

International Administration in Post-Conflict Situations by the United Nations and Other International Actors

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I. Introduction

In Afghanistan, Bosnia and Herzegovina, Cambodia, East Timor, Eastern Slavonia, Baranja and Western Sirmium, Iraq, Kosovo, Somalia, and at other occasions external assistance was needed to establish or to re-establish governmental structures for the respective territory or even to form a nation state. The collapse of all governmental structures (governance problem) or the disappearance of elements of statehood (nation problem) had different reasons such as the secession of a territory from a state (East Timor),¹ internal conflict (Afghanistan, Cambodia, Somalia), the dissolution of a state (Yugoslavia – Kosovo as well as Bosnia and Herzegovina, Eastern Slavonia), decolonization (West Irian, Namibia) or the belligerent occupation of a territory (Iraq). In all these cases third parties intervened in one way or another to fill the governmental vacuum until the respective national institutions could be set up by the population concerned.

Another scenario is the one of Sierra Leone. In this case ECOWAS, the United Nations and individual states intervened to assist a democratically elected President to overcome rebellions and to restore internal peace.

Such intervention from the outside faces the dilemma that by influencing or even by taking over governmental authority, either totally or partially or to establish new governmental structures for that territory

¹ A somewhat different differentiation is used by R. Wilde, "From Danzig to East Timor and Beyond: The Role of International Territorial Administration", *AJIL* 95 (2001), 583 et seq. (583).

in turmoil such intervention interferes with the right of self-determination of the respective population to decide on its political and economic future. However, without assisting activities from the outside the population would not be able to exercise its right of self-determination due to the lack of representative institutions. This will need to be discussed in more detail.

Assessing past experiences it has been suggested – and, in fact, this approach has been implemented in respect of Bosnia and Herzegovina and Kosovo – that the legal order and the respective state institutions should be installed before the population should be called upon to participate in political decision-making.² The opposite approach is to engage the respective population and/or its elites at an early stage and to keep the external involvement at a minimum, an approach which marked the development in Afghanistan.³ This again deserves further consideration.

The traditional international law provides only inadequate legal tools to deal with or to manage post-conflict situations where states can no longer guarantee the well-being of their population. In particular the role which may be exercised by third states or international organizations or, particularly, the limits such states or international organizations face are unclear. One of such legal regimes – the rules of international humanitarian law on belligerent occupation – limits the powers of the occupant. The respective rules on belligerent occupation are enshrined in the arts 42-56 of the Hague Regulations,⁴ the Fourth Geneva

² The Brahimi Report (Report of the Panel on UN Peace Operations, Doc. A/55/305-S/2000/809 of 21 August 2000, para. 81) states in respect of post-conflict missions: “These mission tasks would have been much easier if a common United Nations justice package allowed them to apply an interim legal code to which mission personnel could have been pre-trained while the “applicable law” question was being worked out”. A more forceful position is being taken by P. Ashdown, “Broken Communities, Shattered Lives: Winning the Savage War of Peace”, Speech to the International Rescue Committee, London, 19 June 2003, <<http://www.intranet.theirc.org/docs/ashdown-lecture.pdf>>.

³ See the contribution of E. Afsah/ A.H. Guhr, in this Volume; critical on this approach M. Ignatieff, *Empire-Lite: Nation-Building in BiH, Kosovo, and Afghanistan*, 2003.

⁴ Annex to the Convention Respecting the Laws and Customs of War on Land of 18 October 1907, reprinted in D. Schindler/ J. Toman, *The Laws of Armed Conflict*, 1988, 63 et seq. The Nuremberg Trial stated that the Hague Regulations constituted customary international law, cf. Trial of the

Convention, in particular, arts 27-34 and 47-78⁵, in Additional Protocol I⁶ as well as in customary international law.⁷

As has been demonstrated in the case study on Iraq⁸ these rules do not provide for a legal regime which adequately addresses and governs the specific problems of post-conflict situations. This is due to the fact that the rules on belligerent occupation are intended to cover a transitional period only until the government of the occupied state has reorganized itself. They try to strike a balance between the security interests of the occupying power and the interests of the population of the occupied state by preserving the *status quo ante* to the extent the security interests of the occupying power permit. Belligerent occupation, in principle, does not legitimize the introduction of political changes, even if such changes may be necessary for the transformation from a totalitarian government into democracy thus eradicating the causes of internal or international conflict. In spite of its short-comings, the application of the rules of international humanitarian law on belligerent occupation to the situation where an international organization has assumed the governmental control over a territory by way of analogy has been discussed. This deserves some consideration.⁹

Another option is to involve international organizations, in particular the United Nations, in this process of transition from collapsed

Major War Criminals before the International Military Tribunal, Nuremberg, Vol. XXII, 497.

⁵ Article 154 Fourth Geneva Convention states that it complements the Hague Regulations. This is underlined by M. Greenspan, *The Modern Law of Land Warfare*, 1959, 213 whereas H.P. Gasser, in: D. Fleck (ed.), *Handbook of Humanitarian Law in Armed Conflict*, 1995, states that the dominant law is the Fourth Geneva Convention (241). For a comparison of the provisions of the Fourth Geneva Convention see J. Pictet, *Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in the Time of War*, 1958, 614.

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, *ILM* 16 (1977), 1391 et seq.

⁷ As to the application of general international human rights standards see J.A. Frowein, "The Relationship between Human Rights Regimes and Regimes of Belligerent Occupation", *Isr. Y. B. Hum. Rts* 28 (1998), 1 et seq. (9 et seq.). He points out that international humanitarian law is to be considered as *lex specialis*.

⁸ See the Iraq case study, in this Volume.

⁹ See below.

statehood to a new or reorganized state.¹⁰ To do so would instrumentalize the United Nations as a legitimizing body, a diplomatic forum, and an operational tool. The United Nations – and to a lesser extent regional organizations – are perceived to act as a neutral broker which would keep within the limits of their mandate and would respect the restraints on the exercise of governmental powers enshrined in international law, in general. The reality is more complex. More than once the United Nations has been drawn into a conflict. Apart from that the limits imposed upon the United Nations or another third party intervening in post-conflict management by the respective peace agreement or formulated in the Security Council resolution mandating the exercise of governmental functions and the limits inherent in or derived from the UN Charter, were not, in all cases sufficient to ensure an exercise of authority based upon the rule of law and the respect for international human rights standards.¹¹

In several instances the United Nations or regional organizations were called upon not only to assist in the re-establishment of governmental structures (state-building) but also in nation-building. These two objectives have not always been distinguished clearly enough neither in theory nor in practice. State-building refers to the organization and physical infrastructure of a state whereas nation-building means to form the human beings living in a particular territory into a population sustaining a particular state – the nation. This does not mean ethnical homogeneity; nevertheless, perceived ethnic homogeneity has been politically instrumentalized in nation-building. Nation-building rather depends upon common sentiments within that population based upon, amongst others, a common history, a common culture, a common lan-

¹⁰ Report of the Secretary-General, *An Agenda for Peace – Preventive Diplomacy, Peacemaking and Peace-keeping*, Doc. A/47/277 – S/24111 of 17 June 1992, identifies the following functions of the UN in post-conflict peace-building: monitoring elections, advancing efforts to protect human rights, reforming or strengthening governmental institutions and promoting formal and informal processes of political participation as well as support for the transformation of deficient national structures and capabilities and for the strengthening of new democratic institutions.

¹¹ Critical, for example, as far as East Timor and Kosovo are concerned, Frowein, see note 7, 50 et seq.; C. Stahn, “International Territorial Administration in the former Yugoslavia: Origins, Developments and Challenges Ahead”, *ZaöRV* 61 (2001), 107 et seq. (152 et seq.), claims that in Kosovo international human rights standards have not always been fully respected by the UN administration.

guage and the belief in common values.¹² As demonstrated in the case of Afghanistan nation-building may also result from the common suffering in a war. Nation-building can be fostered by developing a unified legal order and overcoming legal pluralism. Therefore establishing a governmental structure for a territory (state-building) may contribute to nation-building. This will be the case, though, only if the population concerned is ready for such development, endorses it and has the opportunity to participate in it. From that perspective those responsible for international administration often have not contributed to nation-building. This is particularly true in those cases where a legal order was imposed upon the respective population without taking into account the legal culture of that particular territory. This was the case in Iraq, and also in Kosovo and Bosnia and Herzegovina.

Under the mandate system of the League of Nations and the trusteeship system of the United Nations states have been authorized to administer certain territories under the supervision of the League of Nations or the United Nations with a view to prepare the population for self-government.¹³ These regimes, however, applied only to post-colonial situations. It has been argued that an analogous approach should be made in respect of failed states or collapsed governmental structures.¹⁴ This idea should be given some consideration.¹⁵

In the past, the United Nations has been involved in the administration of areas or the territory of a state after the end of an armed conflict with the view to assisting a transition of the respective entity to a stabilized situation which is less likely to develop into an armed conflict

¹² See the contribution of von Bogdandy et al., in this Volume; the report of J. Dobbins/ S.G. Jones/ K. Crane/ A. Rathmell/ B. Steele/ R. Teltschik/ A. Timilsina, *The UN's Role in Nation-Building: From Congo to Iraq*, 2005, for example, fails to distinguish between nation- and state-building.

¹³ See the contribution of N. Matz, in this Volume concerning the implementation of Article 22 of the Covenant of the League of Nations (which is reprinted as Annex to the contribution). This contribution also contains a brief reference to Article 76 of the UN Charter. Article 81 of the UN Charter provides for the possibility that the administering authority may be the United Nations.

¹⁴ B. Dreiwert, "A new Trusteeship for World Peace and Security: Can an old League of Nations Idea be applied to a First Century Iraq?", *Ind. Int'l & Comp. L. Rev.* 14 (2004), 771 et seq. (796 et seq.); M. Bothe/ T. Marauhn, "The United Nations in Kosovo and East Timor: Problems of a Trusteeship Administration", *International Peace-keeping* 6 (2000), 152 et seq.

¹⁵ See below.

again.¹⁶ Under the League of Nations some territories were also placed under some form of international administration. These were not necessarily war-torn territories, but they were all territories of strategic importance in respect of war. The assessment as to whether the League of Nations activities are to be considered a success is mixed; this may be one of the reasons why the United Nations at the beginning did not assume direct governmental or administrative responsibilities¹⁷ in respect of territories, but rather restricted its peace-keeping efforts in post-conflict situations or situations likely to develop into a conflict by sending peace-keeping forces. Only in the course of a development were UN peace-keeping missions supplemented by a civilian component which was directly responsible for international administration. Although not anticipated when the UN Charter was drafted, such a function of the United Nations falls within its overall responsibility to restore and preserve international peace and security.¹⁸

In the following analysis the cases dealt with in this Volume (in particular, Bosnia and Herzegovina, Cambodia, East Timor, Iraq, Kosovo, Namibia, Sierra Leone, Somalia, West Irian, Afghanistan) together with Eastern Slavonia and the City of Mostar, will be classified and assessed. In this context it is intended to establish on what basis they were managed, which objectives were pursued and who was in charge of the process. The assessment of the international involvement will have to establish first whether the intervening party, in most cases the Security Council, is free in how it proceeds in the management of post-conflict situations. The United Nations Charter and further actions taken by United Nations organs based thereon constitute limits on the discretionary powers of international administration or intervention.

¹⁶ For a survey see J. Chopra, "UN Civil Governance-in-Trust", in: T.G. Weiss (ed.), *The United Nations and Civil Wars*, 1986, 69 et seq.; S.R. Ratner, *The UN Peace-keeping*, 1996; more recently, J.A. Frowein, "Notstandsverwaltung von Gebieten durch die Vereinten Nationen", in: *Festschrift für W. Rudolf zum 70. Geburtstag*, 2001, 43 et seq.; E. de Wet, "The Direct Administration of Territories by the United Nations and its Members in the Post Cold War Era: Legal Bases and Implications for National Law", *Max Planck UNYB* 8 (2004), 291 et seq.; O. Korhonen/ J. Gras, *International Governance in Post-Conflict Situations*, 2001.

¹⁷ Although a far reaching plan concerning the internationalization of Jerusalem and of Trieste was considered; see M. Yedit, *Internationalised Territories*, 1961, and R. Beck, *Internationalisierung von Territorien*, 1962, 41 et seq.

¹⁸ Stahn, see note 11, 131.

II. Classification of Third Party Involvement in Post-Conflict Management

1. Introduction

Attempting to classify the participation of the United Nations, regional organizations and states in efforts to manage or to assist in post-conflict situations is complicated or even arbitrary. The legal basis of each involvement, the functions exercised and the objectives pursued have varied significantly in each case. This has led, under the auspices of the United Nations, to a case by case approach, considering each single involvement as being unique,¹⁹ with the consequence that the United Nations has failed to develop a coherent strategy concerning its involvement in post-conflict governance. Nevertheless, in principle, it is possible to identify three different approaches: the United Nations offers merely technical assistance such as the monitoring of elections or the holding of a referendum, or the United Nations entrusts a state or several states with the management of a post-conflict situation providing guidance and technical assistance, or the United Nations takes over direct governmental responsibilities. The dividing line between these three basic approaches is often opaque and, in particular, a case may mutate from one category to the other.²⁰

2. Technical Assistance

For the United Nations or other international organizations, such as the Council of Europe or the Organization of American States, rendering technical assistance in the re-establishment of a governmental structure is quite common. The contributions in this Volume are not primarily concerned with this situation although occasionally administrative functions have been taken up in this context by the respective institution. For example, in the case of the Congo the Security Council vested

¹⁹ See Korhonen/Gras, see note 16, 25 et seq.

²⁰ Wilde, see note 1, 584 also includes amongst others the international administration of camps, housing refugees or internally displaced people. Such activities do not amount to the assumption of governmental powers thus replacing the exercise of sovereignty by respective states as in the cases mainly dealt with in this Volume. They are, therefore, not part of this study.

the Special Representative with the mandate to help the government to restore public order with the view to permit the departure of Belgian military forces.²¹ This was camouflaged as “technical assistance”. In fact, the UN involvement clearly went beyond that.²² ONUC assumed governmental functions to respond to the administrative vacuum caused by the departure of Belgian officials and by their not having established an adequate governmental structure for the Congo. The civilian assistance established or helped in the establishment of all essential services such as mining, air traffic control, meteorological services, radio operation, postal and telecommunication services, port authority, foreign exchange and trade, medicine, judicial system and education.²³

A particular solution was designed for Namibia reflecting the unique legal situation of this territory. It resembled international administration although the functions exercised by the United Nations were more of a technical nature. In 1966 the UN General Assembly declared the South African administration of Namibia illegal and decided to place the territory under its own administration. In consequence of this decision the Council for Namibia was set up by the UN General Assembly²⁴ to administer the territory preparing it for independence, ensuring the maximum possible participation of the population in the independence process. However, South Africa never permitted the Council for Namibia to assume its functions. Only in the late eighties was it possible actually to implement the international administration of Namibia established by S/RES/435 – this resolution not having been enacted under Chapter VII of the UN Charter. The United Nations Transition Assistance Group (UNTAG) was established as proposed by a Contact Group in the Security Council (Canada, France, Germany,

²¹ S/RES/143 (1960) of 14 July 1960; for further details see E.W. Lefever, *Crisis in the Congo: A United Nations Force in Action*, 1965, 190.

²² See first Memorandum of the Secretary-General to the Security Council on the United Nations Civilian Operation in the Republic of Congo, 11 August 1960, Doc. S/4417/Add. 5, 60; G. Abi-Saab, *The United Nations Operation in Congo 1960-1964*, 1978; Stahn, see note 11, 123.

²³ See Reports of the Secretary-General to the Security Council Doc. S/5240 and Add. of 4 February 1963; Doc. S/5428 of 17 September 1963 and Doc. S/5784 of 29 June 1964.

²⁴ A/RES/2145 (XXI) of 27 October 1966 through which the mandate of South Africa over the territory of Namibia was terminated and A/RES/2248 (S-V) of 19 May 1967 by which the Council for Namibia was established. This was confirmed by the Security Council in S/RES/385 (1976) of 30 January 1976 and S/RES/435 (1978) of 29 September 1978.

the United Kingdom) and endorsed by the Security Council. It operated under the Special Representative of the Secretary-General for Namibia. UNTAG was mandated to ensure the peaceful transfer of power from the government of South Africa to the people of Namibia, monitor the withdrawal of South African troops and oversee the election process in order to create a government for an independent state. The main objective of UNTAG though was to prepare for and to organize free and fair elections.²⁵

3. States acting under the Authority of the United Nations

The earliest example of the United Nations explicitly entrusting particular states with a mandate to assist a state to develop its governmental structure is the case of Libya. In 1949 the UN General Assembly appointed a Commissioner for Libya to assist the two administering powers, France and the United Kingdom, in preparing Libya for independence.²⁶ The Commissioner took part in setting up a central government and in drafting a constitution but did not assume governmental or administrative functions. Such functions were, in fact, exercised by the two administering powers.

By way of a generalization this set-up can be compared with the approach taken in the case of Somalia where the United States took the lead role,²⁷ and in East Timor where Australia played the lead role as far as the military aspect was concerned.²⁸ Although coming from a totally different point of departure, entrusting a particular group of states with a specific mandate was also the set-up in the case of Iraq where the governmental functions have been exercised by the United States as the lead nation.²⁹ However, in this case the role of the United Nations was restricted to render advice and assistance in respect of humanitarian and constitutional issues; it lacked the right of initiative as in the other cases referred to. For that reason the influence of the United Nations on the procedure concerning post-conflict management and peace-building and concerning the standards to be applied in this process were extremely limited. In respect of Kosovo one may equally speak of a “lead

²⁵ See the contribution of N. Matz, in this Volume.

²⁶ A/RES/289 (IV) of 21 November 1949.

²⁷ For details in respect to UNITAF, see C. Philipp, in this Volume.

²⁸ For details see M. Benzing, in this Volume.

²⁹ See note 8.

organization” since NATO is responsible for the military aspect of preserving peace. Finally, the administration of Mostar was vested in the EU and in the case of Sierra Leone the dominant role was played – at least for some time – by ECOWAS.³⁰ Also in Afghanistan the principle of a “lead nation” was used, albeit sector-wise. Germany, for example, took responsibility for the reorganization and training of the police and Italy coordinated the efforts concerning the justice sector.

What has been said in respect of the situation prevailing in Iraq is to be phrased as a general assessment. Whenever responsibility for the international administration of a territory or peace-keeping is entrusted to a particular state or a group of states this results in weakening the constructive role the United Nations may potentially play.

4. Direct Administration of Territories

International involvement in post-conflict management has on several occasions taken the form of direct administration of the respective territories. This approach was already pursued under the League of Nations,³¹ although the reasons for assuming such responsibility differed from those leading the United Nations to take over such functions.

The Free City of Danzig was the first territory to be administered by the League of Nations from 1919 to 1939.³² The League, represented by a High Commissioner, had three principal responsibilities: to agree on a Constitution for Danzig drawn up by duly appointed representatives and to guarantee the Constitution, to deal with any disputes arising between Danzig and Poland and to protect against any discrimination within the Free City of Danzig to the detriment of citizens of Po-

³⁰ The key players changed in Sierra Leone; for details see M. Goldmann, in this Volume.

³¹ Concerning the League of Nations one must distinguish between the Mandate System on the one hand and direct international administration on the other hand. In contrast to the UN Trusteeship system, the Mandate System did not enshrine elements of direct administration. The League of Nations direct administrative activities took place outside the Mandate System.

³² Probably the earliest example of international administration was the establishment of the European Danube Commission.

land and other persons of Polish origin or speech.³³ More pronounced was the League's administration of the Saar Basin from 1920 to 1935. The League, through a Commission administered the territory for a period of 15 years during which France was allowed to exploit the coal mines as partial payment for reparations from Germany for damages resulting from the war. The Versailles Treaty guaranteed to the Commission all the powers of government hitherto belonging to the German Empire, Prussia or Bavaria. After 15 years of administration, the League was to organize a plebiscite. The League was not bound to respect the wishes of the inhabitants in deciding on the sovereignty of the territory; it was only required to take their wishes into consideration.³⁴ Finally, the League administered the Columbian town and district of Leticia from 1933 to 1934 following its occupation by Peruvian irregulars with the backing of the Peruvian government.³⁵ Furthermore such activities were contemplated for Fiume and the coast of Dalmatia but never implemented.³⁶

As already indicated, the United Nations has assumed governmental powers to a greater or lesser extent in respect of a territory in the context of post-conflict management as exemplified by five operations, namely the UN Temporary Executive Authority in West New Guinea (West Irian) (UNTEA)³⁷, the United Nations Transitional Authority in Cambodia (UNTAC),³⁸ the UN Transitional Administration for East-

³³ G. Levesque, *La situation internationale de Dantzig*, 1924; F.P. Walters, *A History of the League of Nations*, 1960, Chapter 9; R. Wolfrum, *Die Internationalisierung staatsfreier Räume*, 1984, 15 et seq.

³⁴ A. Allot, *Le Bassin de la Sarre*, 1924.

³⁵ Wilde, see note 1, 587-588.

³⁶ For further details see Yedit, see note 17 and Wolfrum, see note 33, 14 et seq.

³⁷ See the contribution of D. Gruss, in this Volume.

³⁸ In Cambodia the UN operation was governed by the Paris Agreements on a Comprehensive Political Settlement of the Cambodia Conflict of 23 October 1991. According to Part I, Section 3, article 6 of the Agreement on a Comprehensive Political Settlement, *ibid.*, the Supreme National Council delegated to the United Nations "... all powers necessary to ensure the implementation of this Agreement, as described in annex I ...". See on this agreement S.R. Ratner, "The Cambodia Settlement Agreements", *AJIL* 87 (1993), 1 et seq. and the contribution of L. Keller, in this Volume. The mandate was endorsed by S/RES/745 (1992) of 28 February 1992.

ern Slavonia, Baranja and Western Sirmium (UNTAES),³⁹ the UN Interim Administration Mission in Kosovo (UNMIK)⁴⁰ and the UN Transitional Administration in East Timor (UNTAET).^{41 42}

UNTEA was established on a contractual basis rather than, as was the case in later examples, on the basis of a resolution of the Security Council under Chapter VII of the UN Charter, sometimes with the consent of the respective state, sometimes without. It took over the administration of West Irian in 1962 from the Netherlands having full powers to appoint government officials, to legislate for the territory and to guarantee law and order.⁴³ Actually sovereignty was transferred from the Netherlands to Indonesia whereas UNTEA exercised executive powers based on a delegation by the two states. UNTEA transferred administration and police functions from the Dutch to Indonesian authorities, established a court system, set up regional councils and administered public health and educational issues during the interim period.

UNTAC was also established on a contractual basis.⁴⁴ It was entrusted with significant portions of the civil administration of Cambodia. The issues of foreign affairs, national defense, finance, public security and information were all placed under the direct control of UNTAC. The Special Representative of the Secretary-General who was responsible for the day to day management of UNTAC had the power to adopt binding executive directives in these areas. It also had legislative power in respect of the regulation of elections. Since UNTAC was empowered to revoke legislation which could undermine the purposes of

³⁹ Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium, S/RES/1037 (1996) of 15 January 1996 and Doc. S/1995/951, Annex. This Agreement had entered into force on 12 November 1995; see 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 (2000), 423 et seq. (433).

⁴⁰ S/RES/1244 (1999) of 10 June 1999; see J. Friedrich, in this Volume.

⁴¹ S/RES/1272 (1999) of 25 October 1999; see M. Benzing, in this Volume.

⁴² De Wet, see note 16, 297 et seq., prefers a different classification, namely co-administration and direct administration. The former includes UNTAC, UNOSOM II and Bosnia and Herzegovina.

⁴³ See Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), arts IV to VI, see Annex of the contribution of D. Gruss, in this Volume and A/RES/1752 (XVII) of 21 September 1962.

⁴⁴ See note 38.

the Peace Agreement⁴⁵ its legislative impact was significant. The direct exercise of governmental power also extended to judicial questions, in particular pertaining to human rights. UNTAC had, in respect of its functions, many similarities with UNMIK and UNTAET.

UNTAES in turn, was established in January 1996 to oversee the peaceful restoration to Croatia of the last remaining Serb-held region of the former Yugoslav Republic. The authority given to UNTAES by the Basic Agreement⁴⁶ was extensive, although limited to two years. The agreement signed by the Croatian government and the local Serb leadership which formed the basis of an enabling resolution called upon the Security Council to establish an administration to govern the region pending its restoration to Croatia. However, the Secretary-General's Special Representative conceived a regime in which the transitional authority alone would have executive power and would not have to obtain the consent of either the transitional council or the parties. In contrast to UNMIK and UNTAET, however, UNTAES did not perform many of the tasks of administration itself. It allowed the Serbs to continue to administer the territory, overriding their decisions when necessary.

UN Security Council Resolution 1244, although recognizing the sovereignty of Yugoslavia, authorized the creation of KFOR and UNMIK, the authorities that would operate in Kosovo on behalf of the international community, thus establishing a *de facto* UN protectorate in Kosovo. KFOR, providing the international security presence, was to be established by Member States and relevant international organizations.⁴⁷ UNMIK, which was established by the UN Secretary-General, functions under the control of a Special Representative of the Secretary-General performing all basic civil and administrative functions. This Authority is acting fully as an interim government of Kosovo.⁴⁸ UNMIK exercises most of the important attributes of sovereignty on behalf of the people of Kosovo. For example, the Special Representative can change, repeal or suspend existing laws incompatible with the mandate or the objective of UNMIK. The Yugoslav military, police and para-

⁴⁵ Comprehensive Settlement Agreement, see note 38, Annex 1, Section D, para. 3 (b).

⁴⁶ See note 39.

⁴⁷ S/RES/1244 (1999) of 10 June 1999, operative para. 7.

⁴⁸ A detailed analysis of the governmental activities of the Authority is provided by J. Friedrich, in this Volume.

military forces were required to withdraw from the territory.⁴⁹ S/RES/1244 provides for a gradually diminishing role of the Special Representative due to a progressive transfer of administrative responsibilities to democratically elected local institutions for self-government.⁵⁰

For East Timor a similar approach was chosen. UNTAET was given full responsibility for the administration of the territory. The UN Security Council established UNTAET⁵¹ to administer the territory until it achieved independence on 20 May 2002. UNTAET's authority exceeded that of UNTAES in Eastern Slovenia and UNMIK in Kosovo, respectively. UNTAET was replaced by UNMISSET⁵² after East Timor gained independence. UNMISSET continued to exercise administrative powers in key areas until the end of its mandate on 20 May 2005. It was replaced by UNOTIL.⁵³

5. The Special Case of Bosnia and Herzegovina

The international administration of Bosnia and Herzegovina constitutes a special case since it has, in fact, changed its nature over time. This international administration has its basis in the Dayton Accord.⁵⁴ The factual situation leading to international administration was different to the one in Kosovo and East Timor, but similar to the one in Cambodia. The three warring factions, Serb, Croat and Muslim Bosnian, remained intact after the war, and the international community, in the embodiment of a High Representative, was merely empowered to monitor implementation of the peace agreement and to promote compliance with it. The High Representative was meant to rely on the co-operation of the local parties. Over time, however, the High Representative has been

⁴⁹ S/RES/1244 (1999) of 10 June 1999, Annex 2, operative para. 2.

⁵⁰ See also UNMIK/REG/2001/9 of 15 May 2001, 6th preambular paragraph.

⁵¹ S/RES/1272 (1999) of 25 October 1999. Its relevant part reads: "The Security Council ... Decides to establish, in accordance with the report of the Secretary-General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice; ..."

⁵² S/RES/1410 (2002) of 17 May 2002, operative para. 1.

⁵³ See M. Benzing, in this Volume, text accompanying footnote 52.

⁵⁴ General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes, 14 December 1995, *ILM* 35 (1996) 75 et seq.

given more authority including the power to dismiss local officials deemed to be obstructing implementation of the peace agreement and to issue interim laws if the local parties fail to do so.⁵⁵ The Dayton Accord gave the Organization for Security and Co-operation in Europe an important role in respect of the democratization of Bosnia and Herzegovina, such as preparing for elections, strengthening the legal system and assisting in establishing firm democratic control over armed forces. Other international organizations appointed foreign nationals as members of certain key governmental institutions for a transitional period (e.g. the Constitutional Court).⁵⁶ In the Brcko District a Supervisor of the Office of the High Representative was given certain administrative functions by the arbitral tribunal charged with determining the district's future status. It was the long-term objective of international administration to develop Bosnia and Herzegovina as a fully functioning and sustainable democracy that would integrate itself as a member of democratic Europe.

III. Assessment and Comparison

1. Similarities/Dissimilarities concerning the Format of International Involvement in Post-Conflict Situations

a. Format: Peace-Keeping with Civilian Component or a New Format

The format of all cases in which an international administration was established or where the United Nations was involved in post-conflict management displays many similarities.

⁵⁵ See Oellers-Frahm, in this Volume.

⁵⁶ The President of the European Court of Human Rights makes certain appointments to the Constitutional Court (Annex 4, art. VI (1)) and the Commission for Displaced Persons (Annex 7, art. IX). The Committee of Ministers of the Council of Europe makes certain appointments to the Human Rights Chamber (Annex 6, arts. VII (2), + (2)). The Director General of UNESCO made appointments to the Commission to preserve national monuments (Annex 8). Respective appointment rights for different positions were vested in the European Bank for Reconstruction and Development, the International Monetary Fund and the OSCE. As a general rule such appointees must not be nationals of Bosnia and Herzegovina or a neighboring state.

Usually the respective UN activity started with a peace-keeping element to which a so-called civilian component was added or where later the original mandate was broadened in this respect. This development in two stages became necessary if either a peaceful environment had to be ensured first or when there was a change concerning the basis of the mandate. In Sierra Leone equally a two stage approach was adopted although the sequence was different.⁵⁷

Typical for the progressive involvement and the change as far as the mandate is concerned is the case of Somalia where consent-based actions and those based upon Chapter VII of the UN Charter followed each other.⁵⁸ UNOSOM I was established through S/RES/751 (1992) of 24 April 1992 as a peace-keeping mission for humanitarian operations (delivery of emergency assistance to the civilian population). This mission was solely based upon the consent of the warring factions; the withdrawal of this consent led to a complete change in approach, namely the establishment of UNITAF under Chapter VII of the UN Charter. This was the first time that the United Nations authorized a group of states to use military force for humanitarian ends in an internal conflict albeit one with serious threats for the regional peace and security.⁵⁹ UNITAF was to establish a "secure environment" for humanitarian relief operations in Somalia.⁶⁰ The mandate of the peace-keeping force was broadened for UNOSOM II⁶¹ to include disarmament of the warring factions and to promote and advise on political reconciliation.

Again in Bosnia and Herzegovina several stages of international involvement can be identified. UNPROFOR was followed by IFOR which is, in accordance with the Dayton Peace Agreement, in charge of ensuring safety whereas the High Representative monitors the civilian implementation of the Peace Agreement. Whereas IFOR was based upon a Security Council resolution adopted under Chapter VII of the UN Charter, the establishment of the High Representative has its basis in the Dayton Peace Agreement.⁶² As in the case of Somalia the shift in

⁵⁷ See M. Goldmann, in this Volume.

⁵⁸ For details see C. Philipp, in this Volume.

⁵⁹ S/RES/794 (1992) of 3 December 1992.

⁶⁰ The term "secure environment" was not interpreted by the United States, in which operational command was vested, to disarm the warring factions.

⁶¹ S/RES/814 (1993) of 26 March 1993.

⁶² S/RES/1031 (1995) of 15 December 1995, operative para. 26 speaks only of "[e]ndorses the establishment of a High Representative, following the request of the parties ...". In respect of IFOR the resolution, however, states

format is due to the change of basis for the international post-conflict involvement. Finally, in East Timor the shift from UNAMET⁶³ whose task was to prepare and monitor the referendum to UNTAET⁶⁴ with the task to provide security and maintain law and order and to establish an effective administration and again to UNMISSET was due to the changed circumstances.

A different approach was followed in the case of Cambodia.⁶⁵ At the invitation of the warring factions the United Nations intervened in Cambodia pursuing two different objectives, namely peace-keeping and peace-building. The peace-keeping force of approximately 22,000 peace-keepers in 270 locations around the country played a crucial role in ensuring national and human security through disarmament, demobilization and reintegration of armed forces. Annex 1 of the Comprehensive Political Settlement Agreement stated that UNTAC would supervise the regrouping and relocating of all forces to specifically designated cantonment, would then initiate the process of arms control and reduction and would take necessary steps regarding the process of demobilization of the military forces of the parties. UNTAC would also assist with the clearing of mines and undertake training programs in mine clearance and a mine awareness program among the Cambodian people. The peace-building objective focused on the preparation of elections and the temporary taking over of governmental responsibilities through UNTAC.

The same approach as with UNTAC was adopted in respect of Eastern Slavonia, Baranja and Western Sirmium. Here the peace-keeping operation was directly combined with a civilian component.⁶⁶

As already indicated, in all cases of active UN involvement in post-conflict situations a form of peace-keeping was used. The particularity is the emphasis of the civilian component which was either an integral

(operative para. 14): "Authorizes the Member States acting through or in cooperation with the organization referred to in Annex 1-A of the Peace Agreement to establish a multinational implementation force (IFOR) ...". The wording indicates that the basis of the mandate is to be found in the resolution rather than the Dayton Peace Agreement.

⁶³ S/RES/1246 (1999) of 11 June 1999.

⁶⁴ S/RES/1272 (1999) of 25 October 1999.

⁶⁵ Note has to be taken of the fact, though, that UNTAC was preceded by UNAMIC (United Nations Advance Mission in Cambodia), a peace-keeping force not mentioned in the Paris Agreements.

⁶⁶ S/RES/1037 (1996) of 15 January 1996, operative para. 1.

part of the military peace-keeping operation or independent thereof, as for example in the case of Bosnia and Herzegovina and in Kosovo. What distinguishes each case of UN involvement in post-conflict situations is rather the basis of the mandate than its format since sometimes the UN involvement was based upon the consent of the parties concerned and sometimes upon a resolution of the Security Council adopted under Chapter VII of the UN Charter. Occasionally there was a switch from one to the other. This format had an impact on the basis of the mandate.

b. Basis of Mandate: Security Council Resolution under Chapter VII of the UN Charter or Consent of the Parties concerned

As an assessment of the various cases shows the basis of an international involvement in post-conflict situations varies since the United Nations and in earlier cases the League of Nations, have assumed their functions either on the basis of a peace treaty (Saar Basin,⁶⁷ Danzig,⁶⁸ Cambodia,⁶⁹ Sierra Leone⁷⁰); or an agreement between the parties concerned and the United Nations (West Irian, East Timor (UNTAET), Namibia (UNTAG),⁷¹ Eastern Slavonia, Baranja and Western Sirmium as well as Bosnia and Herzegovina); or on the basis of a resolution of the Security Council under Chapter VII of the UN Charter alone (Kosovo). The qualification of the regime for Kosovo as being solely based upon Chapter VII of the UN Charter is disputable, however.⁷² In

⁶⁷ Articles 45-50 of the Treaty of Versailles.

⁶⁸ Articles 100-102 of the Treaty of Versailles and Annex.

⁶⁹ Peace Agreements, see note 38.

⁷⁰ See the Lomé Agreement; for details see M. Goldmann, in this Volume.

⁷¹ Working on the basis of an agreement between the United Nations, South Africa and the SWAPO. S/RES/435 (1978) of 29 September 1978 was not adopted under Chapter VII of the UN Charter and therefore could only serve as a legitimizing basis as far as the establishment of UNTAG as a subsidiary body of the UN was concerned. Nevertheless, it declared the preparatory measures taken by South Africa concerning elections in Namibia to be null and void.

⁷² Yugoslavia has accepted the Military Technical Agreement (Agreement between the International Security force (KFOR) and the Government of the Federal Republic of Yugoslavia, ratified 9 June 1999) and the Republic of Serbia as well as the peace plan (Agreement of Principles) presented to the 'leadership' of the Federal Republic of Yugoslavia by the President of Finland, Martti Ahtisaari, representing the European Union, and Victor

some of the cases the United Nations has felt it necessary to supplement a consensual agreement on the post-conflict administration by a Security Council resolution under Chapter VII of the UN Charter, thus providing the post-conflict administration with double legitimacy as in the cases of Eastern Slavonia, Baranja and Western Sirmium,⁷³ Bosnia and Herzegovina,⁷⁴ East Timor (INTERFET)⁷⁵ and Sierra Leone.⁷⁶ In the cases of Namibia and Cambodia the respective Security Council resolutions⁷⁷ were not adopted under Chapter VII of the UN Charter. Finally, as was the case in Iraq, third party involvement may be the result of belligerent occupation, although, the power of the belligerent occupant may be modified by a Security Council resolution under Chapter VII of the UN Charter,⁷⁸ as again demonstrated in the case of Iraq.

Considering that resolutions of the Security Council adopted under Chapter VII of the UN Charter as well as the consent of the parties is being used to legitimize an international administration of a territory in a post-conflict situation, it is an open question whether each of these two options is sufficient and adequate.

According to Article 39 in combination with Article 41 of the UN Charter, the Security Council may take such measures for the preservation of peace also in post-conflict situations. Two issues have to be clearly separated in this context, namely the assumption of governmental authority as such and the objectives pursued therewith. Whenever the Security Council or a regional organization has assumed the governmental authority it has done so to bring to an end to the fighting, to monitor a cease-fire, to disarm the warring fractions or to assist the

Chernomyrdin, Special Representative of the President of the Russian Federation (Doc. S/1999/649 of 7 June 1999) (ratified 3 June 1999). However, when ratifying these commitments which were the basis for S/RES/1244 (1999) of 10 June 1999, Yugoslavia was under military pressure from NATO. Therefore it is inappropriate to speak of a consensual basis of the international administration of Kosovo.

⁷³ S/RES/1037 (1996) of 15 January 1996.

⁷⁴ S/RES/1031 (1995) of 15 December 1995.

⁷⁵ S/RES/1264 (1999) of 15 September 1999.

⁷⁶ S/RES/1270 (1999) of 22 October 1999; S/RES/1289 (2000) of 7 February 2000.

⁷⁷ S/RES/435 (1978) of 29 September 1978. S/RES/745 (1992) of 28 February 1992. In particular, the latter resolution outlined the consent of the parties as the basis for the action of the UN.

⁷⁸ S/RES/1483 (2003) of 22 May 2003.

population. Such activity is clearly covered under Article 41 of the UN Charter. However, the Security Council is not limited to take actions pursuing such short-term objectives. To provide for or to assist in the provision for a sustainable peace in the given territory equally falls under the mandate of the Security Council. Taking over governmental control in a territory with the intention to change its infrastructure so as to set the preconditions for sustainable peace⁷⁹ equally comes under the mandate of Article 41 of the UN Charter, although this provision does not refer to this possibility explicitly. Article 41 of the UN Charter does not contain an exhaustive list of possible measures the Security Council may take to preserve international peace and security. In that respect it has a wide discretion how to fulfill its mandate.⁸⁰ This means the assumption of governmental power for a territory by the United Nations or the respective authorization of states or regional organizations may be based upon a Security Council resolution adopted under Chapter VII of the UN Charter. As already indicated, this approach was implemented in respect of the Kosovo.⁸¹

Additionally, the Security Council may equally engage in the administration of a territory on the basis of the consent of the parties concerned as it has done in respect of Cambodia, West Irian and Namibia. The precedence for that approach is to be found in the practice of the Security Council to establish peace-keeping missions on the basis of the consent of the parties concerned.⁸² However, also in these cases the Security Council has always given its approval to the agreement reached among the parties and the involvement of the United Nations by issuing a respective resolution. Given the fact that the taking over of the administration of a territory by the United Nations used the established format of peace-keeping it follows that here, too, the consent amongst

⁷⁹ In the cases of Kosovo (S/RES/1244 (1999) of 10 June 1999 - UNMIK), Eastern Slavonia (S/RES/1037 (1996) of 15 January 1996 - UNTAES) and East Timor (S/RES/1272 (1999) of 25 October 1999 - UNTAET) the Security Council has stated that the situation in these regions constituted a threat to peace and security and that it was for this reason that the Security Council took action.

⁸⁰ See M. Ruffert, "The administration of Kosovo and East-Timor by the international community", *ICLQ* 50 (2001), 613 et seq. (616-622).

⁸¹ S/RES/1244 (1999) of 10 June 1999.

⁸² M. Bothe, "Peace-keeping", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2nd edition 2002, MN 13 et seq., de Wet, see note 16, 314 et seq.; J. Matheson, "United Nations Governance of Post Conflict Societies", *AJIL* 95 (2001), 76 et seq.

the parties to the conflict is endorsed by the Security Council. However, this is not just a matter of established practice. Such a decision of the Security Council has an important UN internal aspect. Only on the basis of such a resolution can the necessary budgetary decisions be taken and the necessary UN internal infrastructure be set up.

It is a matter of discussion whether the UN organizational basis for establishing peace-keeping forces is Article 29 in connection with Article 39 of the UN Charter⁸³ or whether such competence is to be regarded as an implied power of the Security Council endorsed by practice.⁸⁴ The matter seems to be of limited practical relevance. What is of essence is the consent of the parties concerned and their co-operation.⁸⁵ This applies to traditional peace-keeping and, even more so, to the takeover of administration of a territory.

Occasionally the international administration of a territory was based upon a Security Council resolution adopted under Chapter VII of the UN Charter as well as the consent of the parties to the conflict. This was the case for East Timor,⁸⁶ Eastern Slavonia, Baranja and Western Sirmium,⁸⁷ Sierra Leone⁸⁸ as well as Bosnia and Herzegovina.⁸⁹ There are legal as well as practical reasons for the adoption of this approach. As far as East Timor was concerned the validity of the consent

⁸³ Bothe, see note 82, MN 84; critical de Wet, see note 16, 314 pointing out that it is incorrect to combine Article 39 with Article 29 UN Charter, the former belonging to Chapter VII of the UN Charter. However, Article 29 UN Charter refers to Chapter VI and VII alike. Since most of the peace-keeping missions were established with the objective to provide for peace in the respective region the reference to Article 39 of the UN Charter seems to be appropriate.

⁸⁴ de Wet, see note 16, 314.

⁸⁵ See the so-called Brahimi Report, see note 2.

⁸⁶ The peace-keeping force UNAMET had a double legitimacy, namely S/RES/1246 (1999) of 11 June 1999 and consent of the respective government – at that time still the government of Indonesia. Also Portugal had endorsed the action. Since the occupation of East Timor by Indonesia was considered illegal the meaning of the consent from Indonesia was doubtful. Also UNTAET had a double legitimacy, S/RES/1272 (1999) of 25 October 1999 and the consent of Indonesia and Portugal as the former colonial power (see the respective agreement between the two with the UN Secretary-General of 5 May 1999 (Doc. A/52/951 – S/1999/513, article 6).

⁸⁷ S/RES/1037 (1996) of 15 January 1996.

⁸⁸ S/RES/1270 (1999) of 22 October 1999.

⁸⁹ S/RES/1031 (1995) of 15 December 1995.

of the Indonesian government was doubtful as was the case in respect of the consent of South Africa concerning Namibia. However, assuming administrative functions concerning a state or a territory against the will of the parties which exercise *de facto* control is doomed to fail; in such cases the United Nations may just become another party to the conflict against which the conflicting parties may even unite. Even in the case of Iraq the United Nations has not deviated from this course of action as S/RES/1483 has been adopted after prior consultations with the Governing Council of Iraq and with the consent of the Coalition. In respect of Eastern Slavonia, Baranja and Western Sirmium and Sierra Leone, Chapter VII of the UN Charter was invoked only as far as the security and freedom of movement of the personnel of the United Nations peace-keeping operation was concerned.⁹⁰ In respect of Bosnia and Herzegovina the reference to Chapter VII was needed as S/RES/1031 authorizes Member States to establish IFOR,⁹¹ reaffirms the obligation of all states to co-operate with the International Criminal Tribunal for the Former Yugoslavia,⁹² provides for the transfer of authority from UNPROFOR to IFOR⁹³ and changes the scope of the arms embargo.⁹⁴

Given the particular situation in these cases it is possible to argue that the assumption of governmental control in post-conflict situations by the United Nations or by states mandated by the United Nations in general will take place on the basis of consent of the parties concerned. The respective resolutions of the Security Council are primarily of organizational relevance. In all these cases the take-over of the administration constitutes a variation of a peace-keeping activity. It is the characteristic of these cases that the civilian component dominates the military aspect, an issue not always properly reflected in the structure of each single operation. Unifying the responsibilities under the civilian component may prove more successful than splitting the responsibilities. What is of essence at this point is that international administration by the United Nations in form and substance constitutes a peace-keeping

⁹⁰ See the wording of the last preambular paragraph of S/RES/1037 (1996) of 15 January 1996 and the wording of S/RES/1270 (1999) of 22 October 1999. See, however, S/RES/1289 (2000) of 7 February 2000, which broadened the mandate.

⁹¹ *Ibid.*, operative paras 14 and 15.

⁹² *Ibid.*, operative para. 4.

⁹³ *Ibid.*, operative paras 19, 21 and 33.

⁹⁴ *Ibid.*, operative para. 22.

activity as developed by the United Nations over the years. There is no need to develop a new design.

In all other cases where the Security Council additionally resorted to its powers under Chapter VII of the UN Charter the respective activities are of a hybrid nature. Nevertheless, such measures of the United Nations are also peace-keeping activities, dependent upon the co-operation of the parties concerned. This means the fact that a Chapter VII mandate was felt to be needed does not change the format of international administration in post-conflict situations as peace-keeping missions.

c. Political Trusteeship: Using an old Format for Post-Conflict Management

It has been suggested to revive the trusteeship concept as enshrined in Chapter XII of the UN Charter for post-conflict international administration. This suggestion has been made with the view to pursue two different objectives, namely to borrow some elements from that concept for international administration under UN auspices (for example, Kosovo)⁹⁵ or to broaden the competencies of the belligerent occupant beyond what is anticipated in international humanitarian law.⁹⁶ The latter suggestion is conceptually misleading. The trustee was considered – at least in theory – to act for the community of states and purely on behalf and for the benefit of the population under its jurisdiction. This is not the case for the belligerent occupant as the situation prevailing in Iraq demonstrates.⁹⁷ Further, the trustee is meant to function under the supervision of the Trusteeship Council. However, no such checks and balances exist in respect of the exercise of the powers and functions of the belligerent occupant. The same is true for all cases of international administration. In fact, it is one of the weaknesses of international ad-

⁹⁵ Bothe/ Marauhn, see note 14.

⁹⁶ A. Gerson, "Trustee-Occupant: The Legal Status of Israel's Presence in the West-Bank", *Harv. Int'l L. J.* 14 (1973), 1 et seq.; Gerson seems to limit this type of occupation to situations where the territory did not enjoy full sovereignty prior to occupation. H.H. Perritt, jr., "Structures and Standards for Political Trusteeship", *UCLA J. Int'l L. & Foreign Aff.* 8 (2003), 385 et seq. and id., "Iraq and the Future of the United States Foreign Policy: Failures of Legitimacy", *Syracuse Journal of International Law and Commerce* 31 (2004), 149 et seq.

⁹⁷ See the Iraq case study, in this Volume.

ministration that it does not dispose of checks and balances typical for the trusteeship system. One has to acknowledge though that such checks and balances were not used effectively in practice. Finally, account must be taken of the fact that the trusteeship system was designed for a particular group of territories and must be seen within the context of decolonization. Therefore this system does not invite itself for an analogous application to other scenarios. In spite of this it cannot be denied that some of the features of the trusteeship system may be considered in the context of international administration, such as the strict focusing on the interests of the population concerned and the temporary nature of its application.

d. Functions of the International Involvement

The cases of international administration exercised by or under the mandate of an international institution fall in either of two categories: delegation of parts of governmental powers to an institution established by the United Nations on the basis that this institution acts as the final authority in particular areas (Cambodia), or temporary but complete take-over of administrative functions until national reconstruction has advanced to a point where the respective state can resume its functions (West Irian, Kosovo, Eastern Slavonia, Baranja and Western Sirmium as well as East Timor and partly Somalia). Technical assistance alone concerning particular issues, such as the monitoring of elections or referenda does not fall into this category since this does not mean any transfer in the exercise of sovereign powers.⁹⁸ For Namibia the UN opted formally for technical assistance although UNTAG's functions not only included the preparation of elections but also embraced police and military functions. However, in many of the cases referred to in this Volume the preparation of referenda and elections as well as their monitoring was also part of the mandate (for example East Timor, Cambodia, Sierra Leone).

As already indicated the take-over of administration of the territory was either a partial or a complete one. Which approach was adopted depended mostly upon whether the territory concerned still possessed some remaining governmental infrastructure which was accepted by the parties concerned. In all cases it was understood that the governmental functions should be gradually transferred to institutions formed by the

⁹⁸ Different G.B. Helman/ S.R. Ratner, "Saving Failed States", *Foreign Pol'y* 89 (1992-1993), 12 et seq. (13).

respective population. This was, for example, emphasized in UNMIK Regulation 2001/9;⁹⁹ the respective paragraph in the Preamble reads:

“Considering that gradual transfer of responsibilities to Provisional Institutions of Self-Government will, through parliamentary democracy enhance democratic governance and respect for the rule of law in Kosovo.”

This should be taken as the standard guidance for the policy to be pursued by international administrations.

In Bosnia and Herzegovina the regime originally designed provided that the High Representative should only monitor the implementation of the Peace Agreement but it devolved into one where the High Representative actively took over legislative as well as executive functions. In the case of West Irian UNTEA was vested with the power to appoint government officials, to legislate for the territory and to guarantee law and order. The Authority transferred as already mentioned administrative and police responsibilities from the Dutch to the Indonesian authorities, established a court system and a new administrative system.¹⁰⁰ The 1991 Paris Agreements signed by the four Cambodian factions entrusted the United Nations with the key aspects of the administration of Cambodia by delegating to UNTAC all powers necessary to ensure the implementation of the peace agreement. It exercised administrative as well as legislative functions.¹⁰¹ The responsibilities of UNMIK are even more embracing. Equally far-reaching legislative activities were entrusted to UNTAET in East Timor.¹⁰² Here the United Nations assumed various functions. In 1999 the Security Council¹⁰³ authorized the establishment of the United Nations Mission in East Timor (UNAMET) to oversee a transition period during which the population could exercise their right of self-determination. After the plebiscite the United Nations engaged in a peace-keeping mission¹⁰⁴ to stop the continuing violence against the population. This was followed

⁹⁹ See note 50.

¹⁰⁰ For details see D. Gruss, in this Volume. A similar system applied for Eastern Slavonia to provide for a peaceful transition of that territory from Serbia to Croatia (cf. S/RES/1037 (1996) of 15 January 1996).

¹⁰¹ For further details see Stahn, see note 11, 126/127, and L. Keller in this Volume.

¹⁰² See M. Benzing, in this Volume and for Kosovo J. Friedrich, in this Volume.

¹⁰³ S/RES/1246 (1999) of 11 June 1999.

¹⁰⁴ S/RES/1264 (1999) of 15 September 1999.

by the establishment of UNTAET.¹⁰⁵ UNTAET was established as an integrated multi-dimensional peace-keeping operation fully responsible for the administration of East Timor in its transition to independence.¹⁰⁶ After the gradual development of governmental structures in East Timor namely the election of a Constituent Assembly, a Council of Ministers and the election of a President, the Security Council established a new mission for East-Timor with a revised mandate, namely to provide assistance to governmental administrative structures, interim law enforcement and public security, assistance in developing the East Timor police service, and to support the country's internal and external security.¹⁰⁷

Finally, the belligerent occupant in the case of Iraq has taken over the exercise of all governmental powers and thus acted – albeit on a different basis – in the same way as the international administration in the cases of Kosovo, East Timor as well as Eastern Slavonia, Baranja and Western Sirmium.

e. Long-Term Objectives of International Administration

The long-term objectives have not always been quite clear and this may be one of the reasons why international administrations have been considered as unsuccessful in some cases, particularly in respect of Kosovo.

In all the cases dealt with in this Volume – and this is their common denominator – it was the objective of the international institutions, in particular the United Nations or states involved, to preserve or restore peace and security. However, this objective is evident considering the format of this involvement by the United Nations and the basis on which it was enacted. What is more essential are the efforts which have

¹⁰⁵ S/RES/1272 (1999) of 25 October 1999.

¹⁰⁶ The respective mandate reads *ibid.* operative para. 2: “(a) Provide security and maintain law and order throughout the territory of East Timor; (b) To establish an effective administration; (c) To assist in the development of civil and social service; (d) To ensure the coordination and delivery of humanitarian assistance, rehabilitation and development assistance; (e) To support capacity building for self-government; (f) To assist in the establishment of conditions for sustainable development”. See further the Report of the Secretary-General Doc. S/1999/1024 of 4 October 1999, para. 27.

¹⁰⁷ S/RES/1410 (2002) of 17 May 2002.

been undertaken to achieve such objective, in particular to make peace sustainable.

In the cases dealt with under UN auspices where territorial sovereignty was at issue, except in the case of Kosovo, either an independent territorial entity, i.e. a new state, was established or the integration of this territory into a particular state was implemented and moreover this was the declared objective from the outset. It was essential that the territorial situation was settled before, thus the international administration was not called upon to provide for an act of external self-determination but to implement or assist in implementing a decision already taken.¹⁰⁸ In this respect the objective of international administration under the auspices of the United Nations differs from the ones exercised under the auspices of the League of Nations. In none of the former was there a dispute between two states concerning territorial sovereignty as was the case under the latter (Leticia, Saar Basin, Danzig). Also Mostar was not a case where territorial sovereignty was disputed but rather one where two local groups could not agree to cooperate at the level of local administration. For these reasons the Memorandum of Understanding establishing the EU Administration of Mostar from 1994 to 1996 to administer the city as a whole pending local agreement on unification was not concerned with territorial sovereignty.¹⁰⁹ In the case of UNTAES it was clear from the beginning that Eastern Slovenia, Baranja and Western Sirmium would be returned to Croatia within a prescribed period of time.¹¹⁰ It was equally clear after the referendum had taken place that East Timor would gain independence.¹¹¹ The objective in Bosnia and Herzegovina was also clear¹¹² although none of the warring factions were satisfied with the outcome of the Dayton Accord.

In contrast thereto UNMIK's long-term objective is uncertain as far as the territorial status of Kosovo is concerned, reflecting the international community's own uncertainty about the future of Kosovo. UNMIK was mandated to promote substantial autonomy and self-

¹⁰⁸ One has to acknowledge though that the population of West Irian did not have a fair chance to exercise its right of external self-determination.

¹⁰⁹ Wilde, see note 1, 584 and 590.

¹¹⁰ See S/RES/1037 (1996) of 15 January 1996, second preambular paragraph.

¹¹¹ See S/RES/1272 (1999) of 25 October 1999, third preambular paragraph.

¹¹² See S/RES/1031 (1995) of 15 December 1995 which refers in its second, third and fourth preambular paragraph to the agreements reached among the parties.

government and to facilitate a political process to determine Kosovo's future status, without, however, undermining the sovereignty and territorial integrity of Yugoslavia, of which Kosovo is a part.¹¹³ Whereas the majority of the population and of the political representatives of the Kosovo Albanians favor a secession from Yugoslavia the relevant UN Security Council Resolutions continuously affirmed the commitment to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.¹¹⁴ Instead of making an attempt of defining the future territorial status of Kosovo, the United Nations has developed a procedure postponing the decision concerning the territorial status of Kosovo.¹¹⁵ Since this, at least theoretically, provides for the possibility of secession of Kosovo from Serbia the government of Yugoslavia has rejected this procedure.

As far as Kosovo is concerned the task for the international administration is similar to the one of the League of Nations in respect of the Saar Basin. In Kosovo, the territory's future is at least *de facto* open since although S/RES/1244 emphasizes the sovereignty and territorial integrity of the Federal Republic of Yugoslavia this may be read to refer to the intermediate status of Kosovo, only. Concerning the Saar Basin the question of status was to be determined according to a pre-established procedure and a pre-set date. In comparison thereto UNMIK has yet to develop such a procedure and decide upon the date.

Nevertheless, the whole tendency of S/RES/1244 seems to favor a solution under which the Kosovo remains within Serbia. This is in accordance with the policy pursued by the United Nations so far. Minorities have not been encouraged to seek secession; the principle of the territorial integrity of states has prevailed over secessionist aspirations. The prime example is the case of Nigeria where the Ibos have not been granted their own state, the counter-example being Eritrea whose secession from Ethiopia has been accepted. Apart from previous practice, a more relevant argument against the secession of Kosovo would be that this might amount to the recognition of a right of minorities to live in an ethnically homogenous state, an aspiration irreconcilable with the

¹¹³ See S/RES/1244 (1999) of 10 June 1999, operative para. 11.

¹¹⁴ S/RES/1244 (1999) of 10 June 1999, tenth preambular paragraph; General principles on a political solution for the Kosovo crisis adopted on 6 May 1999 (Doc. S/1999/516, Annex 1 to S/RES/1244); principles set forth in point 1 to 9 presented in Belgrade on 2 June 1999 and accepted by the Federal Republic of Yugoslavia (Annex 2 to S/RES/1244), principle 8.

¹¹⁵ On the details see J. Friedrich, in this Volume.

basic principles of the legal regime concerning minorities. When granted to minorities, such a right would be difficult to deny to majorities, with all the consequences experienced during the conflicts following the dissolution of Yugoslavia.

Apart from being a political problem, it is a problem as to whether the United Nations, in defining its objectives of involvement in Kosovo, may curtail the right of self-determination of the Kosovo Albanians if such a right includes the right to secession. This constitutes a general problem¹¹⁶ which the United Nations is facing in respect of most international involvements in post-conflict situations since often such conflicts arise from an internal armed conflict resulting from the intention of a minority group to form a separate state. This deserves a more general discussion.

2. Generic Problems

a. Self-Determination

S/RES/1244 reaffirms the “commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia ...” Along the same lines S/RES/1483 (2003) of 22 May 2003 emphasizes the sovereignty and territorial integrity of Iraq. In both cases this statement is directed against the aspirations of the Kosovo Albanians and the Kurds respectively to establish their own state based upon ethnic considerations. The reason for the Security Council to oppose such aspirations is its concern that the secession of the Kosovo from Serbia or the secession of the predominantly Kurdish populated areas of Iraq from Iraq may have a destabilizing effect on the respective region. However, such objections to secessionist movements may conflict with the right of self-determination of the respective population.

The right of peoples to self-determination is acknowledged in Article 2 of the UN Charter, the Declaration on Friendly Relations and Cooperation among States and both international human rights covenants. It is generally accepted that – at least in theory – the right to self-determination may be either implemented by the respective people by forming a particular new state by seceding from a state in which this people constituted a minority (external self-determination) or by vest-

¹¹⁶ See below.

ing the particular people with autonomy which allows it to develop its own culture (internal self-determination).¹¹⁷ Apart from that the right to self-determination also includes the right of a people to freely and without external interference decide upon its political future and the economic system it will implement. This latter aspect was frequently referred to in Security Council resolutions mandating international administration.

It is the majority view that the realization of the right to self-determination, except for cases of decolonization, is to be sought internally rather than externally through secession.¹¹⁸ It is, however, acknowledged that in cases of severe oppression of the minority in question it may seek secession. Such exception is based upon the view that the oppression may make it quite unrealistic that the respective people, the majority and the minority, live in peace in the future.

The question at stake for Kosovo may be whether the Security Council has the power – even if taking into consideration the oppression of the Kosovo Albanians – to deny them the right to secede from Serbia on the basis that such secession would destabilize the region.

Although the right to self-determination is enshrined in Article 2 UN Charter which is one of the principles and purposes of the United Nations binding upon the Security Council, the Security Council is primarily concerned with the preservation of international peace and security, a purpose equally referred to in Article 2 of the UN Charter. Therefore the Security Council has to weigh its options and in this respect it has – being a political organ – a wide discretion. The solution to be favored is that which has the best prospect for preserving peace and security in the region and which, at the same time, provides the Kosovo Albanians with guarantees for a non-reoccurrence of the oppression and human rights violations they have faced in the past.

Apart from that, international administration may come into conflict with the right to self-determination as far as its internal aspect is concerned. In all these cases (Cambodia, East Timor, Kosovo, Iraq, West Irian, Bosnia and Herzegovina) the international administration

¹¹⁷ For details which are not to be dealt with in this Volume see A. Eide, *Protection of Minorities: Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities*, Report to the ECOSOC, Commission on Human Rights, Subcommittee on the Prevention of Discrimination and Protection of Minorities, Doc. E/CN.4/Sub.2/1993/34 of 10 August 1993, para. 88.

¹¹⁸ See note 117.

altered the political infrastructure and the economic system significantly. This was particularly true for Kosovo and Iraq.

On the one hand, there is a fundamental requirement for respect of continuing state sovereignty during the occupation or international administration, which in legal terms, takes the form of restraints being placed on the alterations that can be introduced by the international administrator or occupying power within the respective territory. However, there is also a need for economic and political restructuring after years of wars or sanctions to ensure the establishment of reliable, legitimate and effective political institutions to replace those which formerly existed.

Here again the justification lies – as far as the Security Council is concerned – in its overarching mandate to preserve international peace and security. However, this mandate also has its inherent limits. No action undertaken by the international administrator is justified which does not ultimately serve this purpose. Apart from that such measures must not curtail the freedom of action of the future representative government. As far as a belligerent occupant is concerned (see the case of Iraq) its powers are limited by the respective international humanitarian law. As has been outlined, the measures taken concerning the economic restructuring of Iraq by the Coalition are hardly compatible with international law.¹¹⁹ Also legislative acts concerning the restructuring of Kosovo and Bosnia and Herzegovina may exceed the mandate of international administration, especially in cases where both the necessity of such acts for the maintenance of peace and local participation in the decision-making process were minimal.¹²⁰

b. Fostering Democracy through International Administration

aa. Introduction

Attempts through third party intervention to establish democratic structures in post-conflict situations seem to have followed a three-step approach. First, civil administration is vested in an entity set up for a transitional period by a third party; this approach has been followed by

¹¹⁹ See the Iraq case study, in this Volume.

¹²⁰ For example UNMIK Regulation No. 2000/68 and 2001/3. Compare for this assessment L. von Carlowith “UNMIK Lawmaking between Effective Peace Support and Internal Self-determination”, *AVR* 41 (2003), 336 et seq. (390).

the United Nations, regional international organizations and groups of states having no international mandate (Afghanistan, East Timor, Cambodia, Kosovo, Iraq). Such transitional authority was always closely linked to the entity in charge of international administration without including representative elements of the population concerned (Iraq, East Timor, Kosovo). Only in few cases were representatives of the elite of that population included (Afghanistan), or they were constituted on the basis of a still existing organizational infrastructure of the territory in question (Bosnia and Herzegovina). In all cases the governmental authority was gradually transferred to institutions embracing representatives of the given territory. With the exception of Bosnia and Herzegovina a further step was the convocation of a Constitutional Assembly having the sole task of drafting a constitution. Such Constitutional Assembly sometimes resulted from elections (Iraq, Namibia, Cambodia, East Timor) or it was constituted from an Assembly of an elite according to the traditional system of that state (see in Afghanistan the Loya Jirga).

In spite of the efforts undertaken by the international administration of territories to establish democratic structures the record in respect of democratization is mixed. This is due to several reasons. Neither the United Nations nor the states responsible for international administration have developed a long-term objective concerning the democratization of the territories under their authority, although in reality every attempt was made to establish democratic structures. Apart from that, the entities in charge frequently intervened in a manner and pursued objectives which were in conflict with the views of the representative local institutions. Finally, international administration itself lacks the checks and balances essential for a democratic government.

bb. Democratization as Objective

Although attempts have been made to establish democratic structures through international administration, democratization was not – at least not from the outset – a declared function of post-conflict interventions undertaken by the United Nations, states acting under its authority or by regional organizations. In many circumstances it has been emphasized by the United Nations or the responsible entity that it was, first of all, for the respective population to seek for national reconciliation or reconstruction.¹²¹ Instead of actively engaging itself in respective ef-

¹²¹ E.g. S/RES/814 (1993) of 26 March 1993, concerning Somalia.

forts the United Nations has emphasized that the restoration of law and order as well as finding a consensus on basic principles of government and steps leading to a representative government has to be achieved by the population concerned. The language used varies although the general approach always strikes the same note.

For example in respect of Cambodia the Comprehensive Settlement Agreement of the Paris Peace Agreements stated:¹²²

“The Cambodian people shall have the right to determine their own political future through the free and fair election of a constituent assembly, which will draft and approve a new Cambodian constitution ...”.

The Security Council emphasized that the international presence would contribute to the assurance of self-determination of the Cambodian people through free and fair elections and that free and fair elections were essential to produce a just and durable settlement to the Cambodian conflict. It was the role of the United Nations to organize and monitor referenda and elections. The United Nations was thus mandated procedurally rather than contributing substantially to the democratic structure of Cambodia. For the 1993 election UNTAC established 1,400 polling sites across the country and recruited and trained 48,000 Cambodian election workers as well as 1,000 international supervising officers. It also assisted in the registration of voters. The UN were further tasked with coordinating the joint international observers group consisting of 500 observers from 40 countries.

As far as East Timor is concerned the language of the respective Security Council resolution is even more vague; according to it UNTAET shall:

“support capacity-building for self government” and it shall “assist in the establishment of conditions for sustainable development ...”.¹²³

In respect of Kosovo it is the main responsibility of the international presence to promote substantial autonomy and self-government.¹²⁴ For Afghanistan the involvement concerning the future governmental structure of this state has been qualified as being a “light footprint”¹²⁵ and concerning Iraq the Security Council has frequently emphasized that it

¹²² Part 2, article 12.

¹²³ S/RES/1272 (1999) of 25 October 1999, operative para. 2 (e) and (f).

¹²⁴ S/RES/1244 (1999) of 10 June 1999, operative para. 11 (a).

¹²⁵ See the contribution of E. Afsah/ A.H. Guhr, in this Volume

was the right of the Iraqi people to freely determine their own political future while, at the same time, the necessity for the establishment of a representative government and the holding of elections was stressed.¹²⁶ The framework developed by S/RES/1546 concerning Iraq left the scope of decision making responsibility of the Coalition unclear. It declared its duty to be to promote self-government and to govern for the benefit of the Iraqi people. The allocation of governing power between international and local institutions remained, however, vague. This approach resembles the one concerning Bosnia and Herzegovina.

Since these references concerning the establishment of the future political structure mostly avoid the word “democracy” they may be considered as pursuing an overly cautious policy dictated by the political realities in each single case, and reflect a more general approach as expressed in the Agenda for Democratization. The Agenda states that there is “... no one model of democratization or democracy suitable for all societies ...”¹²⁷ it continues to state that “... it is not for the United Nations to offer a model of democratization or democracy or to promote democracy in a specific case ...”.¹²⁸ However, the United Nations has, on several occasions, intervened or endorsed an intervention to re-establish a democratic government against a rebellion or a military coup (cf. Haiti or Sierra Leone).

In spite of this abstract rhetoric, in the case of Kosovo the Special Representative of the Secretary-General and in the case of Bosnia and Herzegovina the Office of the High Representative has clearly sought to promote particular forms of democracy. The same is true for East Timor. In the case of the Kosovo, for example, the Special Representative has, by issuing Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo developed a structure for Kosovo which is based upon self-government, the separation of powers, the democratic election of the legislature and the application of human rights. The Special Representative not only provided for the conduct of elections and their monitoring but also significantly ruled how each ethnic community should be represented in the Assembly.¹²⁹

¹²⁶ S/RES/1546 (2004) of 8 June 2004, operative paras 3 and 4.

¹²⁷ B. Boutros-Ghali, *An Agenda for Democratization*, 1996, para. 4.

¹²⁸ *Ibid.*, para. 10.

¹²⁹ See Chapter 9, Section 1. According to this provision 100 of the 120 seats shall be distributed amongst all parties in proportion to the number of valid votes received by them; 10 seats shall be allocated to the Roma, Ashkali and Egyptian communities (4), the Bosniak community (3), the Turkish com-

This distribution of seats was guided by the concern that the minorities should have a voice in the legislature of Kosovo. Whether this interference of the Special Representative possibly amounts to the overrepresentation of the respective minorities in comparison to the share these minorities hold in Kosovo is another matter. In Bosnia and Herzegovina, the Office of the High Representative has influenced the election law in particular with the view to overcome ethnic barriers. Here again, it is an open question whether minorities have not been overly privileged. Finally, concerning East Timor Regulation No. 1999/2 has established the National Consultative Council through which the representatives of the people of East Timor shall actively participate in the decision making process during the period of the United Nations Transitional Administration in East Timor, and through which the views, concerns, traditions and interests of East Timor's people had to be represented.

This approach verbally advocated and in several cases implemented by the United Nations is open to criticism. It means to respect the right of the population in question to freely decide upon its future political and economic structure – a right which flows from the right to self-determination as enshrined in Article 2 of the UN Charter. This approach does not, though, take into consideration several aspects. Firstly that the lack of a democratic structure and the suppression of parts of the population has been the root cause for the respective internal conflicts and that, secondly, the respect for democratic procedures and democratic values has become the concern of the community of states. Apart from that it is illogical for the Security Council to respect the right to self-determination as far as the political structure of a state is concerned and, in respect of the same state, to deny a minority the possibility of secession, thus possibly infringing the exercise of such right.¹³⁰

munity (2) and the Gorani community. The seats for each community will be distributed amongst the respective parties proportional to the number of votes received. Ten seats shall be allocated to parties from the Serb community proportional to the votes received.

¹³⁰ See below.

cc. *Democratic Accountability of International Territorial Administration*

International administrations require – just as the democratic structures they are planning to establish – mechanisms and procedures ensuring their accountability and thus their permanent legitimacy. Speaking of accountability one must distinguish between accountability *vis-à-vis* the institution having mandated the respective takeover of administrative functions (for example the Security Council) and the accountability towards the respective populations. Both have a different basis, whereas the former derives from the mandate, the latter derives from the right of self-determination of the population concerned. For that reason accountability towards the Security Council or any other institution having mandated the establishment of that international administration (internal accountability), cannot supplement democratic accountability.

Fundamentally speaking, accountability is the area where international administration is deficient. Internal accountability is ineffective and democratic accountability is missing totally. In that respect international administration reflects an inherent contradiction; while it seeks to implant democracy in the territories under its jurisdiction, its functioning does not fully meet the standards of democratic accountability.¹³¹ This is all the more relevant since international administration is not embedded in the society and the cultural and legal history of the territory. There is no separation of powers; legislative, executive and sometimes even judicial functions are vested in a single authority. The population on whose behalf this authority is acting can neither challenge its acts nor remove the respective persons from office. In Iraq the personnel of the Coalition enjoyed immunity in Iraqi courts. Moreover, the personnel of the international administration in Kosovo and East Timor etc. equally were not answerable to local courts. UNMIK Regulation No. 2000/47 provides that all KFOR and UNMIK personnel shall be immune from any form of arrest and detention and that all KFOR and high ranking UNMIK officials shall be immune from local jurisdiction in respect of any civil or criminal act committed by them in the territory of Kosovo. UNMIK personnel are subject to the jurisdiction of UNMIK and KFOR personnel to the jurisdiction of the respective sending state.¹³²

¹³¹ R. Caplan, *International Governance of War Torn Territories, Rule and Reconstruction*, 2005, 195 et seq.

¹³² *Ibid.*, 209.

This does not mean that international administration has not developed any procedures for ensuring some forms of accountability – Iraq being a totally different issue.

The Security Council required the Secretary-General to report regularly on the functioning and the activities of the international administration it had authorized (Eastern Slavonia, Kosovo, East Timor, Cambodia) or endorsed (Bosnia and Herzegovina).¹³³ Furthermore, the High Representative is required under the Dayton Accord to report to the European Union, the United States, Russia and other interested governments, parties and organizations (including the United Nations) on the progressive implementation of this agreement.¹³⁴ Reporting requirements also exist *vis-à-vis* the World Bank and the OSCE.

Some international administrations have also established internal forms of accountability by establishing the office of the Ombudsperson.¹³⁵ The function of the office is to promote and to protect human rights. However, its scope of jurisdiction is limited. In Bosnia and Herzegovina the institution functions only in relation to Bosnian authorities. In respect of Kosovo KFOR is exempt from the jurisdiction of the Ombudsperson whereas it may receive complaints against UNMIK personnel. In East Timor complaints could be filed against UNTAET as well as agencies, programs and institutions of East Timor with respect to policies, proceedings and decisions that were thought to be unfair, discriminatory or unjust or in violation of human rights.¹³⁶

Although NGO's may, to a certain extent, promote transparency concerning the exercise of governmental powers by the inter-administration one must state – considering the immunity granted to the personnel of an international administration – that their accountability does not reach a level which is the minimum standard for democratic states. It is an irony pointed out by the Ombudsperson in Kosovo that the Kosovo people living under UNMIK rule, lack the protection that derives from Belgrade's increasing implementation of

¹³³ Ibid., 199.

¹³⁴ The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 10, Art. II, 1(f).

¹³⁵ See UNMIK Regulation No. 2000/38 of 30 June 2000; in Bosnia and Herzegovina three institutions were established – one at the state level (including the district of Brcko) and one for each of the two entities. The jurisdiction of the two latter does not extend to international actions. The office of the Ombudsperson for East Timor was established without a regulation.

¹³⁶ Caplan, see note 131, 201.

international human rights instruments, including its acceptance in 2001 of the right of individual petition to the Human Rights Committee, albeit the fact that the lack of protection of human rights was used to legitimize the intervention in Kosovo and the establishment of an international administration.¹³⁷ The same criticism may be voiced concerning the international administration in Bosnia and Herzegovina and East Timor although the powers of the Ombudsperson are somewhat broader in scope. Even if the respective Ombudspersons had been given full investigative powers such powers cannot compensate for the lack of independent judicial control which seems to be typical for international administration. Therefore international administration does not, in this respect, prepare the respective population to be governed by democratic institutions.

c. Protection of Human Rights

aa. Fostering the Protection of Human Rights

As far as the protection of human rights is concerned, Part III of the Agreements on a Comprehensive Political Settlement of the Cambodia Conflict mandated Cambodia and UNTAC to share the responsibility to ensure that human rights would be respected. Cambodia agreed to ensure respect for and observance of human rights and fundamental freedoms and agreed to take effective measures to ensure that the policies and practices of the past should never be allowed to return and to adhere to relevant international human rights instruments. UNTAC's human rights component had the responsibility to foster the development and implementation of a program of human rights education, to promote respect for and understanding of human rights, to investigate human rights complaints and, where appropriate, to take corrective action. After UNTAC's departure, the UN established a branch of the office of the High Commissioner for Human Rights to monitor and promote the respect of human rights in Cambodia in line with the Agreement which required international monitoring and an annual report to the UN. Also, the other resolutions of the Security Council establishing

¹³⁷ Ombudsperson Institution in Kosovo, Second Annual Report 2001-2002, 5.

or mandating the establishment of international administration of territories refer to the protection of human rights.¹³⁸

bb. Human Rights as Restraints for International Territorial Administration

It has been argued that entities taking over governmental responsibilities in respect of a territory are under an obligation to maintain the level of human rights protection for the respective population.¹³⁹

UNMIK has, at least formally lived up to this principle. The first UNMIK Regulation (UNMIK/REG/1999/1) of 25 July 1999 stated in Section 2:

“Observance of Internationally Recognized Standards

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

The respective regulation issued by UNTAET (UNTAET/REG/1999/1 of 27 November 1999) is even more elaborated on this issue.¹⁴⁰ UNMIK followed the example of UNTAET with its Regulation

¹³⁸ Cf. S/RES/1244 (1999) of 10 June 1999, operative para. 11 (j) in respect of Kosovo.

¹³⁹ J. Cerone, “Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo”, *EJIL* 12 (2001), 469 et seq.; T.H. Irmscher, “Legal Framework for Acts of UNMIK”, *GYIL* 44 (2001), 353 et seq.; Human Rights Committee, General Comment No. 26, see below note 144.

¹⁴⁰ See Section 2: “In exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards, as reflected, in particular, in: the Universal Declaration of Human Rights, 1948; the International Covenant on Civil and Political Rights, 1966 and its Protocols; the International Covenant on Economic, Social and Cultural Rights, 1966; the Convention on the Elimination of All Forms of Racial Discrimination, 1965; the Convention on the Elimination of All Forms of Discrimination Against Women, 1979; the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; the International Convention on the Rights of the Child, 1989. All persons undertaking public duties shall not discriminate against any person on any ground such as sex, race, color, language, religion, political or other opinion, national, ethnic or social ori-

No. 1999/24 of 12 December 1999 now listing the same international human rights instruments plus the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto. The question is whether these references are of a constitutive or a declaratory nature. This is of some relevance since it is doubtful whether such regulations are binding on KFOR given the different mandate the civilian and the military wing of the international administration of Kosovo each enjoy according to S/RES/1244.¹⁴¹ Although there are some indications that KFOR is obliged to respect human rights on the basis of the said UNMIK Regulation¹⁴² these are not sufficient to answer the more generic question as to whether UNMIK and KFOR in exercising their functions, have to respect international human rights standards.

Several arguments may be advanced to support the view that both UNMIK and KFOR are, apart from the self-commitment of UNMIK in the UNMIK Regulations, in respect of the execution of their functions bound by international human right standards.¹⁴³ The first argument is based upon the fact that the Socialist Federal Republic of Yugoslavia, the predecessor of the Federal Republic of Yugoslavia was a State party to most of the international human rights instruments in which

gin, association with a national community, property, birth or all other status". See also UNMIK Regulation No. 1999/24 amending Regulation No. 1999/1. The former lists the following human rights instruments: Universal Declaration of Human Rights, 1948; European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Protocols thereto, 1950; the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural Rights, 1966; the International Convention on the Elimination of All Forms of Racial Discrimination, 1965; the Convention on the Elimination of All Forms of Discrimination Against Women, 1979; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; and the International Convention on the Rights of the Child, 1989. All persons undertaking public duties shall not discriminate against any person on any ground such as sex, race, color, language, religion, political or other opinion, natural, ethnic or social origin, association with a national community, property, birth or other status.

¹⁴¹ On this, in particular Cerone, see note 139, 473.

¹⁴² S/RES/1244 (1999) of 10 June 1999 obliges KFOR to comply with the purposes of the United Nations, which includes the promotion of human rights and KFOR is required to support the international presence (operative para. 6).

¹⁴³ See in particular the analysis by Cerone, see note 139, 474 et seq.

the latter has automatically succeeded. This principle has been appropriately expressed by the Human Rights Committee in its General Comment No. 26 of 29 October 1997.¹⁴⁴ This Comment states:

“Once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant”.

Since UNMIK and KFOR act as public authorities in place of the state government the exercise of their functions faces the same human rights restraints as the latter. As far as KFOR is concerned its national contingents are bound by the international human rights instruments to which its governments have adhered to, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms and to international humanitarian law. It is established that international human rights instruments apply also to the extra-territorial application of the jurisdiction of its States parties.¹⁴⁵ Having been integrated in KFOR the national contingents remain under the authority of the sending state and thus are bound to the obligations their governments are committed to. Finally, it has to be taken into account that in August 1999 the UN Secretary-General issued a code of principles and rules of international humanitarian law applicable to United Nations forces¹⁴⁶ which may not be directly applicable to KFOR, but to UNMIK as a peace-keeping operation.¹⁴⁷

To put it into a nutshell, UNMIK as well as KFOR are bound in the exercise of their public functions by international human rights stan-

¹⁴⁴ Report of the Human Rights Committee, Volume I, GAOR 53 Sess., Suppl. No. 40.

¹⁴⁵ See, for example, the comment of the Human Rights Committee on the Report of the United States, Doc. CCPR/C/79/Add. 50 (1995), para. 19; Judgment of the European Court of Human Rights, *Loizidou v. Turkey* (Merits), 40/1993/435/514 of 18 December 1996, para. 57.

¹⁴⁶ Observance by United Nations Forces of International Humanitarian Law Doc. ST/SGB/1999/13 of 6 August 1999.

¹⁴⁷ It has to be remarked that on 28 August 2004 there had been issued an Agreement between the Special Representative of the Secretary-General and the Secretary-General of the EU Council which provides that the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, as well as the Framework Convention for the Protection of National Minorities apply to UNMIK.

dards as if they were state organs of a State party to the respective instruments.

d. Rule of Law

Frequently when mandating international administration the need was emphasized to restore law and order.¹⁴⁸ Equally it has been stated that there was a need to reform the justice sector and the police sector.¹⁴⁹ A third element in this context is the prosecution of the crimes committed by the previous regime.¹⁵⁰

Finally, international administration does not mean that the pre-existing legal order of the territory in question is automatically abolished. This is due to the temporary nature of international administration. This has been acknowledged in respect of Kosovo, for example. UNMIK has provided that the laws applicable in Kosovo prior to 24 March 1999 shall continue to apply insofar as they do not conflict with regulations issued by UNMIK or the object and purpose of S/RES/1244.¹⁵¹

¹⁴⁸ E.g. S/RES/814 (1993) of 26 March 1993, in respect of Somalia.

¹⁴⁹ S/RES/1563 (2004) of 17 September 2004, in respect of Afghanistan, S/RES/897 (1994) of 4 February 1994 in respect of Somalia.

¹⁵⁰ See Seibert-Fohr, in this Volume. This aspect as well as the restructuring of the police and justice sector are dealt with in the Report of the Secretary-General of 23 August 2004, Doc.S/2004/616.

¹⁵¹ Sec. 3 of UNMIK/REG/1999/1 of 25 July 1999 reads: "Applicable Law in Kosovo - The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with standards referred to in section 2, the fulfilment of the mandate given to UNMIK under United Nations Security Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK". UNMIK/REG/1999/24 of 12 December 1999 later stipulated that those legal rules apply which were in force in Kosovo on 22 March 1989 (the date at which the autonomy was withdrawn). The law between 1989 and 1999 is applicable only if otherwise there would be a legal lacuna and such rules are not discriminatory. UNMIK/REG/1999/24 was amended by UNMIK/REG/2000/59 of 27 October 2000 according to which the applicable law in Kosovo shall be: "1.1. The law applicable in Kosovo shall be: (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and (b) The law in force in Kosovo on 22 March 1989. In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence. 1.2. If a court of competent jurisdiction or a body or person required to implement

Establishing a government based on the rule of law requires international administration to revise existing law and to introduce new law. International administration has been engaged in both. As already mentioned, it must meet the demands of two potentially conflicting objectives, namely the establishment of a legal order while at the same time not prejudging more than necessary the future elected government. It has already been indicated that on several occasions international administration has overstepped its mandate.¹⁵²

The method used for the creation of new and the change of old law has been identical in all cases. International administration has assumed legislative power, decreeing that its legislative acts supersede.¹⁵³

As already indicated in the case studies, international administration has on several occasions established new governmental structures or, if such structures still existed as in Bosnia and Herzegovina, has reformed them. The border line between those two cases may be fluid as may be seen in the case of the Congo. ONUC was technically meant to support

a provision of the law determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law". The situation in respect of East Timor is similar. The respective provision (Sec. 3) in UNTAET/REG/1999/1 of 27 November 1999 states: "Applicable Law in East Timor - 3.1. Until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2, the fulfilment of the mandate given to UNTAET under United Nations Security Council resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator. 3.2. Without prejudice to the review of other legislation, the following laws, which do not comply with the standards referred to in section 2 and 3 of the present regulation, as well as any subsequent amendments to these laws and their administrative regulations, shall no longer be applied in East Timor: Law on Anti-Subversion; Law on Social Organizations; Law on National Security; Law on National Protection and Defense; Law on Mobilization and Demobilization; Law on Defence and Security. 3.3. Capital punishment is abolished".

¹⁵² See above.

¹⁵³ See for example UNMIK Regulation 2000/59 Sec.1; UNTAET/REG/1991/1 Sec. 3; the same method has been used by the Coalition Provisional Authority in Iraq.

the civil administration of the government; in fact it had to train Congolese administrators to manage governmental functions. The counter-example was the case of Cambodia. This was the first international administration under the authority of the United Nations in which the United Nations at least assumed nominal responsibility for governing the country. *De facto* international administration was mostly reduced to a control function since the national administration was still intact. This was not the case in East Timor where UNTAET had to fill the administrative vacuum after the withdrawal of 8000 civil servants to Indonesia. UNTAET established not only the administration but also the judiciary. This approach, already pursued in post-war Germany and Japan and has been used in all cases where administrative structures had been missing.

In establishing new administrative structures or in reorienting them different objectives were pursued. Frequently the objective was to prepare for new governmental structures having a different political orientation. In the case of Namibia this meant replacing a government opposed to independence, in Mostar a local government divided on ethnic lines, in Kosovo to replace the Serbian dominated government and in Iraq to replace the government controlled by the Ba'ath party. In cases where the governmental structure had broken down the international territorial administration was meant to fill the existing vacuum and to provide for the gradual establishment of a national government (e.g. East Timor, Cambodia). Both objectives come under the broader goal to assist the population to establish its own governmental structures.

IV. Conclusions

In his report "In Larger Freedom: Towards Development, Security and Human Rights for All"¹⁵⁴ the UN Secretary-General emphasized that the UN system is institutionally deficient since "no part of the United Nations system effectively addresses the challenge of helping countries with the transition from war to lasting peace".¹⁵⁵ For that reason the establishment of a Peacebuilding Commission as well as a Peacebuilding Support Office within the UN Secretariat is being proposed.

¹⁵⁴ Doc. A/59/2005 of 21 March 2005.

¹⁵⁵ *Ibid.*, page 31.

The concerns voiced by the UN Secretary-General are common ground but before new institutions are to be set up it seems to be mandatory to assess which international law standards are to be applied in post-conflict situations.

It has been argued that the complete administrative take-over of a territory by the United Nations may be considered as a trusteeship administration.¹⁵⁶ The decisive feature of trusteeship administration is the international administration of a territory on behalf of another entity, in particular another state. The administration of Leticia and the Saar Basin by the League of Nations and of East Timor, Cambodia, West Irian etc. by the United Nations meet this criterion. However, such objective does not distinguish such administration from peace-keeping activities. Here, too, the United Nations does not act for its own benefit but in the interest of the international community of states in the preservation of peace and also in the interest of the population living in the conflict area. Therefore it is not the objective pursued which divides trusteeship administration from international administration by the UN in post-conflict situations but the complete or nearly complete take-over of governmental control compared to the more limited infringement in the exercise of sovereignty which goes with traditional peace-keeping. Proceeding from the objective of the international administration of territories does not justify the qualification of such activities as a new form of political trusteeship-administration.

Nevertheless, some lessons can be taken from the general concept of trusteeship. As the international administration involving the notion of trusteeship is meant to be of a temporary nature, namely until representative institutions will be functioning, such administration shall avoid taking irreversible decisions, such as agreements concerning the borders of the territory in question, or concerning the ownership of public property. As a general rule international administration shall avoid decisions on issues which are irreversible or have long-ranging effects or on issues which may be left to the representative government without endangering the restructuring process.¹⁵⁷

Further, the objectives as provided for in Article 76 of the UN Charter should apply to international administration in post-conflict situations, namely the promotion of peace, the promotion of the political, economic, social and educational advancement of the inhabitants

¹⁵⁶ Bothe/ Marauhn, see note 14, 153 et seq.; Deiwert, see note 14, 796 et seq.

¹⁵⁷ At least formally this principle has been respected for example for Kosovo and East Timor.

and their progressive development towards self-government. In particular, the latter point is even more significant for international administration than it was for the trusteeship system under Chapter XII of the UN Charter since, except for Kosovo, clear deadlines and objectives have been set by the agreements or Security Council resolutions mandating the establishment of international administration.

Some lessons for international administration can also be learned from international humanitarian law. In particular, the temporary nature of belligerent occupation, the prohibition to use natural resources, except for the benefit of the respective territory are principles which equally apply to international administration in spite of the fact that international administration authorized by the United Nations provides for the possibility to change the political structures of the respective territory whereas international humanitarian law does not. Thus international administration is influenced by principles rooted in international humanitarian law whereas belligerent occupation cannot be transformed into international administration.¹⁵⁸ The limits for a belligerent occupant are more constrained since it does not function under an international mandate.

The main deficiency of international administration is the non-implementation of principles governing the administration of democratic states. There is no separation of powers; there is no established system providing for an internal accountability of international administration nor is there any democratic accountability. The lack of democratic accountability is only acceptable for a transitional period. There is no justification for the lack of internal accountability which seems to be typical for international administration. As a matter of principle in cases of international administration, internal accountability should be strengthened and made transparent for the population concerned to somehow compensate for the lack of democratic accountability. After the setting up of representative institutions, even on the municipal level, these institutions should assume full responsibility. In implementing the right to self-determination, a principle equally binding upon international administration, the latter should refrain from interfering in decisions of such institutions. If it is claimed that such decisions violate the peace arrangements, recourse should be made to independent dispute settlement mechanisms which are not under the control of the respective international administration.

¹⁵⁸ Different Dobbins et al., see note 12, who treat cases of international administration and belligerent occupation alike.

International administration is finally lacking coherency. Treating each case on its own detracts from that fact that international administration is bound by international standards, such as human rights, humanitarian law, the principle of self determination and at least the basic elements of democracy and rule of law. This should be set out *in abstracto* and right from the beginning. Equally the United Nations should prepare in advance a judicial review system which provides for protection not only against human rights violations but any misuse of power by the personnel of international administration. If the United Nations performs the functions of a state it should act within the same legal framework as democratic states committed to human rights and the rule of law. The above mentioned report "In Larger Freedom" does not refer to this. Setting up new institutions without clear standards to be applied will not improve the efficiency and, in particular, the credibility of the United Nations or other institutions engaged in international administration.