UNMIK in Kosovo: Struggling with Uncertainty

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I. Introduction

The violent conflict in Kosovo at the end of the last century induced extraordinary commitment and involvement of the international community. Following, in many ways, unprecedented intervention by the world's most powerful security alliance, the United Nations moved to establish an international territorial administration which was equally unprecedented for its scope, concentration of authority and financial capacity.

More than six years after, with the world's attention having moved on to other trouble spots, Kosovo is struggling. Ethnically motivated violence against the Serb, Roma and Ashkali minority communities killed 19 and left almost 1000 persons injured in March 2004, not to speak of the widespread destruction of houses and churches. Elections in November 2004 were largely boycotted by the Serb community,[1] who felt alienated and had lost trust in the authority of UNMIK (United Nations Interim Administration Mission in Kosovo). At the same time, dissatisfaction and impatience of the majority, the Kosovo Albanians, with the work of UNMIK is indicated by one-sided moves of the Kosovo Assembly challenging the distribution of power under UNMIK Regulations. To make things worse, the unemployment rate has attained record levels of 70 to 90 per cent.

Taking these difficulties into account, it is high time to think about whether changes of policy can improve the situation and still save the international community from failing to deliver on its promises. A refocus on Kosovo is also necessitated by the fact that the issue of the future status, which still awaits a solution, becomes more pressing. Furthermore, enough time and resources have been spent to allow for a tentative assessment of what general lessons Kosovo teaches for future UN missions that might have to address similar post-conflict situations. Are there structural problems with the approach used in Kosovo that could be avoided in the future, if politically feasible? Can the approach chosen in Kosovo provide a useful model for future post-conflict peacebuilding?

In addition to making the attempt to focus on some of these questions, this case study is foremost concerned with trying to provide the

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1 Doc. S/2004/348 of 30 April 2004, para. 3.

necessary facts about this mission, thereby hoping to contribute to a better understanding of the "situation on the ground", as the basis for comparisons with other cases and for further analysis. It therefore starts with the most essential historical facts (Part II.), to be followed by an overview of the framework that forms the basis of this mission, but which has also been the root of some of the difficulties that the mission faced and is still facing. In this context, light will be shed on the issue of self-determination which occupies such a central place in both the conflict and its solution (Part III.). Thereafter, the implementation practice with regards to some of the key objectives is addressed in a cursory fashion in order to allow the reader to get a basic understanding of the actual work of the administration and the enduring difficulties (Part IV.). As we are faced with an administration that has assumed full governmental power, the question of the legal limitations gains particular importance in the case of Kosovo. In addition, legality is directly linked to legitimacy and credibility, two key factors for the acceptance of the mission and ultimate success. Therefore, Part V. indicates the legal limitations and addresses some legality issues arising from the practice of the mission. Finally, in Part VI. an attempt will be made to point out some general lessons that can be drawn from the experience in Kosovo. The conclusion will include some remarks on the model character of the mission and its usefulness (Part VII.).

II. Historical Background[2]

1. Origins of the Conflict

The conflict in Kosovo and the difficulties of peacefully resolving it cannot be understood without taking into account the strong historical and emotional ties of both Albanians and Serbs to the province.

Many Albanians view Kosovo as a cultural centre as well as a metaphor for the injustices that Albanians had to endure during their history.[3] The importance attached to Kosovo by Albanians also derives from the crucial role which the province played during the historical period of 1878-1912.[4] Exemplary is that the Albanian national movement, which ultimately led to the declaration of independence of Albania in 1912, started at a meeting in Prizren in 1878.[5]

The Serbs' attachment to Kosovo is to a large extent based on the perception that Kosovo reflects part of their collective identity, as it is by many considered to be the "cradle" of Serb nationhood.[6] Of centrality for the development of such a perception is the Battle of the Field of the Blackbirds of 1389, in which a coalition army under the leadership of the Serb prince Lazar lost to Ottoman forces under Sultan Murad I.

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2 For overviews of the historical and political background of the conflict in Kosovo, see for example N. Malcolm, *Kosovo: a short history*, 1998; Independent International Commission on Kosovo, *Kosovo Report. Conflict, International Response, Lessons Learned*, 2000, Part I; P.A. Zygojannis, *Die Staatengemeinschaft und das Kosovo: Humanitäre Intervention und internationale Übergangsverwaltung unter Berücksichtigung einer Verpflichtung des Intervenienten zur Nachsorge*, 2003, 22-30; T.D. Grant, "Extending Decolonisation: How the United Nations might have addressed Kosovo", *Ga. J. Int'l & Comp. L.* 28 (1999), 10 et seq. (10-20); J. Kokott, "Human Rights Situation in Kosovo 1989 – 1999", in: C. Tomuschat (ed.), *Kosovo and the International Community*, 2002, 1 et seq. (2-6); OSCE Kosovo Verification Mission, "Historical and Political Background to the Conflict, in: K. Ambos/ M. Othman (eds), *New Approaches in International Justice: Kosovo, East Timor, Sierra Leone and Cambodia*, 2003, 9 et seq.

3 M.J. Calic, "Kosovo in the twentieth century: A historical account", in: A. Schnabel/ R. Thakur (eds), *Kosovo and the Challenge of Humanitarian Intervention*, 2000, 19 et seq. (24).

4 Malcolm, see note 2, 217.

5 Id., 223; Calic, see note 3, 24.

6 Calic, see note 3, 23.

While the battle has historical importance insofar as the defeat ensured the decline and eventual ending of medieval Serbian influence in the province, the significance lies mainly in the central role of the story of the battle for Serbian identity.[7] The battle emerged as the centrepiece of the ideology of the Serbian nationalist movement of the 19th century. Thus, Kosovo plays a fundamental role for the Albanian and Serb nationalist movements and their collective identities, a factor that should not be underestimated when dealing with the conflict today.

It was not until 1878 that the Serbs regained complete independence and not until 1912 in the First Balkan War that they gained control over Kosovo. The area had in over five hundred years of Ottoman rule become home to a majority of Albanians that had converted to Islam. Despite this demographic constellation, Kosovo was divided between Serbia and Montenegro and did not become part of the new Albanian state.

Under Tito's rule in Yugoslavia, Kosovo Albanians gained recognition as a minority and Kosovo was granted the status of an autonomous province under the Yugoslavian Constitution of 1974.[8] However, Tito's death in 1980 was followed by growing nationalism and neither the Serbs nor the Kosovo-Albanians were – for opposite reasons – content with the status of autonomy. Serbs in Kosovo felt alienated and discriminated against by an Albanian majority and Kosovo-Albanians demanded the status of an independent republic within the SRFY. With Slobodan Milošević and Serbian nationalism becoming increasingly influential in Serbia, minority rights and provincial autonomy of Kosovo were largely abolished through amendments in the Serbian Constitution in 1989. After the Kosovo Assembly was dissolved in 1990, 114 of the 180 deputies declared Kosovo an independent republic within the SRFY and organised a referendum on sovereignty which was reported to have been 99 per cent in favour with 87 per cent of the population participating. As a result of the suppression of those activities by Serbian police, an Albanian "shadow state" developed. The parallel elections in May 1992 were won by the League for a Democratic Kosovo led by Ibrahim Rugova who was declared President of the Republic of Kosovo in 1992. His policies of seeking a peaceful settlement and attempts for international protection for Kosovo brought little results. As

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7 Malcolm, see note 2, 58.

8 However, Kosovo was not recognised as a republic within the Socialist Federal Republic of Yugoslavia, which consisted of the republics of Slovenia, Croatia, Bosnia-Herzegovina, Macedonia, Montenegro, and Serbia.

the Kosovo issue was not included in the international negotiations at Dayton in 1995, more radical movements gained the upper hand.

2. Intensification of the Conflict and International Responses

From 1996 onwards, armed resistance and a violent struggle for independence led by the Kosovo Liberation Army (UÇK) were met with increasing violence by the Serbian police and special security forces. In 1998, attacks by those forces on villages and grave human rights violations from both sides not only strengthened support for the UÇK even among moderate Kosovo Albanians, but finally led to greater but arguably belated[9] international attention.

As reaction to the deteriorating situation, the UN Security Council supported the strategy of the so called "Contact Group"[10] and imposed an arms embargo on the (then) Federal Republic of Yugoslavia (FRY)[11] through Resolution 1160.[12] Serbia ignored the demands of the Resolution and Serb forces intensified their campaign, leading to the displacement of over 230,000 people from their homes in just four months. In Resolution 1199, the UN Security Council on 23 September 1998 called for an end to civilian repression as well as for a cease-fire and the start of a dialogue between the Kosovo Albanian leaders and the FRY.[13] Against the explicit opposition from Russia, these demands were backed up by a threat of air strikes by NATO. The strategy bore fruit insofar as it resulted in the Holbrooke-Milošević Agreement which was "endorsed" by the UN Security Council in Resolution 1203.[14]

This cease-fire, monitored by the OSCE Kosovo Verification Mission,[15] did not last and could not prevent further massacres of the civil-

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9 For the argument that earlier action might have prevented the escalation and the need for NATO military action, see Kokott, see note 2, 34.

10 The six-country contact group includes France, Germany, Italy, the Russian Federation, the United Kingdom and the United States.

11 This name will be used when referring to Serbia and Montenegro in a historical context, i.e. the time before the change of name in 2003.

12 S/RES/1160 (1998) of 31 March 1998, para. 8.

13 S/RES/1199 (1998) of 23 September 1998, paras 1 and 4.

14 S/RES/1203 (1998) of 24 October 1998, paras 1 and 3.

15 See for the activities of the OSCE, W. Czaplinski, "The Activities of the OSCE in Kosovo", in: C. Tomuschat (ed.), *Kosovo and the International Community,* 2002, 37 et seq.

ian population. Another diplomatic attempt at Rambouillet failed for lack of consent by the FRY/Serb delegation. The provisional Rambouillet Agreements foresaw autonomous institutions for Kosovo, a mechanism for a final political settlement at the end of three years, reaffirmed Yugoslav sovereignty and included the deployment of a NATO force to enforce these terms. After Serbia declined to accept, the NATO air campaign started on 24 March 1999 and lasted until 8 June 1999, when the governments of the FRY and the Republic of Serbia accepted a peace plan of the Group of Eight (G7 and Russia) and signed and approved a Military Technical Agreement with KFOR.[16]

The political principles of the peace plan – being based on the principles of the Rambouillet Agreements – were embraced by the Security Council in Resolution 1244.[17] It contains the obligation for the FRY to end the violence and to withdraw all military, police and paramilitary forces from Kosovo,[18] and for the UÇK to cede all offensive action and to demilitarise.[19] The Resolution authorises NATO to deploy an "international security presence"[20] (KFOR) and the Secretary-General of the UN to establish an "international civil presence" (later UNMIK).[21]

3. Initial Post-Conflict Situation

The humanitarian situation after the end of the conflict was dire. Out of a population of 1.7 million, 800,000 persons had taken refuge in neighbouring countries and about 500,000 were internally displaced.[22] The security situation was tense and many Serbs left Kosovo as a result of crimes committed by Kosovo Albanians against Serbs, including killings, forced expropriations, looting and arson.[23]

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16 See Military Technical Agreement between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, available at: http://www.nato.int/kfor/kfor/documents/mta.htm (last visited 1 June 2005).

17 S/RES/1244 (1999) of 10 June 1999, para. 1 and Annexes 1 and 2.

18 Ibid., para. 3.

19 Ibid., para. 15.

20 Ibid., para. 5 and 7 in conjunction with Annex 2, para. 4.

21 Ibid., paras 5 and 6.

22 Doc. S/1999/779 of 12 July 1999, para. 8.

23 Ibid., para. 5.

Besides the largest Serb minority, Kosovo is also home to Roma, Ashkali, Egyptian, Bosnian and Gorani minorities. The relations between Kosovo Albanians, who make up for approximately 90 per cent of Kosovo's population, on the one hand, and Serbs and other minorities on the other were in serious disrepair; cities were often divided along ethnic lines. Basic infrastructure and public services were largely inoperative, although water and electricity were usually available.[24] The economy was catastrophic and the complete absence of investment and finances made economic projections for the future look sombre.[25]

III. The Framework of Resolution 1244 and General Format of the Mission

1. Mandate for UNMIK and KFOR under Security Council Resolution 1244

a. Legal Basis

When authorising Member States to establish the international security presence and the Secretary-General to establish the international civil presence by means of Resolution 1244, the Security Council was explicitly acting under Chapter VII of the UN Charter. It is widely accepted that Chapter VII provides sufficient legal ground for the deployment of a territorial administration, including the complete take-over of governmental functions as in the case of UNMIK in Kosovo.[26]

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24 See ibid., paras 11-13.

25 Ibid., para. 16.

26 S. Chesterman, *You, the people: The United Nations, Transitional Administration, and State-Building*, 2004, 54; J.A. Frowein/ N. Krisch, "Article 41", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary,* Vol. I, 2002, MN 21; C. Stahn, "The United Nations Transitional Administrations in Kosovo and East Timor: A first analysis", *Max Planck UNYB* 5 (2001), 105 et seq. (139); T.H. Irmscher, "The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation", *GYIL* 44 (2001), 353 et seq. (353); J.A. Frowein, "Die Notstandsverwaltung von Gebieten durch die Vereinten Nationen", in: H.W. Arndt (ed.), *Völkerrecht und deutsches Recht*, 2001, 43 et seq. (44); M. Bothe/ T. Marauhn, "The United Nations in Kosovo and East Timor – Problems of a Trusteeship

The legal and political reasoning which supports such powers of the Security Council emanates from the consideration that the concept of "peace" in the sense of Article 39 UN Charter must be understood to include the establishment of long-term and sustainable peace.[27] Insofar and to the extent that territorial administrations must be considered a necessary instrument to fulfil this task,[28] the Security Council has the power to authorise such administrations under Article 41 UN Charter.[29] The absence of any explicit reference to such a measure does not present an obstacle, because the list of measures contained in Article 41 must be considered as non-exhaustive.[30] The same reasoning can be applied to measures under Article 42, which in conjunction with Article 48 provides the legal basis for a mandate that comprises the use of force, e.g. the authorisation for the international security presence (KFOR).[31]

A different reasoning ultimately leading to the same result is to rely on the implied powers doctrine developed by the ICJ.[32] In this sense, it can be argued that the establishment of a territorial administration is an essential and necessary tool for the Security Council in order to fulfil its duty under Article 39 of the UN Charter, i.e. to achieve peace and security. Therefore, its establishment lies within the realm of the powers of

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Administration", *International Peacekeeping* 6 (2000), 152 et seq. (154); M. Wagner, "Das erste Jahr der UNMIK", *Vereinte Nationen* 4 (2000), 132 et seq. (133).

27 See in particular M. Ruffert, "The administration of Kosovo and East-Timor by the international community", *ICLQ* 50 (2001), 613 et seq. (616-622).

28 Ibid., 620-621.

29 See the authors at note 26.

30 International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tadić* (Appeal on Jurisdiction), Case No. IT-94-AR72, 2 October 1995, paras 34 et seq.; Bothe/ Marauhn, see note 26, 154; Frowein, "Notstandsverwaltung", see note 26, 44; M.J. Matheson, "United Nations Governance of Postconflict Societies", *AJIL* 95 (2001), 76 et seq. (79); A. Yannis, "The UN as Government in Kosovo", *Global Governance* 10 (2004), 67 et seq. (84).

31 Frowein/ Krisch, see note 26, MN 21; C. Stahn, "International Territorial Administration in the former Yugoslavia: Origins, Developments and Challenges ahead", *ZaöRV* 61 (2001), 107 et seq. (131); Bothe/ Marauhn, see note 26, 154.

32 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174 et seq. (182).

the Security Council even though Articles 41 or 42 of the UN Charter do not expressly provide for such powers.[33]

Another possible legal explanation is to consider the mandate part of the customary powers of the organs of the United Nations, i.e. in this case of the Security Council.[34] With regard to Kosovo, the acceptance by the international community of such practice is, for example, expressed in two General Assembly Resolutions.[35]

Although it is not necessary to rely on customary or implied powers given that the lists of measures in Articles 41 and 42 of the Charter are non-exhaustive, any of these legal explanations leads to the same result, namely that the Security Council can mandate such administrations. All mentioned possibilities provide the legal basis for the pursuit of the entire objectives and duties outlined by Resolution 1244, since all of these objectives are fundamental to building a sustainable peace. Insofar as governmental functions, including judicial and legislative functions, are necessarily connected to these objectives, the Security Council's mandate is not limited to administrative tasks. It potentially extends to all necessary governmental functions,[36] albeit within the limits of necessity, the Resolution itself and other legal parameters.[37]

b. Objectives and General Format of the Mission

aa. KFOR

KFOR must generally support UNMIK but nevertheless retains an independent position *vis-à-vis* UNMIK, as it is authorised separately and

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33 Ruffert, see note 27, 621; L. von Carlowitz, "UNMIK Lawmaking between Effective Peace Support and Internal Self-determination", *AVR* 41 (2003), 336 et seq. (342 and 343) (arguing that implied powers justify the power of the Security Council to vest regulatory power in UNMIK).

34 E. de Wet, "The Direct Administration of Territories by the United Nations and its Member States in the Post Cold war Era: Legal Bases and Implications for National Law", *Max Planck UNYB* 8 (2004), 291 et seq. (312-318).

35 A/RES/53/241 of 28 July 1999 and A/RES/54/245 of 23 December 1999.

36 Frowein/ Krisch, see note 26, MN 20; Matheson, see note 30, 84; von Carlowitz, see note 33, 342.

37 See for the question whether the complete governmental control of UNMIK was legitimate in light of Resolution 1244, further below in this Part at b. cc. For the legality of the implementation practice see in particular Part V., below.

has its own area of responsibility.[38] This is clarified in Resolution 1244 which stipulates that KFOR should be "coordinating closely with the work of the international civil presence"[39] in "a mutually supportive manner".[40]

This parallel non-hierarchical structure between the peacekeeping or peace-enforcement component and the international administration differentiates this mission from UNTAET – the United Nations Transitional Administration in East Timor. UNTAET had the power "to take all necessary measures to fulfil its mandate".[41] For these purposes, it was endowed with a military component which replaced the multinational force INTERFET and which was integrated into the structures of UNTAET under a unified command.[42]

KFOR's tasks are, on the one hand, those of classic peacekeeping troops. They include deterring new hostilities, ensuring that refugees can return safely and that humanitarian aid can be delivered as well as de-mining and border monitoring.[43] On the other hand, KFOR has a mandate for peace-enforcement with respect to enforcing the cease-fire and the demilitarisation of the UÇK.[44] Of importance especially in the immediate post-conflict situation was the establishment of a secure environment not only for refugees to be able to return but also for UNMIK and humanitarian organisations to be able to start their work.[45]

A phased approach was applied with respect to public safety. KFOR took over policing until UNMIK had built up its own and local police.[46] Such an initial complete substitution of local police authority had rarely been done before.[47] In addition, KFOR remains responsible for the safety and protection of UNMIK and other international organisa-

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38 Compare S/RES/1244 (1999) of 10 June 1999, paras 5, 7 and 9.

39 Ibid., para. 9 (f).

40 Ibid., para. 6.

41 S/RES/1272 (1999) of 25 October 1999, para 4.

42 Ibid., paras 3 (c) and 9. See in this respect the contribution of M. Benzing, in this Volume.

43 S/RES/1244 (1999) of 10 June 1999, para. 9 (a), (c), (e), (g).

44 Ibid., para. 9 (a), (b).

45 Ibid., para. 9 (c).

46 Ibid., para. 9 (d).

47 See M. Guillaume, "Le cadre juridique de l'action de la KFOR au Kosovo", in: C. Tomuschat (ed.), *Kosovo and the International Community*, 2002, 243 et seq. (259).

tions even in the long run.[48] Furthermore, KFOR is demanded to fully cooperate with the International Criminal Tribunal for the Former Yugoslavia (ICTY). This duty to cooperate applies equally to all other persons participating in the UN mission in Kosovo.[49]

bb. UNMIK

While KFOR's responsibilities resemble those of traditional UN-authorised troops with a strong mandate, UNMIK's tasks are of an unprecedented scope.[50] In order to deal with the multitude of objectives and to coordinate the different organisations, UNMIK comprises four different pillars, each corresponding to a different task area as required by Resolution 1244. Each pillar is placed under the authority and supervision of the Special Representative of the Secretary-General (SRSG) and is headed by a Deputy SRSG.

The coordination and provision of humanitarian assistance[51] (former Pillar I) was provided by the Office of the High Commissioner for Refugees (UNHCR) until the emergency stage was over and the engagement was phased out at the end of June 2000. The civil administration[52] (Pillar II) and the police and justice administration[53] (new Pillar I since 2001) are run directly by the UN. The objective of democratisation and institution building (Pillar III) is being pursued under the leadership of the Organisation for Security and Co-operation in Europe (OSCE). Finally, the task of reconstructing the economy and infrastructure[54] (Pillar IV) is managed by the European Union.

Further overall objectives are the promotion and protection of human rights[55] and the return of refugees and displaced persons to their homes.[56]

The main long-term political objective for UNMIK is to promote the establishment "of substantial autonomy and self-government in

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48 S/RES/1244 (1999) of 10 June 1999, para. 9 (h) and (f).

49 See ibid., para. 13.

50 Matheson, see note 30, 79; Yannis, see note 30, 67.

51 S/RES/1244 (1999) of 10 June 1999, para. 11 (h).

52 Ibid., para. 11 (b).

53 Ibid., para. 11 (i).

54 Ibid., para. 11 (g).

55 Ibid., para. 11 (j).

56 Ibid., para. 11 (k).

Kosovo".[57] The "development of provisional institutions for democratic and autonomous self-government" and the holding of elections is to be accompanied by a transfer of administrative responsibilities "as these institutions are established", while UNMIK is "overseeing" their consolidation.[58] Such a wording can be interpreted to mean a gradual transfer of authority which depends on UNMIK's discretion. After having facilitated a political process to determine Kosovo's future status, UNMIK has the responsibility to oversee the final transfer of authority to the institutions established under a final settlement.[59]

cc. Complete Governmental Powers for UNMIK

In Regulation[60] 1999/1 of 25 July 1999, the SRSG outlines that the authority vested in UNMIK by means of Resolution 1244 comprises all legislative and executive power, as well as the authority to administer the judiciary.[61] According to the Regulation, not only can the SRSG issue directly applicable law and in fact decide what the law in Kosovo should be, but he can also appoint or remove any person within the civil administration and the judiciary.[62] The scope of such an authority is all-encompassing, as it gives the SRSG complete control over the legislature, the executive and the judiciary of Kosovo.

The assumption of far-reaching responsibilities reaches unprecedented levels in Kosovo, but is not entirely new. Many similarities exist with the United Nations Transitional Authority in Cambodia (UNTAC) which was established by Security Council Resolution 745 in 1992.[63] The scope of responsibilities as outlined in the Agreements on a Comprehensive Political Settlement of the Cambodia Conflict, signed in Paris on 23 October 1991, encompassed *inter alia* administration, law and order, security, reconstruction, humanitarian aid, human rights

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57 Ibid., para. 11 (a).

58 Ibid., para. 11 (c) and (d).

59 Ibid., para. 11 (f).

60 Regulations are the legislative acts of UNMIK which take precedence over all other law in force, see for the legal hierarchy in detail further below, in this part.

61 UNMIK/REG/1999/1 of 25 July 1999, section 1 para. 1; all UNMIK Regulations are available at: www.unmikonline.org/regulations (last visited 1 June 2005).

62 Ibid., section 1 para. 2.

63 S/RES/745 (1992) of 28 February 1992.

promotion and the organisation of free elections. It was envisaged that UNTAC, according to the legal framework, would take over crucial administrative tasks for each of the different areas as well as judicial and legislative functions.[64] Although comparable in original concept and approach as well as in the enormous scope of the mission, UNTAC's role was in practice more akin to one of supervision and monitoring.[65] Therefore, while the initial approach to territorial administration showed many parallels with Kosovo, the actual implementation deviated considerably.

Similarities also exist between the role of the UN in Kosovo and in Bosnia-Herzegovina, but in this case the resemblance lies less in the original framework as in Cambodia, but in the actual implementation. Contrary to Kosovo and Cambodia, the approach initially taken by the international community in Bosnia-Herzegovina, as determined by the Dayton Agreements, did not provide for a similar displacement of the sovereign government of the state.[66] Here, the practical circumstances required a change of strategy, resulting in a strong role for the High Representative in Bosnia-Herzegovina comparable to a considerable extent to that of the SRSG in Kosovo. The High Representative was forced to extend its initial, merely supervisory role, by increasingly interfering with legislative and executive action in order to overcome the paralysis of the national institutions.[67] It seems likely that the approach of UNMIK in Kosovo was influenced by the experiences in Bosnia-Herzegovina, because contrary to Bosnia-Herzegovina, a strong role with far-reaching powers was envisaged from the very beginning of the mission.

Kosovo in turn has served as a model for UNTAET, which was equally vested with far-reaching responsibilities and corresponding full governmental powers very similar to those of UNMIK in Kosovo.[68]

The wide scope of powers claimed by the SRSG is reflected in the hierarchy of the legal norms. UNMIK Regulations as the primary legal instruments of the SRSG take precedence over the second source of law, which is the law that was in force in Kosovo before the withdrawal of

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64 See for more details L. Keller, in this Volume.

65 R. Caplan, *A New Trusteeship? The International Administration of Wartorn Territories*, 2002, 14.

66 Bothe/ Marauhn, see note 26, 153.

67 See K. Oellers-Frahm, in this Volume.

68 See for a detailed account of UNTAET in East Timor, M. Benzing, in this Volume.

autonomy on 22 of March 1989. Although originally intended to stay in force, the Yugoslavian law in force in Kosovo between 1989 and 1999 was, after a short initial period, declared invalid except for cases in which the issue was not covered by the mentioned sources of law and provided that the Yugoslavian law was not found to be discriminatory.[69] International law is not explicitly mentioned as a source of law, but all major human rights treaties are to be observed by any person holding public office in Kosovo.[70] This must be understood as the foundation for their applicability to all decision-making, including those of the judiciary.

The legal hierarchy thereby established in Kosovo is remarkable for at least two aspects. First, the direct applicability of the Regulations of the International Administration which supersede any municipal law effectively opens the legal system of the administered territory to the decisions of a United Nations representative and thus to "United Nations law".[71] A similar approach was chosen and seemingly widely accepted by Member States in East Timor.[72] It was also applied in Iraq, where the Coalition Provisional Authority (CPA) issued Regulations that were to supersede any law in force in Iraq, i.e. the law that was in force in Iraq as of 16 April 2003, in case of conflict.[73] This demonstrates a development in international territorial administration towards the possibility of directly inserting international law into the legal order of the territory through international actors.[74]

Second, it is interesting to note that the initial approach of the SRSG, namely the continuous application of the law of Kosovo before 1999, was altered as a result of protests from Albanian jurists, in particular the Joint Advisory Council on Legislative Matters.[75] Only the law in force before the abolishment of autonomy in 1989 was considered to be sufficiently non-discriminatory towards Albanians and thus

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69 UNMIK/REG/1999/1 of 25 July 1999, section 3, as amended by UNMIK/REG/1999/24 of 12 December 1999, section 1.3.

70 UNMIK/REG/1999/1 of 25 July 1999, section 2; UNMIK/REG/2000/24 of 12 December 1999 and UNMIK/REG/2000/59 of 27 October 2000.

71 Bothe/ Marauhn, see note 26, 155.

72 See UNTAET/REG/1999/1 of 27 November 1999, section 3.

73 CPA/REG/16 May 2003/01, section 2; for a detailed study of these issues in Iraq, see R. Wolfrum, in his article on Iraq, in this Volume.

74 De Wet, see note 34, 331-332; Bothe/ Marauhn, see note 26, 155.

75 Zygojannis, see note 2, 188; for the role of the Joint Advisory Council, see Part IV. 1. a.

suitable for the new situation.[76] The development can be taken as an example of the delicacy of the "rule of continuity", i.e. the continuous application of the law that was in force under the previous government or regime. However, the exceptions made in Kosovo seem to be a unique deviation from such a rule, especially when one takes into account the continuous application of most Indonesian laws – albeit with important exceptions – under UNTAET[77] and of Iraqi law under the CPA and later on.[78]

The question must be asked, however, whether the concentration of power, which led to a complete *de facto* governmental control by UNMIK, is legitimate in light of the mandate of Resolution 1244. Unlike Resolution 1272 regarding UNTAET, Resolution 1244 does not explicitly vest legislative and executive powers and the administration of the judiciary in UNMIK. It rather enumerates objectives and functions at the same time as it stresses the sovereignty and territorial integrity of the FRY.[79] One could therefore argue that complete legislative powers, including the right to abrogate the Yugoslavian law in force,[80] goes beyond the authorisation under Resolution 1244 which could be seen as merely outlining administrative tasks. Accordingly, the FRY has argued that in the initial stages of the mission, the SRSG had "usurped more power than he was given under Security Council resolution 1244 (1999)".[81]

However, for the fulfilment of the objectives with which UNMIK is mandated by the Security Council, it requires full legislative powers and at least initially control over the judiciary.[82] Promoting human rights as well as completely rebuilding and democratising a society which had up to that point been dominated by a discriminatory and suppressive legal system requires extensive legal reform.[83] For similar

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76 Zygojannis, see note 2, 188; Irmscher, see note 26, 358.

77 Compare UNTAET/REG/1999/1 of 27 November 1999, section 3.

78 CPA/REG/16 May 2003/01, section 2.

79 S/RES/1244 (1999) of 10 June 1999, para. 11 and para. 1 in conjunction with Annex 1 and Annex 2, para. 8.

80 See UNMIK/REG/1999/24 of 12 December 1999.

81 *Memorandum of the government of the FRY on the U.N. Security Council Resolution 1244 (1999), Part II*, of 5 November 1999, para. 6, available at: http://www.serbia-info.com/news/1999-11/05/15429.html (last visited 1 June 2005).

82 Bothe/ Marauhn, see note 26, 153.

83 Frowein, see note 26, 47.

reasons, the justice system and the executive had to be completely restarted and changed. In other words, the objectives could not be pursued in practice without possessing full governmental powers.[84] This argument at the same time expresses the functional limitations that UNMIK has to obey in the exercise of its broad powers. The exercise of governmental powers is further limited by other sources of international law as well as the sovereignty and territorial integrity of Serbia and Montenegro, which must be respected by UNMIK as long as the final status has not been determined.[85] UNMIK Regulations that directly touch upon issues of sovereignty such as the collection of customs[86] or currency matters[87] are problematic in this respect.[88]

2. Legal Status of Kosovo under UNMIK

As already mentioned, Resolution 1244 reaffirms the "commitment of all Member States to the sovereignty and territorial integrity of the FRY".[89] It specifically states that the interim administration for Kosovo aims to establish "substantial autonomy within the Federal Republic of Yugoslavia".[90] This contrasts with the wide scope of UNMIK's responsibilities, which require not only executive, but also legislative and judicial powers.[91] Resolution 1244 therefore has the effect of creating a "hybrid situation" by separating *de jure* sovereignty from the *de facto* exercise of public power.[92]

Even though such a division is not free from controversy with regard to its legitimacy, Resolution 1244 provides a mandate for the functionally necessary governmental powers, as long as the sovereignty of Serbia and Montenegro remains largely intact, i.e. as long as core issues of sovereignty are not regulated by UNMIK and as long as the future

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84 Bothe/ Marauhn, see note 26, 153.

85 See for an analysis of the legality of the implementation practice of UNMIK Part V, below.

86 UNMIK/REG/1999/3 of 31 August 1999.

87 UNMIK/REG/1999/4 of 2 September 1999.

88 For further analysis see Part V. 1., below; compare Memorandum of the FRY, see note 81.

89 S/RES/1244 (1999) of 10 June 1999, preamble.

90 Ibid., para. 10.

91 See for this the previous paragraph, above.

92 Stahn, see note 31, 135.

status is not predetermined. Within these limitations, the separation of sovereignty and exercise of public power is justifiable in light of the mandate.

Nevertheless, the "hybrid situation" resulting from the broad scope of objectives is unique and extraordinary, and can hardly be grasped with common terminology or comparisons. It must be differentiated from any previous constellation, but also distinguishes Kosovo from later missions. For example, it differs from the status of Cambodia and Bosnia-Herzegovina, which both remained sovereign states despite the fact that important powers were in both cases delegated to the United Nations Transitional Authority in Cambodia (UNTAC) and the Office of the High Representative (OHR), leading to direct UN supervision and control in many areas.[93] The approach also stands in contrast to the case of UN involvement in East Timor. While the role and scope of governmental powers of UNTAET was equally wide and concentrated, the territory was completely internationalised and independent from Indonesia.[94]

Unlike in the case of East Timor under UNTAET, one cannot speak of Kosovo as of an internationalised territory, as the term suggests that there is no sovereign except for the international community acting through an international organisation.[95] Additionally, this term does not provide any further clarifications with regard to legal implications.[96]

In search of an accurate terminology, the protective function of the international community on which Kosovo entirely depends suggests a classification as a "modern protectorate".[97] But the colonial connotations of such a terminology should caution its usage.

The only terminology that seems to accurately describe the situation while at the same time providing for some conceptual guidance is that of a trusteeship. Although Articles 77, 78 of the UN Charter cannot

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93 For Bosnia-Herzegovina, this is only true for the later period when the High Representative was forced to absorb more power in reaction to the paralysis of the national institutions. Compare K. Oellers-Frahm, in this Volume. For UNTAC's powers, see in detail L. Keller, in this Volume.

94 Compare Benzing, in this Volume.

95 See for the concept of an internationalised territory in the context of territorial administration, H. Hannum, *Autonomy, Sovereignty and Self-Determination*, 1996, 17.

96 Ruffert, see note 27, 629.

97 Stahn, see note 26, 120.

apply directly, there exist strong arguments for an analogy to principles of the trusteeship system of Chapter XII of the UN Charter.[98] Considering the fiduciary and interim character of the administration and the fact that the administration in Kosovo acts in place and in the interest of a future beneficiary without having ownership rights, UNMIK could be seen as sort of a trusteeship administration.[99] This confirms that the trusteeship concept has been implicitly resurrected at least to a certain extent by international territorial administrations acting under Chapter VII.[100] In such cases, the principles of the trusteeship system should then equally apply.[101] Although one should refrain from equating former colonies and situations like Kosovo, the trusteeship concept can at least give guidance to extensive and direct international administration as for example in Kosovo,[102] especially insofar that Security Council Resolutions lack specificity.

3. Self-Determination for Kosovo?

The existence and content of a right to self-determination for the Kosovo Albanians is a question the answer to which has far-reaching consequences not only for the current UN administration, but also for the decision over the future status of Kosovo. In addition, it is of interest for international law in general.

a. The Kosovo Albanians and the Right to Self-Determination

The principle of self-determination as stipulated in Articles 1 (2) and 55 of the UN Charter is part of modern international law[103] and has evolved into a legal right.[104]

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98 Frowein/ Krisch, see note 26, MN 21; Bothe/ Marauhn, see note 26, 152; Stahn, see note 31, 133 and 134.

99 H.H. Perritt, "Structures and Standards for Political Trusteeship", *UCLA J. Int'l L. & Foreign Aff.* 8 (2003), 385 et seq. (402-403); Bothe/ Marauhn, see note 26, 152; Stahn, see note 31, 133 and 134.

100 Stahn, ibid.

101 For an analogical application of the principles of the Trusteeship System, see ibid.; Frowein/ Krisch, see note 26, MN 21.

102 Compare Chesterman, see note 26, 55.

103 See only I. Brownlie, *Principles of Public International Law*, 5th edition, 1998, 601.

The holder of the right can, at least theoretically, also be a minority living within a state,[105] as long as it is a group of people living in a delimited territory which possesses and is closely connected by a distinct history, religion, language, or other cultural attributes, and which is striving to preserve these characteristics.[106] When applying such criteria to Kosovo, it must be recognised that the overwhelming majority of the people living within the specific territory of Kosovo are Albanians who not only share a common history, culture, language and religion which differentiates them from the Serb majority of Serbia and Montenegro, but that they have been desiring to preserve their unique identity, especially since the second half of the 19th century.[107] They therefore fulfil the objective and subjective criteria for being considered a "people" in international law.[108] This is partly confirmed by UNMIK's practice in Kosovo because the Constitutional Framework for Self-Government in

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104 See C. Tomuschat, "Self-determination in a Post-Colonial World", in: C. Tomuschat (ed.), *Modern Law of Self-Determination,* 1994, 1 et seq. (2); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16 et seq. (31); *Western Sahara*, ICJ Reports 1975, 12 et seq. (31-33).

105 Supreme Court of Canada, *Reference re Secession of Quebec*, *ILM* 37 (1998), 1340 et seq. (1373); K. Doehring, "Self-determination", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Vol. I, 2002, MN 29.

106 H.J. Heintze, "Träger des Selbstbestimmungsrechts der Völker", in: K. Ipsen, *Völkerrecht*, 5th edition, 2004, § 28, MN 9-10; Doehring, see note 105, MN 29; the definition using subjective and objective elements goes back to the PCIJ, *The Greco-Bulgarian "Communities"*, PCIJ, Series B, No.17, 1930, 21.

107 See the historical background given in Part II., above.

108 A. Zimmermann/ C. Stahn, "Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo", *Nord. J. Int'l L.* 70 (2002), 423 et seq. (454); J.A. Frowein, "The Protection of Human Rights in Europe and the Right to Self-Determination", *Studime 10* (2003), 9 et seq. (16); G. Seidel, "A New Dimension of the Right of Self-Determination in Kosovo?", in: C. Tomuschat (ed.), *Kosovo and the International Community*, 2002, 201 et seq. (204); F. Münzel, "Läßt sich die Unabhängigkeit Kosovos völkerrechtlich begründen?", in J. Marko (Hrsg.), *Gordischer Knoten Kosovo/ Durchschlagen oder entwirren?*, 1999, 199 et seq. (218-219); a different opinion is held by H. Quane, "A Right to Self-Determination for the Kosovo Albanians ", *LJIL* 13 (2000), 219 et seq. (219-227).

Chapter 1 stipulates that "Kosovo is an entity … which, with its people, has unique historical, legal, cultural and linguistic attributes".[109]

The more controversial and difficult question is the scope of application of such a right, i.e. its substantive content *ratione materiae*. The Friendly Relations Declaration, for example, is foremost describing what could be called a notion of internal self-determination, namely the right of the people living within a state to "freely determine, without external interference, their political status and freely pursue their economic, social and cultural development" without impairing "the territorial integrity or political unity of sovereign and independent states".[110] Under normal circumstances, the content of the right to self-determination for ethnic minorities representing a people excludes secession, but is confined to the right to preserve their specific characteristics *vis-à-vis* the majority and politically participate within the framework of the existing state.[111] Autonomy and self-government can be means to ensure such internal self-determination, although these concepts might also be based on instruments relating to minority rights.[112] As a minority representing a people within Serbia and Montenegro, the Kosovo Albanians are entitled to minority rights which derive from this internal aspect of self-determination.

Defining self-determination as an internal notion reflects the reluctance of states to grant distinct ethnic groups living in a certain territory within sovereign states a right to external self-determination, for fear that this could encourage secessionist aspirations and run contrary to the principle of territorial integrity of sovereign states. Indeed, in the interest of such a fundamental principle which should not be put in jeopardy as it provides the basis for much of the stability and functionality of international relations, the internal solution is preferred and in-

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109 UNMIK/REG/2001/9 of 15 May 2001, para. 1.1.; for more on the Constitutional Framework, see Part IV., below.

110 *Friendly Relations Declaration* of 24 October 1970, A/RES/2625 (XXV), principle 5.

111 A. Eide, "Protection of minorities: Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities", Report to ECOSOC, Commission on Human Rights, Subcommission on the Prevention of Discrimination and Protection of Minorities, Doc. E/CN.4/Sub.2/1993/34 of 10 August 1993, para. 88; Supreme Court of Canada, see note 105, 1373; Doehring, see note 105, MN 32.

112 A. Eide, ibid.

deed preferable.[113] An external right to self-determination should therefore only be acknowledged under very strict conditions. Whether the right to self-determination contains a right of ethnic minorities to secede is therefore highly disputed and even if acknowledged at all, the conditions for such an external right remain controversial.[114]

However, the Friendly Relations Declaration and other Declarations indicate that the respect for territorial integrity should be seen as being dependent on whether the state is respecting the right to self-determination and whether its government represents the whole population without discrimination or distinction.[115] In other words, respect for territorial integrity is linked to the conduct of the state in question. In exceptional cases, namely when a people which is part of a state becomes the subject of systematic and grave human rights violations, secession should be possible.[116] Although strict conditions must be applied to such a right to secession, it is justified as a form of "self-defense"[117] or "ultimate defense".[118] To be sure, it should not be argued for a general right to secession for minority groups within states. A general right is neither recognized by state practice nor desirable as it would be "highly destabilizing at the present stage".[119] However, a right for peoples within states to secede under the outlined exceptional circumstances can help to promote the respect of states for the internal rights of minorities because misconduct could be sanctioned by the then rightful secession.[120] In this sense, the right to secession could even be helpful to preserve the integrity of states as it could function as a

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113 Tomuschat, see note 104, 16 and 17.

114 Hannum, see note 95, 48-49; Doehring, see note 105, MN 36.

115 *Friendly Relations Declaration*, see note 110, principle 5; World Conference on Human Rights, *Vienna Declaration and Programme of Action,* Doc. A/CONF.157/24 of 12 July 1993, reprinted in *ILM* 32 (1993), 1663 et seq., para. 2.

116 Supreme Court of Canada, see note 105, 1373; C. Tomuschat, *International Law: Ensuring the survival of mankind on the eve of a new century*, *General Course on Public International Law,* 2001, 254; Doehring, see note 105, MN 37; Seidel, see note 108, 207-209.

117 Doehring, see note 105, MN 40.

118 Tomuschat, see note 116, 254.

119 A. Eide, see note 111, para. 163.

120 D. Murswiek, "The Issue of a Right of Secession – Reconsidered", in: C. Tomuschat (ed.), *Modern Law of Self-Determination,* 1993, 21 et seq. (26); Seidel, see note 108, 210, S. Oeter, "Selbstbestimmungsrecht im Wandel", *ZaöRV* 52 (1992), 740 et seq. (766).

motivator to grant autonomy and stop discrimination before it is too late.[121] Despite these arguments, state practice in this regard is almost entirely lacking, a fact that demonstrates the political sensitivity of the issue.[122]

The complete abolition of the status of autonomy which Kosovo enjoyed under the Constitution of the Socialist FRY of 1974 in 1989 and the continuous massive violations of fundamental human rights and brutal oppression of the Albanian ethnicity over the following ten years fulfil even the strictest conditions one might demand to overcome the threshold for an internal right to self-determination to become external, i.e. to include the right to secession.[123] Particularly significant in this regard are the attempts of the Serbian government to drive out the Albanian population in 1998-1999.[124] Therefore, there is a strong argument that the Kosovo Albanians had a right to external self-determination in 1999 before the intervention of NATO and the establishment of UNMIK.[125]

b. Self-Determination and Resolution 1244

In contrast to the above considerations, all Security Council Resolutions dealing with the Kosovo crisis reaffirm the commitment of all Member States to the sovereignty and territorial integrity of the FRY.[126] Resolution 1244 stresses that a solution to the crisis should take the principles of sovereignty and territorial integrity of the FRY into consideration.[127] It avoids mentioning the right to self-determination. The

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121 Murswiek, see note 120, 39.

122 Tomuschat, see note 116, 254.

123 Ibid.

124 Doehring, see note 105, MN 40.

125 Frowein, see note 108, 16; C. Tomuschat, "Yugoslavia's Damaged Sovereignty over the Province of Kosovo", in: G. Kreijen (ed.), *State, Sovereignty, and International Governance*, 2002, 323 et seq. (343); J.I. Charney, "Self-Determination: Chechnya, Kosovo and East Timor", *Vand. J. Transnat'l L.* 34 (2001), 455 et seq. (461-462).

126 S/RES/1160 (1998) of 31 March 1998, preamble; S/RES/1199 (1999) of 23 September 1998, preamble; S/RES/1203 (1998) of 24 October 1998, preamble; S/RES/1239 (1999) of 14 May 1999, preamble (reaffirming the integrity and sovereignty of all states in the region); S/RES/1244 (1999) of 10 June 1999, preamble and para. 1 in conjunction with Annexes 1 and 2, para. 8.

127 S/RES/1244 (1999) of 10 June 1999, para. 1 in conjunction with Annexes 1 and 2, para. 8.

only indicator in favour of a right to self-determination could be the reference in Resolution 1244 to the "people of Kosovo".[128] However, neither is such terminology consistently used – other parts refer to the "Kosovo population"[129] or "inhabitants of Kosovo"[130] – nor does it call them "a people". From this, it is safe to conclude that a right to secession or an external right of self-determination for the Kosovo Albanians is not recognised in Resolution 1244.[131]

At the same time, Resolution 1244 seems to propagate an internal solution when it mandates UNMIK to establish "substantial autonomy and meaningful self-administration"[132] and "self-government"[133] in Kosovo. The interpretation of such terms in the light of self-determination is not self-evident. The emphasis on autonomy could simply reflect a tendency in international law to address minority concerns through the recognition of autonomy.[134] Accordingly, the Security Council's support for substantial autonomy for Kosovo in the absence of any reference to self-determination could be understood as testimony for the growing international support for minority protection but not necessarily for the right of self-determination.[135] However, all three concepts, i.e. autonomy, self-administration and self-government are at the same time describing a framework which allows the people of Kosovo a certain legally protected autonomous sphere in which it has the decision-making power to pursue its own development and preserve its characteristics. Despite the absence of a clear reference to self-determination, all of these concepts can thus be understood as expressions of the acceptance that the Kosovo Albanians have an internal right to self-determination.[136] Such a conclusion is supportive of the qualification of the Kosovo Albanians as a people who are generally bearers of the right to self-determination.

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128 Ibid., para. 10.

129 Ibid., preamble.

130 Ibid., para. 10.

131 Von Carlowitz, see note 33, 365.

132 S/RES/1244 (1999) of 10 June 1999, preamble.

133 Ibid., preamble and para. 11 (a).

134 Quane, see note 108, 227.

135 Bothe/ Marauhn, see note 26, 156.

136 C. Stahn, "Constitution Without a State: Kosovo Under the United Nations Constitutional Framework for Self-Government", *LJIL* 14 (2001), 531 et seq. (541); Tomuschat, see note 125, 345; von Carlowitz, see note 33, 366.

What is more important, however, is that Resolution 1244 does not recognise an external right to self-determination even despite large-scale discriminations and human rights violations. This reflects previous state practice in its reluctance to recognise such a right for ethnic groups within states.[137] The approach displays the sensitivity of the issue especially for some of the permanent members of the Security Council which fear for their own national unity, but also corresponds to the objectives of the Security Council acting under Chapter VII, namely to act with a view to establish peace and security, but not to decide on issues of self-determination and territoriality. Secession is avoided as long as other options to achieve these aims exist. The experience with Kosovo indicates that such other options include the complete take-over of the governmental powers of the country by the international community and the *de facto* suspension of sovereignty at least for an interim period.

At the same time, Resolution 1244 reiterates that autonomy, self-government and self-administration are to be promoted "pending a final settlement"[138] and that provisional institutions are established "pending a political settlement".[139] It must be deduced from this wording that Resolution 1244 does not make any final and binding determinations on the future status of Kosovo.[140] It does not rule out the possibility of future independence for the Kosovo Albanians, which would amount to recognition of their external right to self-determination. The core issue of the conflict, namely the question of independence or autonomy for Kosovo, has therefore not been permanently solved.[141] Although politically understandable, the resulting uncertainty over the future has been, as will be seen in the following, a considerable burden for Kosovo and for UNMIK. It has been detrimental to stability and has made it considerably harder for UNMIK to implement its policies while maintaining the support of the population.[142]

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137 Tomuschat, see note 116, 250 and 254.

138 S/RES/1244 (1999) of 10 June 1999, para. 11 (a).

139 Ibid., para. 11 (c).

140 Stahn, see note 136, 539; Independent International Commission on Kosovo, see note 2, 259 et. seq.

141 Yannis, see note 30, 68.

142 K. Eide, "Report on the situation in Kosovo", in: Letter dated 6 August 2004 from the Secretary-General addressed to the President of the Security Council, Doc. S/2004/932 of 30 November 2004, Annex 1, Enclosure, para. 5; International Crisis Group, "Kosovo: Toward Final Status", Europe Re-

c. Self-Determination and Future Status

The status of uncertainty which frustrates Kosovo Albanians, Serbs, efforts of UNMIK and potential investors alike must be resolved as soon as possible if Kosovo is to move ahead and be saved from the danger of plunging back into turmoil.[143] As preparations for future status talks are expected to begin in the second half of 2005, the question must be raised what legal parameters must be added to the highly political discussions about such status. In particular, it is essential to discuss and outline the role of the right of self-determination.

As could be seen from the considerations above, the massive human rights violations and the systematic denial of rights before 1999 satisfied the criteria that justify the exercise of an external right to self-determination. However, the response of the international community helped to end these violations and guaranteed the protection of the people of Kosovo by means of a territorial administration. The mandate of Resolution 1244 for the interim period can be understood as a confirmation of an internal but not an external right to self-determination. In addition, the political situation in Serbia and Montenegro has changed to a democratic government. In light of these new circumstances, which differ considerably from the situation before the intervention, one could argue that internal self-determination must again take precedence over a right to external self-determination that might have existed in 1999.[144]

There are good reasons to make such an argument. With respect to the importance of the principles of territorial integrity and sovereignty, it was previously seen that external self-determination for minority groups should only apply in exceptional cases as a form of self-defence. Therefore, now that the human rights violations have ceased and that democracy has reached Belgrade, the need for such a drastic measure seems to have vanished. But can such a change of circumstances justify that a right that has come into existence at one point in the past has ceased to exist? Even if a change in circumstances was accepted as a fact which could entail such consequences, it is important to note that the international intervention has only stopped the human rights violations, but otherwise created a *de facto* separation of Serbia and Montenegro

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port No. 161 of 24 January 2004, available at: http://www.crisisweb.org/home/index.cfm (last visited 1 June 2005).

143 International Crisis Group, see note 142, 1.

144 Zimmermann/ Stahn, see note 108, 456.

and Kosovo. It has not led to a situation which could be regarded as a functioning autonomy within Serbia and Montenegro. Therefore, no circumstances have arisen which could be considered as proof that the right to self-determination will be secured in the future. Of course, the regime change in Serbia and Montenegro encourages hopes in that direction, but this is not sufficient, especially as it would be difficult to explain how an internal change of government could lead to a re-evaluation of the international rights of the Kosovo Albanians.

At a minimum, it is hard to perceive how a people should be required under international law to be part of and pay allegiance to a state that has considered them an enemy and has attempted to rid itself of this part of the population.[145] A future settlement must therefore at least pay tribute to the right to self-determination by respecting the will of the people of Kosovo. There can be no imposed solution without some sort of democratic participation of the people of Kosovo, be it through a referendum or elections.[146] Any imposed solution could neither be understood as being in line with the right to self-determination nor would it promise to be a politically feasible solution in the long run.[147] Given the clear wish for independence and distrust of Belgrade among Kosovo Albanians, which represent over 90 per cent of Kosovo's population, independence seems to be the most likely outcome.[148]

Of course, one must not neglect other legally relevant principles or purposes of the international legal order expressed in the UN Charter. Regarding the maintenance of peace and security, some considerations seem to strongly favour an internal solution. One fear is that independence for Kosovo could encourage renewed violence in the whole region, in particular Montenegro and Macedonia, and encourage nationalist Albanian demands for a Greater Albanian state, thereby endangering the territorial integrity of the neighbours.[149] Besides, Kosovo's independence could set a potentially dangerous precedent in international law in general. However, while it is important to take the potential dangers to peace and security into account, it must be kept in mind that the integration of Kosovo into Serbia and the FRY against the will of the people has in the past not been able to secure peace and security in the region. A reintegration into Serbia and Montenegro or a partition could

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145 Tomuschat, see note 116, 255.

146 Frowein, see note 108, 17.

147 International Crisis Group, see note 142, 25.

148 Id., 6 and 7.

149 Ibid.; Independent Commission on Kosovo, see note 2, 269.

equally have unintended consequences such as further disillusionment of the Albanian population and entail renewed radicalisation within Kosovo.

To a certain extent, the potential negative political effects of the exercise of the right to self-determination, for example a domino-effect within the region leading to the creation of a "Greater Kosovo", could be mitigated by conditions linked to independence. One of them could be the respect and the integrity of established frontiers. An international legal rule in support of such a condition derives from the *uti possidetis juris* principle, according to which established frontiers must be respected and not be subject to changes at the time of independence.[150] Although Kosovo is not a case of decolonisation and was not a former state of the FRY, there is no reason why *uti possidetis* should not apply to Kosovo, since it is recognised to be "a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs".[151] Intended to provide for stability and the maintenance of the territorial *status quo*, the principle must be taken into account "in the interpretation of the principle of self-determination of peoples".[152] Applied to Kosovo, this means that the territorial *status quo* of the region must not be reconsidered and challenged by any of the parties involved in the case of independence, except by agreement of all concerned states.[153]

Fervent opposition to independence derives from the fear that independence would be tantamount to eventual expulsion and continued discrimination of the minority groups.[154] To address these fears, a po-

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150 This principle has been used by the ICJ in respect of decolonisation and by the Arbitration Committee for Yugoslavia regarding the independence of former republics of Yugoslavia. See *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, ICJ Reports 1986, 554 et seq. (565); Opinion No. 2 of the Badinter Arbitration Committee, included as Appendix in: A. Pellet, "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples", *EJIL* 3 (1992), 178 et seq. (183-184).

151 ICJ, *Frontier Dispute*, see note 150.

152 ICJ, see note 150, 567.

153 Compare for application of the *uti possidetis juris* principle to Kosovo Frowein, see note 108, 18-19.

154 Independent International Commission on Kosovo, see note 2, 269.

tential solution could, again, be seen in conditional independence.[155] The exercise of (internal or external) self-determination encompasses the task to secure public order and human rights. If such protection cannot be provided or guaranteed, the Kosovo Albanians could risk forfeiting their right to self-determination.[156] Therefore, a condition that could be demanded from Kosovo Albanians in an agreement of "conditional independence" is the protection and respect of minorities, including the Serb community within Kosovo.

In sum, the legal analysis as well as political factors suggest that Kosovo could indeed become the first practical case to confirm as part of the law on self-determination a right to secession in extreme instances of grave and systematic human rights violations. This practice would reflect what had been described in the Friendly Relations Declaration and the decision of the Supreme Court of Canada, namely that self-determination is to be pursued internally within the larger state unless the extremely discriminatory conduct of that state excludes such a possibility. In this sense, the case could confirm a law on self-determination that includes a defence and deterrence mechanism with the potential to help ensure human rights protection and the internal exercise of self-determination in the future.

IV. Implementing Resolution 1244: Six Years of UNMIK Practice in Overview

As seen above, the mandate of the international community for UNMIK demands nothing less than to completely rebuild Kosovo and to establish a new political system. Analysing the implementation practice of such an enormous variety of tasks that range from the provision of electricity to settling property issues[157] is far beyond the scope of this article. Still, some important aspects should receive attention.

The choice of these aspects should not divert attention from the fact that in many respects, UNMIK has worked very effectively and suc-

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155 See for the proposal of granting independence under certain conditions Independent International Commission on Kosovo, see note 2, 271-273; International Crisis Group, see note 142, 25-27.

156 Tomuschat, see note 125, 346.

157 This important issue is addressed by L. von Carlowitz, "Settling Property Issues in Complex Peace Operations: The CRPC in Bosnia and Herzegovina and the HPD/DD in Kosovo", *LJIL* 17 (2004), 599 et seq.

cessfully. However, for the sake of learning lessons from Kosovo for other missions, the following will concentrate on some of the key objectives of UNMIK that are at the same time vital for success and continue to pose problems for the administration.

1. Building of Institutions for Self-Government and Transfer of Authority

UNMIK's mandate is, *inter alia*, to organize and oversee the development of provisional institutions for democratic and autonomous self-government, and to transfer its administrative responsibilities as these institutions are established. While overseeing and supporting the provisional institutions for self-government, it shall progressively transfer authority to them and oversee the final transfer of authority from the provisional institutions to the institutions to be established in conformity with the final settlement.[158] Resolution 1244 does not provide for a specific timetable, nor has UNMIK ever set one. After five years, it still has not transferred all administrative authority to the newly built institutions and has not started the political process towards a final settlement.

UNMIK's political governance in pursuit of this objective during the last five years can be roughly divided into three phases. In a first phase, lasting from July 1999 to January 2000, executive and legislative powers were entirely taken over by UNMIK and the SRSG; it constituted during this time a fully-fledged direct administration without meaningful local participation.[159] In a second phase lasting from January 2000 to May 2001, UNMIK allowed local representatives to have limited participatory rights in administrative matters. The third phase which has lasted from the first general elections to the Kosovo Assembly in November 2001 until today is defined by the "Constitutional Framework for provisional self-government in Kosovo", promulgated by the SRSG in May 2001.[160]

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158 S/RES/1244 (1999) of 10 June 1999, para. 11 (c), (d).

159 For the terminology of direct full-fledged administration, see de Wet, see note 34, 292.

160 UNMIK/REG/2001/9 of 15 May 2001.

a. Phase 1 (July 1999 – January 2000): No Meaningful Participation

During this phase, UNMIK carried out its governmental powers on its own, only allowing for some consultative and advisory participation.

An initial but tentative step towards local participation was the creation of the Kosovo Transitional Council (KTC) in July 1999. It included twelve representatives of political parties and ethnic groups and could make recommendations regarding UNMIK's decision-making process. Similarly, the Joint Advisory Council, established due to pressure from local judges and prosecutors, had the consultative task to review and comment on draft legislation and propose new legislation. It was composed of 20 national and international legal experts.[161]

An advisory and consultative role in the administration of the judiciary was also given to a local Advisory Judicial Commission.[162] The Commission advised the SRSG on the appointment of judges and was consulted in cases of removal of national judges and prosecutors. However, full authority for the appointment and removal of judges remained with the SRSG who had wide discretion in this regard.[163]

b. Phase 2 (January 2000 – November 2001): Local Participation in Administrative Decision-Making

The sharing of provisional administrative management between UNMIK and local community representatives under the Joint Interim Administrative Structure (JIAS)[164] was intended to dissolve the "shadow government" which was emerging in form of a "Provisional Government of Kosovo" and a "Presidency of the Republic" as well as nascent local administrative structures.[165]

Under the JIAS, UNMIK enlarged the KTC to better reflect the pluralistic composition of Kosovo.[166] It also created an Interim Administrative Council (IAC) which functioned as an advisory cabinet to the SRSG and which was composed of eight members, four of whom were the Deputy SRSGs and four of whom were from Kosovo, including

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161 Wagner, see note 26, 134.
162 UNMIK/REG/1999/7 of 7 September 1999.
163 UNMIK/REG/2000/6 of 15 February 2000.
164 UNMIK/REG/2000/1 of 14 January 2000.
165 Von Carlowitz, see note 33, 375; Yannis, see note 30, 77.
166 UNMIK/REG/2000/1 of 14 January 2000, para. 2.1.

three Kosovo-Albanians and one Serb.[167] The IAC could make recommendations to the SRSG for amendments to the law and for new regulations.[168] In case of disagreement with these, the KTC could make different recommendations to the SRSG who then decided.[169] However, the SRSG, in the end, decided alone; he only had to explain his reasons in writing should he decide contrary to a three-quarters majority of the IAC.[170] The procedures gave both Councils only a very limited role, but were useful as a testing ground for democratic procedures and gave the local population further possibilities to voice their opinions.

The novelty which gave its name to the JIAS was the integration of SRSG-appointed Kosovars serving as co-heads alongside an UNMIK official in leading the 20 newly established Administrative Departments.[171] These departments, which covered all areas of the administration,[172] implemented policy guidelines of the IAC and could make policy recommendations to their respective Deputy SRSG.[173]

The local administration was, from January 2000 onwards, performed by Municipal Administrative Boards headed by an UNMIK Municipal Administrator. He appointed the members, thereby trying "to the extent possible" to include Kosovo members. The Municipal Administrator also supervised the institutions of self-government which were established on the municipal level.[174] Municipal Assemblies were directly elected in October 2000, and again in 2002 and 2004. They are authorised to manage a considerable amount of their own local affairs, such as urban planning and building, public services, education, health care and environmental issues.[175] This includes the power to promulgate local municipal regulations.[176]

The transfer of authority to the Municipal Assemblies was the first real step of UNMIK in establishing provisional institutions of self-government and in transferring power. However, the SRSG retained the

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167 Ibid., section 4.

168 Ibid., para. 3.1.

169 Ibid., para. 2.5.

170 Ibid., para. 6.2.

171 Ibid., section 7.

172 From education and culture to media development and justice, see ibid., para. 7.1. in conjunction with Annex.

173 Ibid., paras. 7.2 and 7.3.

174 UNMIK/REG/2000/45 of 11 August 2000.

175 UNMIK/REG/2000/45 of 11 August 2000, paras 3.1 – 3.3.

176 Ibid., para. 4.1.

final decision-making power in all areas. He can "set aside" decisions taken by the municipality if they are contravening the applicable law or if they are not taking sufficient account of the interests and rights of minorities.[177] This already indicates what is later confirmed under the Constitutional Framework, namely that the protection of minority rights is a problematic issue which gives rise to the retention of power of the SRSG.

c. Phase 3 (November 2001 – today): Kosovo-Wide Provisional Institutions of Self-Government

A major milestone in the five years of UNMIK practice were the first Kosovo-wide elections on 17 November 2001 of the Kosovo Assembly. The Kosovo Assembly is the main organ of the "provisional institutions of self-government" (PISG) established under the Constitutional Framework for Provisional Self-Government in Kosovo[178] with a view to gradually transfer power from UNMIK and thereby establish autonomous institutions.

The 120-seat Assembly is the legislative body for Kosovo within the areas of responsibilities transferred progressively by UNMIK. Such powers include all fields of governmental affairs, ranging from economic and financial policy to transport and judicial affairs.[179] The devolution of these powers to the Assembly was completed in December 2003 when the responsibilities within the fields of environment, media, culture and agriculture were transferred.[180]

The SRSG continues to retain a number of important powers which are discharged by UNMIK directorates. These include, *inter alia*, the ultimate authority on the budget and on the appointment of judges as well as responsibility over the Kosovo Protection Corps (former UÇK), monetary policy, customs, international relations, property administration and the coordination with KFOR.[181] Some of these reserved powers are attributes of sovereignty, some are not. In addition, and very importantly, the ultimate authority rests with the SRSG who oversees and can take "appropriate measures", including dissolving the Assembly or not signing its laws, if actions of the provisional institu-

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177 Ibid., para. 47.2.

178 UNMIK/REG/2001/9 of 15 May 2001.

179 Ibid., chapter 5.

180 Ibid.

181 Ibid., chapter 8.

tions run counter to the provisions of Resolution 1244.[182] The different SRSGs have made use of this ultimate authority in numerous cases,[183] although the practice was rather cautious when compared to the High Representative in Bosnia-Herzegovina. For instance, the SRSG denied the Kosovo Assembly the right to more decision-making power through amendment of the Constitutional Framework in July 2004.[184] The example reflects the tensions that have existed from the beginning between local leaders who demanded a further transfer of authority and the policies of UNMIK to maintain large amounts of authority until certain standards are met by the existing institutions.[185]

Further responsibilities of the Kosovo Assembly are the election of a President of Kosovo and the government which is led by a Prime Minister. While the President has a merely representative role, the government can propose laws and is the executive body.[186]

Overall, the Constitutional Framework is remarkable for its detailed protection mechanisms for members of minorities. Twenty out of the 120 seats of the Assembly are reserved for minority communities.[187] Six members of the Assembly can submit a motion claiming that a proposed law would violate vital interests of their community.[188] In addition, at least two ministers must be from a non-majority community.[189] While these guarantees helped to convince Serbs to participate in the 2001 elections, the elections of 23 October 2004 were a setback in this regard. Only one percent of the potential Serb electorate went to the polls.[190] In fact, Serbs have not participated in any of the institutions since the March violence. This underlines that the political integration especially of the Serb community continues to be a challenge just as it has been over the past five years.[191]

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182 Ibid., chapter 12.

183 Doc. S/2002/1376 of 19 December 2002, para. 6.

184 UNMIK news of 8 July 2004, available at: www.unmik.org (last visited 1 June 2005).

185 See already Doc. S/2002/1376 of 19 December 2002, para. 6.

186 UNMIK/REG/2001/9 of 15 May 2001, chapter 9.

187 Ibid., para. 9.1.3.b).

188 Ibid., para 9.1.39.

189 Ibid., para. 9.3.5.

190 Doc. S/2004/907 of 17 November 2004, para 7.

191 See already Doc. S/2001/926 of 2 October 2001, para. 5.

The Constitutional Framework is not intended to be a constitutional document.[192] It is not the highest ranking norm, but shares the same rank with other Regulations. UNMIK thus remains within the limits of Resolution 1244 insofar as it does not allow Kosovo to have a constitution, because this would have to be seen as a step towards an independent final status without a previous political settlement and run contrary to Resolution 1244.[193]

In sum, the SRSG not only retains the ultimate authority, but also retains important powers. While the retention of the ultimate authority with its sanctioning-capacity is a necessary mechanism to effectively "oversee" the provisional institutions in conformity with Resolution 1244, retaining important reserved powers that are not attributes of sovereignty is not a legal necessity. It could even be argued that Resolution 1244 rather foresees a complete transfer of powers except for some ultimate monitoring authority and powers that are attributes of sovereignty.

With regard to facilitating the final status discussion, UNMIK has pursued a benchmark policy, i.e. to establish certain benchmarks that must be met before the final status discussion and the question of the final transfer of authority can begin. Although having already been applied since 2001, this so-called "standards before status" policy was further concretised in December 2003 with the publication of the "Standards for Kosovo",[194] followed by the "Kosovo Standards Implementation Plan" of 31 March 2004.[195]

These documents describe democratic standards demanding *inter alia* functioning democratic institutions, rule of law, establishment of complete freedom of movement within Kosovo, sustainable returns and minority protection and a legal framework for a competitive economy as well as direct Belgrade-Pristina dialogue. This dialogue had been interrupted for one year due to Belgrade's reluctance after the March violence.[196] However, some progress could be reported by May 2005.[197]

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192 Stahn, see note 136, 543-549.

193 Ibid., 549.

194 UNMIK/PR/1078 of 10 December 2003, available at: www.unmik.org (last visited 1 June 2005).

195 *Kosovo Standards Implementation Plan* of 31 March 2004, available at: www.unmik.org (last visited 1 June 2005).

196 See Doc. S/2004/907 of 17 November 2004, para. 47; Doc. S/2005/88 of 14 February 2005, para. 13.

197 Doc. S/2005/335 of 23 May 2005, para. 8.

The persistent problems especially with regard to sustainable return, minority protection and the freedom of movement for these groups have been outlined above.

With this strategy, UNMIK makes use of its discretion when to start the process for the final status of Kosovo by linking it to the fulfilment of these standards. Additionally, the "standards before status" policy aims to ensure that Kosovo is sufficiently equipped for democratic self-government before further devolution of power. The policy reflects an approach to conflict-resolution and peace-building that could be called an "earned sovereignty" approach. This approach describes that starting from an initial phase of shared sovereignty or *de facto* sovereignty by international actors, sovereign powers and authority will be progressively transferred to newly established institutions, until the final status will be decided upon. The transfer of power and determination of final status will possibly be linked to certain standards of human rights and democracy which must be implemented and complied with by the newly established institutions.[198]

Although generally useful as a tool to mitigate uncertainties and guarantee the implementation of certain standards, it is key to the success of the approach that authority is actually continuously transferred as progress is being made.[199] In Kosovo, however, transfer of authority has been too slow and insufficient, even if motivations of the international actors for a more careful pursuit of these policies is understandable in light of the political instabilities in Serbia and Montenegro after the fall of Milošević.[200] Furthermore, it seems worth considering whether the uncertainty over the final status has not diminished the incentives for the Kosovo Albanians to implement the standards. Be this as it may, it is clear that the "standards before status" approach has never been accepted by the leaders of Kosovo as they have never considered the standards their own goals. One possible explanation for

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198 See generally J.R. Hooper/ P.R. Williams, "Earned Sovereignty: The Political Dimension", *Den. J. Int'l L. & Pol'y* 31 (2003), 355 et seq.; P.R. Williams/ F.J. Pecci, "Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination", *Stanford J. Int'l L.* 40 (2004), 347 et seq. (350).

199 P.R. Williams, "The Road to Resolving the Conflict over Kosovo's Final Status", *Den. J. Int'l L. & Pol'y* 31 (2003), 387 et seq. (424).

200 Ibid., 415.

these difficulties could be that the approach was applied too statically and that benchmarks were set too high.[201]

2. Law and Order

UNMIK and KFOR have made tremendous efforts in order to maintain law and order by establishing a multi-ethnic judiciary and a local police force, the Kosovo Police Service (KPS).[202] Although the security situation had been continuously improving over the years,[203] the outbreak of violence in March 2004 against minority communities and international security forces has demonstrated the continuous fragility of the situation and represented a major setback to stabilisation efforts.

The development cannot be dismissed as a singular incident, because it was the result of "an organised, widespread and targeted campaign".[204] It testifies to what remained one of the main challenges for UNMIK and KFOR over five years, namely the ethnically motivated violence against Kosovo's minority communities.[205]

What has been called a "failure to protect"[206] by UNMIK and KFOR in March 2004 certainly has many causes, but one contributing factor was possibly the lack of coordination between the different institutions responsible for security matters (KFOR; UNMIK police, KPS).[207] Detrimental in this regard might have been the parallel structure of KFOR and UNMIK. A unified command for security forces as in East Timor might be a better approach for handling such emergency situations.

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201 See for this question also Part VI. and VII., below.

202 The Kosovo Police Force was more numerous than the international UNMIK police by 2002, see Doc. S/2002/1376 of 19 December 2002, para. 12.

203 A 27 per cent drop in the crime rate was reported in the first 3 years, see Doc. S/2002/1376 of 19 December 2002.

204 Doc. S/2004/248 of 30 April 2004, para. 2.

205 This has been a continuous problem from the very beginning of the mission. See already Doc. S/1999/779 of 12 July 1999, para. 5 and Doc. S/2001/926 of 2 October 2001, para. 7.

206 Compare for this assessment the recent report by Human Rights Watch, "Failure to Protect: Anti-Minority Violence in Kosovo, March 2004", Human Rights Watch 16, No. 6 (D) of July 2004, 3, available at: http://www.hrw.org/reports/2004/kosovo0704 (last visited 1 June 2005).

207 Human Rights Watch, see note 206, 11.

As one of the main incentives for extremists was to drive the remaining Serbs from Kosovo, one should critically ask whether the uncertainty of the future status of Kosovo has not been counterproductive with respect to mitigating ethnic tensions. For example, the feeling that Serbs are holding up the process for determining the future status has fuelled the support for extremists.[208]

3. Post-Conflict Justice

After the end of the conflict, the physical infrastructure of the judicial system was largely destroyed. Qualified personnel was scarce, unwilling or out of practice due to the restrictions for ethnic Albanian lawyers under the judicial system of the FRY.[209] As a consequence, UN authorities had to rely on foreign lawyers and judges in support of local personnel in order to reinstall the justice system. The result was the establishment of mixed courts, i.e. courts which have mixed compositions of international and local judges.

War crimes were largely dealt with by these mixed courts. Although international judges were in the minority during an initial phase, all war crimes have been prosecuted mostly by international prosecutors and judged by tribunals in which international judges have disposed of the majority from December 2000 onwards.[210] Only the worst atrocities are being pursued by the ICTY, which is exercising its jurisdiction also in respect of Kosovo, but which would otherwise be overburdened by the sheer number of cases.[211]

Overall, the utilisation of mixed courts was a response to the shortcomings of a purely international or a purely national approach. Although the model has worked rather well in Kosovo, it can be still im-

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208 K. Eide, see note 142, para. 5.

209 Stahn, see note 26, 174-175.

210 Compare UNMIK/REG/2000/64 of 15 December 2000.

211 ICTY, *Statement by Carla del Ponte Prosecutor of the International Criminal Tribunal for the Former Yugoslavia on the Investigation and Prosecution of Crimes Committed in Kosovo*, PR/P.I.S./437-E, 29 September 1999, available at: http://www.un.org/icty/latest/index.htm (last visited 1 June 2005).

proved if it is strategically prepared and better coordinated from the outset and not built *ad hoc* without much preparation as in Kosovo.[212]

A similar model of mixed courts has been applied in East Timor[213], Sierra Leone[214] and is foreseen in the plans for the Extraordinary Chambers in the Courts of Cambodia (ECCC).[215] The cases of Kosovo, East Timor and Sierra Leone indicate that mixed courts become necessary in situations of emergency following a break-down of the judicial system. They can be useful and important tools to bring about justice and reconciliation, even if only supplementing international criminal courts such as the ICTY or, in the future, the ICC. With respect to the latter, mixed courts could ensure the functioning of the complementarity mechanism.[216] They are arguably advantageous to other solutions insofar as they have the potential to provide for greater legitimacy in the eyes of the population and improve the capacity of the domestic legal institutions.[217] In addition, the fact that trials are held on the territory with the participation of locals, arguably enhances reconciliation.[218]

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212 G.L. Naarden/ J.B. Locke, "Peacekeeping and Prosecutorial Policy: Lessons from Kosovo", *AJIL* 98 (2004), 727 et seq. (743).

213 M. Benzing, in this Volume.

214 M. Goldmann, in this Volume.

215 See L. Keller, in this Volume; for a good comparison of the different approaches and an assessment see C.P.R. Romano, "Mixed Jurisdictions for East Timor, Kosovo, Sierra Leone and Cambodia: The Coming of Age of Internationalized Criminal Bodies?", *The Global Community: Yearbook of International Law & Jurisprudence,* Vol. I (2002), 97 et seq.

216 See A. Cassese, "Mixed Courts and Tribunals Trying International Crimes as an Alternative to Other Options for Fighting Impunity", in M.D. Đilas/ V. Đerić (eds), *The International and the National: Essays in Honour of Vojin Dimitrijević*, 2003, 111 et seq. (121).

217 L.A. Dickinson, "The Promise of Hybrid Courts", *AJIL* 97 (2003), 295 et seq. (310); for more on these issues see Stahn, see note 26, 174-176; H. Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor", *AJIL* 95 (2001), 46 et seq.

218 Cassese, see note 216, 117; for details on the difficulties facing mixed courts, see F. Egonda-Ntende, "Justice after Conflict: Challenges Facing 'Hybrid' Courts: National Tribunals with International Participation", *Journal of International Law of Peace and Armed Conflict* 18 (2005), 24 et seq.

4. Economy

The economic reconstruction pillar headed by the EU has successfully established a banking sector and concentrated its efforts on privatisation of the formerly socialist economy.[219] Despite high growth rates in the first three years,[220] the economy is far from being self-sustaining.[221] It suffers *inter alia* from decreasing international aid and lack of private investment. Again, the unresolved status of Kosovo has added to the already difficult situation, because it has hindered access to lending from international financial institutions[222] and made it difficult for Kosovo to be an equal trading partner with other countries. For example, Kosovo cannot fully participate in the European Union's Stabilisation and Association Process.[223] However, creative solutions have solved some of these difficulties. The lack of eligibility to participate in the European Union's Stabilisation and Association Process was overcome by creating the Stabilisation and Association Tracking Mechanism (STM), a joint working group of officials from the European Commission, UNMIK and the Kosovo Provisional Institutions. The STM pursues the goal of promoting reforms and standards with a view to prepare Kosovo for closer integration into the EU. It is connected to substantial financial aid.[224]

The precariousness of the economic situation is demonstrated by the 60-70 per cent unemployment rate which is a primary source for frustration and disillusionment.[225] Non-Albanian minorities continue to be the most severely affected (90 per cent unemployment). To make matters worse, the economy is expected to downslide even more in the near future as international aid will be declining.[226]

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219 The privatisation process is previewed to be completed by late 2006, see Doc. S/2004/907 of 17 November 2004, para. 38.

220 Doc. S/2002/1376 of 19 December 2002, para 32.

221 Doc. S/2004/613 of 30 July 2004, para. 42.

222 Doc. S/2002/1376 of 19 December 2002, para. 33.

223 Yannis, see note 30, 72.

224 For more information on the STM and the relations between the EU and Kosovo, see http://europa.eu.int/comm/external_relations/see/fry/kosovo/index.htm (last visited 1 June 2005).

225 K. Eide, see note 142 , para. 43.

226 K. Eide, see note 142, para.12.

5. Return of Refugees

Most of the refugees of the majority group, i.e. the ethnic Albanians, returned to Kosovo in the first year.[227]

Although considerable efforts for example by means of donor funding programs (e.g. the 2003 Strategy for Sustainable Returns) and information campaigns have been pursued, the low figures of sustainable minority returns continued to be a consistent source of concern for UNMIK and minority leaders.[228] Part of the problem can be seen in the unresolved final status, because minority members fear the possibility of independence. The slow progress experienced a major blow in March 2004. As a result of the violence, more minority community members left Kosovo in 2004 than returned to it.[229]

6. Protection and Promotion of Human Rights

It is obvious that the problem of minority returns is part of the greater issue of human rights deprivations of minorities. Non-Albanian minorities have to live under serious constraints regarding their freedom of movement and suffered large-scale human rights deprivations regarding life, physical integrity, and with respect to their property during the March 2004 violence.[230]

The establishment of the Ombudsperson Institution for Kosovo, which can receive complaints by individuals and investigate complaints from any person or entity in Kosovo,[231] was a major improvement. It increases transparency and has an important watchdog function.

A considerable step forward with respect to human rights protection was also taken by UNMIK when it entered into two monitoring

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227 Doc. S/2000/538 of 6 June 2000, paras 70 et seq.

228 Doc. S/2001/926 of 2 October 2001, paras 36-38; Doc. S/2002/1376 of 19 December 2002, para. 9; Doc. S/2003/113 of 29 January 2003, paras 38 and 39.

229 Doc. S/2004/907 of 17 November 2004, para. 29.

230 For details see Ombudsperson Institution in Kosovo, *Fourth Annual Report 2003-2004* of 12 July 2004, 18- 20, available at: www.ombudspersonkosovo.org (last visited 1 June 2005).

231 UNMIK/REG/2000/38 of 30 June 2000, para. 3.1.

agreements with the Council of Europe.[232] Under one of these agreements, UNMIK will provide the Council of Europe's Committee of Ministers with relevant information as they will monitor compliance with the Framework Convention for the Protection of National Minorities. The other agreement is related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and allows an independent committee of experts to examine the treatment of persons deprived of their liberty in Kosovo. Again, this is likely to increase pressure on the public authorities to comply with the standards of the convention.

V. Legality of the Implementation Practice

The issue of legality is linked to the question which international legal rules are applicable to international administrations. Defining the legal limitations is of utmost importance when dealing with cases in which the UN has basically taken up the functions of the state. The issue of legality is also important insofar as it is linked to the legitimacy of the mission.[233] The following discussion shall contribute to establishing awareness for these questions and outline the legal limits using the example of Kosovo.

1. Territorial Integrity and Sovereignty of Serbia and Montenegro

Being a sub-organ of the United Nations,[234] UNMIK is bound by the purposes and principles of the United Nations which are binding upon the organisation according to Article 2 of the UN Charter. Although not an organ of the United Nations, KFOR is mandated by the UN and is consequently equally bound to the purposes and principles of the UN Charter in the pursuit of its objectives. The obligation to respect

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232 UNMIK/PR/1216 of 23 August 2004; available under http://www.unmikonline.org/press/2004/pressr/pr1216.pdf (last visited 1 June 2005).

233 See below; Perritt, see note 99, 428.

234 It is debated whether UNMIK is a sub-organ of the Secretariat or of the Security Council, but for present purposes it is sufficient to agree upon the fact that it is a sub-organ of the United Nations. Compare for the debate Ruffert, see note 27, 622; Irmscher, see note 26, 355.

the sovereignty and territorial integrity of Serbia and Montenegro can be deduced not only from Article 2 (1) UN Charter,[235] but is also reflected in Resolution 1244.[236]

Although UNMIK has been careful not to preclude final status talks,[237] it has taken numerous decisions which do not testify to great respect for the sovereignty of Serbia and Montenegro.[238] For example, it has introduced a customs system which is completely independent from that of Serbia and Montenegro,[239] issued passports for Kosovars and introduced a new currency,[240] all of which are decisions that lie at the heart of sovereignty. This implementation practice of UNMIK reflects a wide interpretation of the powers given by Resolution 1244 which in many aspects cannot be reconciled with the *de jure* sovereignty of the FRY guaranteed *inter alia* by Resolution 1244. The government of the FRY protested against these violations in a detailed memorandum to the Security Council in 1999.[241]

2. Principle of Self-Determination

UNMIK, as an organ of the United Nations, mandated by the Security Council, is bound by the principle of self-determination as stipulated in Articles 1 (2) and 55 in conjunction with Article 2 of the UN Charter. As shown previously, many voices foremost understand self-determination outside of the colonial context as a principle vesting peoples with a right to internal self-determination.[242] Internal self-

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235 See for the interpretation of sovereign equality as including sovereignty and territorial integrity for example the *Friendly Relations Declaration*, see note 110, principle 5.

236 See above at Part III. 2.

237 For example, the Constitutional Framework cannot be seen as a Constitution for Kosovo, one reason for that being that it is not the supreme law of the territory, but remains on the same hierarchical level as other UNMIK Regulations.

238 Yannis, see note 30, 70.

239 UNMIK/REG/1999/3 of 31 August 1999.

240 UNMIK/REG/1999/4 of 2 September 1999.

241 Memorandum of the FRY, see note 81.

242 See only A. Rosas, "Internal Self-Determination", in: C. Tomuschat (ed.), *Modern Law of Self-Determination*, 1993, 225 et seq.; Supreme Court of Canada, see note 105, 1373.

determination or a "federal" [243] right to self-determination can have two main implications.

First, the people of a state have the right to constitute their political system, i.e. decide on the form of government.[244] In this sense, the right might encompass an evolving right to democratic governance, i.e. the right of all citizens of all nations to determine their political status through democratic participation.[245] Second, internal self-determination describes the right of a minority within a state to protect and preserve their characteristics *vis-à-vis* the majority, i.e. through autonomy and self-government.[246] It becomes obvious that the latter aspect harbours the potential to find compromises between the preservation of sovereignty and the accommodation of group rights in cases of conflict. However, despite such promising implications, at least the group rights dimension of an internal right to self-determination must be still considered *in statu nascendi*.[247]

Nevertheless, Kosovo arguably represents one of the first cases in which the international community by means of Resolution 1244 has implicitly acknowledged such an internal right.[248] Therefore, it is worth considering that the concept of internal self-determination applies to the interim period in Kosovo. As UNMIK is acting as the governing body of the territory in a role comparable to that of a state government, it is obliged to have due regard to the requirements of a right to internal self-determination within the interim period. As far as the first dimension of the right is concerned, namely the determination of the political system, the people of Kosovo can of course not determine their interna-

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243 O. Kimminich. "A 'Federal' Right to Self-Determination?", in: C. Tomuschat (ed.), *Modern Law of Self-Determination*, 1993, 83 et seq.

244 Rosas, see note 242, 249; Doehring, see note 105, MN 32; Supreme Court of Canada, see note 105, 1373.

245 For the right to democratic governance in general see T.M. Franck, "The Emerging Right to Democratic Governance", *AJIL* 86 (1992) 46 et seq. (58 and 59); J. Kokott, "Souveräne Gleichheit und Demokratie im Völkerrecht", *ZaöRV* 64 (2004), 517 et seq. (525-527); J. Weiler, "The Geology of International Law – Governance, Democracy and Legitimacy", *ZaöRV* 64 (2004), 547 et seq.

246 R. Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts*, 1996, 23; Tomuschat, , see note 125, 345; Doehring, see note 105, MN 34.

247 D. Thürer, "Self-Determination", in: R. Bernhardt (ed.), *EPIL* IV (2000), 364 et seq. (373).

248 Zimmermann/ Stahn, see note 108, 456-457; Tomuschat, see note 125, 345; see for this argument already Part III. 3, above.

tional status. However, internal self-determination gives them the right to participate in constituting their political system, or, in other words, to decide on their desired form of autonomy. Consequently, UNMIK is bound accordingly when discharging its duty to establish "autonomy" and "self-government" in Kosovo. In accordance with this obligation, UNMIK must allow for meaningful participation of the population with a view to ensuring that they determine the features of their autonomy. It prevents UNMIK from deciding essential questions regarding the form and content of their autonomous government because such decisions are predetermining the future format of autonomy. Internal self-determination consequently also requires transfer of important competences as fast as possible. Both the participation of the local population and the transfer of authority have been implemented relatively slow and reluctantly in Kosovo.

3. International Human Rights

a. Human Rights Obligations of UNMIK and KFOR

aa. UNMIK

Resolution 1244 mandates UNMIK to protect and promote human rights.[249] It does not, however, expressly include an obligation for UNMIK itself to obey and respect human rights. However, to conclude that the organisation and its organs are not equally bound by human rights would be overly formalistic and run contrary to the principles of Article 1 of the UN Charter. As a subject of international law mandated by the Security Council, UNMIK is bound to respect international human rights standards, at least insofar as the Security Council, acting under Chapter VII, must respect such norms as guidelines in its actions.[250] Additionally, the SRSG by means of Regulations 1999/1 and 1999/24 explicitly declared all major human rights treaties to be binding upon "all persons undertaking public duties or holding public office in

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249 S/RES/1244 (1999) of 10 June 1999, para. 11 (j).

250 Frowein/ Krisch, "Introduction to Chapter VII", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Vol. I, 2002, MN 28; Irmscher, see note 26, 368-369; Stahn, see note 31, 139.

Kosovo".[251] UNMIK personnel are therefore bound by all major human rights treaties in the exercise of public functions. This technique has been equally applied by UNTAET in East Timor.[252]

bb. KFOR

Although being deployed "under United Nations auspices",[253] Resolution 1244 leaves no doubt that the responsibilities of KFOR are separate from the ones of UNMIK.[254] KFOR troops largely remain under the responsibilities of the sending states which are authorised by the Security Council, but act in their own capacity under Article 48 (2) UN Charter.[255] Consequently, an obligation of KFOR personnel to observe human rights cannot be directly deduced from UNMIK Regulations stipulating the applicability of human rights treaties.[256] The independent role of KFOR was confirmed by Regulation 2000/47, which demands that KFOR shall respect applicable Regulations and law, but only "insofar as they do not conflict with the fulfilment of the mandate given to KFOR under Security Council Resolution 1244".[257]

However, international human rights standards also apply to KFOR. KFOR's mandate requires that actions of KFOR pay due respect to such standards, because Resolution 1244 cannot authorise KFOR beyond the limitations applicable to the Security Council itself. Although such limitations of the Security Council's activities under Chapter VII must always be balanced with the objective to maintain peace, resulting in their function being more akin to that of guidelines

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251 UNMIK/REG/1999/1 of 25 July 1999, section 2; UNMIK/REG/1999/24 of 12 December 1999, para. 1.3. (Regulation 1999/1 merely mentions "internationally recognized human rights standards", which seemingly was not concrete enough, so that all applicable human rights treaties were explicitly mentioned in UNMIK/REG/24, para. 1.3. and UNMIK/REG/59 of 27 October 2000, para. 1.3.

252 UNTAET/REG/1999/1 of 27 November 1999, section 2.

253 S/RES/1244 (1999) of 10 June 1999, para. 5.

254 See already above, at Part II. 1. a.

255 The responsibility for KFOR's actions ultimately remains with the sending states, see below, in this section.

256 J. Cerone, "Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo", *EJIL* 12 (2001), 469 et seq. (473).

257 UNMIK/REG/2000/47 of 18 August 2000, para 2.2.

than limits,[258] KFOR troops cannot act outside such a framework.[259] This view is confirmed by Resolution 1244 when it emphasises that KFOR acts "under UN auspices".[260] In addition, it stipulates that both presences operate towards "the same goals in a mutually supportive manner",[261] and that KFOR must support the work of UNMIK.[262] As the protection and promotion of human rights are of central concern among UNMIK's objectives, KFOR must not undermine this goal by not complying with international human rights standards.[263]

Furthermore, KFOR troops are subject to human rights obligations of their sending states insofar as the latter remain internationally responsible and insofar as the human rights obligations apply extraterritorially.

Regarding the first condition, it can be summed up in short that the command structures of KFOR are such that the decisive control over the mission rests with the sending states. NATO only exercises operational control, i.e. the authority to assign tasks and order troop movements within a certain framework, but cannot, for example, change the mission or deploy troops outside the agreed framework. Therefore, the sending states remain internationally responsible for the actions of their troops.[264]

The second condition, i.e. the extraterritorial application of human rights obligations, is controversial in detail, but there is a clear tendency in international law towards such responsibilities. This is because generally, with a view to avoid legal vacuums, the traditional territorial limits of human rights directed at states must be reconsidered and be increasingly extended to obligate the international actors that are substituting the state in its exercise of authority.[265] Although it is beyond the

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258 Frowein/ Krisch, see note 250, 28.

259 Stahn, see note 31, 151.

260 S/RES/1244 (1999) of 10 June 1999, para. 5.

261 Ibid., para. 6.

262 Ibid., para. 9 (f).

263 Cerone, see note 256, 473-474.

264 For a more detailed analysis with the same result see H. Krieger, "Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz", *ZaöRV* 62 (2002), 669 et seq. (677-683).

265 T. Giegerich, "Grund- und Menschenrechte im globalen Zeitalter: Neubewertung ihrer territorialen, personalen und internationalen Dimension in Deutschland, Europa und den USA", *EuGRZ* 31 (2004), 758 et seq. (759).

scope of this paper to deal with this issue in the necessary depth,[266] such reasoning can be applied to KFOR troops in Kosovo.

According to General Comment 31, article 2 para. 1 of the International Covenant on Civil and Political Rights (ICCPR) is to be understood to include obligations of the states towards "anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".[267] Explicitly mentioned are "forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation".[268] Thus, the obligations and rights of the ICCPR generally apply to the sending states of KFOR and thus to KFOR troops.

The extension of obligations beyond territorial boundaries is more controversial in the regional context, as for example regarding the applicability of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). As all European Member States of NATO are also parties to the ECHR, such applicability would be especially consequential for the case of a KFOR engagement in Kosovo as it would include the jurisdiction of the European Court of Human Rights (ECtHR).

In *Loizidou v. Turkey*, the ECtHR has generally acknowledged the possibility of extraterritorial jurisdiction in cases where a state "exercises effective control of an area outside its national territory".[269] States should generally not be allowed to do abroad what they cannot do at home. Otherwise, the result would be a "regrettable vacuum in the system of human-rights protection".[270] However, a qualification of these general considerations could be seen to appear in the *Bankovic* decision, where the ECtHR stressed that jurisdiction within the meaning of article 1 of the ECHR is foremost to be understood in terms of territorial jurisdiction, thereby emphasising the regional character of the Convention. It generally only applies in "the legal space *(espace juridique)* of

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266 See instead Krieger, see note 264.

267 General Comment 31 by CCPR, Doc. CCPR/C/21/Rev.1/Add.13 of 29 March 2004, para. 10; see also S. Joseph/ J. Schultz/ M. Castan, *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary,* 2004, MN 4.15.

268 Joseph/ Schultz/ Castan, see note 267, MN 4.15.

269 ECtHR, *Loizidou v. Turkey* (Preliminary Objections), 23 February 1995, Series A, No. 40/1993/435/514, para. 62.

270 ECtHR, *Cyprus v. Turkey* (Judgement), 10 May 2001, No. 52207/99, para. 78.

the Contracting States"[271] in which "the FRY clearly does not fall".[272] From this, one could be led to assume that the ECHR does not apply beyond such a space, i.e. in some way spatially qualifying the *Loizidou* ruling to the territories of states that are members of the Council of Europe.[273] However, such a conclusion would somewhat neglect that the Court actually reconfirms the possibility of extraterritorial jurisdiction "when the respondent State, through the effective control of the relevant territory and its inhabitants … exercises all or some of the public powers normally exercised by that Government," but underscores the exceptional character of such a possibility.[274] According to the Court, exceptions can only be made in cases where there would otherwise exist a legal vacuum because "the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention".[275] Seemingly, this description again makes reference to spatial limitations. It is not clear, however, whether this should be taken as a general description of the exceptions, and therefore as a spatial limitation, because the argument appears in a context where the Court is explaining its remarks in *Loizidou* about the need to fill a legal vacuum.[276] Therefore, exceptional extraterritorial application beyond the territory of Contracting States should be a possibility even after this judgement. And indeed, the ECtHR has in *Issa v. Turkey* confirmed that effective control can give rise to jurisdiction even on the territory of states which clearly do not fall within the "legal space" of the Convention.[277]

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271 ECtHR, *Bankovic and Others v. Belgium and 16 Other Contracting States,* No. 52207/99, 12 December 2001, para. 61.

272 ECtHR, *Bankovic,* see note above, para. 80.

273 C.M. Cerna, "Extraterritorial Application of the Human Rights Instruments of the Inter-American System", in: F. Coomans/ Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, 2004, 141 et seq. (171).

274 Bankovic, see note 271, para. 71; R. Lawson, "Life after Bankovic: On the Extraterritorial Application of the European Convention on Human Rights", in: Coomans/ Kamminga, see note 273, 83 et seq. (110-111).

275 Ibid., para. 80.

276 M. O'Boyle, "The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on 'Life after Bankovic'", in: Coomans/ Kamminga, see note 273, 125 et seq. (137); Lawson, see note 274, 114.

277 ECtHR, *Case of Issa and Others v. Turkey*, No. 31821/96, 16 November 2004, para. 74.

In light of these arguments, a clear case of applicability of the ECHR should be during the time period after the ratification of the ECHR by Serbia and Montenegro on 3 March 2004. The so-described condition of "specific circumstances" could be fulfilled afterwards, because the ratification has led to a legal vacuum in Kosovo as compared to the rest of Serbia and Montenegro for the simple fact that Serbia and Montenegro are not exercising effective control over their territory as a result of the *de facto* exercise of governmental powers by UNMIK and KFOR. As KFOR troops are effectively exercising control and at least some governmental functions, especially with regard to security, the sending states are responsible under the ECHR. Considering the object and purpose of the ECHR,[278] the fact that Kosovo would otherwise present a legal vacuum without having had the possibility to join the Convention, as well as the intensity of control that KFOR exercises over the territory and the persons living on it, the ECtHR should have jurisdiction also in this case,[279] i.e. independently of a ratification of Serbia and Montenegro. It remains to be seen whether the ECtHR shares this view,[280] but the decision in *Issa v. Turkey* indicates that it would.

It can be concluded that KFOR's actions must be guided by deference to international human rights standards, the obligation foremost deriving from the international obligations of the sending states and their mandate.[281]

b. Human Rights Violations by the International Actors

With a view to improve future activities in Kosovo or elsewhere, the present study is foremost concerned with the legal structures of the territorial administration in Kosovo. Consequently, the following will only outline some of the areas where action or non-action of UNMIK

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278 See for this argument ibid.

279 See for the same result Stahn, see note 31, 151; Cerone, see note 256, 475-481.

280 An application to the ECtHR regarding the question of responsibility of France under article 1 in conjunction with article 2 of the ECHR with respect to alleged negligent behaviour of KFOR troops in failing to dismantle an unexploded cluster bomb is pending. See ECtHR, *Behrami and Behrami v. France*, Appl. no. 71412/01, 16 September 2003.

281 Similarly Krieger, see note 264, 686; Stahn, see note 31, 151-152.

and KFOR have given rise to concern with respect to compliance with international human rights standards.

With UNMIK and KFOR effectively controlling the territory, they hold some responsibility for the human rights deprivations of members of minority communities. For example, they only insufficiently and negligently fulfilled their protection duties in various cases, especially during the violence in March 2004.[282] In addition to the negligent fulfilment of protection duties, there have also been cases of human rights violations by UNMIK police and KFOR, for instance unlawful detentions of persons even despite judicial release orders.[283]

Furthermore, inconsistencies regarding human rights obligations exist within all areas of law-making by UNMIK.[284] The lack of legal clarity regarding the applicable law in Kosovo raises concerns with respect to the criminal law principle of *nullum crimen sine lege*.[285] As previously seen, the applicable law in Kosovo is the law in force in Kosovo before the abolition of autonomy (22 March 1989), superseded only by UNMIK Regulations.[286] However, the law in force after that date can be applied if the previous law does not cover the issue at hand, provided that it is non-discriminatory and in conformity with international human rights law.[287] Obviously, finding the applicable law under these parameters is not an easy task even for international judges well-versed in international human rights law. Although intended to clarify, a further complication adds to these difficulties, namely that courts can request

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282 J. Narten, "Menschenrechtsschutz in internationalen Mandatsgebieten und ihre strukturellen Widersprüche am Beispiel des Kosovo", *Informationsschriften Humanitäres Völkerrecht* 3 (2004), 144 et seq. (146-147); Human Rights Watch, see note 206, 20 et seq.; Ombudsperson Institution in Kosovo, *Fourth Annual Report 2003-2004*, see note 230, 20.

283 See as examples the cases of *Hamdi Rashica vs UNMIK*, Ombudsperson Report of 31 October 2001 (Registration No. 52/01) and *Shefqet Maliqu vs UNMIK*, Ombudsperson Report of 13 March 2002 (Registration No. 361/01); for a good overview of the human rights problems with UNMIK actions see J. Nilsson, "UNMIK and the Ombudsperson Institution in Kosovo: Human Rights protection in a United Nations 'Surrogate State'", *NQHR* 22 (2004), 389 et seq.

284 For an excellent and detailed discussion of the human rights and rule of law problems with UNMIK legislation see Stahn, see note 26, 162-167; Stahn, see note 31, 154-161; Frowein, see note 26, 50-54.

285 Stahn, see note 31, 156; Frowein, see note 26, 51.

286 UNMIK/REG/1999/24 of 12 December 1999, para. 1.1.

287 Ibid., para.1.2.

clarifications regarding the applicable law from the SRSG.[288] This system leads to the situation that it is not exactly clear before the commencement of court proceedings and possible clarifications by the SRSG which law applies.

Another serious problem is the lack of an independent judiciary. The SRSG has the power not only to appoint, but also to remove any judge or prosecutor from office, a power which he retains as ultimate authority even under the Constitutional Framework.[289] As there exist no safeguards against these decisions, the executive is able to control the judiciary, which is incompatible with the requirements of an independent and impartial tribunal as required under fair trial guarantees of international human rights law.[290]

c. Absence of Effective Remedies against the International Authorities

The special status of Kosovo[291] coupled with immunity clauses for the international actors presents a dilemma regarding effective remedies against human rights violations of public authorities. The situation leaves a gap that raises serious doubts with respect to basic requirements of the internationally guaranteed access to courts, which is included in the fair trial principle of international human rights law.[292]

On the one hand, Serbia and Montenegro is excluded from effective control over Kosovo and therefore not responsible for preventing human rights violations of UNMIK and KFOR. Therefore, human rights obligations of Serbia and Montenegro have no protective effect for the people in Kosovo. On the other hand, with the exception of the sending

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288 Ibid., section 2.

289 UNMIK/REG/2001/9 of 15 May 2001, para. 8.1.

290 See for these guarantees for example article 10 of the Universal Declaration of Human Rights, article 14 (1) ICCPR; see in particular CCPR in *Angel Oló Bahamonde v. Equatorial Guinea*, Case No.4681991 in: 1994 Report of the Human Rights Committee to the General Assembly, Annex IX, section BB, para. 9.4.; A. de Zayas, "The United Nations and the Guarantees of a Fair Trial in the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", in D. Weissbrodt/ R. Wolfrum (eds), *The Right to a Fair Trial*, 1998, 669 et seq. (682-683).

291 See for the status of Kosovo under UNMIK, Part III. 2, above.

292 See article 14 (1) ICCPR; Joseph/ Schultz/ Castan, see note 267, MN 14.14.

states of KFOR, the international actors cannot be held accountable for any of their actions, because they fall under immunity clauses or are not parties to human rights treaties. There does not exist any means for people in Kosovo to litigate or complain against human rights violations of UNMIK, despite the fact that it is under the obligation to respect such rights. The result is unsatisfying from a human rights perspective. As the Ombudsperson Institution in Kosovo rightly observes, it is difficult to accept that the only place left in the Balkans where people are effectively excluded from complaints to the ECtHR for human rights violations of their government (UNMIK) is Kosovo, the one place where the international community has made such efforts to improve human rights protection.[293]

But even before national courts, remedies against UNMIK and KFOR are largely excluded due to immunity claimed by the international actors.[294] Besides granting absolute immunity from jurisdiction before courts in Kosovo to KFOR personnel, which remains under the jurisdiction of the sending states, and to the SRSG and the four Deputy SRSGs, UNMIK Regulation 2000/47 provides all international and local UNMIK personnel with functional immunity before all courts in Kosovo. But foremost, it grants UNMIK as an institution complete immunity from legal process,[295] thus creating a legal vacuum with respect to access to justice.[296]

Such broad immunity clauses contrast with the argument that human rights obligations of states cannot be altered or become superfluous by the mere fact that the sending states are acting within the framework of an international organisation, because the transfer of responsibilities to such organisations should not lead to less effective human rights protection by *de facto* absolving states of their international legal obligations.[297] At the same time, there exists a need for International Organizations to ensure that the organisation or members acting in pursuit of its objectives can fulfil their functions without state inter-

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293 See Ombudsperson Institution in Kosovo, *Fourth Annual Report 2003-2004*, see note 230, 16.

294 UNMIK/REG/2000/47 of 18 August 2000.

295 Ibid., section 3.

296 Narten, see note 282, 145.

297 The argument provides the basis for the judgement of the ECtHR in ECtHR, *Case of Waite and Kennedy v. Germany*, Judgement of 18 February 1999, Appl. No. 26083/94, para. 67; See also Stahn, see note 31, 151.

ference.[298] Accordingly, immunities find an important justification in the principle of functional necessity, which constitutes a fundamental rule of the system of international privileges and immunities.[299]

However, functional necessity can only allow for immunity in those areas in which the functions and objectives could otherwise not be fulfilled.[300] In the case of UNMIK and KFOR, the need for extensive immunity clauses is questionable, because there hardly exists any functional necessity to be safeguarded from the interference of other states. Both present *de facto* the only governmental power and must not seek any protection for themselves or for their personnel from other states. Even when considering security concerns as a legitimate justification for restricting the human rights guarantees, such restrictions cease to be justifiable after the end of an emergency period. Therefore, even if broad exceptions are necessary in the initial stages of a mission, improvement of the security situation and development of institutions decrease the need for immunity from local courts and should thus be accompanied by greater accountability.[301]

As an alternative to more restrictive immunity clauses, the stipulation of which might not always be realistic, the overly restricted access to justice could and should be alleviated by providing alternative means of judicial remedies for individual complaints.[302]

In Kosovo, however, effective alternative complaint mechanisms against human rights violations of the international actors are nonexistent or insufficient.

First, the Ombudsperson Institution for Kosovo cannot be considered an effective remedy to satisfy human rights standards.[303] Though formally supposed to "act independently",[304] the Ombudsperson is ap-

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298 F. Rawski, "To waive or not to waive: immunity and accountability in U.N. Peacekeeping Operations", *Conn. J. Int'l L.* 18 (2002-2003), 103 et seq. (106).

299 M. Gerster/ D. Rotenberg, "Article 105", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Vol. II, 2002, MN 8.

300 Stahn, see note 31, 148.

301 Ibid., 149.

302 Compare for the argument within the context of the ECHR, *Waite and Kennedy v. Germany*, see note 297, para. 68.

303 Compare ECtHR, *Klass and others vs. Federal Republic of Germany*, 6 September 1978, para. 64; Nilsson, see note 283, 400; Stahn, see note 31, 165.

304 UNMIK/REG/2000/38 of 30 June 2000, para. 2.1.

pointed and removed by the SRSG.[305] Besides, it can only make recommendations and is unable to enforce its decisions. Furthermore, it depends on the SRSG for funding.

Second, the two monitoring agreements with the Council of Europe[306] – while being important compliance instruments with respect to the issues covered – cannot be considered effective judicial remedies since they do not provide for any individual complaint possibilities.

It must be concluded that the lack of accountability created by the broad immunity clauses is neither justified by functional necessity nor alleviated by other alternative means of access to justice. This result underscores that the practice of UNMIK in the field of human rights protection is insufficient and unsatisfactory.

4. Law of Occupation

UNMIK and KFOR are deployed in the territory of a foreign country and are exercising complete control over the territory. Must they consequently obey obligations of the law of occupation?

Considering the applicability *ratione personae*, the law of occupation[307] applies when a belligerent state occupies the territory of the adversary or a part thereof.[308] With UNMIK not being a state, the rules do not apply directly with respect to UNMIK. However, the rules could be applicable by way of analogy if the situation is similar to that of an occupation. The KFOR participating countries could be directly obliged if their engagement under UN authorisation is comparable to that of an occupation.

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305 Ibid., paras 6.2 and 8.2.

306 UNMIK/PR/1216 of 23 August 2004, available at: www.unmikonline.org/press/2004/pressr/pr1216.pdf (last visited 1 June 2005).

307 Sources of such law are essentially arts 42 to 56 of the Hague Regulations, annexed to 1907 Hague Convention (IV) and arts 27-34 and 47-78 of the Fourth Geneva Convention of 1949 as well as arts 14, 63 and 69 of the 1977 Additional Protocol I to the 1949 Geneva Convention.

308 C. Greenwood, "The Administration of Occupied Territories in International Law", in: E. Playfair (ed.), *International Law and the Administration of Occupied Territories*, 1992, 241 et seq. (243).

What matters for the application *ratione materiae* are the factual circumstances of the situation, i.e. whether an occupation *de facto* takes place, without regard for the legality of such a situation.[309]

Looking at the factual situation, the terms of KFOR and UNMIK involvement resemble in some ways the situation of the law of occupation. The deployment is of provisional character and Serbia and Montenegro continues to be the *de jure* sovereign of the territory, even if it is completely excluded from exercising such powers temporarily. From this, it could be concluded that the law of occupation applies directly (KFOR) or per analogy (UNMIK).[310]

However, it is important to see that the role of the United Nations and KFOR is essentially different from that of an occupying state, and thus the rules of the law of occupation do not fit for a number of reasons. First, the role to maintain peace and security in a post-conflict situation can hardly be compared to that of an occupying state.[311] Furthermore, the objectives to build peace through reforming a territory, e.g. by establishing democratic self-government, renders inadequate such rules that are – as the rules of the law of occupation – designed to maintain the *status quo ante* of the occupied state. Consequently, UNMIK and KFOR can not be compared to an occupying force. The law of occupation does not apply.

Nevertheless, as there might be gaps in the otherwise guiding framework of Resolution 1244, the law of occupation could be taken to serve as a source of legal guidance.[312]

VI. Some Lessons for Future Missions

When attempting to draw lessons from Kosovo for other international administrations, one must always keep in mind that there does not exist a blueprint formula for a successful mission.[313] In many ways, Kosovo is a unique case, and some of the difficulties outlined above might never

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309 One of the classic principles in the law of occupation is the separation of *ius ad bellum* and *ius in bello*.

310 Irmscher, see note 26, 386-387; Stahn, see note 31, 139.

311 De Wet, see note 34, 320-329 (for a detailed discussion of the applicability of the law of occupation).

312 Irmscher, see note 26, 387.

313 De Wet, see note 34, 339.

be of critical importance again. However, some of the problems that were identified and which will be clarified more thoroughly in the following seem to be representative of more general aspects of effective peace-building, especially in cases of a full-scale direct administration. They should therefore be kept in mind when it comes to future international missions.

The main task of Chapter VII of the UN Charter and of post-conflict governance is to prevent recurrence of war by achieving a self-sustaining peace. The tools that promise to lead to such a result are democratic institutions, reconciliation and a culture of human rights protection,[314] mirrored in the approach of Resolution 1244. However, unlike a cease-fire, such goals cannot be enforced, but must be built with the participation of the target society. The people must make these goals their own and acquire a sense of "local ownership".[315] Political success of the mission will thus ultimately depend to a large extent on the acceptance and actual support of the local authorities and civil population,[316] in particular elites.[317] From this seemingly trite, but nevertheless essential fact follow a number of guidelines that could increase effectiveness and success of a mission but have only received insufficient attention by the decision-makers in the case of Kosovo.

1. Need for a Clear Political Perspective

A mission needs a clear political perspective. Without a clear vision of the future, the mission will not only have problems of credibility and lose the acceptance of the population in the interim period, but the people will find it difficult to know what exactly it is that they should make their own, what it is that they should strive for. The "standards before status" policy has not been able to adequately address or alleviate this uncertainty in Kosovo, but could be improved.

As can be seen in this paper, the unclear final status, accompanied by a lack of clear direction has created difficulties for the work of the Ad-

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314 O. Korhonen, "International Governance in Post-Conflict Situations", *LJIL* 14 (2001), 495 et seq. (524).

315 K. Eide, see note 142, para. 14.

316 De Wet, see note 34, 339.

317 See for the importance of the support and acceptance of elites, R. Utz, in this Volume.

ministration.[318] The discrepancy between the international support for Yugoslavian sovereignty on the one hand and the wish of the overwhelming majority of Kosovo's population for independence on the other [319] has been worsened by the introduction of this factor of uncertainty.

Whatever policy UNMIK was pursuing, it was suspiciously scrutinised by both Kosovo Albanians and the Serb minority who interpreted it as being a step towards or away from independence. Therefore, many issues were unnecessarily politicised.[320] Kosovo Serbs were largely non-cooperative, especially regarding the process of building autonomous institutions for fear that this would create facts on the ground. As hopes for independence were kept high but uncertain, Kosovo Albanians were often dissatisfied with policies intended to establish autonomy without full transfer of power or with attempts to improve standards for minority protection. Consequently, UNMIK's acceptance fell as they increasingly perceived UNMIK to stand between them and independence.[321]

In addition, tensions between the groups remained arguably higher than they would have otherwise; uncertainty about the future status in a way means that the conflict continues.[322] In particular, ethnically motivated violence as in March 2004 could be perceived by short-sighted extremists as a possibility to influence the uncertain outcome of a final decision.

Of course, it would be overly simplistic to just recommend a decision over the final status at the end of the conflict, as the internal as well as international (regional) situation might not be stable enough at that point for a settlement. As in the case of Kosovo, where attention had to be paid to the political situations in Macedonia, Montenegro and Serbia, such decisions must be timed wisely. But it is important to resolve such an issue as soon as possible, or at least provide a clear strategy towards that end.

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318 Korhonen, see note 314, 496.

319 Yannis, see note 30, 68.

320 Id., 74 and 76.

321 D. Harland, "Legitimacy and Effectiveness in International Administration", *Global Governance* 10 (2004), 15 et seq. (16); Yannis, see note 30, 77; K. Eide, see note 142, para.12.

322 Yannis, see note 30, 68 and 78.

UNMIK realised this need and introduced the "standards before status" policy, albeit rather late. While such a strategy has the potential to add a sense of direction to the self-governing institutions and the people, the standards must be perceived as achievable and realistic aims. If they are too strict and inflexible, they will lack credibility. This has been the case in Kosovo, where the "Kosovo Standards Implementation Plan" has outlined the features of a modern and democratic society, a process that can take decades to be completed.[323] Instead, a standard policy should focus more on the most urgent priorities, such as minority returns, decentralisation and reconstruction for the immediate future, in order to achieve a climate between the ethnic groups that allows for a further transfer of responsibilities.[324]

2. Respecting Basic Democratic Standards and Standards of Human Rights to Maintain Credibility and Legitimacy[325]

Territorial Administration needs to remain legitimate and credible in the eyes of the population. Essential for legitimacy and credibility is the adherence of the administration itself to the principles it is trying to implement for the territory. It is at this point where political success and effectiveness are closely connected to questions of the legality of the implementation practice.[326]

In order to be perceived as legitimate and to improve the ability to implement its objectives, an administration acting as the *de facto* government of a state must itself comply with basic requirements of democratic governance, rule of law and human rights if such principles are

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323 Compare K. Eide, see note 142, para. 30.

324 Ibid., para. 31.

325 Legitimacy is here in this context used as perceived or subjective legitimacy, i.e. the "perception of a rule as legitimate by those to whom it is addressed". Compare T. Franck, "Legitimacy in the International System", *AJIL* 82 (1988), 705 et seq. (706); Perritt, see note 99, 425 (citing in part Nigel Purvis, "Critical Legal Studies in Public International Law", *Harv. Int'l L. J.* 32 (1991), 81 et seq. (111)).

326 Although legality can generally enhance the perceived legitimacy by increasing the objective legitimacy, it does not automatically ensure an increase in the perceived legitimacy in every case. See for the differentiation between objective and perceived or subjective legitimacy Perritt, see note 99, 425-426. According to him, "the challenge is to make these factors converge", i.e. to strive for subjective and objective legitimacy, see ibid.

supposed to govern the target society.[327] Effectively fulfilling the mandate therefore demands that UNMIK is not perceived as an absolute sovereign, but as a governing entity which is subject to normative constraints and control.[328] In other words, the international actors in peacebuilding missions must themselves comply with and be accountable under those obligations and standards that they are obliging others to meet. Otherwise, they will not be credible, lose legitimacy and hurt the success of the missions.[329] UN administrations should not only build institutions but also set examples.[330]

The structure of UNMIK did not correspond to important standards of democratic governance and rule of law. As can be seen in this paper, it entailed virtually no separation of power. In particular, it lacked a means of judicial control of the executive, as well as a procedure to at least challenge UNMIK legislation through the courts.[331] Similarly, lack of accountability of UNMIK and, to a lesser extent, of KFOR not only conflicts with basic standards of human rights, but contrasts with basic standards of democratic governance and the rule of law.[332] No democratic state government in the world accords itself immunity from any responsibility as does UNMIK.[333] The wide immunity clauses are therefore inadequate for a meaningful pursuit of the objectives of democratic governance[334] and should be alleviated through the provision of alternative complaint mechanisms.

A concentration of power in the hands of unaccountable institutions might be justified in an initial emergency phase.[335] Besides, there are many practical considerations such as the willingness for troop contributions or the inability of national courts to provide for international standards of due process that are behind these structures. However, at least in the context of transitional government where the UN is the sole

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327 Stahn, see note 31, 114.

328 Korhonen, see note 314, 525.

329 Krieger, see note 264, 698.

330 Korhonen, see note 314, 501, von Carlowitz, see note 33, 370 and 389; Nilsson, see note 283, 411.

331 See UNMIK/REG/1999/1 of 25 July 1999 and UNMIK/REG/1999/24 of 12 December 1999.

332 Rawski, see note 298, 124-125; Stahn, see note 26, 160.

333 See Ombudsperson Institution in Kosovo, *Fourth Annual Report 2003-2004*, see note 230, 15.

334 Rawski, see note 298, 125.

335 See in this sense Wagner, see note 26, 137.

governing power, independent fora to address allegations of human rights violations could be an important step towards a more just, more credible and ultimately more effective transitional administration.[336] The creation of the Ombudsperson Institution and the agreements with the Council of Europe are already pointing into the right direction, but are not yet sufficient. An independent expert commission for human rights violations of international territorial administrative bodies could be a feasible option in this respect.[337]

3. Minority Protection

A priority for achieving sustainable peace must be minority protection and integration. Negligence in this respect results in the loss of trust of the minority and the likely failure of the reconciliation and pacification efforts.

Minority protection and integration presented a major challenge in Kosovo. Although wide guarantees are included in the Constitutional Framework, this challenge has never really been met, stalling the overall progress in consequence. Although building better structures cannot replace nation-building,[338] legal protection mechanisms such as the ones inserted in the Constitutional Framework or sanctioning of the majority can contribute at least towards gaining the trust of minorities. A useful instrument to achieve that end could also be the decentralisation of authority with a view to giving greater authority to minority communities in areas with greater concentration of minority population.[339] This could counteract attempts to drive minorities out and facilitate minority returns. In an attempt to learn lessons from the violence in March 2004 and in response to calls from Belgrade, UNMIK has embarked on a reform of local government.[340] It proposes devolution of more power to the local communities which has the potential to in-

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336 Similarly Rawski, see note 298, 127.

337 Narten, see note 282, 151.

338 See for the concepts of state-building and nation-building, A. von Bogdandy et al., in this Volume.

339 This policy is highly recommended by K. Eide, see note 142, para. 23.

340 UNMIK Working Group on Local Government, "Framework for the Reform of Local Self-Government in Kosovo", 19 July 2004, available at: www.unmikonline.org/misc/frameworkdoc_eng.htm (last visited 1 June 2005).

crease the feeling of security and ownership by the minority communities, thereby contributing to an atmosphere of trust.

4. Ensuring Democratic Participation of the Population

Central for establishing a sustainable peace is the participation of the local population in the peace process from the very beginning.[341] Therefore, the territorial administration must strive to increasingly include the population in the decision-making processes.[342] This approach finds expression in Resolution 1244, to a certain extent in the principle of self-determination[343] as well as in an emerging right to democratic governance.[344] Even though the latter cannot (yet) be seen as legally required, the requirement to base governance on consent and provide for meaningful participation is useful in providing guidance to an effective administration. The same is true for the law of occupation insofar as Resolution 1244 does not address an issue.

Substantial participation of the population in the process and consent of the population has been demonstrated in Kosovo by the participation of the majority in elections.[345] UNMIK has also allowed for broad participation of the population in many areas, but has done so too reluctantly and too slowly. Especially long-term and intrusive measures were introduced without meaningful participation of the population, which for a long time had only limited advisory roles.[346] Examples for such problematic measures are privatisation, the creation of a market economy as well as the change of the domestic commercial law.[347]

Until today, important powers that are neither attributes of sovereignty nor necessary as protection and sanctioning mechanisms have

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341 See for example von Carlowitz, see note 33, 354; Korhonen, see note 314, 528-529.

342 Stahn, see note 31, 138.

343 See Part V. 2., above.

344 See the authors at FN 245.

345 Irmscher, see note 26, 365.

346 See Part IV. 1., above.

347 For example UNMIK/REG/2000/68 of 29 December 2000 (Sale of Goods) or UNMIK/REG/2001/3 of 12 January 2001 (Foreign Investment); see for these issues also von Carlowitz, see note 33, 390; Irmscher, see note 26, 390-395.

remained reserved powers of the SRSG. As shown above, Resolution 1244 only requires a continuous monitoring of the practice of the institutions, but not the retention of the powers until all standards are fulfilled.

The length of this retention is thus neither legally necessary nor is it politically sensible. Of course, the reluctance to cede power must be seen against the background of continuous ethnic division and ongoing challenges to the security situation which have made it more difficult to entrust the local population with its own governance.[348] Nevertheless, the unanimous demand of the Kosovo Albanian leadership to transfer those powers indicates the risk of withholding too much authority for too long. It only leads to further loss of legitimacy of the administration. On the contrary, the transfer of these powers under certain guarantees of implementation could increase further the sense of "ownership" of the society that is vital for final success.[349]

VII. Final Concluding Remarks

The approach to post-conflict state-building as employed in Kosovo combines a set of features which, taken together, outline a specific model of international territorial administration. Such a model can be situated at the extreme end of a spectrum of international involvement. A central feature is the assumption of complete governmental power on the part of a United Nations sub-organ, mandated by the Security Council under Chapter VII. Numerous other actors and organisations are integrated into an administration under the umbrella of the UN as the leading agency. The political transition and devolution of power occur in phases; the initial absolute authority of an international actor is progressively transferred as institutions are built and conditioned upon the implementation of standards of human rights, in particular with respect to vulnerable minorities, democratic governance and rule of law. The end point of the development is the determination of the final status. This approach to transition, which has been called "earned sovereignty" approach[350] despite the fact that only status discussions, but not sovereignty in the real sense can be "earned", intends to mitigate the dichotomy of sovereignty and self-determination. It is especially sa-

348 Stahn, see note 26, 152.

349 Compare K. Eide, see note 142, para. 14.

350 See Williams, see note 199, 422 et seq.

lient in the "standards before status" policy of UNMIK, which incorporates an element of conditionality into the approach.[351]

The trend in post-conflict peace-building towards a larger scope of responsibilities for international actors and for direct intervention in the internal affairs of states had already marked the UN missions in Cambodia and Bosnia-Herzegovina. In both cases, either the initial approach (Cambodia) or the actual implementation (Bosnia-Herzegovina) contained elements of direct administration such as the administration of core governmental functions or legislative powers. However, despite the enormous responsibilities assumed by the UN, parallel state structures (Bosnia-Herzegovina) or at least a legitimate authoritative body (Supreme National Council in Cambodia) existed alongside, a fact that forbids the classification as direct administrations.[352]

The development of the 1990s towards ever stronger international involvement culminated in a structure which effectively replaced the authority of the sovereign state over the territory. The mandate in Resolution 1244 foresees a wide scope of authority and responsibility, thereby distinguishing Kosovo from Bosnia-Herzegovina. The subsequent implementation practice of UNMIK maintained this direction, and insofar deviated from cases like Bosnia-Herzegovina and Cambodia, by effectively suspending the sovereignty of Serbia and Montenegro while at the same time concentrating the power in the hands of the SRSG. In this respect, UNMIK has served as an example for UNTAET in East Timor, where the UN equally assumed absolute power.

The advantages of such an approach obviously lay in the potential to address effectively an emergency situation and establish security. The coordination of the numerous organisations involved under one umbrella organisation counteracts the tendency that numerous actors work at cross purposes, as it happened to a large extent in Bosnia-Herzegovina. That even a division of peace-enforcement and civil administration runs contrary to security is demonstrated by coordination problems between KFOR and UNMIK, and has been improved in East Timor where the security force and the civil administration were united under one command structure.

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351 "Conditional sovereignty" is an optional element of the "earned sovereignty" approach, see Williams/ Pecci, see note 198, 356; for the approach in general see Hooper/ Williams, see note 198.

352 See for details the articles of L. Keller and K. Oellers-Frahm, in this Volume.

In some ways, the initial concentration of civil and military power in the hands of the international actors is also reflected in the structures established in the immediate aftermath of the conflict in Iraq, exemplified by the role of the Coalition Provisional Authority and its power to legislate.[353] The obvious difference to the model of Kosovo and East Timor is of course the role of the UN, which is negligible in Iraq. The choice of the international community to vest such extensive tasks and responsibilities in the hands of a UN organ acting under the mandate of the Security Council pays tribute to the need for international and internal legitimacy.[354] The UN is the actor least likely to be perceived as illegitimately interfering with the internal affairs of a country.[355] The special legitimacy and neutrality of the UN also makes it the ideal candidate to initiate and moderate the dialogue between the elites of the territory which is essential for success.[356]

However, even the legitimacy of the UN will suffer from prolonged involvement against the will of the people and from discrepancies between the means and the ends of a mission. The case of Kosovo shows that a model of direct administration where international actors are vested with absolute authority as it is foreseen by Resolution 1244 presents a serious contradiction between the structures of absolute authority and the goal to build democratic self-governing institutions. This contradiction, reflective of the dilemma between security and democratic governance which is vexing for all post-conflict administration, must be solved by balancing both interests. Even if emergency requirements of the initial post-conflict situation require a neglect of some standards, the international administration cannot afford in the long run to maintain structures void of basic standards of human rights protection and accountability for its own behaviour, especially if the obedience of such standards by the population is considered a precondition for the devolution of power. In addition, mechanisms of accountability and rule of law which equally apply to international actors are essential for effective governance and for establishing a culture of human rights and rule of law.[357] If it proves to be politically infeasible to limit immu-

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353 See already Part III. 1. b. cc., above; for more details see R. Wolfrum, in his article on Iraq, in this Volume.

354 See for these terms and the importance of legitimacy Perritt, see note 99.

355 Caplan, see note 65, 22.

356 See for the role and importance of elites and their dialogue R. Utz, in this Volume.

357 Chesterman, see note 26, 153.

nity clauses, which lack some of their functional necessity in a situation where absolute authority is held by the international actor, other control mechanisms must be established. This political and legal imperative is not confined to the UN as the main actor. It is even more essential in a situation where it is not the UN, but a coalition or single states which assume such functions without being able to rely on the political legitimacy of the UN, as for example in Iraq.

The dilemma between participation and self-determination on the one hand and security concerns on the other resurges in the approach to local participation and the transfer of authority. The dilemma concerns all post-conflict administrations, and it regularly proves difficult to find the right balance, as the most recent problems in Iraq again demonstrate. But in cases like Kosovo, where vulnerable minorities depend on long-term protection, the issue attains even higher complexity. The vulnerability of minorities, e.g. the Kosovo Serbs in Kosovo, might not only require the choice for the model of direct administration, but also necessitates that the administration withholds certain powers even after an initial emergency phase.

In such a situation, what seems to be important is clarity about the process of transition.[358] The above mentioned "earned sovereignty" approach can be a helpful means to provide for such clarity and serve the cause of minority protection and human rights through the established conditionalities.

The utility of such an approach is confirmed by the experience in Bosnia-Herzegovina, where the danger of devolving too much power too soon became apparent. The case of Iraq might provide for a useful comparison, since the devolution of power, at least in comparison with Kosovo, has been particularly rapid. The only preconditions for devolution of power are elections and a representative government,[359] i.e. it is hardly dependent on a set of standards or benchmarks. It remains to be seen if such an approach can also be crowned with success, a result that would undermine the claim to utility of the "earned sovereignty" approach.

Indeed, "earned sovereignty" harbours some dangers, some of which have become apparent in Kosovo. First, the withholding of power for too long can infringe on legitimacy as it shifts all responsi-

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358 Chesterman, see note 26, 152-153.

359 S/RES/1483 (2003) of 22 May 2003, para. 9; S/RES/1546 (2004) of 8 June 2004, para. 4 in conjunction with para. 12.

bilities and therefore all potential blame to the international actors. Second, the approach might conflict with the concept of "ownership" which is central to sustainable peace. If local institutions and actors are integrated too slowly, local actors are less likely to develop the sense of responsibility and conviction needed to implement and maintain the standards. The reluctance of the international actors in Kosovo to transfer authority stalled the process and discredited the overall approach.[360] Third, if conditionalities are linked to the approach, i.e. by making the transfer of power and the determination of final status contingent on the fulfilment of standards, standards must remain attainable and a clear political endpoint foreseeable. Contrary to the examples of Bosnia-Herzegovina or Cambodia, UNMIK's operational aim is unclear and only of temporary nature. The "standards before status" approach has left open the question what procedures will decide over the final status of Kosovo. Therefore, the conditionalities upon which the "earned sovereignty" approach builds only provide weak incentives for the participants.

This latter fact is indicative of the underlying reason why the model applied has (so far) not been able to deliver. The dilemma already inherent in Resolution 1244 between territorial integrity for the FRY and self-determination for the Kosovo Albanians has prevented the political actors from resolving one core issue of the conflict, namely the issue of sovereignty over Kosovo. The consequence was an administration that continuously struggled with a lack of direction and with non-cooperative Kosovo Albanians and Kosovo Serbs.[361] Without a clear strategy to come to terms with this root cause, the conflict will continue in a way that prohibits real progress.

It is at this point where the law of self-determination should be developed further and applied in a clear manner by the international community. Compromise solutions taking account of the importance of both territorial integrity and self-determination inherent in concepts such as internal and (exceptional) external self-determination as well as "earned sovereignty" are readily available to provide the basis for much needed refinement. The case study has led to the conclusion that it is in the interest of all participants to resolve the issue of sovereignty as soon as possible by applying such new concepts in a cautious, but consistent manner. Otherwise, the conflict continues underneath the surface. Unfortunately, the opportunity to find a peaceful internal solution had not

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360 Williams, see note 199, 424.

361 Caplan, see note 65, 17.

been taken by the FRY before 1999. The international community missed a chance to find a solution in 1999 and after the fall of Milošević in 2000, although for understandable political reasons. It is to be hoped that the political process of final status determination will now begin as soon as possible and resolve the issue in accordance with international law as outlined above. Given the history of human rights abuses in Kosovo, a sustainable solution cannot be decided against the will of the people of Kosovo, but the majority must understand that its rights are linked to the rights and protection of the minorities and regional security.

Irrespective of these difficulties, which are to a certain extent specific to Kosovo, the international administration in Kosovo can provide a useful model framework for future missions in similar circumstances, provided that the inherent dilemmas in such an approach are recognised and that structures are adjusted. Success of other missions will depend on their capability to avoid past mistakes that have paralysed progress in Kosovo. The lessons from Kosovo in this way are an indispensable part of the toolkit for future successful peace-building.