practice to the test of local judicial remedies or international supervision through international human rights bodies'¹. This chapter considers the various limitations on securing a right of judicial review for individuals within Kosovo.

A. Review within the UN system

Although the ICJ is the principal judicial organ of the UN², it is not a 'constitutional court' in the sense found in many domestic legal systems³. The ICJ does not have a general mandate to review the exercise of power by either the Security Council or its subsidiary

¹ Brand, 'Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation' (2001) 70 *Nordic Journal of International Law* 461-488 at 476.

² Article 92, Charter.

³ See: Alvarez 'Judging the Security Council' (1996) 90 *AJIL* 1; Akande, 'The International Court of Justice and the Security Council: Is there room for judicial control of decisions of the political organs of the United Nations?' (1997) 46 *ICLQ* 309; Gowlland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the light of the *Lockerbie* case' (1994) 88 *AJIL* 643; Crawford, 'The Charter of the United Nations as a Constitution' in *The Changing Constitution of the United Nations* (Fox ed) (1997); Herdegen, 'The Constitutionalization of the UN Security System' (1994) 27 *Vanderbilt Journal of Transnational Law* 135; Macdonald, 'Changing Relations between the International Court of Justice and the Security Council of the United Nations' (1993) *CYBIL* 1; Roberts, 'Second-guessing the Security Council: The International Court of Justice and its Powers of Judicial Review' (1995) 7 *Pace International Law Review* 281; and Watson 'Constitutionalism, Judicial Review, and the World Court' (1993) 34(1) *HILJ* 1.

organs⁴. For the ICJ to review the creation, mandate or performance of the UNMIK or KFOR the issue must arise as part of a contentious claim brought by a member State⁵. Even if an opportunity to review the legality of the actions of the Security Council or its subsidiary organs arose as part of an inter-State dispute, it is not certain that the ICJ would consider the matter justiciable. Decisions of the ICJ are not binding on States (other than the States that are parties to the dispute) or international organisations, such as NATO and the UN⁶, and must be referred to the Security Council for enforcement action. For an ICJ decision to effectively invalidate a decision or act of the Security Council, 'states would have to give the Court's decision more persuasive force than the law requires'⁷.

The General Assembly and the Security Council may request an advisory opinion on any legal question from the ICJ⁸. While the Security Council has only requested an advisory opinion on one occasion⁹, there is potential for the development of the ICJ's advisory jurisdiction¹⁰. UNMIK, as a subsidiary organ of the Security Council, may itself be competent to request an advisory opinion from the ICJ on legal questions arising within the scope of its activities¹¹. It is unlikely to do so when the allegation is that its own actions are

⁴ See Bowett, 'Judicial and Political Functions of the Security Council and the International Court of Justice' in *The Changing Constitution of the United Nations* (Fox ed) (1997); D'Angelo, 'The Check on International Peace and Security Maintenance: The International Court of Justice and Judicial Review of Security Council Resolutions' (2000) 23 *Suffolk Transnational Law Review* 561; and Franck, 'The 'Powers of Appreciation': Who is the Ultimate Guardian of UN Legality?' (1992) 86 *AJIL* 519.

⁵ For example, the legality of Security Council Resolutions 731 and 748 was indirectly challenged in the inter-state proceedings instituted by Libya in the ICJ against the United States and the United Kingdom: *Lockerbie Aerial Incident* Case. See also: Gowlland-Debbas (1994) note 3; Martenczuk, 'The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?' (1999) 10 *EJIL* 517; and McWhinney, 'The International Court as Emerging Constitutional Court and the Co-ordinate UN Institutions (Especially the Security Council): Implications of the *Aerial Incident at Lockerbie*' (1992) *CYBIL* 261.

⁶ The UN cannot be a respondent.

⁷ Alvarez, note 3 at 5.

⁸ Article 96(1), Charter.

⁹ Arguably, Article 12 of the Charter would preclude the General Assembly from taking such action in relation to a matter of international peace and security which is already the subject of debate in, or action by, the Security Council, although consider the recent advisory opinion sought by the World Health Organisation relating to nuclear weapons. The Security Council has requested an advisory opinion on only one occasion, in relation to Namibia.

¹⁰ See: Alvarez, note 3 at 8-9, who points to the request by the General Assembly and the WHO in relation to nuclear weapons; Akande, 'The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice' (1998) 9 *EJIL* 437; and Reisman, 'The Constitutional Crisis in the United Nations' (1993) 87 *AJIL* 83 at 92.

¹¹ Article 96(2), Charter.

in violation of international law. Advisory opinions are not binding upon either the Security Council or subsidiary organs, although an advisory opinion is likely to be highly persuasive¹².

The UNHRC is also not suited to ensure the accountability of the international administration, as the primary mechanism of ensuring accountability is a system of human rights reporting. States are required to submit reports to the UNHRC on a regular basis, detailing the measures adopted to give effect to the ICCPR rights, the progress made on the enjoyment of ICCPR rights by the national population and any difficulties encountered by the State in procuring ICCPR rights¹³. The UNHRC must consider reports submitted to it by States, and may transmit its comments on the reports to the State concerned, or relevant specialised UN agencies as appropriate¹⁴. Such reporting requirements only extend to State parties, not the UN itself, its subsidiary organs or forces under UN auspices. The UNHRC may receive a communication from individual victims alleging violations of ICCPR rights by State Parties only if the offending State is a party to Optional Protocol 1 to the ICCPR¹⁵. UNCHR has established a Special Rapporteur in relation to human rights in the former Yugoslav republics, who has been seized with matters relating to the human rights situation in Kosovo¹⁶. However, the Special Rapporteur's recommendations do not bind the international administration, nor can he accept or process complaints from individuals.

If the Charter is considered a delegation of powers from member States to the Security Council, rendering the Security Council accountable to the General Assembly as the body representative of member States, the General Assembly may be competent to review persistent and substantial violations of IHRL by UNMIK¹⁷. This would require member

¹² Article 96, Charter.

¹³ Article 40, ICCPR. Article 41 also provides for inter-State complaints where both States had accepted the jurisdiction of the UNHRC to receive such complaints. The UNHRC may also request reports from individual States.

¹⁴ Article 40(4), ICCPR

¹⁵ Article 1, First Optional Protocol to the ICCPR.

¹⁶ Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia.

¹⁷ However, both these principles are not universally accepted: see the discussion in Sarooshi, 'The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers' (1999) at 25-32.

States to determine that the Security Council or UNMIK had violated the Charter or other peremptory norms¹⁸. Given the uncertain Charter basis of KFOR, it is not certain whether the General Assembly has similar powers in relation to KFOR. Alternatively, the General Assembly has a residual capacity to make recommendations to restore international peace and security, particularly where the Security Council is unable or unwilling to act¹⁹. However, given the clear wording of Article 12 of the Charter²⁰, review by the General Assembly where the Security Council has acted would be highly controversial and would be of a political, not legal, nature. In addition the General Assembly is limited to making recommendations, it does not have enforcement powers²¹.

A recent trend has seen the commissioning of internal reports and independent inquiries by the Secretariat or other UN organs relating to the actions of the UN in situations involving alleged human rights abuses. For example, the Secretary-General commissioned an inquiry into the fall of the UN safe area of Srebrenica in Bosnia²² and the failure of UN troops to prevent and stop the systematic slaughter of 800,000 people during the 1994 genocide in Rwanda²³. However, while these reports expose problems within peacekeeping missions, they do not provide for an individual remedy for persons affected. Instead, they are directed at improving and reforming peacekeeping itself. Individual State governments have also commissioned independent reports, the most recent of which was commissioned by the Netherlands government in relation to the role of Dutch troops in the United Nations Protection Force at Srebrenica²⁴. The government dramatically resigned following negative

¹⁸ Gill, 'Legal and some Political Limitations on the Power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter' (1995) *Netherlands Yearbook of International Law* 33 at 124-5.

¹⁹ See *Certain Expenses* at 151 and The Uniting for Peace Declaration, adopted by the General Assembly in 1950 (Resolution 377(V)), discussed in White, *Keeping the Peace: The United Nations and the maintenance of international peace and security* (1993), part 2.

²⁰ Article 12(1) provides that the General Assembly must not make any recommendation in relation to a dispute or situation in respect of which the Security Council is exercising its powers under the Charter.

²¹ Articles 10-14, Charter.

²² Report of the Secretary-General pursuant to General Assembly resolution 53/35: *The Fall of Srebrenica*, 15 November 1999, UN Doc A/54/549.

²³ Commission of Inquiry on Rwanda *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda* 15 December 1999.

²⁴ Netherlands Institute for War Documentation, *Srebrenica: A 'Safe' Area*, April 2002, available at www.srebrenica.nl/em/a_index.htm

findings, demonstrating that such reports may have important political, if not legal, consequences²⁵.

B. The Courts

In mature human rights systems, rights are ordinarily enforced in courts of law within the judicial system. Upon its arrival in Kosovo, UNMIK was faced with a situation in which little of the resources of the previous legal system, either material or human, remained. Court buildings had been destroyed or damaged and there was a serious shortage of essential legal materials, from copies of legal texts and statute books, to the basic paper and stationary supplies needed to run a judicial system²⁶. Due to politically and ethnically motivated appointments, removals and training, only 30 of 756 judges and prosecutors formerly serving in Kosovo were Kosovo Albanian²⁷. Crime, both organised and revenge-motivated violence, was escalating in the law and order vacuum. Accordingly, it was recognised that it was vital to the long-term success of the mission that UNMIK quickly develop a functioning judiciary in Kosovo²⁸. The difficulties facing the interim administration in establishing a judicial system upon arrival in Kosovo have been well documented²⁹.

Responsibility for rebuilding the justice system was shared between the OSCE and UNMIK. One of the first actions of the SRSG was to establish an emergency justice system to focus exclusively on providing hearings to criminal defendants detained by KFOR, while UNMIK concentrated on establishing a permanent judicial system³⁰. By March 2000, the SRSG had appointed in excess of 400 judges and prosecutors to service a permanent judicial system, largely based on the previous administration of the autonomous

²⁵ Finn, 'Dutch Government Quits After Report on Serb Massacre', *Washington Post*, 17 April 2002.

²⁶ SG Report 12/7/1999; OMIK, *Emergency Measures for legal systems*, 7 November 1999 (OMIK Report 1) and OMIK, *The Development of the Kosovo Judicial System (10 June through 15 December 1999)*, 17 December 1999 (OMIK Report 2).

²⁷ See Strohmeyer, 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *AJIL* 46 at 49.

²⁸ This is a consistent theme in the reports of the Secretary-General. For example: SG Report 12/7/99, paragraph 66.

²⁹ See Betts, Carlson & Gisvold, 'The Post-Conflict Transitional Administration of Kosovo and the lessons learned in efforts to establish a judiciary and rule of law' (2001) 22 *MJIL* 371; Lorenz, F.M. 'The Rule of Law in Kosovo: Problems and Prospects' (2000) 11 *Criminal Law Forum* 127; and Strohmeyer, note 27.

³⁰ See OMIK Reports 1 and 2.

province of Kosovo³¹. There is significant evidence that the Kosovo judicial service is not independent or impartial and remains unable to ensure that 'normal' standards of justice can be attained, particularly in relation to war and ethnically motivated crimes and political violence³². Minority groups are significantly underrepresented in the judiciary, and there is a widespread perception that Kosovo Albanian judges and prosecutors are unable to distance themselves from the recent armed conflict to provide impartial justice to Serb defendants or victims³³. Cases against Kosovo Serb defendants suggest that prosecutors and investigating judges may be pursuing or not preventing malicious prosecutions based on the ethnicity of the defendants³⁴. There are also concerns that prosecution cases against Kosovo Albanian defendants have been dropped and investigations conducted without due diligence either through incompetence or ethnic bias.

Reviews of the judicial system argue that the most conspicuous indication that external pressures affect judges is the unusually high rate of releases from detention of persons arrested by KFOR and UNMIK police³⁵. There is evidence that decisions to release detainees are often the result of interference with the judiciary. Of particular concern is the situation of former KLA members or supporters, who reportedly approach judges and obtain the release of detainees. Observers note that accused persons with affiliation to the KLA are rarely held in detention for long, if at all. Participants in the criminal justice system are often subjected to threats and intimidation, intended to encourage the individual to cease participating in the system or to influence the individual's legal decisions, particularly those involving prominent personalities or people with affiliation to the KLA.

³¹ The three-tiered structure comprises approximately 18 Municipal Courts, five District Courts, and a Supreme Court, together with Minor Offence Courts. See OMIK, *A Review of the Criminal Judicial System – February to July 2000* (OMIK Report 7/00).

³² There were a number of initial independent reviews of the justice system including: The Human Rights Bar Committee of England and Wales *Kosova 2000: Justice, Not Revenge* 16 February 2000; Lawyers Committee for Human Rights *A Fragile Peace: Threats to Justice in Kosovo* October 1999; Amnesty International *Recommendations to UNMIK on the judicial system* February 2000; International Crisis Group, *Kosovo Report Card* 28 August 2000.

³³ See various OMIK reports on the criminal justice system. See also: Smith, 'Rule of Law is Elusive in Kosovo' *Washington Post* 29 July 2001 and Wood, 'Amnesty and UN staff accuse Kosovo war crimes tribunal of ethnic bias' *The Guardian* 20 June 2001.

³⁴ In some instances, Kosovo Albanian prosecutors and investigating judges have continued prosecutions of Kosovo Serbs for genocide where the charge was inflated and not supported by the evidence.

³⁵ OMIK Report 7/00, Section 6.

The OSCE provided examples of intimidation of the judiciary in all five District Courts in trials for serious offences, including murder. Evidence supports the assertion that threats and intimidation are also affecting the decision by judges and prosecutors to initiate or to continue investigations³⁶.

While the appointment of international judges to courts throughout Kosovo³⁷ has helped to prevent ethnically or politically biased judgements, the limited number of international judges led to an unequal treatment of defendants. Further, the requirement of majority verdicts restricted the influence of the international judge³⁸. In December 2000, the SRSJ introduced a system for allocating international judges and prosecutors to cases where the appointment is necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice³⁹. While a positive step, the absence of any objective criteria or policy for the consideration of petitions for international panels causes monitoring bodies concern. Further, an application may only be made prior to the trial commencing, or before an appellate review has commenced. As bias or misconduct may arise during trial, this provision may unduly restrict the effectiveness of the regulation⁴⁰. Regulation 2001/2 also extends the scope of cases in which an international prosecutor may intervene to prevent prosecutions being avoided or abandoned due to bias⁴¹.

The judicial system also lacks the institutional and functional independence and the competence to challenge the international administration in its legislative and executive

³⁶ As above.

³⁷ The SRSJ appointed international judges, first to the Mitrovica District Court, and later to courts throughout Kosovo. International judges and prosecutors may "select and take responsibility for new and pending criminal cases within the jurisdiction of the court". See Regulation 2000/6 *On the Appointment and Removal from Office of International Judges and Prosecutors* 15 February 2000, which permitted the appointment of an international judge and prosecutor to the District Court in Mitrovica and was extended to the entire territory by Regulation 2000/34 *Amending Regulation 2000/6 On the Appointment and Removal from Office of International Judges and Prosecutors* 29 May 2000.

³⁸ District Court panels comprise two professional judges (of which the international judge is one) and three lay-judges. For analysis, see OMIK Report 7/00 at 69-70.

³⁹ Regulation 2000/64 *On Assignment of International Judges and Prosecutors and/or Change of Venue* 15 December 2000. See also UNMIK Press Release *International Judges have 'dramatically reduced' chance of bias in Kosovo* 20 October 2000.

⁴⁰ See the discussion of Regulation 2000/64 in OMIK, *Kosovo – A Review of the Criminal Justice System 1/9/00 – 28/2/01 (OMIK Report 2/01)* at Section 8.1 and the examples provided.

⁴¹ Regulation 2001/2 *Amending Regulation 2000/6, as amended, On the Appointment and Removal from Office of International Judges and Prosecutors*.

functions. Regulation 1 vests the administration of the judiciary in the SRSG. Despite establishing several advisory commissions, the SRSG retains the ultimate power to make judicial appointments and, until recently, power in relation to the discipline of international and local judicial staff. There is also evidence that legislative enactments by UNMIK have changed the legal status of criminal cases pending before a court⁴².

Apart from the practical problems outlined above, applying the international human rights standards and associated case law directly in domestic courts has proved problematic, even in the more mature human rights States. In determining the applicable law, courts in Kosovo may request clarification from the SRSG in connection with the implementation of the relevant regulation⁴³. The SRSG has confirmed that Regulation 1 applies to judges and that judges must not apply any provisions of the domestic law that are inconsistent with IHRL, which takes precedence over domestic law, yet there is little guidance as to how this is to be achieved in practice⁴⁴. In Kosovo, most lawyers and judges are not familiar with a system where human rights law is applied directly and, as a continental code system, the use of legal precedent is unknown⁴⁵. Lawyers and the judiciary do not refer to IHRL in legal argument or judgments, thus limiting the effect of such standards in domestic law.⁴⁶ The presence of so many sources of law creates confusion amongst the judiciary and lawyers and the judiciary as to which law applies and which law would take precedence in the case of conflict⁴⁷. There is no central guiding body, such as a human rights chamber or constitutional court, to provide guidance on the compatibility of domestic legislation (including UNMIK regulations) with IHRL⁴⁸. UNMIK regulations and the existing law were not immediately subject to comprehensive review for compatibility with IHRL and the police and judiciary had to attempt to apply existing law in accordance with the human rights obligations imposed by Regulation 1. There is no consultation process by the SRSG

⁴² See the extensive discussion of the issue in OMIK Report 2/01, Section 3 and in OMIK Report 7/00 at 58.

⁴³ Section 2, Regulation 1999/24.

⁴⁴ Letter to the President of the Belgrade Bar Association dated 14 June 2000 from the SRSG.

⁴⁵ OMIK Report 7/00 at 18.

⁴⁶ OMIK Report 7/00 at 17-18.

⁴⁷ OMIK Report 7/00 at 15.

⁴⁸ In comparison, the European Convention and other human rights instruments are directly applicable in Bosnia and both the Human Rights Chamber and the Constitutional Court issue guidelines on the application of IHRL: Constitution of Bosnia and Herzegovina, Articles II(1), (2) and (7).

prior to promulgation of a new regulation and there is a lengthy delay both in publishing in English and in translating regulations into Albanian and Serbian, despite most regulations being effective on promulgation⁴⁹. Neither judges or lawyers can be expected to implement legislation that is applicable but not known or accessible to them.

C. Privileges and Immunities of UNMIK and KFOR

In considering the availability of a legal remedy, it is necessary to consider the privileges and immunities of UNMIK and KFOR and their personnel. As there is no SOFA, the privileges and immunities of the international administration are set out in Regulation 2000/47. Although the regulation was promulgated on 18 August 2000, it has retrospective application and is deemed to commence on 10 June 1999, the date of Resolution 1244.

UNMIK has institutional immunity and its property, funds and assets are immune from any legal process⁵⁰. Senior UNMIK personnel⁵¹ are immune from local jurisdiction in respect of criminal or civil act performed or committed by them in Kosovo⁵². Other UNMIK personnel are immune in respect of words spoken and all acts performed in an official capacity⁵³, and cannot be subjected to any form of arrest or detention by local authorities⁵⁴. As UNMIK is defined to include all four components of the civil presence and the international organisation responsible for each component⁵⁵, the OSCE, the EU and their personnel enjoy the same protection. An important restriction on this immunity is the power of the Secretary-General to waive the immunity of UNMIK personnel where, in his opinion, the immunity would impede the course of justice and could be waived without prejudice to the interests of UNMIK⁵⁶. For members of the OSCE and EU, any waiver of immunity is to be carried out in consultation with the heads of those components⁵⁷.

⁴⁹ OMIK Report 2/02 at 16-17.

⁵⁰ Section 3.1, Regulation 2000/47

⁵¹ This includes the SRSG, his five deputies and 'other high ranking officials as may be decided from time to time' by the SRSG.

⁵² Section 3.2, Regulation 2000/47

⁵³ Section 3.3, Regulation 2000/47

⁵⁴ Section 3.4, Regulation 2000/47

⁵⁵ Section 1, Regulation 2000/47. See Chapter 1 for details of the pillars.

⁵⁶ Section 6.1, Regulation 2000/47. The Secretary-General has waived the immunity of UNMIK civilian police on several occasions. However, OMIK was concerned that, even with the waiver, none of the charges

As an institution, KFOR is also immune from local jurisdiction⁵⁸. As international KFOR personnel are immune from prosecution before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in Kosovo⁵⁹, its military personnel are largely excluded from the domestic legal regime. International KFOR personnel are subject to the exclusive jurisdiction of their respective sending States and cannot be arrested or detained other than by persons acting on behalf of the sending State⁶⁰. Locally recruited personnel are immune with respect to tasks carried out exclusively related to their services to KFOR⁶¹. Any request to waive the immunity of KFOR personnel must be referred to the commander of the national element of the individual troops⁶².

While these rules are consistent with those generally found in peacekeeping missions⁶³, they effectively preclude the decisions and actions of UNMIK and KFOR from judicial review in Kosovo⁶⁴. This is inconsistent with principles of accountability expected of public servants in peacetime and both the Ombudsperson⁶⁵ and the OSCE⁶⁶ have held that

were properly investigated, the accused individuals escaped criminal responsibility and most were repatriated: OMIK Report 2/02 at 40-41. Amnesty International has also questioned UNMIK's commitment to prosecuting civilian police after an Austrian officer accused of torture and ill-treatment of suspects fled Kosovo with the assistance of other personnel and with the knowledge of the Austrian government: News Release Amnesty International 'Federal Republic of Yugoslavia (Kosovo): No impunity for the international community' 18 June 2002 EUR 70/005/2002. See also: Lynch, 'Austria is said to aid flight of suspect: UN Officials Assail Thwarting of Probe' *The Washington Post* 6 March 2002.

⁵⁷ Section 6.1, Regulation 2000/47.

⁵⁸ Section 2.1, Regulation 2000/47.

⁵⁹ Section 2.4, Regulation 2000/47.

⁶⁰ Section 2.4, Regulation 2000/47.

⁶¹ Section 2.4, Regulation 2000/47.

⁶² Section 6.3, Regulation 2000/47.

⁶³ The immunities of the UN are contained in the General Convention on the Privileges and Immunities of the UN 1946 and, more generally, Article 105 of the Charter. The immunities in UNMIK Regulation 2000/47 are without prejudice to the privileges and immunities enjoyed by UNMIK under the Charter and the General Convention: Section 9, Regulation 2000/47.

⁶⁴ For example, a Kosovo Albanian woman who contested in the Municipal Court an administrative act issued by Kacanik Municipality and the former UNMIK Department of Education and Science. UNMIK relied on its institutional immunity under Regulation 2000/47. Despite the Municipal Court finding that the immunity did not apply and making an award in favour of the applicant, UNMIK refused to enforce the judgement, again claiming that the act had been subject to the privileges and immunities of UNMIK. See Ombudsperson Institution in Kosovo Report Registration Number 122/01 *Elife Murseli against UNMIK*, 10 December 2001, which concluded that UNMIK's failure to execute the judgement violated Article 6 of the Convention.

⁶⁵ Ombudsperson Institution in Kosovo, Special Report No 1 *On the compatibility with recognized international standards of UNMIK Regulation No 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo* 18 August 2000, paragraph 23.

⁶⁶ OMIK Report 2/02 at 38-9.

Regulation 2000/47 is incompatible with IHRL. The Ombudsperson argued that 'no democratic state operating under the rule of law accords itself total immunity from any administrative, civil or criminal responsibility. Such blanket lack of accountability paves the way for immunity of the state'⁶⁷.

Violations of the applicable law by KFOR personnel are resolved through recourse to the courts or other disciplinary procedures of the sending State pursuant to its domestic legislation⁶⁸. There are several concerns regarding military investigations and prosecutions. First, they are not public investigations and prosecutions and cannot be easily monitored. Second, there is no legal obligation on the sending State to proceed with investigations, prosecutions or sentencing as the UN and the host State have no power to compel the State government to initiate or continue prosecutions. Refusal to submit troops to domestic jurisdiction also signals a lack of faith in the judicial system established and administered by the international civil presence. While such refusal may be justified in relation to criminal prosecutions against individual personnel, it should not extend to all legal process, including civil claims and judicial review of KFOR detentions. The greatest concern with military investigation is that it removes the proceedings from Kosovo, leaving the victim with no remedy and unable to participate in the proceedings.

Regulation 2000/47 creates a dichotomous legal regime whereby KFOR is governed by a different legal regime to UNMIK. When faced with an identical threat of aggression, KFOR troops, by virtue of their robust rules of engagement, may take more aggressive action than UNMIK police⁶⁹. Any failure to comply with the rules of engagement by that KFOR soldier would be subject to prosecution before the military courts of the sending

⁶⁷ Ombudsperson Special Report 1, note 65, paragraph 23

⁶⁸ To illustrate, British troops within a KFOR unit operate under a statutory disciplinary framework (based on the Armed Forces Act 2001), which applies wherever in the world they are based, whether in times of peace or conflict. When British soldiers killed two civilians in Pristina, they were investigated and prosecuted by the army's legal service in Britain, in consultation with local UNMIK prosecutors. See Wood, 'Kosovo's love affair with Nato keeps tempers down' *The Guardian* 4 December 2000 and 'Paratroopers charged with Kosovo killing' *The Guardian* 4 December 2000.

⁶⁹ Provided the soldier's action can be characterised as an act in furtherance of KFOR's mandate, it is not a breach of a domestic law provision. In contrast, the UNMIK police officer must obey all domestic legal provisions, including IHRL, and must refrain from taking any action or activity incompatible with such provisions: Regulation 2000/47.

State, while UNMIK civilian police may be subject to local jurisdiction following a waiver of immunity by the Secretary-General. A victim's access to a remedy, and ultimately the degree of accountability, is thus dependent on whether UNMIK police or KFOR troops perform the act, a position that is unsatisfactory and does nothing to promote certainty or accountability.

Traditional immunities are necessary for the effective exercise of the organisation's functions and by the need for the organisation 'to perform its tasks independently and free from interferences'⁷⁰ from any member State or the government of a host State. Disputes that 'might affect the exercise of an international organisation's essential prerogatives remain outside the reach of national courts'⁷¹. This is a legitimate objective to ensure the effective operation of the UN⁷². Alternatively, other applicable rules, such as a constitutive treaty, headquarters agreement or SOFA, provide for the resolution of disputes other than by recourse to national courts⁷³. However, the role of international organisations is now changing and international organisations are increasingly assuming control of individuals as part of their functions. The traditional assumption that States are regulated while international organisations regulate is no longer appropriate⁷⁴. In Kosovo, UNMIK is not mandated to monitor or assist the government, it is the surrogate government and 'the underlying purpose of the grant of immunity does not apply as there is no need for a government to be protected against itself'⁷⁵.

Where the act in question does not relate to the essential prerogatives of the United Nations and there are no alternative means of dispute resolution, it may be appropriate to restrict the

⁷⁰ Shaw *International Law* (1997) at 925.

⁷¹ Gaillard & Pingel-Lenuzza, 'International Organisations and Immunity from Jurisdiction: To Restrict or to Bypass', (2002) 51 *ICLQ* 1 at 5.

⁷² See *Waite and Kennedy v Germany* Reports 1999-I.

⁷³ Gaillard, & Pingel-Lenuzza note 71.

⁷⁴ Wilde, 'Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor' (2001) 7 *ILSA J Int'l & Comp L* 455 at 457. Wilde uses a similar argument where UNHCR operates development camps for refugees, so that the exercise of certain powers within the territory of those camps is equivalent to *de facto* sovereignty and should be subject to IHRL: Wilde, 'Why and How UNHCR Governance of 'Development' Refugee Camps Should be Subject to International Human Rights Law' (1998) 1 *Yale Human Rights and Development Law Journal* 107. See also Verdirame, 'Compliance with Human Rights in UN Operations' (2002) 2(2) *Human Rights Law Review* 265.

⁷⁵ Ombudsperson Special Report No 1, note 65 paragraph 23.

scope of immunity from jurisdiction⁷⁶. The Constitutional Court of Bosnia has recently considered the immunity accorded to the OHR, an international official with governance functions⁷⁷. The Constitutional Court analysed the role being performed by the OHR and previous instances of territorial administration where sovereign States had been placed under international supervision. It commented that the foreign authorities acting in these States on behalf of the international community substituted themselves for domestic authorities and the laws passed by these international authorities were often passed in the name of the States under supervision⁷⁸. The Constitutional Court continued⁷⁹:

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 for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character.

Due to this functional duality, where the OHR substitutes himself for the national authorities, the law enacted is in the nature of a national law and is subject to review by the Constitutional Court.

The same interpretation could apply to the immunity of UNMIK and KFOR in Kosovo, providing the courts with the competence to review legislative and executive acts of the international administration as the surrogate government of Kosovo⁸⁰. However, the

⁷⁶ Gaillard & Pingel-Lenuzza, note 71. See *Beer and Regan v Germany*, where the ECHR noted that provided the immunity of the international organisation has a legitimate goal, the means used were proportionate to the goal sought and the immunity did not restrict access to the courts 'in such a way or to such an extent that the very essence of the right is impaired' the ECHR will not find a violation of Article 6. Judgment of 18 February 1999, Case No 28934/95, paragraph 25.

⁷⁷ See Case U/9/00 *Request for evaluation of constitutionality of the Law on State Border Service* (Constitutional Court of Bosnia and Herzegovina). Judgment of 3 November 2000, available at <http://ustavnisud.ba/home/en/index.html>. The Court was asked to review the constitutionality of the Law on the State Border Service, imposed by the OHR pursuant to the powers vested in the OHR by Annex 10 to the DPA. The DPA provides that the OHR is the final authority in theatre to interpret his mandate and is immune from legal process. In its initial admissibility decision, the Constitutional Court had to consider its competence to review the legislation

⁷⁸ At paragraph 5.

⁷⁹ At paragraph 5.

⁸⁰ Wilde, 'The Complex Role of the Legal Advisor when International Organizations Administer Territory' (2001) *ASIL Proceedings* 251. Stahn also draws on a concept of functional duality to distinguish between categories of laws passed by UNMIK: see Stahn, 'The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis' (2001) 5 *Max Planck Yearbook of United Nations Law* 105 at 145-8 and Wilde, 'International territorial administration and human rights' in *The United Nations, Human Rights and Post-Conflict Societies* (White, N. and Klaasen, D. eds) (forthcoming 2003) at 21-6.

absence of a constitutional framework in Kosovo restricts the opportunity for judicial review⁸¹. The dual character of such acts is also more readily apparent in relation to UNMIK, which has assumed legislative and executive powers⁸². The Office of the Legal Adviser in Kosovo (OLA) has recognised two distinctive functions of UNMIK in Kosovo; the first as a peacekeeping mission and the second as an interim administration. The OLA argued that UNMIK privileges and immunities should only cover its peacekeeping functions and not its capacity as an interim administrator. UNMIK has rejected this suggested limitation, as this requires individuals to identify the capacity in which they make individual decisions, which is difficult practically⁸³.

However, while KFOR does not perform legislative acts, it does undertake several functions commonly associated with the executive, especially in the area of criminal justice, and is more politicised than a regular military force. There appears to be no legal justification for adopting a separate approach for KFOR, where KFOR also performs 'government' acts. The main justification is practical: the UN relies upon States to voluntarily contribute troops for peacekeeping missions⁸⁴. As States tend to be reluctant to contribute troops, the UN has agreed to favourable conditions on the use of such troops, including the immunity extended to their military personnel. States are concerned as to the quality of justice dispensed by foreign courts and the desire to avoid troops being subjected to show trials in foreign jurisdictions. It is important not to underestimate the significance of this concern. The United States government justified its decision not to ratify the Rome

⁸¹ In Bosnia, the DPA included a Constitution document for Bosnia and Herzegovina that had immediate effect and established the Constitutional Court. In Kosovo, it was not until the promulgation of the Constitutional Framework that the Special Chamber of the Supreme Court on Constitutional Framework Matters was established. In any event, it is doubtful that the new Court has jurisdiction in relation to legislative acts of the SRSG: see Chapter 12, Constitutional Framework and Stahn, note 80.

⁸² Ruffert also relies upon the dual nature of the legal system in Kosovo: Ruffert, 'The Administration of Kosovo and East Timor by the International Community' (2001) 50 *ICLQ* 613 at 626-7.

⁸³ OMIK Report 2/02 at 38-9.

⁸⁴ While the Security Council can authorise the use of force, it cannot compel states to take military action, nor can it require participating states to undertake military action in a manner, or using a level of force, that is not acceptable to participating states.

Statute due to a number of serious objections to the International Criminal Court (ICC)⁸⁵. These objections included⁸⁶:

the lack of adequate checks and balances on powers of the [ICC's] prosecutors; the dilution of the UN Security Council's authority over international criminal prosecutions; and the lack of any effective mechanism to prevent politicized prosecutions of any American service members and officials.

Upon the coming into force of the Rome Statute, the United States was concerned that its military personnel would be subject to prosecution before the ICC. It vetoed a Security Council resolution extending the mandate of the United Nations Mission in Bosnia and Herzegovina (UNMIBH) and threatened to withdraw its personnel from Bosnia⁸⁷. In addition, the United States would not participate in future peacekeeping missions where its troops were exposed to the risk of prosecution. A political compromise was reached so that 'if a case arises involving current or former officials or personnel from a contributing State not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorised operation' the ICC shall not 'commence or proceed with investigation or prosecution of such case, unless the Security Council decides otherwise'⁸⁸. As a result, the mandate of UNMIBH was extended⁸⁹. Even this did not meet the United States Government's concerns as it approached other governments requesting them to sign agreements not to surrender or transfer United States nationals to the ICC⁹⁰. The United States exerted 'extreme pressure'⁹¹ on States, in some cases threatening to withdraw United States military assistance. Given these concerns, it is unlikely that national governments or force commanders would waive the wide immunity conferred on their personnel as part of a

⁸⁵ The British Government faced similar concerns: See for example Norton-Taylor, 'Forces fear war crimes threat' *The Guardian* 7 March 2001 and 'Tories urge block on war crimes court' *The Guardian* 8 March 2001.

⁸⁶ Bradley, 'ASIL Insights: US Not to Ratify ICC Treaty', May 2002.

⁸⁷ See UN Press Release SC/7437 of 30 June 2002.

⁸⁸ Security Council Resolution 1422 (2002) paragraph 1. The prohibition is for an initial 12-month period, commencing 1 July 2002, but is renewable by the Security Council for further 12-month periods for as long as the Security Council considers necessary (paragraph 2).

⁸⁹ Security Council Resolution 1423 (2002).

⁹⁰ Press Release Amnesty International 'ICC: No to US campaign against international justice', 3 September 2002, IOR 30/007/2002.

⁹¹ As above.

peacekeeping force. Thus, any breach of the applicable law committed by KFOR personnel must continue to be resolved through recourse to the disciplinary procedures of the sending State.

D. Ombudsperson Institution

The Ombudsperson is the primary domestic institution designed to enhance the protection of human rights in Kosovo. UNMIK Regulation 2000/38⁹² establishes the Ombudsperson institution, sets out its powers and functions and represents a political compromise between the UN, the OSCE and KFOR⁹³. Despite the importance of the Ombudsperson institution in the scheme of rights protection in Kosovo, the first Ombudsperson did not assume his functions until the second year of the international administration's presence⁹⁴. The Ombudsperson's mandate is to⁹⁵:

promote and protect the rights and freedoms of individuals and legal entities and ensure that all persons are able to exercise effectively the human rights and fundamental freedoms safeguarded by international human rights standards, in particular the European Convention on Human Rights and its Protocols and the International Covenant on Civil and Political Rights.

Further, the Ombudsperson is 'to provide accessible and timely mechanisms for the review and redress of actions constituting the abuse of authority by the interim civil administration'⁹⁶. The Ombudsperson has jurisdiction to receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and alleged abuses of authority by the interim civil administration or any emerging domestic institution, particularly severe or systematic violations and those founded on discrimination⁹⁷. The institution is thus a hybrid of a human rights commission and a

⁹² Regulation 2000/38 *On the Establishment of the Ombudsperson in Kosovo*, 30 June 2000 (**Regulation 2000/38**).

⁹³ See discussion by Brand, note 1 at 482.

⁹⁴ The current Ombudsperson, Marek Nowicki, was appointed in July 2000: see UNMIK Press Release 289, dated 12 July 2000.

⁹⁵ Section 1.1, Regulation 2000/38.

⁹⁶ Section 1.2, Regulation 2000/38.

⁹⁷ Section 3.1, Regulation 2000/38.

traditional ombudsperson⁹⁸. Regulation 2000/38 does not specify which actions will constitute an abuse of authority, or which body is to determine whether an abuse of authority has occurred. Jurisdiction is limited to the territory of Kosovo and to cases occurring after 30 June 2000, the date the relevant UNMIK regulation entered into force and excludes disputes between the international administration and its staff.⁹⁹

The Ombudsperson does not have automatic jurisdiction in respect of the international security presence¹⁰⁰. The power of the Ombudsperson to receive and investigate complaints against KFOR personnel was a particularly contentious issue during the negotiation of the draft regulation. While KFOR command in Kosovo agreed in principle to submit to the jurisdiction of the Ombudsperson, NATO headquarters reversed this decision¹⁰¹. The political compromise insisted upon by NATO command is that the Ombudsperson may enter into an agreement with the KFOR Force Commander in order to deal with cases involving KFOR¹⁰². However, no such agreement has been entered into.

A critical limitation of the Ombudsperson institution is the absence of enforcement powers. The institution is not a judicial body. It can receive complaints, monitor, investigate, offer good offices, take preventative steps, make recommendations and advise on matters relating to its functions, and must take all necessary actions to address complaints¹⁰³. The Ombudsperson may also 'provide advice and make recommendations to any person or entity concerning the compatibility of domestic laws and regulations with recognized international standards'¹⁰⁴. Where the Ombudsperson intervenes directly with the relevant authorities, the authority must respond within a reasonable time. However, where the relevant authority fails or refuses to comply with the measures proposed by the Ombudsperson, the Ombudsperson is limited to drawing the matter to the attention of the

⁹⁸ See Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* 1.

⁹⁹ Sections 3.2, 3.3 and 3.5, Regulation 2000/38.

¹⁰⁰ Section 3.4, Regulation 2000/38.

¹⁰¹ See Brand, note 1 at 483.

¹⁰² This is reflected in Section 3.4, Regulation 2000/38. See also Brand, note 1.

¹⁰³ The powers of the Ombudsperson are set out in Section 4, Regulation 2000/38.

¹⁰⁴ Section 4.3, Regulation 2000/38.

SRSG and to issuing a public statement¹⁰⁵. Other ombudsperson institutions in post-conflict societies have not had such limited powers. For example, the ombudsperson appointed by the EU to scrutinise the European Union Administration Mission for Mostar (EUAM) could make recommendations to the administrator and, in the case of disagreement, refer matters to the EU Council¹⁰⁶. Unlike the Human Rights Ombudsperson in Bosnia-Herzegovina, the Ombudsperson in Kosovo does not have an option to refer matters to a human rights chamber¹⁰⁷.

The independence of the institution from the international administration is 'important for effectiveness'¹⁰⁸ and the Ombudsperson is intended to act independently from UNMIK and the interim administration¹⁰⁹. Despite this, the Ombudsperson is an international official appointed by the SRSG for a two-year term, although this power of appointment may be transferred to domestic elected institutions¹¹⁰. The SRSG may remove the Ombudsperson from office where the SRSG considers that the Ombudsperson has failed in the execution of his or her functions, or has been placed in a position incompatible with the due exercise of his or her functions¹¹¹. On a practical basis, the independence and significance of the institution is affected by the funding arrangements. Dependent on funds from international donors, the institution relies on funds from the Kosovo Consolidated Budget for its continued operation¹¹².

Since its establishment, the Ombudsperson has initiated several investigations concerning alleged violations of human rights standards, of which the majority of complaints relate to property. The Ombudsperson has also issued several special reports concerning the legality of UNMIK regulations, and has found that certain regulations are incompatible with human rights standards. For example, the Ombudsperson has declared Regulation 2000/47

¹⁰⁵ See sections 4.9 to 4.12, Regulation 2000/38.

¹⁰⁶ See discussion of EUAM in Korhonen, 'International Governance in Post-Conflict Situations' (2001) 14(3) *Leiden Journal of International Law* 495 at 519-22.

¹⁰⁷ DPA, Annex 6.

¹⁰⁸ Reif, note 98 at 24.

¹⁰⁹ Section 2, Regulation 2000/38.

¹¹⁰ Section 6, Regulation 2000/38. See also Section 20 on the transfer to elected authorities.

¹¹¹ Section 8, Regulation 2000/38.

¹¹² Section 18, Regulation 2000/38.

incompatible with recognised international human rights standards¹¹³ and has concluded that UNMIK regulations relating to the applicable law do not comply with the provisions of Resolution 1244¹¹⁴. Similarly, the Ombudsperson also considered that the regime for controlling property transfers set out in UNMIK Regulation 2001/17¹¹⁵ was incompatible with recognised international human rights standards¹¹⁶. The response of the SRSB to the recommendations in each report has generally been disappointing. Even with a more powerful mandate and wider powers 'an Ombudsman cannot make up for inexistent or fledgling justice system, for the accountability of police and security forces, and for providing effective legal remedies to citizens'¹¹⁷. At best, the Ombudsperson institution provides 'an important independent and corrective voice within Kosovo'¹¹⁸.

E. Other domestic HR institutions

Several other bodies have been assigned a role in protecting and promoting human rights in Kosovo. OMIK is a distinct component within the framework of UNMIK, and was assigned the lead role in matters relating to capacity building and human rights monitoring¹¹⁹. OMIK has the main responsibility for the monitoring, protection and promotion of human rights pursuant to an agreement with the UN¹²⁰ and Regulation 2000/15¹²¹. OMIK regularly reviews, and issues periodic reports relating to, human rights concerns in the justice system, yet has complained of obstruction to its monitoring abilities, including denial of access to detention centre lists, detainees, court files and juvenile trials.

¹¹³ Ombudsperson Special Report 1, note 65.

¹¹⁴ Ombudsperson Institution in Kosovo *Special Report No 2 on Certain Aspects of UNMIK Regulation 2000/59*, 20 May 2001, paragraph 14.

¹¹⁵ Regulation 2001/17 *On the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo*, 22 August 2001.

¹¹⁶ Ombudsperson Institution in Kosovo *Special Report No 5 on Certain Aspects of UNMIK Regulation 2001/17*, 29 October 2001.

¹¹⁷ Brand, 'Effective human rights protection when the UN becomes the state: lessons from UNMIK' in *The United Nations, Human Rights and Post-Conflict Societies* (White, N. and Klaasen, D. eds) (forthcoming 2003) at 23. See also *Egmez v Cyprus* Reports 2000-XII, which provides that a complaint to an ombudsperson is not in principle a remedy to be exhausted: paragraph 66.

¹¹⁸ Brand, above at 24

¹¹⁹ SG Report 12/7/99.

¹²⁰ Letter of Agreement dated 19 July 1999 between the Under-Secretary-General for Peacekeeping Operations of the UN and the Representative of the Chairman-in-Office of the OSCE.

¹²¹ Regulation 2000/15 *On the Establishment of the Administrative Department of Justice* – pursuant to this regulation an agreement was reached between the Administrative Department of Justice and the OSCE that the OSCE is responsible for the independent monitoring of the judicial system and correctional service.

This significantly affects the ability of OMIK to monitor cases¹²². OMIK is also responsible for one of the Administrative Departments, the Department of Democratic Governance and Civil Society. Despite limited powers and resources, the Department provides advice to other Departments and the Interim Administration Council on democratic governance and human rights issues.

The nature of the relationship between OMIK, the SRSG and UNMIK is not clear. OMIK is 'a separate organisation, with its own staff, rule and procedures, reporting mechanism, distinct needs for visibility, organisational culture and corporate identity'¹²³. OMIK tends to focus its efforts on the monitoring and reporting aspects of its mandate, rather than becoming involved in individual cases. It also tends to emphasise inter-ethnic violence, human rights violations committed by unknown individuals and the criminal justice system. This emphasis overshadows the need to ensure accountability of 'State' actors, in this case UNMIK and KFOR. While OMIK has on one occasion declared a UNMIK regulation to be unlawful, its monitoring role is not a substitute for a right of judicial review.

UNHCR monitors the human rights situation of ethnic minorities, while the Office of the High Commissioner for Human Rights maintains a presence and issues periodic reports on the human rights situation in Kosovo. The SRSG has also established a Human Rights Advisor's Office. However, the role of such bodies is to monitor the human rights situation and to issue reports. These bodies are not judicial in nature, and have no power to compel the interim administration to take or to avoid inappropriate actions or to provide a remedy to individuals.

¹²² OMIK Report 2/02.

¹²³ Brand, note 1 at 485.

Chapter 5 - Individual State responsibility

This chapter considers the prospect of individuals within Kosovo obtaining a legal remedy against the member States of the United Nations or those States with national contingents participating in KFOR¹. The UN, NATO and the OSCE are not parties to international human rights instruments and are thus not subject to international systems of human rights protection which permit the right of individual petition. However, the majority of the member States of the United Nations are parties to the ICCPR and several are Contracting States under the European Convention. Thus, subject to the acceptance by those States of the right to individual petition, individuals may bring complaints against States either for the actions of UNMIK or for the actions of national troops in KFOR.

A. Jurisdiction – does it have an extra-territorial application?

Both the ICCPR and the European Convention contain a jurisdictional clause limiting their application. Article 1 of the European Convention states that the contracting States ‘shall secure to *everyone within their jurisdiction* the rights and freedoms set forth in Section I of this Convention’². Similarly, Article 2(1) of the ICCPR provides that each State party ‘undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognised in the present Convention’. State parties recognise the competence of the UNHRC to ‘receive and consider communications from *individuals subject to its jurisdiction* who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant’³.

Before examining the application of these instruments to the international administration in Kosovo, it is necessary to consider the interpretation given to the concept of jurisdiction in relation to these specific human rights instruments. In interpreting Article 1 of the European Convention, the ECHR is required to have regard principles of international law, including the provisions of the Vienna Convention on the Law of Treaties 1969 (VCLT).

¹ Part of this chapter contains material from Williams and Shah, ‘*Bankovic and Others v Belgium and 16 Other Contracting States*’ (2002) 6 *EHRLR* 775.

² Emphasis added.

³ Article 1 of Optional Protocol 1 to the ICCPR.

The VCLT requires the ECHR to adopt a teleological interpretation of the European Convention, one that seeks to realise the European Convention's object and purpose⁴. The ECHR has stated this object and purpose to be, in general terms, the effective protection of individual human rights⁵. The ECHR must also consider any subsequent State practice in the application of the treaty⁶.

The jurisprudence of the ECHR is based on the notion that jurisdiction in international law is primarily territorial, the exercise of legal authority, actual or purported, over persons owing some form of allegiance to the State or who has been brought within that State's territory. State obligations under the European Convention are in general limited to securing convention rights to those individuals within its sovereign territory so that the European Convention would extend to those individuals within the territory of the participating European States. However, the ECHR does recognise that the Article 1 obligation to secure European Convention rights is not limited to acts or individuals within the territory of the Contracting State.

The ECHR interprets 'jurisdiction' to have an extra-territorial application in exceptional circumstances. Its jurisprudence relating to extra-territorial jurisdiction may be separated into two lines of authority. The first line of authority is based upon the decision of *Soering v United Kingdom*⁷. The applicant argued that his extradition from the United Kingdom to the United States would expose the applicant to treatment by the United States authorities that would be incompatible with Article 3 of the European Convention⁸. The ECHR held that the applicant was within the territory of the United Kingdom and subject to the complete and overall control of the United Kingdom authorities. The United Kingdom Government was required to ensure that any individual within their jurisdiction was not subjected to a violation of their European Convention rights following a decision of the United Kingdom authorities. This included making a decision leading to a 'real risk' of a violation of treatment incompatible with European Convention standards, even where the

⁴ Article 31, VCLT.

⁵ *Golder v United Kingdom* (1975) Series A, no 18.

⁶ Article 32, VCLT.

⁷ (1989) Series A, no 161.

⁸ Paragraph 82.

actual inhumane and degrading treatment would result from the acts of another State⁹. This principle has been upheld by the ECHR in several judgments relating to extradition of individuals from the territory of a European Convention State¹⁰.

The second line of authority relates to the effective control by a State of an area outside its national territory. The ECHR stated the relevant principle in *Loizidou v Turkey (Preliminary Objections)*¹¹:

Bearing in mind the object and purpose of the Convention, 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. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.

Individuals are within the jurisdiction of a Contracting State where its officials exercise effective control over those individuals in a manner that is comparable to the control that is exercised by the State over individuals within its own territory. On the facts of *Loizidou*, the ECHR held that acts committed against individuals within a part of northern Cyprus subject to Turkish control were capable of falling within Turkish jurisdiction¹². The ECHR dismissed the respondent government's assertion that the Turkish Republic of Northern Cyprus was the sovereign State in Northern Cyprus, and that the exercise of public authority was not imputable to Turkey¹³. In the merits phase of the case¹⁴, the ECHR held that the interference with the applicant's access to her property in northern Cyprus was 'a

⁹ Paragraph 91.

¹⁰ For example, *Chahal v United Kingdom*, Application Number 22414/93 Admissibility Decision of 1 September 1994 and Reports-1996-V, and *D v United Kingdom*, Application Number 30240/96, Reports 1997-III.

¹¹ (1995) Series A, no 310, paragraph 62.

¹² Paragraph 64.

¹³ Paragraph 58.

¹⁴ *Loizidou v Turkey (Merits)* Reports 1996-VI.

matter which falls within Turkey's 'jurisdiction' within the meaning of Article 1 and is thus imputable to Turkey'¹⁵.

The ECHR in *Loizidou* relied upon its previous decision in *Drozdz and Janousek v France and Spain*¹⁶, a case concerning Andorra, which did not form part of either Spain or France despite the influence of those countries in the administration of the territory¹⁷. The international arrangements were such that neither France nor Spain had individual jurisdiction to act on behalf of the Principality in relation to the international relations of the Principality¹⁸. Hence, the European Convention did not apply to the Principality. However, the ECHR recognised that¹⁹:

The term "jurisdiction" is not limited to the national territory of the High Contracting Parties; their responsibility can be involved because of acts of their authorities producing effects outside their own territory.

The applicant asserted that the respondent governments had responsibility for the administration of justice in Andorra by virtue of French and Spanish judges sitting as members of Andorran courts. The ECHR concluded that these judges did not sit in the capacity of French or Spanish judges and the Andorran courts exercised their functions independently of the French and Spanish governments²⁰. The ECHR in *Loizidou* clarified that the State would be responsible for the extra-territorial actions of State agents only where they were comparable to a situation of effective control.

Issues of extra-territorial jurisdiction have been raised in subsequent applications to the ECHR yet have not altered the test as set out in *Loizidou*. The ECHR left the issue of jurisdiction to the merits stage of the proceedings in the decisions of *Issa*²¹ and *Ilascu*²², as

¹⁵ Paragraph 57.

¹⁶ (1992) Series A, no 240.

¹⁷ This 'control' included the legislative and executive powers of the Co-Princes, one the President of the French Republic and the other the Bishop of Urgel in the Spanish province of Lleida.

¹⁸ Paragraphs 88-90.

¹⁹ Paragraph 91.

²⁰ Paragraph 96.

²¹ *Issa and Others v Turkey* Application Number 31821/96 Admissibility Decision of 30 May 2000.

²² *Ilascu and Others v Moldova and the Russian Federation* Application no 48787/99 Admissibility Decision of 4 July 2001.

the issue was too closely linked to the merits of the individual cases. In *Issa*, the applicants claimed that there was a violation of the European Convention by Turkish military forces operating in northern Iraq. The respondent government disputed the facts, and if the ECHR finds that there was a case to answer on the facts, Turkey will have to decide whether to raise an objection based on whether or not the applicant was within its jurisdiction. Similarly, in *Ilascu*, the applicants asserted that the actions of Russian Federation troops stationed in the Republic of Moldova in supporting a separatist movement engaged the responsibility of the Russian Federation. The Russian Federation denied all involvement in the acts complained about and the issue of extra-territorial jurisdiction was not considered at the admissibility stage.

*Khavara and others v Italy and Albania*²³ concerned the deliberate striking of an Albanian vessel by an Italian naval vessel in international waters off the coast of Italy. However, the issue of extra-territorial jurisdiction was not raised as the written agreement between the two States implied that jurisdiction on vessels was shared. In *Ocalan*²⁴, the applicant was arrested in Kenya and removed by Turkish officials to Turkey, where he was detained and tried. The Turkish government denied the facts supporting the applicant's claim and did not raise an objection based on jurisdiction. However, the case of abduction of a State's own national may be distinguished from the exercise of control over non-nationals, as the State's legal authority arises by virtue of the applicant's nationality.

The ECHR has found that participation by a State in the defence of proceedings against it in another State is not without more an exercise of extra-territorial jurisdiction²⁵. The ECHR stated that 'the fact that the United Kingdom Government raised the defence of sovereign immunity before the Irish courts, where the applicant had decided to sue, does not suffice to bring him within the jurisdiction of the United Kingdom within the meaning of Article 1 of the Convention'²⁶. The applicant's complaint under Article 6 against the United Kingdom

²³ Application no 39473/98 Decision of 11 January 2001.

²⁴ *Ocalan v Turkey*, Application no 46221/99, Admissibility Decision of 14 December 2000.

²⁵ *McElhinney v Ireland and the United Kingdom* Application No 31253/96, Admissibility Decision of 9 February 2000.

²⁶ Paragraph 2(b).

was considered incompatible with the European Convention and declared inadmissible²⁷. The ECHR has recently reconsidered the Turkish occupation of northern Cyprus and the findings in *Loizidou*²⁸. The Turkish Government objected to the admissibility of the claim and invited the ECHR to reconsider its decision in *Loizidou*. However, the ECHR confirmed the principle of exceptional extra-territorial jurisdiction as set out in *Loizidou*²⁹. The ECHR has subsequently confirmed that the 'overall control' exercised by Turkey over the border zone in Cyprus was such that the arrest and alleged ill-treatment of an applicant in the border area were imputable to Turkey³⁰.

The ECHR recently considered the issue of extra-territorial jurisdiction in the context of military action undertaken by an international organisation in its admissibility decision in *Bankovic*³¹. The facts of *Bankovic* arose during the NATO air strikes against the FRY, commenced on 24 March 1999. On 23 April, NATO launched an attack targeting the main television and radio facilities of Radio-Television of Serbia (RTS), which killed 16 and seriously injured another 16 RTS employees. One of the survivors of the attack, together with relatives of four of the deceased, commenced proceedings against all NATO member States that were also parties to the European Convention. The applicants alleged that the NATO bombing of the RTS facilities was a violation of Articles 2 (the right to life) and 10 (freedom of expression) and that there was no effective remedy as required by Article 13.

The respondents disputed the admissibility of the claim, their primary objection that the victims were not 'within the jurisdiction' of the respondent States within the meaning of Article 1 and that the application was incompatible with the provisions of the European

²⁷ Paragraph 2(b). The complaint alleging a violation against the Irish Government was declared admissible.

²⁸ *Cyprus v Turkey* Application No 25781/94, Judgment 10 May 2001.

²⁹ Above, paragraphs 75-7.

³⁰ *Andreou Papi v Turkey* Application No 16094/90, Admissibility Decision of 26 September 2002. The ECHR relied upon its previous decisions in *Chrysostomos v Turkey* and *Loizidou*. It is interesting that the ECHR did not refer to its decision in *Bankovic*, as the notion of overall control of the border area relied upon in *Andreou* is similar to the concept of overall control of the air space argued by the applicant in *Bankovic* (see below).

³¹ *Bankovic and Others v Belgium and 16 Other Contracting States* Application No 52207/99 Admissibility Decision of 12 December 2001.

Convention³². The respondent States contended that the term jurisdiction had an ordinary and well-established meaning in public international law, the assertion or exercise of legal authority, actual or purported, over persons owing some form of allegiance to that State or who is or has been brought within that State's territory. The respondent States did not exercise such legal authority in relation to the applicants. The respondents also argued that the actions of NATO, and international organisation, could not be imputed to its member States, even if the European Convention applied.

The applicants advanced a notion of jurisdiction that was an adaptation of the 'effective control' test established in *Loizidou*. According to the applicant's notion of jurisdiction, the extent of a State's positive obligation under Article 1 of the European Convention to secure European Convention rights is proportionate to the level of control in fact exercised. This submission was based on the latest *Cyprus v Turkey*³³ decision, where it was held that the Turkish forces 'having effective overall control over northern Cyprus...Turkey's jurisdiction must be considered to extend to securing the *entire range* of substantive rights set out in the Convention'³⁴. However, where the respondent State has a lesser degree of control, the State is only required to secure the convention rights within their control in the situation in question. In the alternative, the applicants argued that NATO's control over FRY airspace was nearly as complete as Turkey's control over the territory of Northern Cyprus. This control, although limited, gave rise to a similarly limited positive obligation to secure European Convention rights. As an additional argument, the applicants also relied on the principle in *Soering*, arguing that the impugned act was the extra-territorial effect of prior decisions taken on the territory of the respondent State or States to launch the air strike and the selection of the target.

In its decision, the ECHR restated the principle in *Loizidou*, accepting that acts of States performed or having effect outside their territory can, in exceptional circumstances, lead to that State exercising jurisdiction. However, such exceptional circumstances arise only

³² Observations of the United Kingdom Regarding the Admissibility of the Application, paragraphs 19-21 (these observations were unanimously adopted by the remaining respondent States).

³³ Note 28.

³⁴ Paragraph 77 (emphasis added).

where the State has effective control of the territory and thus can exercise public powers normally exercised by a government³⁵. The actions complained of in *Bankovic* did not constitute such exceptional circumstances and the ECHR declared the complaint inadmissible³⁶. In particular, the ECHR rejected the notion of proportionate obligation advanced by the applicant. This submission was³⁷:

tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is therefore brought within the jurisdiction of that State for the purpose of Article 1 of the Convention.

In the ECHR's opinion, the text of Article 1 did not support such an approach. Further, the submission equates jurisdiction with the question of whether an individual is a victim of an act imputable to a contracting State. In fact, these are two separate questions³⁸. The ECHR rejected the applicant's argument as to air space for the same reasons³⁹ and agreed with the respondent governments that the decision in *Soering* was not relevant 'given the fundamental differences between that case and the present'⁴⁰.

The ECHR considered that State practice in the application of the European Convention also supported this interpretation of Article 1. States have not recognised, and have consistently denied, that military actions incur extra-territorial responsibility. Despite numerous military missions, no State has indicated its belief that its acts abroad affected persons within its jurisdiction, so making a derogation notice under Article 15. States have only filed Article 15 notices regarding measures derogating from European Convention obligations in relation to internal situations, and not in relation to activities of their troops or agents participating in activities outside the territory of the State. In fact, the ECHR has stated that the European Convention should be read as a whole and that Article 15 itself should be read subject to the jurisdictional limit in Article 1. The applicants had argued

³⁵ Paragraph 70.

³⁶ Paragraph 85.

³⁷ Paragraph 75.

³⁸ Paragraph 75.

³⁹ Paragraph 76.

⁴⁰ Paragraph 77.

that Article 15(2) of the European Convention⁴¹ would be rendered meaningless if the Convention did not apply to extra-territorial wars or emergencies⁴². This may have implications for States contemplating filing notices of derogation in relation to their troops serving in peacekeeping missions⁴³.

Finally, the ECHR held that the primarily territorial notion of jurisdiction is confirmed by an examination of the *travaux préparatoires* of the European Convention⁴⁴. The drafters had replaced the original reference to 'all persons residing within their territories' with the current reference to 'persons within their jurisdiction'. This amendment addressed the concern that the term 'residing' was too restrictive. The European Convention was intended to apply to all 'individuals, who on the territory of any one of our States, may have had reason to complain that [their] rights have been violated'⁴⁵. The European Convention was not intended to extend the protection of the European Convention to individuals anywhere in the world who are affected by the actions of the contracting parties.

This interpretation is consistent with the inclusion of Article 56 of the European Convention. Generally, treaties are silent as to their territorial scope. Article 29 of the VCLT states that unless a contrary intention appears in the treaty or can be otherwise established, a treaty is binding on a party in respect of its entire territory, thus reflecting the customary law principle that jurisdiction is primarily territorial. Article 56 of the European Convention provides that a State may extend the protection of the European Convention to all or any of the territories for whose international relations the State is responsible,

⁴¹ Article 15(2) provides that no derogation may be made from Article 2 is permitted even in times of war or public emergency, other than in respect of deaths resulting from lawful acts of war.

⁴² This issue had been raised in *Romero de Ibanez & Rojas v United Kingdom*, which concerned the sinking of the General Belgrano by the United Kingdom during the Falklands War. However, the application was held inadmissible on the basis that it had not been filed within the six-month period: Application Number 58692/00, Admissibility Decision of 19 July 2001. See 'UK sued over Belgrano sinking', *BBC News*, 29 June 2000.

⁴³ See Chapter 6.

⁴⁴ The ECHR may consider the preparatory works to confirm the interpretation resulting from the application of Article 31 or when the interpretation resulting from the application of Article 31 leaves the meaning of ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable: Article 32 VCLT

⁴⁵ Comment by the representative to Belgium, on 25 August 1950, quoted at paragraph 20 of the *Bankovic* decision.

although the European Convention is to apply ‘with due regard ... to local requirements’. This article confirms that the European Convention was never intended to apply automatically to territories beyond the immediate territory of the Contracting Parties. Instead, the European Convention would only apply to colonies following such election, and presumably only where it was feasible that the Convention rights could be protected by that State⁴⁶. However, the ECHR has clearly indicated that it, and not the individual state, remains the final determiner of State jurisdiction and, in making its determination, the ECHR will adopt an international, and not a national, view⁴⁷.

The applicants in *Bankovic* had maintained that a refusal by the ECHR to accept that the applicants fell within the jurisdiction of the European Convention would defeat the *ordre public* of the European Convention as a system for the protection of human rights and would leave a vacuum in the system of human rights protection⁴⁸. The ECHR held that the European Convention was a ‘constitutional instrument of *European* public order for the protection of individual human beings and its role, as set out in Article 19 of the European Convention, is to ensure the observance of *the engagements undertaken* by the Contracting Parties’⁴⁹. The European Convention is intended to operate in ‘an essentially regional context’ and the desirability of avoiding a gap in human rights protection has only been relied upon to establish jurisdiction ‘when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention’⁵⁰. Thus, the ECHR had previously found that the inhabitants of northern Cyprus had been excluded from the rights and protections that they had previously enjoyed by virtue of Turkey’s effective control of the territory⁵¹. This concern was irrelevant in the present situation, as the FRY was not, and had never been, a party to the European Convention.

⁴⁶ For elaboration of this argument see Lush, ‘The Territorial Application of the European Convention on Human Rights: Recent Case Law’ (1993) 42 *ICLQ* 897.

⁴⁷ For example, in *Amuur v France*, the Court held that individuals detained by the French Government within Paris-Orly airport were within French territory, despite the area being designated an international zone by French law: Reports 1996-III.

⁴⁸ Paragraph 79.

⁴⁹ Paragraph 80, emphasis in original.

⁵⁰ Paragraph 80.

⁵¹ *Cyprus v Turkey* note 32.

The UNHRC has had fewer occasions to consider the extra-territorial application of the ICCPR, although its decisions relating to the interpretation of State responsibility under the ICCPR are authoritative. In *Delia Saldias de Lopez v Uruguay*⁵², the UNHRC found that the respondent government violated its obligations under the ICCPR when its security forces abducted and tortured a Uruguayan citizen then living in Argentina. The UNHRC reasoned that 'it would be unconscionable to so interpret the responsibility under Article 2 of the Covenant so as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'⁵³. However, this decision relates to violations by a State of the ICCPR rights of its own national, even though such violations occurred partly on the territory of another State. It is not general authority for the proposition that the ICCPR has extra-territorial application⁵⁴.

The most vehement supporter of extra-territorial application for the ICCPR is Meron, who argued that Article 2(1) of the ICCPR has an extra-territorial effect⁵⁵. The pertinent provisions of the ICCPR will apply to the treatment of persons under the authority and power of State forces outside the national territory of that State. Referring to the leading study of the legislative history of the ICCPR⁵⁶, Meron concluded that Article 2(1) should be read so that each State party would have assumed the obligations to secure ICCPR rights both to individuals within its territory *and* those subject to its jurisdiction⁵⁷.

The UNHRC has consistently held that the ICCPR can have such extra-territorial application⁵⁸. The UNHRC expressed concern for the failure of Iraq to address the events in occupied Kuwait in its report to the UNHRC, emphasising 'Iraq's clear responsibility

⁵² Communication No 52/1979 (29 July 1981), UN Doc CCPR/C/OP/1.

⁵³ Paragraph 88.

⁵⁴ Compare the view taken by Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo' (2001) 12 *EJIL* 469 at 475-6.

⁵⁵ See Meron, 'Extra-territoriality of Human Rights Treaties' (1995) 89 *AJIL* 78.

⁵⁶ This was conducted by Professor Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations' in *The International Bill of Rights: The Covenant on Civil and Political Rights* 72 (Louis Henkin ed 1981).

⁵⁷ Meron, note 54 at 79.

⁵⁸ General Comment on Article 27, UN Doc CCPR/C/21/Rev.1/Add.5, paragraph 4 (1994). See also General Comment on Article 41, UN Doc CCPR/C/21/Rev.1/Add.6 at 4, paragraph 12 (1994), where the UNHRC commented that 'the intention of the Covenant is that the rights contained therein should be ensured to all those under a State's jurisdiction'.

under international law for the observance of human rights during its occupation of that country'⁵⁹. The Special Rapporteur of the Commission on Human Rights on Kuwait under Iraqi occupation relied on UNHRC practice to assert that Iraq was responsible for complying with its obligations under the ICCPR, regardless of the nationality of the victims or whether the victims' State was a party to the ICCPR. He stated that a 'State party remains bound by the Covenant if it occupies the territory of another State and exercises there *de facto* State power'⁶⁰.

Extra-territorial jurisdiction under Article 2(1) is not limited to the actions of a State's armed forces, but extends to civilian agents and officials exercising power. Meron argued that⁶¹:

Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction or *de facto* jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and the content of a particular right or treaty language suggest otherwise.

In Haiti, the United States forces exercised 'effective power'; therefore Meron concluded that the United States must respect its obligations under the ICCPR.

As stated above, the case law of the UNHRC differs from that of the ECHR in that, as a general proposition, the UNHRC is more willing to find that a State is responsible under the ICCPR for the extra-territorial acts of its officials. However, it is submitted that the appropriate test for the ICCPR is the same as that provided by the jurisprudence of the ECHR. A State should only be responsible under the ICCPR where such power amounts to effective control. Even if Article 2(1) is interpreted as requiring States to secure rights to people both within their territory and subject to their jurisdiction, the ordinary and

⁵⁹ Report of the Human Rights Committee, UN GAOR, 46th Session, Supp No 40, paragraph 652, UN Doc A/46/40 (1991).

⁶⁰ Walter Kälin, *Report on the situation of human rights in Kuwait under Iraqi occupation*, UN Doc E/CN.4/1992/26, paragraphs 58-59.

⁶¹ Paragraph 81.

established meaning of jurisdiction in international law is territorial. Extra-territorial jurisdiction is on an exceptional basis only. A State's responsibility will be engaged in relation to extra-territorial acts only where the State exercises effective control over persons outside its national territory. Unlike the European Convention, the ICCPR is not geographically limited, and is intended to have a wider application as a universal human rights instrument. Despite this, it is still necessary to consider State practice to consider whether States have intended to accept such obligations. As with the European Convention, States have not filed notices of derogation for the acts of their armed forces participating in operations outside the territory of the State, suggesting that States have not accepted such an obligation. For example, while the United Kingdom Government has indicated that its international personnel participating in KFOR 'will have regard to international human rights standards', it considers that Resolution 1244 determines KFOR's mandate and obligations, along with the MTA, decisions of the North Atlantic Council and national regulations⁶².

The Inter-American Commission on Human Rights has also considered the question the extra-territorial jurisdiction of the American Declaration of the Rights and Duties of Man. In *Coard et al v United States*⁶³, the Commission was asked to examine allegations that United States forces in Grenada had violated international human rights norms in violation of the United States' obligations under the American Declaration. The Commission found that the phrase 'subject to its jurisdiction' 'may, under given circumstances, refer to conduct with an extra-territorial locus where the person concerned is present in the territory of one State, but subject to the control of another State, usually through the acts of the latter's agents abroad'⁶⁴. The test is 'not the victim's nationality or presence within a particular geographic area, but [on] whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control'⁶⁵.

⁶² See response to Parliamentary Questions by Lord Lester [HL4602 and HL4603], 22 July 2002.

⁶³ Case 10.951, Report No 109/99, 29 September 1999

⁶⁴ Paragraph 37.

⁶⁵ Paragraph 37.

The Commission determined that the United States forces were bound by human rights law⁶⁶ during their activities in Grenada, and were within the jurisdiction of the United States for the purpose of the Declaration. The American Declaration lacks a comparable jurisdiction clause to either the ICCPR or the European Convention, and this decision is not determinative in relation to the jurisdiction of those convention systems. In any event, it is again submitted that the appropriate test is that the 'authority and control' exercised must be equivalent to the 'effective control' required by the ECHR. On this basis, the United States would be required to secure minimum human rights standards to the detainees held in its naval bases and detention centres in Guantánamo Bay, Cuba⁶⁷.

B. Imputing responsibility to individual States

States have transferred certain powers in the area of peace and security to an international organisation, the UN and it is the UN, not individual States, which is accountable for violations of human rights obligations. Finding jurisdiction for actions against individual States in such circumstances would require the 'lifting of the organisational veil'⁶⁸ and acceptance of the principle that States may be held individually responsible for the actions of international organisations to which they have delegated powers. While the Charter does not expressly preclude concurrent or secondary liability of member States, this is not conclusive that such liability exists⁶⁹.

The jurisprudence of the ECHR and the former Commission provides some support for the view that individual States may be held liable for breaches of convention rights by international organisations. In *Hess v United Kingdom*⁷⁰, the Commission held that the administration of the Spandau prison was outside the jurisdiction of the United Kingdom as the administration of the prison was at all times under the joint authority of the four powers,

⁶⁶ The Commission also considered that the forces were simultaneously bound by international humanitarian law.

⁶⁷ See Amnesty International Press Release, *USA: the legal limbo of the Guantánamo detainees continues*, 10 January 2003.

⁶⁸ See Mole, 'Who Guards the Guards – The Rule of Law in Kosovo' (2001) 3 *EHRLR* 280-299, especially 287.

⁶⁹ See, in the commercial context, Amerasinghe, 'Liability to Third Parties of Member States of International Organisations: Practice, Principle and Judicial Precedent' (1991) 85 *AJIL* 259

⁷⁰ Application No 6231/73 2 D&R 72

and could not be divided into separate jurisdictions⁷¹. However, the Commission did suggest that a State 'is under certain circumstances responsible under the Convention for the actions of its authorities outside its territory'⁷². Individual State responsibility may also have been engaged if the international agreement had been entered into after the European Convention came into force for that State⁷³.

The Commission has rejected jurisdiction in respect of a complaint made against the European Community, as the EC is not a party to the European Convention⁷⁴. The Commission also refused to recognise jurisdiction for a complaint against the member States of the EC acting jointly or against individual member States. Arguably, the decision was reached on the ground that the action complained of was an act of an organ of the EC relating to another organ of the EC. It was not an act of States jointly or individually. In *M v Germany*⁷⁵, the Commission indicated that the transfer of powers to an international organisation does not necessarily exclude a State's responsibility under the European Convention and will be compatible with the European Convention provided within that organisation fundamental rights will receive an equivalent protection.

Three recent ECHR decisions have raised similar issues. In *T.I. v United Kingdom*⁷⁶, the ECHR held that States could not avoid their responsibility under the European Convention by entering into an international treaty in relation to the field of activity protected by the European Convention. Similarly, the ECHR has held⁷⁷ that 'where states establish international organisations in order to pursue or strengthen their co-operation in certain fields of activities', it would be 'incompatible with the purpose and object of the Convention' if States were absolved from their responsibility under the Convention for the field of activity in question. Further, the European Convention does not preclude the transfer of competences to an international organisation, provided the European Convention

⁷¹ Paragraph 73.

⁷² Paragraph 72.

⁷³ Paragraph 73.

⁷⁴ *CFDT v the European Communities* 13 DR 231

⁷⁵ 13258/87 64 DR 138

⁷⁶ Application No 43844/98, Reports 2000-III.

⁷⁷ *Waite and Kennedy v Germany* and *Beer and Regan v Germany* Case No 28934/95, Judgment of 18 February 1999, Reports 1999-I.

rights continue to be secured and that member States' responsibilities continue after the transfer⁷⁸.

In *Loizidou*, the Turkish Government objected to the application on the ground that the acts and omissions complained of were imputable to the TRNC, a separate and independent administration. However, the ECHR did not find it necessary to determine whether Turkey actually exercises control over the policies and actions of the authorities of the TRNC as it was obvious from the large number of troops engaged in active duties in northern Cyprus that Turkey exercised overall effective control⁷⁹. The Turkish Government raised the same objections in the *Cyprus v Turkey* case. In the latter decision, the applicant submitted that⁸⁰:

A Contracting State to the Convention could not, by way of delegation of powers to a subordinate and unlawful administration, avoid its responsibility for breaches of the Convention, indeed of international law in general. To hold otherwise would, in the present context of northern Cyprus, give rise to a grave lacuna in the system of human rights protection and, indeed, render the Convention system there inoperative.

The ECHR held that, given the effective control of the territory, the government's responsibility was not confined to the acts of its own soldiers or officials, 'but must also be engaged by virtue of the local administration which survives by virtue of Turkish military and other support'⁸¹. In *Bankovic*, the respondent governments objected to the imputation of the actions of NATO to the individual member States. As the ECHR had already held the application inadmissible on other grounds, it did not consider the objections raised on this basis⁸².

The UNHRC has held that it may only consider complaints that arise from claims under the jurisdiction of a State party, and not from an international organisation. It held a complaint

⁷⁸ *Matthews v United Kingdom*, Application No 24833/94, Reports 1999-I.

⁷⁹ *Merits* decision, note 14, paragraph 56.

⁸⁰ Paragraph 71.

⁸¹ Paragraph 77.

⁸² *Bankovic*, paragraph 82.

against the Netherlands regarding the recruitment practices of the European Patent Office (EPO) to be inadmissible⁸³. The complainant argued that the EPO exercised public authority in the Netherlands as the State was a party to both the ICCPR and the European Patent Convention, and the government was obliged to ensure that the EPO's recruitment policies met the standards set out in the ICCPR. The UNHRC stated that the claim related to 'recruitment policies of an international organization, which cannot, in any way, be construed as coming within the jurisdiction of the Netherlands'⁸⁴. This suggests that the UNHRC would not entertain a complaint against an individual member State arising from the civilian activities of UNMIK. However, the UNHRC has expressed concern regarding the behaviour of Belgian soldiers operating under the auspices of UNSOM II. In that instance, Belgium recognised the application of the ICCPR to the actions of its forces serving as part of the peacekeeping mission and commenced investigations into the allegations⁸⁵.

Even if extra-territorial acts could be imputed to individual member States severally, it is probable that any attempt to bring a complaint against an individual State would be subject to the *Monetary Gold* principle developed by the ICJ⁸⁶. Applying this principle, the ECHR could not decide the merits of the application as to do so may determine the rights and obligations of States that are members of the international organisation but are not contracting parties to the European Convention or parties to the application in question. This argument was raised by the respondent governments in *Bankovic*, but was not considered by the ECHR⁸⁷. While this may not prove to be a convincing argument for the ECHR in relation to the European Convention, it is likely to preclude consideration of matters by the UNHRC, as the Charter has a wider membership than the European Convention.

⁸³ *H.v.d.P v The Netherlands*

⁸⁴ Paragraph 3.2.

⁸⁵ UN doc ICCPR/C/79/Add 99

⁸⁶ *Monetary Gold Removed from Rome in 1943*, (1954) ICJ Reports at 19 as applied in *East Timor* (1995) ICJ Reports at 90.

⁸⁷ *Bankovic*, paragraph 84.

C. Application to Kosovo

The above analysis suggests that a State may be responsible under its own human rights obligations in respect of its treatment of persons outside its national territory where such individuals are under the effective control of that State, either through its armed forces or through a subordinate local administration. The legality of the State's presence or the consent of the State in whose territory the violation occurs is irrelevant. Therefore, the lawfulness of the mission's presence in Kosovo pursuant to Resolution 1244, or with the consent of the FRY, is irrelevant in considering the responsibility of member States⁸⁸. In determining whether member States are responsible for actions of the international administration in Kosovo, two key issues arise. First, does the level of control exercised by the international administration satisfy the 'effective control' test? Second, are the actions of UNMIK and/or KFOR as part of the international administration imputable to individual member States?

Examining the first issue, KFOR, as the security presence, and UNMIK, as the civil administration presence, together exercise overall effective control in Kosovo. The international administration is the only legitimate authority in Kosovo⁸⁹. The level of control exercised by KFOR and UNMIK together satisfies the test of effective control. Even considering KFOR and UNMIK separately, the effective control test is satisfied. While KFOR is not charged with civil administration functions, it is responsible for law and order, requiring it to provide security and some policing functions. KFOR therefore exercises public authority in Kosovo. UNMIK is mandated to provide basic civil administration functions, including administering the judicial system, policing functions, and legislative and executive functions. It exercises public authority and performs those functions normally exercised by the State.

The varying nature of the functions allocated to each KFOR contingent is relevant in this context. Resolution 1244 limits KFOR's mandate to that of a security force. The responsibilities of the different KFOR contingents vary according to the region in which

⁸⁸ See Cerone, note 54 at 478.

⁸⁹ SG Report 12/7/99 paragraph 35.

they are deployed and the attitude of their sending State toward peacekeeping obligations. In some regions KFOR acts as a civilian police force, runs prisons, detains suspects and conducts criminal investigations. In other areas, KFOR functions only as a support to UNMIK police. Relying on the ECHR's decision in *Issa*, Cerone argues that the different responsibilities of the various KFOR contingents do not preclude direct State responsibility⁹⁰. The effective control test does not require overall control of the entire territory of Kosovo. Instead, it is enough if the State forces exercise control *vis-à-vis* the individual alleging a violation of his or her rights or effective control in at least a defined area. Cerone also argues that the State's level of obligation should be tied to the degree of actual control exercised by that State over individuals⁹¹. However, this notion of proportionate obligations was expressly rejected by the ECHR in *Bankovic*, although that decision may have been due to the extreme circumstances alleged to constitute control (that there was control of the air space through which the missiles travelled), rather than rejection of the notion itself.

It is arguable that the test in *Loizidou* would be satisfied where a KFOR contingent exercised effective control in relation to an area, such as a particular district or a KFOR run prison. For example, from mid-2000 KFOR developed a practice of detaining persons based on its mandate under Resolution 1244 to ensure public safety and order. KFOR detention orders operate outside the domestic judicial system. As part of this practice, individuals were detained at Camp Bondsteel, the US KFOR base⁹². OMIK considered that this practice violated Article 5 of the European Convention⁹³. The different activities do not preclude responsibility; it just requires a consideration of whether the tasks conducted by various contingents in that area satisfy the test of effective control.

The difficulty lies in imputing the actions of UNMIK and KFOR to the individual member States and to show that the State itself exercises 'effective control'. Applying the principles outlined above to UNMIK, only certain member States are both parties to the European

⁹⁰ Cerone, note 54 at 479

⁹¹ As above, at 480

⁹² Other KFOR contingents take detainees to Camp Bondsteel and hand them over to US KFOR.

⁹³ OMIK Report 7/00 at 25.

Convention and to the Charter. For those States, obligations under the Charter predate their obligations under the European Convention, as membership of the United Nations occurred prior to the ratification of the European Convention. Accordingly, the transfer of powers to the United Nations was not subject to the requirement that European Convention rights be protected. Further, Article 103 of the Charter suggests that a State's obligations under the Charter prevail over later treaty obligations, such as the European Convention.

Direct State responsibility for acts of UNMIK is problematic. While the extent of control exercised by UNMIK itself would be sufficient to invoke extra-territorial responsibility, such control cannot be imputed to individual member States. UNMIK is a subsidiary organ of the Security Council. Civilian personnel are employees, or representatives, of the UN, not of individual national governments. The acts of UNMIK are the acts of the UN, and not of its individual member States. In this sense, international personnel are analogous to the French and Spanish judges in the *Droz* case, and act independently of their national governments. It is unlikely that member States of the UN would be individually responsible for acts of UNMIK and its personnel.

Establishing responsibility for States participating in KFOR is more feasible. Participating States argue that each national contingent is an integral part of KFOR and that the contingent does not represent or act on behalf of its sending State. Units report to a common KFOR commander. However, the KFOR commander has limited control over the national contingents, with national governments retaining significant operational control. All contingents have adopted their own rules of engagement and orders given by KFOR command are referred to the defence departments of national governments for approval⁹⁴. As discussed in Chapter 4, troops remain subject to the exclusive jurisdiction of their sending States. For political and operational reasons, participating States retain significant control of troops within national contingents and it may be possible to 'lift the organisational veil' in these circumstances. The main consequence of maintaining such

⁹⁴ See O'Neill, *Kosovo: An unfinished peace* (2001) at 43-4.

operational control is that the States must be responsible for the actions of their troops that violate IHRL⁹⁵.

States that retain significant authority over civilian police units may also be responsible for their actions in violation of international human rights standards based on these arguments. Similarly, actions by staff of the OSCE may engage State responsibility as staff are seconded to the organisation by member States, and are not 'employees' of the international organisation. The decision in *Bankovic* has left this possibility open.

⁹⁵ For a discussion of whether such responsibility would be direct, concurrent or secondary and joint or several, see: Stein, 'Kosovo and the International Community. The Attribution of Possible Internationally Wrongful Acts: The Responsibility of NATO or of its Member States?' in *Kosovo and the International Community* (Tomuschat ed) (2002).

Chapter 6 – Derogation, judicial remedy and conclusions

A. Derogation

Ultimately, success in post-conflict situations is related to a society's ability to make the transition from a state of war to a state of peace marked by the restoration of civil order, the re-emergence of civil society, and the establishment of participatory political institutions¹. The most important objective of post-conflict governance is to prevent the re-emergence of the conflict. Expectations of what UNMIK and KFOR can achieve in the application of IHRL must be based on a realistic appraisal of the difficulties of operating within post-conflict societies². The Convention and the ICCPR contain provisions that allow the suspension of certain human rights obligations in the extraordinary circumstances of war or public emergency³. The conditions facing the international administration upon arrival in Kosovo⁴ were similar to situations in which a State could declare a state of public emergency threatening the life of the nation⁵. The Security Council, UNMIK, KFOR and participating States should have 'expected, articulated and accepted that there would be some derogation of human rights standards'⁶.

Derogating States are required to inform the Secretary-General of the relevant body of the existence of the emergency and the nature of the derogating measures adopted. As with IHRL itself, such notice requirements are not directly applicable to the UN as it is not a party to the relevant instruments. UNMIK and KFOR could not file a formal derogation

¹ Hampson, 'Can Peacebuilding Work?' (1997) 30 *Cornell Int'l LJ* 701 at 716. See also Bratt, 'Assessing the Success of UN Peacekeeping Operations' in *The United Nations, Peace and Force*, edited Michael Pugh, London 1997.

² Kelly, 'The UN, Security and Human Rights: Achieving the Winning Balance' in *The United Nations, Human Rights and Post-Conflict Societies* (White, N. and Klaasen, D. eds) (forthcoming 2003).

³ Article 15, European Convention and Article 9, ICCPR.

⁴ For example, the absence of law and order mechanisms, the total collapse of State institutions, and the security situation, including reverse-ethnic cleansing: See SG Report 12/7/1999.

⁵ The ECHR has stated that this term refers to 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed': *Lawless v Ireland* Series A No 3 (1961) (*Lawless*), paragraph 28. The threat of terrorist activities and low-level violence can amount to a public emergency: *Askoy v Turkey*, Reports 1996-IV; *Sakik and Others v Turkey* Reports 1998-VII; and *Brannigan and McBride v United Kingdom*, Series A No 258-B (1993) (*Brannigan*). Compare: *Greece v United Kingdom No 176/56*, 2 YB 176 (1958) Com Rep.

⁶ Kelly, note 2 at 25.



notice. However, the notice requirement does apply to member States in relation to responsibility of their troops for violation of IHRL while serving with KFOR. It is unlikely that States would have filed individual notices; as to do so is tacit acknowledgement of the extra-territorial application of their international human rights obligations⁷. In any event, the ECHR may permit a State to rely on conditions that would support derogation under Article 15 even where a derogation notice has not been filed⁸.

Both the ICCPR and the Convention provide that derogation is not permitted from fundamental rights⁹. Measures derogating from other rights must be strictly required by the exigencies of the situation: they must be necessary to meet the emergency and existing mechanisms must be inadequate¹⁰. In addition, the measures adopted must be proportionate to the emergency¹¹. In assessing whether the derogating measures are strictly required, the ECHR will allow the State a margin of appreciation¹². The ECHR accepts that the 'national authorities are in principle in a better position than the international judge to decide both on the presence of such emergency and the nature and scope of derogations necessary to avoid it'¹³. This has resulted in a limited review of derogation measures by the ECHR; provided the State is not shown to have exceeded its margin of appreciation, the derogating measures

⁷ See Chapter 5.

⁸ *Brogan and Others v United Kingdom*, (1998) Series A, no 145-B (*Brogan*) paragraph 48.

⁹ These include: the right to life, other than in respect of deaths arising from lawful acts of war, prohibition on torture and inhuman and degrading treatment, prohibition against slavery and prohibition against retrospective criminal offences and punishments. The ICCPR also prohibits derogations from the prohibition against imprisonment for failure to fulfil a contractual obligation, the right to recognition before the law and the right to freedom of thought, conscience and religion.

¹⁰ *Lawless*, paragraph 36; *Ireland v United Kingdom* Series A No 25 (1978) paragraph 212; and *Brannigan* paragraphs 56-59.

¹¹ *Lawless* paragraph 36; *Ireland v United Kingdom* paragraph 212; and *Brannigan* paragraphs 61-65.

¹² *Ireland v United Kingdom* paragraphs 207 and 214; *Brannigan* paragraph 57.

¹³ *Ireland v United Kingdom*, paragraph 207.

will satisfy Article 15(2)¹⁴. The UNHRC and the Inter-American Court and Commission have adopted a more proactive stance¹⁵.

At least in the context of executive detention orders, UNMIK did publicly acknowledge that 'Kosovo falls within this category of a public emergency given the security situation and the need for an international military force to maintain peace and order'¹⁶. UNMIK adopted a number of regulations that do not comply with IHRL, but which were justified by UNMIK by security concerns¹⁷. In addition, UNMIK adopted a policy of executive detention orders¹⁸ and KFOR a practice of KFOR holds¹⁹, both of which operate outside the judicial system and in violation of 'normal' IHRL standards²⁰. In response to criticism that extra-judicial detention does not comply with IHRL, UNMIK relied upon the extreme conditions in Kosovo, stating that²¹:

UNMIK's mandate was adopted under Chapter VII, which means that the situation calls for extraordinary means and force can be used to carry out the mandate. Any deprivation of liberty by an Executive Order is temporary and extraordinary, and its objective is the effective and impartial administration of justice.

¹⁴ For further discussion refer to: Higgins 'Derogations under Human Rights Treaties' (1976-7) 48 *BYBIL* 281; Hartman, 'Derogation from Human Rights Treaties in Public Emergencies' (1981) 22 *HILJ* 1; Iyer, 'States of Emergency – Moderating their Effects on Human Rights' (1999) 22 *Dalhousie Law Journal* 125; Macdonald, 'Derogations under Article 15 of the European Convention on Human Rights' (1997) 36 *Columbia Journal of Transnational Law* 225; and Warbrick, 'The European Convention on Human Rights and the Prevention of Terrorism' (1983) 32 *ICLQ* 82.

¹⁵ Consider: *Habeas Corpus in Emergency Situations (Arts 27(2) and 7(6) of the American Convention on Human Rights)* Inter-Am Ct HR Series A No 8 (1987) and General Comment No 29 *States of Emergency (Article 4)* UN Doc CCPR/C/21/Rev.1/Add.11.

¹⁶ See UNMIK legal paper 'Security and the Rule of Law in Kosovo', 12 January 2000 page 5.

¹⁷ For example, Regulation 1999/2 provides for the temporary detention or restriction of the freedom of movement of individuals who may pose a threat to public peace and order. Regulation 1999/26 also allows for continued detention without a mechanism allowing the detainee to challenge the lawfulness of an order for continued detention, in violation of article 5. See OMIK Report 6 *Extension of Custody Time Limits and the Rights of Detainees: The Unlawfulness of Regulation 1999/26* of 29 April 2000 and also Ombudsperson Special Report 3 *The Conformity of Deprivations of Liberty under 'Executive Orders' with Recognised International Standards*, paragraph 25.

¹⁸ See OMIK Report 10/01 at 33.

¹⁹ KFOR holds are justified by KFOR's general mandate for law and order under Resolution 1244. OMIK Report 10/01 at 37 quoting letter from KFOR Commander to OSCE Head of Mission dated 6 September 2001.

²⁰ Ombudsperson Institute in Kosovo Special Report No 3 (note 17). See also Special Report No 4 *On the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders*.

²¹ UNMIK Press Briefing 2 July 2001, *Statement on the Ombudsperson's Report*.

Given the difficulties in establishing an impartial and functioning judiciary and the margin of appreciation extended to States, these restrictions may have been warranted as emergency measures²². Examining these measures within a derogation framework²³ would have been more appropriate than expecting the international administration to operate within a full range of IHRL obligations.

States of emergency are temporary in nature²⁴. This does not necessarily mean that the state of emergency must be brief²⁵. If the State can provide evidence that it reasonably believes that the threat continues to exist, even if some of the emergency measures have been modified, it will be difficult to establish that the measures are no longer strictly required²⁶. In Kosovo, the international administration has 'made quite notable progress in stabilising the [security] situation and starting to re-build peaceful societies. The most central achievement is the dramatic decrease in violence and the fact that despite lingering tensions and occasional outbreaks new full-scale conflict has thus far been avoided'²⁷. In his report of 13 March 2001, the Secretary-General stated that 'the emergency phase is largely over'²⁸. OMIK asserted that as soon as the judicial system was established, the state of emergency ceased. UNMIK and KFOR were then required to comply with a full range of Convention rights, particularly in relation to detention and fair trial procedures. However, in a post-conflict situation, it is common for periods of relative stability to be

²² For a contrary view see Stahn, 'The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis' (2001) 5 *Max Planck Yearbook of United Nations Law* 105 at 166-7.

²³ There have been several studies of minimum human rights standards in a state of emergency. See: Questiaux, *Study of the Implications for Human Rights of Recent Developments concerning situations known as State of Siege or Emergency* (E/CN.4/Sub.2/1982/15); Fitzpatrick, *Human Rights in Conflict: The International System for Protecting Human Rights during States of Emergency* (1994); Chowdhury, *Rule of Law in State of Emergency: The Paris Minimum Standards of Human Rights in a State of Emergency* (1989); and Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency' (1985) 79 *AJIL* 1073.

²⁴ This derives from the requirement in Article 15 that the measures be strictly required.

²⁵ Oraa, *Human Rights in States of Emergency in International Law* (1992) at 30.

²⁶ *Brannigan*, paragraphs 47 and 51; *Ireland v United Kingdom* paragraph 213; *Marshall v United Kingdom*, Application No. 41571/98, Admissibility Decision of 10 July 2001 page 8 of electronic version.

²⁷ Korhonen, 'International Governance in Post-Conflict Situations' (2001) 14(3) *Leiden Journal of International Law* 495 at 497-8.

²⁸ SG Report 13/3/01, paragraph 62.

interrupted by sudden outbursts of violence and conflict, which can rapidly escalate and require decisive and immediate action by security forces. Strohmeyer comments that²⁹:

The rapidly available capacity to maintain law and order is of pivotal importance in this context and an inability to react swiftly to crime and public unrest, coupled with the failure to detain and convict suspected criminals promptly and fairly, can quickly erode the public's confidence in a mission.

The international administration faces several challenges including the security situation in both the divided city of Mitrovica, which continues to be 'a flashpoint for ethnically related violence'³⁰, and the Presevo Valley³¹. The initial law and order vacuum also permitted organised crime and terrorist groups to flourish within Kosovo, which 'have the capacity to destabilize political and economic institutions and affect inter-ethnic relations'³² and have required a strong response³³. Requiring the international administration to issue a fresh notice of derogation and to re-introduce emergency powers on each of these occasions would hinder the restoration of peace. One of the major criticisms of the international administration is that it did not adopt a strong stance, particularly in relation to crimes against minority groups and organised groups seeking to exploit the security and political vacuum³⁴. This may have been avoided if a derogation framework had been adopted.

There is a tension between the security aspects of Resolution 1244 and the long-term mandate of the mission, which emphasises the development of local institutions and peace-building activities and requires considerable indigenous consultation and participation, together with decentralised and democratic administration. As the situation stabilises,

²⁹ Strohmeyer, 'Making Multilateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor' (2001) 25 *Fletcher Forum of World Affairs Journal* 107 at 120.

³⁰ SG Report 6/6/00 paragraph 23. From early 2000, Mitrovica has been the scene of outbreaks of violence between ethnic groups, which have required the intervention of UNMIK police and KFOR. For example, a humanitarian shuttle bus carrying Kosovo Serbs was attacked in February, leaving eight people dead and 20 to 30 people seriously injured. See SG Report 3/3/00, paragraph 20-21, SG Report 15/1/02, paragraph 23 and SG Report 17/7/02, paragraph 44.

³¹ This area borders FYROM and was the subject of tension during the recent conflict in Macedonia, with some 82,000 refugees crossed the border into Kosovo: Report of the Secretary-General on the United Nations Interim Administration in Kosovo of 2 October 2001, UN Doc S/2001/926, paragraph 43 (SG Report 2/10/01), paragraph 12.

³² SG Report 15/1/02, paragraph 26.

³³ The SRSG has promulgated three regulations relating to organised crime and authorised the establishment of specialised units within the Police and Justice Pillar. See SG Report 2/10/01, paragraph 48 and SG Report 15/1/02, paragraph 26.

³⁴ See O'Neill, *Kosovo: An unfinished peace* (2001) at 46-8.

centralised power should gradually be devolved by the emergency regime to indigenous institutions, with appropriate protection for human rights³⁵. The international administration has provided for this phased transition although there have been difficulties in implementing the phases in practice³⁶. Regular review of the emergency measures is one of the most effective safeguards against abuse³⁷, and the international administration should be required to continuously monitor the emergency and to justify the need for the measures adopted. One alternative is to create an *ad hoc* mechanism within the mission structure of each mission.

B. Is the application of IHRL desirable?

It is difficult to characterise the nature of the obligations of UNMIK and KFOR under IHRL pursuant to which legal responsibility is State-based. IHRL, both customary and treaty-based, regulates the relationship between the State and the individuals subject to the jurisdiction (including control) of that State. The State has both a negative obligation not to infringe the rights of persons within its jurisdiction and a positive obligation to ensure that State systems comply with IHRL and to provide a real and effective remedy where they do not³⁸. Under traditional concepts of State responsibility, if a State violates or fails to meet an obligation arising from a treaty or a rule of customary international law it incurs responsibility, unless it can rely upon grounds precluding the wrongfulness of its conduct³⁹. IHRL is not concerned with the relationship between individuals and international organisations such as the UN. This reflects the traditional assumption that States and international organisations perform inherently different functions: States are regulated, while international organisations regulate or monitor the conduct of States⁴⁰. Preparing

³⁵ Beauvais, 'Benevolent Depotism: A Critique of UN State-Building in East Timor' (2001) 33 *New York University Journal of International Law and Policy* 1101.

³⁶ For example, there have been differences of opinion as to the amount of responsibility given to the provisional institutions of self-government under the Constitutional Framework and the timing of a decision on the ultimate status of Kosovo. UNMIK's position is that the provisional institutions must satisfy key standards in relation to rights protection before any decision as to the status is made. See SG Report 9/10/02, paragraph 2 and the Report of the Security Council Mission to Kosovo and Belgrade of 19 December 2002.

³⁷ *Brannigan*, paragraphs at 62-65 and *Lawless*, paragraph 66.

³⁸ See *Marckx v Belgium* (1979) Series A No 31, paragraph 31.

³⁹ See ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001.

⁴⁰ See Wilde, 'Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor' (2001) 7 *ILSA Journal of International and Comparative Law* 455

acceptable principles of State responsibility has been difficult enough, yet such principles do not have to regulate 'the convoluted structures of mandates and delegations as those behind the international administrations'⁴¹. Traditional principles of responsibility are not appropriate or relevant to a collective security organ such as the Security Council, UNMIK or KFOR⁴². What would be the consequences of engaging the responsibility of these organs: to cease the activity and restore the situation prevailing prior to the wrongful activity, or to pay compensation to victims⁴³?

IHRL provides that an individual should have access to an effective remedy, generally equated with a right to judicial process and, if a violation is established, the payment of compensation. However, an individual right to a legal remedy may not be appropriate where the violations complained of are systematic or entrenched and require political not legal action⁴⁴. For example, the experience of the ECHR in relation to Turkey and Northern Ireland suggests that the Convention system may be ineffective where the narrowly defined individual dispute masks 'a politically charged and often long-standing larger dispute – which may have a much larger human rights dimension'⁴⁵. Judicial decision-making methods are limited to the facts relevant to the individual dispute and may not provide a comprehensive analysis of the political context. Political decision-making mechanisms may be better suited to such issues.

In Kosovo, the international administration is faced with rebuilding the structure of a society and is faced with complex and difficult decisions, often with only political solutions. The situation arose precisely because the legal system has proved incapable of resolving these political issues in the past. Exposing the international administration to

⁴¹ Korhonen, note 27 at 527.

⁴² See Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 *ICLQ* 55.

⁴³ Gill, 'Legal and some Political Limitations on the Power of the UN Security Council to exercise its enforcement powers under Chapter VII of the Charter' (1995) *Netherlands Yearbook of International Law* 33 at 108.

⁴⁴ In the context of derogation, see Gross, 'Once More unto the Breach': The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale Journal of International Law* 437.

⁴⁵ White, 'Tackling Political Disputes Through Individual Applications' (1998) 1 *EHRLR* 61 at 61-2. See also Quigley, 'Israel's forty-five year emergency: Are there time limits to derogations from Human Rights obligations?' (1994) 15 *MJIL* 491.

numerous legal claims based on similar violations is unlikely to resolve such issues. For example, the main source of complaints to the Ombudsperson has been property disputes, as KFOR and UNMIK seize property to return it to pre-conflict owners or to accommodate returning refugees⁴⁶. Underlying this policy⁴⁷ is the priority accorded to refugee return and the protection of ethnic minorities under Resolution 1244⁴⁸. In order to achieve its policy of a multi-ethnic Kosovo, UNMIK is aware that encouraging Kosovo Serbs to participate in the political process is one of the mission's greatest challenges⁴⁹. The grant by a court of a legal remedy to an individual in relation to a property claim in this context would not address the underlying policy issues and may serve to aggravate existing tensions. On a practical level, the UN is already struggling from a shortage of financial resources and simply does not have the financial resources to pay compensation to individuals for individual violations. The prospect of such claims could prevent or deter the organisation from offering assistance to post-conflict societies in the future.

The absence of judicial review and/or an individual remedy is not restricted to the administration of territory by the UN. The UN system is not a constitutional structure that provides for judicial review in the manner expected in domestic democracies⁵⁰. The international criminal tribunals operate within a legal vacuum, lacking an external legal review mechanism and actions of other UN actors are not subject to judicial review. IHL does not provide for a judicial tribunal with automatic jurisdiction in respect of violations, nor does it provide for a right of individual petition. Similarly, international criminal law is primarily designed to punish those individuals found guilty of serious crimes⁵¹. Although the ICC may make an order directly against a convicted person specifying reparations to, or in respect of, victims, this does not amount to a right on the part of individual victims to

⁴⁶ See Ombudsperson Special Report 1, paragraph 29.

⁴⁷ UNMIK established a Housing and Property Directorate to process housing claims and to provide accommodation to returning refugees.

⁴⁸ See Ward, 'The failure to protect minorities in Post-War Kosovo' (2000) *Helsinki Monitor* no 1 at 37 and White, 'Reconstructing Kosovo: The Ethnic Dimension' in *Kosovo: Lessons Learned for International Cooperative Security* (Spillman and Krause eds) (2000).

⁴⁹ See various reports of the Secretary-General, which emphasise the importance of engaging all minorities and the divisive nature of property law disputes. For example, SG Report 16/9/99 at paragraph 7.

⁵⁰ *Tadic*, paragraph 11.

⁵¹ These crimes are specified in the relevant statute and include genocide, crimes against humanity, war crimes and crimes of aggression. See Articles 5 to 8, Rome Statute and Articles 2 to 5, ICTY Statute.

petition the ICC for, or to receive, a remedy⁵². Accountability lies in the political sphere: the legitimacy of the UN system depends not on judicial determinations but on the acceptance of States and the wider international community. It also contains an element of faith: faith that the UN will uphold the international standards it establishes, preaches and promotes.

C. Conclusions

The international administration is criticised for failing to adhere to international human rights standards when exercising governance functions, as because if the UN expects States to adhere to such principles, it must do so when it acts as a government. Such analysis presupposes that the international administration of territory is democratic in nature, an assumption that is not correct. International administrations are by definition transitional, and are not accountable to the local population through either the political incentive of re-election, or legally by virtue of citizen rights and State duties. As outlined in Chapter 2, both UNMIK and KFOR are measures to restore international peace and security established pursuant to Chapter VII of the Charter. They exercise powers delegated by the Security Council.

Chapter 3 has demonstrated that, while the UN has made a commitment to observing IHRL in all aspects of its activities, this commitment is political or moral in nature, and is not legally binding. IHRL does not apply directly to the acts of either KFOR or UNMIK in Kosovo, either by virtue of the Charter, Resolution 1244 or UNMIK regulations. Even if IHRL did apply, the prospect of an individual obtaining a judicial remedy, such as compensation, in respect of any violation is limited due to the wide immunities granted to UNMIK and KFOR, the absence of a functioning and independent judiciary and the difficulties in obtaining judicial review in the international system. Accountability is likely to be achieved through political, rather than legal, means. Responsibility ultimately lies

⁵² Article 75, Rome Statute. The Rome Statute provides for the establishment of a trust fund for this purpose. The ICTY Statute does not contain a similar provision, only providing for the ICTY to order the return of any property and proceeds obtained through criminal activities: Article 24. For a discussion of reparations in the context of the ICC, see Shelton, 'Reparations for Victims of International Crimes' in *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (Shelton ed) (2000).

with the UN. It is one of its principal organs, the Security Council, which has established UNMIK and authorised the powers exercised by KFOR.

There is some prospect for an independent judicial remedy through the application of the laws of State succession, the developing principle of extra-territorial responsibility and the notion of functional duality. The former may result in the direct or concurrent responsibility of the FRY and the UN for the actions of the international administration in Kosovo which violate IHRL. Extra-territorial responsibility leads to individual member States being held responsible for the extra-territorial acts of their agents, and is more likely to be incurred in relation to the States participating in KFOR that retain significant command and control in relation to their national contingents. Functional duality requires the courts in Kosovo to distinguish between the functions of UNMIK and KFOR that are international in nature, and those that are the acts of the surrogate government in Kosovo. The courts must then be willing to recognise that the traditional immunities of international organisations do not apply in respect of the latter. However, all three possibilities are not widely accepted, either by States or the UN, and their application would require a significant development, either judicially through the ECHR, or politically. Why should an international administration comply with an inherently regional convention as the European Convention, although contracting States participating in KFOR may be required to comply with the European Convention?

In considering the application of IHRL to post-conflict situations such as Kosovo, it is necessary to determine whether extending the protection of IHRL is appropriate. It is similarly unrealistic to expect an international administration in a post-conflict situation to comply with the entire range of rights protected by IHRL. Adopting such ambitious standards as a measure of mission success is conducive to perceived failure and threatens the credibility of the UN as a guarantor of human rights. In relation to future international administrations, the Security Council should recognise the extreme nature of post-conflict situations and indicate that such mission will, at least initially, operate in accordance with the minimum standards of human rights applicable in a state of emergency. This will redirect the emphasis to an examination of what are realistic expectations for the international administration in the post-conflict context and lead to more comprehensive

and attainable mandates, with a clear human rights component. The jurisprudence of the ECHR and the UNHRC in relation to derogation will provide important guidance in a post-conflict human rights framework. This may necessitate recognising that the political decisions facing the international administration are not always suited to a judicial remedy.

The threat of State withdrawal from international peace enforcement missions such as KFOR is significant. Any reduction in the level of immunity extended to military personnel or the extension of the notion of extra-territorial jurisdiction to peacekeeping forces could have serious consequences for international collective military action. In addition to weakening the capacity of the UN to respond to threats to international peace and security, withdrawal of troops from collective actions could result in a greater willingness on the part of States to take unilateral action outside the UN system. If the State was, or had the support of, a permanent member of the Security Council, it is unlikely that the Security Council could prevent or even regulate unilateral action. Ultimately, while clear responsibility of military forces may be a desirable objective, does this warrant risking the existing level of control exercised by the Security Council, or the arguably greater risk that no action may be taken at all?

The relative success of the missions in Kosovo and East Timor is likely to lead to the deployment of similarly extensive missions in the future. Before doing so, the UN, its member States and the wider international community should consider the potential application of IHRL in such situations and produce clear guidelines for its application. This should avoid a repetition of the confusion and uncertainty that has surrounded the activities of the international administration in Kosovo.

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