

Accountability of International Organisations  
Engaged in the Administration of Territory

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Conclusion

## Introduction

As I write these words, armed attacks are being perpetrated against peacekeepers in Côte d'Ivoire, apparently sparked by fears that the United Nations is taking over the administration of the country. UN police stations have been firebombed, UN forces have been attacked and protestors have been killed by “blue helmets”. Protestors carrying placards emblazoned with “La Côte d'Ivoire n'est pas sous tutelle” vehemently demand that United Nations peacekeeping forces leave the country immediately.<sup>1</sup> A group of supporters of President Laurent Gbagbo are apparently convinced that the United Nations-led International Working Group, set up to oversee the implementation of the peace plans for the country, in fact led “a political coup” when it recommended the dissolution of the Ivorian Parliament on 15 January of this year.<sup>2</sup> The mistrust shown by some parts of the local population toward the United Nations (and possibly also the African Union) reflects the ambiguity of the role of the international community in complex peace operations. Even if the true motivation for protest is to allow President Gbagbo to remain in power no matter the results of elections, protestors may appeal to the public conscience on account of recent exercises in territorial administration by international organizations. There is a palpable and justifiable sense that international organizations are no longer averse to taking actions that only a few decades ago would have been seen as an unacceptable encroachment on State sovereignty.

The 1990s saw the revival of a practice that most observers of international relations had thought to be obsolete: administration of territory by an international entity. Indeed, some peace operations resemble states with all their apparatuses, rather than the simple interposition forces of the Cold War era, and have the personnel to match.<sup>3</sup> The two most prominent

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<sup>1</sup> *The Telegraph*, "David Blair's Africa Weblog", Four killed as UN pull out of Ivory Coast posts, 18 January 2006, (Photo of protestors carrying placards (article on file with the author)). Online: <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/01/18/ivory.xml&sSheet=/portal/2006/01/18/ixportaltop.html>.

<sup>2</sup> A *Financial Times* article reported "The president's supporters say the latest international mediation amounts to a political coup." 19 January 2006, <http://news.ft.com/cms/s/41b39bb0-8891-11da-a05d-0000779e2340.html>. The IWG (better known by its French acronym GTI) was created by the Peace and Security Council of the African Union and endorsed in a Chapter VII resolution of the United Nations Security Council. For the Peace and Security Council decision, see *Annex to the letter dated 6 October 2005 from the Permanent Representative of Nigeria to the United Nations addressed to the President of the Security Council*, UN Doc. S/2005/639 (11 October 2005). See also Security Council res. 1633 (2005) (21 October 2005). UN press releases are themselves inconsistent: the press release of 21 January said that the IWG decision effectively dissolved the Parliament, whereas that of 26 January announcing that 400 staff were being evacuated referred only to the “nonbinding decision” of the working group.

<sup>3</sup> Some early UN peace operations also displayed a civilian administrative component, such as ONUC in Congo in the early 1960s. For this reason, characterization of such peace operations as 'third generation', suggesting a chronological evolution toward complex operations, is inappropriate. See Ralph Wilde, "Representing International Territorial Administration: A Critique of Some Approaches" (2004) 15 *EJIL* 71 at 77.

contemporary examples of international administration of territory are the United Nations Mission in Kosovo<sup>4</sup> (UNMIK) and the United Nations Transitional Administration in East Timor<sup>5</sup> (UNTAET), but these are by no means the only occasions in the past decade or so that the international community has embarked on a mission to act as the government. A further two peace operations in the Balkans, the United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium<sup>6</sup> (UNTAES) and the Office of the High Representative (OHR) in Bosnia and Herzegovina,<sup>7</sup> also put international civil servants in the position of acting as local government. The latter is a complex mission. The security mandate was run by the UN while the civilian administration component is run by the European Union (through the High Representative). Other (now defunct) peace operations have exhibited similar characteristics – in particular, the UN Temporary Executive Authority (UNTEA)<sup>8</sup> in West Irian and the UN Transitional Administration in Cambodia<sup>9</sup> (UNTAC). The scope and exercise of the power of international administrators may fluctuate from one operation to another, but the fact that the international community at times acts directly as the government in post-conflict territories is undeniable.

Other populations that are clearly under direct UN (or other) administration have not reacted as violently against the UN as in Côte d'Ivoire, but those administrations have nonetheless garnered their fair share of criticism. The most troubling aspect of the international administrations is the absence of the rule of law in favour of highly autocratic administration. When Bernard Kouchner, the first Special Representative of the Secretary-General (SRSG) of UNMIK, proclaimed Regulation 1/1999, which accorded to himself and his administration “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary,”<sup>10</sup> the resemblance of the government to that of Louis XIV did not go

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<sup>4</sup> UN SC res. 1244 (1999).

<sup>5</sup> UN SC res. 1272 (1999).

<sup>6</sup> UN SC res. 1037 (1996).

<sup>7</sup> UN SC res. 1035 (1995). The UN component, which did have a Special Representative of the Secretary-General at its helm, oversaw the civilian police component of the mission. Since the OHR is the civilian administrative aspect, to be as accurate as possible I will refer to this mission throughout under OHR rather than under the UN acronym UNMIBH. See also the Dayton General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995, available online: [http://www.ohr.int/dpa/default.asp?content\\_id=379](http://www.ohr.int/dpa/default.asp?content_id=379).

<sup>8</sup> UN GA res. 1752 (XVII) 21 September 1962.

<sup>9</sup> UN SC res. 745 (1992).

<sup>10</sup> Regulation 1/1999 Article 1 states in full: “All legislative and executive authority with respect to Kosovo, including the administration of the judiciary is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.” See UNMIK/REG/1999/1, online: <http://www.unmikonline.org/regulations/unmikgazette/02english/Econtents.htm>. [All UNMIK regulations are available at this site.]

unnoticed in the international press.<sup>11</sup> Even the SRSG of the other UN-administered territory at the time, the late Sergio Vieira de Mello, observed, with respect to his own powers in East Timor, that he was in a situation of “benevolent despotism”.<sup>12</sup> Just as in any well-intentioned domestic government, the lack of a separation of powers has proved to be worrisome, even for a UN-run peace operation. An administration with no system of checks and balances flies in the face of everything the international community preaches about democratic government and the rule of law as fundamental to maintaining international peace and security.

In the recent international administrations, decisions by the heads of the administrations and actions of their officials and agents are not subject to challenge in local courts.<sup>13</sup> In addition, the manner in which the SRSGs (or their equivalents) exercise their powers runs the risk of skewing any developing conception of democratic government. With discomfiting regularity, they unilaterally dismiss elected officials from office (a power which is supposedly the source of the current unrest in Côte d’Ivoire), unilaterally amend laws adopted by an elected parliament prior to promulgating them,<sup>14</sup> and have sometimes failed to translate into local languages and publish their own laws in a timely way.<sup>15</sup> There is a serious lack of clarity in determining the applicable law within the territory.<sup>16</sup> And, finally, it is currently the SRSG

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<sup>11</sup> For example, one article in the *Washington Times* reported the adoption of the regulation under the headline “Kosovo’s New ‘King’”. See Betsy Pisik, 26 July 1999, p. A14.

<sup>12</sup> Sergio Vieira de Mello, *How Not to Run a Country: Lessons for the UN from Kosovo and East Timor* (2002), cited in Jacob S. Kreilkamp, “U.N. Postconflict Reconstruction” (2003) 35 *N.Y.U. J. Int’l Law & Politics* 619 at 656.

<sup>13</sup> This lack of checks and balances is derided by virtually all who write on these administrations. See Rüdiger Wolfrum, “International Administration in Post-Conflict Situations by the United Nations and Other International Actors” (2005) *Max Planck Yearbook of United Nations Law* 649 at 672-73 and 685-687; Simon Chesterman, *You the People: The United Nations, Transitional Administration and State-Building* (Oxford: Oxford Univ. Press, 2004), Elizabeth Abraham, “The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detention in its Mission in Kosovo” (2003) 52 *American Univ. Law Review* 1291 at 1296; Joel C. Beauvais, “Benevolent Despotism: A Critique of UN State-Building in East Timor” (2001) 33 *N.Y.U. Journal of Int’l Law and Politics* 1101 at 1169 - 70; Kristen Boon, “Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant’s Law-Making Powers” (2005) 50 *McGill Law Journal* 285; Ralph Wilde, “Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor” (2001) 7 *ILSA Journal Int’l & Comp. Law* 455. See also Richard Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (Oxford: Oxford Univ. Press, 2005); Alexandros Yannis, “The UN as Government in Kosovo” (2004) 10 *Global Governance* 67 – 81.

<sup>14</sup> See for example, something as banal as the promulgation of the Law on Measurement Units adopted by the Kosovo Assembly, *UNMIK/REG/2004/14*, 28 May 2004, online, *supra* note 10.

<sup>15</sup> Administrative Direction No. 2000/16 (20 July 2000) providing for publication of UNMIK laws in a gazette came more than a year following the adoption of regulation 1999/1 according the SRSG legislative power. See UNMIK Official Gazette, online, *supra* note 10. Moreover, that Directive specifies that whether a law is published in the Gazette has no impact on its validity. See section 4 of the Administrative Direction. Moreover, three years after the publication of regulation 1999/1, important regulations were still only available in English. See Caplan, *supra* note 13 at 208.

<sup>16</sup> Marcus Brand, “Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation” (2001) 70 *Nordic Journal Int’l Law* 461 – 488, was one of the first to write on this. Lakhdar

and the UN Office of Legal Affairs in New York, and not a court, that determines whether a law passed by the Kosovo Parliament violates the constitutional framework.<sup>17</sup> In Bosnia, the High Representative has simply “overruled” the Constitutional Court of the Republika Srpska after it found that Biljana Plavsic had acted *ultra vires* when she dissolved Parliament.<sup>18</sup> Political scientists criticise the lack of democratic accountability of some international administrations, arguing that it is difficult to teach democracy by saying “do as I say, not as I do”.<sup>19</sup> Lawyers have recently begun to call for the ability to have judicial review of administrative action in such circumstances.<sup>20</sup>

Equally troubling, and directly related to the absence of the rule of law, international administrations have been the perpetrators of human rights violations. In particular, UNMIK and UNTAET have drawn criticism for the following practices: executive orders to detain persons without warrant or for a long time after a court had ordered their release<sup>21</sup>; retroactive application of new laws; application of laws that violate human rights, such as criminal prosecution for defamation (or failing to stop such prosecution)<sup>22</sup>; lack of *habeas corpus*, access to defence counsel and lack of respect of fair trial procedures<sup>23</sup>; and abusive prosecution<sup>24</sup>. Another example of an apparently frequent human rights violation by both the civilian and military components of international administrations is the expropriation of property without compensation in order to meet the material needs of the administration.<sup>25</sup>

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Brahimi also cited it as a problem in his renowned *Report of the Panel on United Nations Peace Operations*, 21 August, 2000, UN Doc. A/55/305 and S/2000/809, available online at [http://www.un.org/peace/reports/peace\\_operations/](http://www.un.org/peace/reports/peace_operations/), at para. 79 [hereinafter Brahimi Report].

<sup>17</sup> See International Crisis Group, *Two to Tango: An Agenda for the New Kosovo SRSG*, Europe Report No. 148 (Pristina/Brussels) 3 September 2003 at p. 22.

<sup>18</sup> Richard Caplan, *supra* note 13 at 181.

<sup>19</sup> Simon Chesterman, *You the People*, *supra* note 13 at 150ff.

<sup>20</sup> See especially Rüdiger Wolfrum, *supra* note 13 at 685-687 and 696.

<sup>21</sup> Ombudsperson Institution in Kosovo, *Special Report No. 3: On the Conformity of Deprivations of Liberty Under ‘Executive Orders’ with Recognized International Standards* (29 July 2001), available online at <http://www.ombudspersonkosovo.org>; Amnesty International, "Federal Republic of Yugoslavia (Kosovo): Amnesty International calls for an end to Executive Orders of detention" (3 August 2001) AI Index EUR 70/017/2001.

<sup>22</sup> Carla Bongiorno, "A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor" (2002) 33 *Colum. Human Rights Law Review* 623 at 666 ff.

<sup>23</sup> Report of the OSCE Legal Systems Monitoring Section, *Kosovo: A Review of the Criminal Justice System* 1 September 2000 – 28 February 2001; LSMS, *Kosovo: A Review of the Criminal Justice System*, October 2001 at 19ff. All reports are available online at <http://www.osce.org/kosovo/documents.html>.

<sup>24</sup> Kosovo Ombudsperson, Letter to Mr. Jean-Christian Cady, Deputy SRSG for Police and Justice, 11 October 2004 and response of 28 February 2005, available online at <http://www.ombudspersonkosovo.org>.

<sup>25</sup> Ombudsperson Institution in Kosovo, *First Annual Report 2000-2001* (18 July 2001): In that report, Ombudsperson Marek Antoni Nowicki reported that 141 of the 344 formal claims related to property, including lack of compensation for taking property without compensation and for unrecompensed damage to property. Available online, *supra* note 24; Leopold von Carlowitz, "Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovo" (2004) 10 *Global Governance* 307

Freedom of expression has been severely curbed in various administrations, including, in Bosnia, for political communication totally devoid of incitement to hatred or violence.<sup>26</sup> Critics have not been assuaged by the response from UNMIK that it could derogate from human rights treaties since it was operating in the context of a state of emergency.<sup>27</sup> The fact that UN personnel enjoy immunity from any kind of legal or judicial proceeding either on the basis of the application of the Convention on the Privileges and Immunities of the United Nations<sup>28</sup> or on the strength of a particular regulation promulgated by the mission itself<sup>29</sup> has fortified calls to review the applicable accountability regime, including by institutions within the international administrations themselves.<sup>30</sup>

Finally, such administrations may infringe the right to self-determination, especially since these have also been involved with privatizing property<sup>31</sup> and re-drawing municipal boundaries<sup>32</sup>. One administration has signed Free Trade Agreements with neighbouring States without the consent of the sovereign host State.<sup>33</sup>

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– 331 fails to deal with this aspect of UNMIK and KFOR’s impact on property rights. The author focuses instead on regulations attempting to reform the system of registering property and prohibiting sales in certain areas. It is indeed ironic that compensation for property used by the peace operation is an issue considering that the main document of the UN on liability in peace operations deals with occupancy of property see *Report of the Secretary-General: Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters* (20 September 1996), UN Doc. A/51/389 [hereinafter *Financing of UNPROFOR*] at paras. 9 – 15.

<sup>26</sup> One example Richard Caplan provides is related to a law on calling into question the territorial unity of the Federation. The SDS was fined by the administration “for having ‘continually stressed the substantial autonomy granted to Republika Srpska in the [Dayton] General Framework Agreement, to the total exclusion of any reference to the unity of Bosnia and Herzegovina.’” See Caplan, *supra* note 13 at 181 – 182.

<sup>27</sup> See UNMIK News No. 98 25 June 2001, <http://www.unmikonline.org/pub/news/nl98.html>. The statement read, “UNMIK reminds critics that Kosovo still ranks as an internationally-recognized emergency. For such circumstances, international human rights standards accept the need for special measures that, in the wider interests of security and under prescribed legal conditions, allow authorities to respond to the findings of intelligence that are not able to be presented to the court system.”

<sup>28</sup> 1 U.N.T.S. 15, 13 February 1946 [hereinafter *Immunities Convention*].

<sup>29</sup> UNMIK Regulation 2000/47, online, *supra* note 10.

<sup>30</sup> Ombudsperson Institution in Kosovo, *Special Report No. 1 on the compatibility with recognized international standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo (18 August 2000) and on the implementation of the above REGULATION* (2001), available online, *supra* note 21 [hereinafter *Special Report No. 1*].

<sup>31</sup> The Kosovo Trust Agency, that has a mandate to privatise publicly and socially-owned property in Kosovo, was created by a regulation promulgated by the SRSG of UNMIK "in consultation with" the Provisional Institutions of Self-Government. See *UNMIK/REG/2002/12*, 13 June 2002. See also the agency's website: [www.kta-kosovo.org](http://www.kta-kosovo.org). It should be noted, however, that at the same time UNMIK created a special tribunal to deal with claims regarding decisions made by the KTA. See *UNMIK/REG/2002/13*, 13 June 2002.

<sup>32</sup> *UNMIK/REG/2000/43*. Available online: *supra* note 10.

<sup>33</sup> Free Trade Agreements were signed between Kosovo and Albania and Kosovo and Macedonia: UNMIK/FTA/2003/1 and UNMIK/FTA/2005/1. Available online at <http://www.unmikonline.org/regulations/unmikgazette/02english/IAE/IAE.htm>



Peacekeeping and peacebuilding by the United Nations have long drawn criticism from the international community. When it comes to international administrations, the appropriateness of the UN acting as the government of territory in post-conflict situations has even been questioned in reports on peacekeeping commissioned by the Secretary-General. The Brahimi Report put it bluntly, citing the problems of civil administration and stating, "[b]eyond such challenges lies the larger question of whether the UN should be in this business at all...".<sup>34</sup> While it seems as though the international community took a step back from direct administration in the early part of this decade,<sup>35</sup> the ambiguous situation in Côte d'Ivoire indicates that international organizations have not renounced this role completely.<sup>36</sup> It is therefore worthwhile to examine the important legal questions regarding accountability under international law that are unique to this type of peace operation.

### **Emerging Legal Framework on Responsibility of International Organisations**

Although it is still in its early stages of development,<sup>37</sup> the emerging framework of the responsibility of international organisations provides an important point of departure to the study of accountability in international administrations. As in the case of State responsibility, the responsibility of an international organisation is engaged when an organisation commits an internationally wrongful act. The International Law Commission's (ILC) Draft Articles on the Responsibility of International Organizations (such as are thus far adopted by the Committee) define internationally wrongful acts as "conduct consisting of an action or omission" that "(a) is attributable to the international organization under international law" and that (b) constitute "a breach of an international obligation of that organization."<sup>38</sup> Peace operations are subsidiary organs of the United Nations and therefore engage the responsibility

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<sup>34</sup> Brahimi Report, *supra* note 16 at para. 78.

<sup>35</sup> Kreilkamp, *supra* note 12 at 662 -63.

<sup>36</sup> The mission in Côte d'Ivoire is mentioned in this context mostly to show that the UN is not necessarily wedded to the new "light footprint" approach exemplified by UNAMA in Afghanistan. See *infra* note 57.

<sup>37</sup> The *Report of the International Law Commission on the work of its fifty-fifth session*, 5 May – 6 June and 7 July – 8 August 2003, UNGA O.R. 58<sup>th</sup> Sess, Supp. No. 10, UN Doc. A/58/10) at para. 44 indicates that the responsibility of international organisations was first identified as an issue in 1963 [hereinafter ILC Report 2003].

<sup>38</sup> See the *Report of the International Law Commission on the work of its fifty-seventh session*, 2 May – 3 June and 11 July – 5 August 2005, UNGA O.R. 60<sup>th</sup> Sess., Supp. No. 10, UN Doc. A/60/10 [hereinafter ILC Report 2005] at para. 205 for the text of the Draft Articles "provisionally adopted so far by the Commission". While no official name appears to have been selected, I refer to these Draft Articles as the Draft Articles on the Responsibility of International Organizations (or DARIO). The definition of an internationally wrongful act is found in Draft Article 3 of the DARIO. Although this Draft Article was first adopted provisionally by the Committee in 2003, I refer to the 2005 report of the ILC because it contains the most comprehensive and up-to-date version of the Draft Articles. According to Jan Klabbers, the obligation in question can be from treaty, custom, or be a general principle of law. See his *An Introduction to International Institutional Law* (Cambridge: Cambridge Univ. Press, 2002) at 310 – 311 [hereinafter *International Institutional Law*].

of the UN as a whole. Already in 1996 the UN Secretary-General acknowledged that the United Nations is responsible under international law for damages caused by peacekeeping forces in breach of international law.<sup>39</sup>

### *Accountability defined*

"Accountability" is broader than "responsibility" under international law. As Richard Caplan writes, "Accountability refers to the various norms, practices, and institutions whose purpose is to hold public officials (and other bodies) responsible for their actions and for the outcomes of those actions."<sup>40</sup> This concept is much broader than that of the ILC's area of concern. In fact, the "responsibility" dealt with by the International Law Commission regarding international organizations does not even include liability for harm resulting from lawful acts, but is strictly limited to responsibility for a breach of an international obligation. This choice is underscored in the Commentary to the Draft Articles but is not explained in any greater detail than this: "The choice made by the Commission to separate, with regard to States, the question of liability for acts not prohibited from the question of international responsibility prompts a similar choice in relation to international organizations."<sup>41</sup> In contrast, the work of the International Law Association with regard to international organizations addresses the broader concept of "accountability". In its view, "power entails accountability, that is the duty to account for its exercise."<sup>42</sup> The Committee of the ILA considered that "accountability" can be identified on three levels: the first level comprises internal and external scrutiny and monitoring of the way an organization fulfils its functions; the second addresses "tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law" and the third level is that which aims to address those acts that are caught under the rubric of legal responsibility for breach of international obligations.<sup>43</sup>

The International Law Association determined that the secondary rules of "enforcing" obligations depends on the nature of the obligation in question. As such, it determined that the

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<sup>39</sup> See *Financing of UNPROFOR*, *supra* note 25 at para. 6. In fact, the ILC cites a passage from that report to lend support to its general argument that international organizations can incur responsibility under international law. See para. 2 of the ILC Report 2003, *supra* note 37 at 45 - 49, Commentary to Draft Article 3.

<sup>40</sup> Caplan, *supra* note 13 at 197.

<sup>41</sup> ILC Report 2003 at 37, para. 5 of Commentary to Draft Article 1.

<sup>42</sup> International Law Association, *Committee on Accountability of International Organisations, Third Report* (New Delhi Conference 2002) at 2.

<sup>43</sup> International Law Association, *Committee on Accountability of International Organisations, Final Report* (Berlin Conference 2004) at 5 [Hereinafter *ILA Final Report*].

"first level of accountability" entails internal and external oversight.<sup>44</sup> In the international administrations under discussion, some of the first level accountability as identified by the ILA "upwards" exists – for example, a Special Representative of the Secretary-General must report to the Security Council and the General Assembly, and the High Representative in Bosnia is answerable to the Peace Implementation Council (PIC) and its Steering Board. These are internal oversight mechanisms – they are reporting to the body that gave them power. The ILA asserts in its Recommended Rules and Principles that the principle of supervision and control contains an obligation for "Parent organs", which entails that the latter "should use their supervisory and controlling power to overrule a decision by a subsidiary organ if that decision is contrary to applicable legal rules."<sup>45</sup> This obligation flows naturally from the fact that international organisations "remain fully accountable for the actions and omissions of subsidiary organs and their agents."<sup>46</sup> However, the weaknesses of the reporting system in place for international administrations are well known. Although oversight was very regular, even monthly at the outset, the degree of rigorous examination of the legality of acts is sorely lacking. Moreover, this oversight at times lacks transparency: during the crucial meeting when regulation 1999/1 was adopted by Bernard Kouchner, the Security Council held its meeting *in camera*. The General Assembly also exercises some oversight over these operations since it controls the budget for peace operations. Nevertheless, an oversight mechanism that is entirely external to the operation and, moreover, that is independent, is completely lacking.

The ILA's more comprehensive approach to accountability is in many ways more fitting for the situation of international administrations than the limited concept of responsibility for breaches of international obligations. Nonetheless, it is important to deal with the legal framework of the new Draft Articles of the ILC. The crucial advantage of this approach is that it sets international administrations within their proper legal framework – that of public international law – and therefore better clarifies possible solutions to the accountability deficit.

The general framework on the law of international responsibility thus defines the structure of this paper. The first Part will attempt to sketch an outline of the legal obligations of peace

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<sup>44</sup> *ILA Final Report*, *supra* note 43 at 5.

<sup>45</sup> *ILA Final Report*, *supra* note 43 at 13.

<sup>46</sup> *Ibid.*

operations that conduct international administration of territory. In so doing, it will determine the limits of the power of such administrators, first by analysing the legal value of constitutive instruments of administrations and discerning the limits set by them. It will then examine the applicability of international human rights law, international humanitarian law – including the law of military occupation – and the law of the international trusteeship system to international administrations. Having concluded that neither the law of occupation nor the law of international trusteeship is *a priori* applicable to these operations, this paper will query whether those two regimes nevertheless indicate general principles for the obligations of international administrators. It will also examine whether there is support for the statement that an international administration is bound by the “general obligations of a government to its people”.<sup>47</sup> Once the applicable law has been determined, Part II will turn to an analysis of how those limits may be enforced. The emerging principles of the law on responsibility of international organisations (with reference to the work of the ILA) will be applied to international administrations. The approach preferred in this paper is rigorous analysis of the existing legal framework for accountability in international administrations in order to provide solutions *de lege lata*.

This project is ambitious; attempting to define such a general framework necessarily means that at times depth of analysis of a particular administration or a given principle must be forsaken. Nonetheless, this approach has been chosen in opposition to arguments that the uniqueness of each administration means that each should rather be considered on its own. Equally, the emphasis on legal mechanisms is a conscious choice in the face of the questionable sincerity of ensuring accountability through non-legal measures. Indeed, given the climate of accountability<sup>48</sup> and the current international focus on responsibility of international organisations, one might have hoped that the most significant institutional reform regarding peacekeeping in the past decade, the establishment of the Peacebuilding Commission as a subsidiary organ of the Security Council, would concretise the commitment

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<sup>47</sup> Guido Acquaviva, “Subjects of International Law: A Power-Based Analysis” (2005) 38 *Vand. J. Transnat’l L.* 345 at 384 – 385, paraphrasing Andreas Zimmermann and Carsten Stahn, “Yugoslav Territory, United Nations Trusteeship of Sovereign State? Reflections on the Current and Future Legal Status of Kosovo” (2001) 70 *Nordic Journal of International Law* 423 – 460 [hereinafter Zimmermann/Stahn].

<sup>48</sup> See, as an example of the present efforts to address the consequences of the lack of a climate of accountability, Secretary-General of the United Nations, *Zeid Report: Letter dated 24 March 2005 from the Secretary-General to the President of the General Assembly on the issue of sexual exploitation and abuse by United Nations peacekeeping personnel*, (24 March 2005) UN Doc. A/59/710. See also *Report of the Special Committee on Peacekeeping Operations and its Working Group on the 2005 Resumed Session*, 4 – 8 April 2005, UN Doc. A/59/19/Add.1 [hereinafter *Zeid Report*]; Secretary-General’s Bulletin: Special measures for protection from sexual abuse and sexual exploitation, 9 October 2003, UN Doc. ST/SGB/2003/13.

to increasing accountability. The Peacebuilding Commission could have been engineered to provide some mechanism for petition and redress in case of injury, or at a minimum, careful and engaged supervision and oversight. But to our great dismay, that institution was not conceived with such accountability in mind. None of its constitutive documents, nor even the Security Council debates following the adoption of the resolution, mention the word “accountability”.<sup>49</sup> Instead, its primary focus and role is “co-ordination”. This paper will show that, despite dissimulation, clear obligations exist under international law for international organisations administering territory to be accountable for the exercise of their power to the individuals under their care.

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<sup>49</sup> See UN SC res. 1645 (2005), UN SC res. 1646 (2005), and *Security Council, 60th year: 5335th meeting*, 20 December 2005, UN Doc. S/PV.5335 (20 December 2005).

## Part I: Obligations and Limits on Power

### 1. Definition of International Territorial Administration

This paper considers only those peace operations that actually directly administer territory, such as UNMIK and UNTAET. Peace operations in which territory is directly administered by an international organization must be distinguished from those in which an international organization may play a considerable role in advising and supporting local authorities, but has no powers to directly promulgate and/or apply law.<sup>50</sup> For the purposes of this paper, the executive authority to pass laws and oversee their execution is the key. Even a mission with a restricted mandate to administer is included in this rubric. Thus, for example, the transitional phase of the United Nations Mission for the Referendum in Western Sahara (MINURSO), which would have empowered the SRSB to make changes to the laws in force only insofar as necessary to facilitate holding the referendum, would have warranted the inclusion of that mission in the category of international administrations (had it ever been implemented).<sup>51</sup>

The UN missions in Afghanistan and Iraq are often considered in the context of discussions of international administrations. A small number of scholars consider the United Nations Assistance Mission in Afghanistan (UNAMA) to be an international administration<sup>52</sup>; however, the “light footprint” approach there means that UNAMA does not enjoy direct powers to administer but rather advises and supports the interim and transitional administrations, which are composed entirely of Afghan nationals. At the most, the SRSB is authorized, under carefully described circumstances, to “use his good offices with a view to facilitating a resolution to [an] impasse or a decision.”<sup>53</sup> At least one scholar considers UNAMI, the UN Assistance Mission for Iraq, to be an international administration in which the Security Council delegated the execution of the mandate to the US and UK rather than to

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<sup>50</sup> Some authors distinguish between international administrations in which international civil servants execute the decisions promulgated by the international administrator and those in which an SRSB may make orders but rely on local inhabitants to administer and execute. See, for example, Richard Caplan, *supra* note 13 at 88 (distinguishing between the degree of executive authority and the fact that control does not always mean that international administrators assume the responsibility to provide the services).

<sup>51</sup> That mandate was defined in a report of the Secretary-General to the Security Council establishing the basis for that operation. See, *The Situation Concerning Western Sahara, Report of the Secretary-General*, 18 June 1990, UN Doc. S/21360.

<sup>52</sup> Carsten Stahn, “Justice Under Transitional Administration: Contours and Critique of a Paradigm” (2005) 27 *Houston Journal Int’l Law* 311; Erika de Wet, “The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law” in (2004) 8 *Max Planck United Nations Year Book* 291 [hereinafter “Direct Administration”].

<sup>53</sup> *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions* (Bonn Agreement), Annex II: Role of the United Nations during the Interim Period (5 December 2001), para. 5. UN Doc. S/2001/1154.

an international organisation. Erika de Wet bases this interpretation on her reading of Security Council resolution 1483 (2003), which creates UNAMI and give specific tasks to a Special Representative of the Secretary-General and in another paragraph declares the US and the UK to be occupying powers.<sup>54</sup> Although intriguing, her interpretation is not convincing. The resolution does not make the Coalition Provisional Authority into the international administration; instead, it affirms that two States are occupying powers and obliges them to respect their obligations under IHL as they undertake the administrative tasks of an occupying power.<sup>55</sup> The United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) has a civilian component that operates through "mixed commissions" with the Transitional Government (i.e. the indigenous Congolese authorities). One such commission is tasked with legislative reform. However, the mandate given to the UN civilian administration is exclusively "supportive"; MONUC may not "assume responsibility" but is merely supposed to "provide support to the overall coordination."<sup>56</sup>

These latter three operations are better defined as examples of "assistance missions" in which the SRSGs have no power to take direct governmental action, in contrast to the other international administrations described above. It appears indeed that a preference for this "light footprint" approach may dominate future peace operations.<sup>57</sup> Assistance missions also raise important accountability issues, including with respect to limits on the exercise of power and the tricky issue of influence on local leaders, but they are beyond the scope of this paper. In addition, this paper deals only with the civil servant component of direct international administration missions.<sup>58</sup>

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<sup>54</sup> See Erika de Wet, "Direct Administration" *supra* note 52 at 315-316. See also UN SC res. 1483 (2003) at paras. 4, 5, and 8.

<sup>55</sup> Marcelo Kohen describes the situation in Iraq as a kind of *sui generis* occupation, but not as an international administration. See his "L'administration actuelle de l'Irak: vers une nouvelle forme de protectorat?" in Karinne Bannelier, et al. eds., *L'intervention en Irak et le droit international* (Paris: Pedone, 2004) at 299 – 315.

<sup>56</sup> *Third Special Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, 16 August 2004, UN Doc. S/2004/650, defining the assistance role for the civilian component of the mission. See especially paras. 62 – 63.

<sup>57</sup> Brahimi Report, *supra* note 16; Brahimi was the first SRSG in Afghanistan, and some consider his approach as reflective of his reluctance to endorse direct administration as a good and effective peace operation activity. See in particular, Kreilkamp, *supra* note 12 at 659. See also Simon Chesterman, "Walking Softly in Afghanistan: The Future of UN State-Building" (2002) 44 *Survival* 37 – 46.

<sup>58</sup> It should be noted that the different roles of civilian police in different operations mirrors the division here between assistance and execution. Some Civilian Police merely provide training and support, but do not arrest, while others carry out arrests and directly implement criminal laws.

The current mission in Côte d'Ivoire appears to be a hybrid assistance/administration mission, but it remains somewhat unclear.<sup>59</sup> Insofar as an international organization, be it the UN, the African Union, or another international organisation, exercises administrative and/or decision-making power directly in a territory, that mission is an international administration for the purposes of this paper.

## **2. The legal capacity of the UN or international community to take on territorial administration**

Two of the most well-known contemporary international administrations were created through the adoption of resolutions by the Security Council acting under Chapter VII of the UN Charter (UNMIK and UNTAET).<sup>60</sup> A third Chapter VII international administration, prior to the UNMIK and UNTAET in time but less widely discussed, is UNTAES.<sup>61</sup> Others have been created through peace agreements between parties to a conflict that are subsequently endorsed by the Security Council (this was the case of the OHR in Bosnia with the Dayton Accords and UNTAC in Cambodia with the Paris Agreement). Yet another has been created by a resolution of the UN General Assembly on the basis of an agreement between governments in order to prevent conflict during the transfer of territory from one power to another (UNTEA in West Irian).<sup>62</sup> The Balkans boast a considerable share of internationally administered territory, as well as the widest variety of instruments constituting administrations. One international administration was the product of an arbitral award

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<sup>59</sup> Nigerian President Obasanjo (as AU head) emphasized the lack of administrative powers of the UN-led working group, insisting that that working group “has no power to dissolve the national assembly, has no intention to dissolve, and has no mandate from anywhere to do so and did not do so.” See: “Gbagbo urges Ivorians to end the street violence”, Agence France Press, 19 Jan 2006. On the other hand, Obasanjo's words are difficult to reconcile with a UN press release that states, “A UN-mandated International Working Group monitoring the post-civil war transition recommended over the weekend that the expired mandate of parliament not be renewed, *effectively disbanding the body*.” See “Annan demands end to anti-UN protests in Côte d'Ivoire”, 17 January 2006, online: <http://www.un.org/apps/news/ticker/tickerstory.asp?NewsID=17192>, emphasis added. Finally, it is clear from his most recent report to the Security Council that the Secretary-General of the United Nations interprets the force of decisions of the IWG as binding upon the parties. See para. 78 of the *Seventh Progress Report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, (3 January 2006), UN Doc. S/2006/2.

<sup>60</sup> *Supra* notes 4 and 5.

<sup>61</sup> *Supra* note 6.

<sup>62</sup> *Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)* UNGA res. (XVII) (1962). This operation provided for the administration of West New Guinea during the withdrawal of the Netherlands.



(Brcko),<sup>63</sup> another was created through an agreement between a local town government and an international organisation (Mostar).<sup>64</sup>

### 2.1 Legal basis for peace operations

For territorial administrations established by a Security Council or General Assembly resolution, there is an important preliminary question: do those organs have the capacity to mandate such broad powers? That capacity is integrally linked with other legal bases for peacekeeping, including the legal basis in the UN Charter to conduct peacekeeping operations. Although the UN Charter does not provide specifically for the creation of peacekeeping operations, the ICJ held in 1962 that such operations are within the implied powers of the organisation as part of its obligation to ensure international peace and security.<sup>65</sup> Moreover, the capacity to authorize peacekeeping operations is not limited to the Security Council. The General Assembly may, either under its recommendatory powers under Article 11 or 14 of the UN Charter, or on the basis of the Uniting For Peace resolution, also authorize peacekeeping missions under certain circumstances.<sup>66</sup>

### 2.2 Legal basis for territorial administration

Initial doubts about the legality of peacekeeping operations with such invasive civil administrations led scholars to embark on historical surveys of international administration of territory to demonstrate that the practice is in fact not wholly extraordinary, is supported by precedent and is well within the powers of the Security Council.<sup>67</sup> Hans Kelsen had written in

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<sup>63</sup> *Brcko Arbitral Tribunal for Dispute Over the Inter-Entity Boundary in Brcko Area*, AWARD, VII. Award, 1997. Available online: [http://www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content\\_id=5356](http://www.ohr.int/ohr-offices/brcko/arbitration/default.asp?content_id=5356).

<sup>64</sup> *Memorandum of Understanding of the European Union Administration of Mostar*, 5 July 1994, established by Council Dec. 94/308/CFSP (1994) O.J. L134/1. See Fabrizio Pagani, "L'Administration de Mostar par l'Union Européenne" (1996) XLII *AFDI* 234 - 254.

<sup>65</sup> *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)*, *Advisory Opinion of 20 July 1962*, I.C.J. Rep. [1962] 151, [hereinafter *Certain Expenses*]. For a more detailed look at the capacity of different UN organs to create peacekeeping operations, please see, Aleksander Orakhelashvili, "The Legal Basis of the United Nations Peace-Keeping Operations" (2003) 43 *Virginia J. Int'l Law* 485. The powers of the Security Council within Chapter VII are not perceived to be limited to the enumerated acts in Articles 40, 41 and 42 of the Charter. Article 29 of the UN Charter permits the Security Council to establish subsidiary bodies; the Council enjoys the "kompetenzkompetenz" to determine whether such bodies are necessary.

<sup>66</sup> See *Certain Expenses*, *supra* note 65 at 172; see also UNGA res. 377(V) *Uniting for Peace* (3 November 1950). It is not entirely clear that this resolution provides a legal basis for peace operations. In the case of UNEF, the resolution was used to trigger a Special Emergency Session during which UNEF was created.

<sup>67</sup> Please see especially Ralph Wilde, "From Danzig to Timor and beyond" (2001) 95 *AJIL* 583 - 606; Chesterman, *You the People*, *supra* note 13. Rüdiger Wolfrum also surveys the history - see *supra* note 13. See also Zimmermann/Stahn, *supra* note 47. Note that in "Representing International Territorial Administration: A Critique of Some Approaches" (2004) 15 *EJIL* 71 - 96, Ralph Wilde criticizes a historicist approach that seeks to legitimize this kind of peace operation "through a progressist narrative". See also Tobias Irmscher, "Legal Framework for the Activities of the UNMIK" (2001) *German YB Int'l Law* 353 at 363.

1961 that "the Organisation is not authorised by the Charter to exercise sovereignty over territory which has not the legal status of a trust territory."<sup>68</sup> However, it would seem that interpretations of the capacity of the UN have evolved (or that this power is something less than "sovereignty"). Indeed, many authors painstakingly point out that territory was administered by the League of Nations under the auspices of the Versailles Treaty, namely, the Free City of Danzig and the Saar Basin.<sup>69</sup> In addition, Jerusalem and Trieste were both earmarked for international administration by the UN (although neither administration actually materialized) which further supports the argument that the UN enjoys the capacity to undertake such administrations outside the mandate and trusteeship systems of the League of Nations and United Nations.<sup>70</sup> The UN also created a transitional administration for Libya from 1947-51 in order to facilitate the end of the Italian colonial regime in that territory at the end of the Second World War.<sup>71</sup> This is an important example, because it shows that international administration did not always coincide with peace operations: the first proper peacekeeping operation occurred only in 1956 with United Nations Emergency Force. Finally, the most commonly-cited example of territory outside of Europe that was placed under international administration in the interwar period is the city of Leticia, which was contested between Colombia and Peru. Leticia was administered by Commission of the League of Nations for a short time in 1933-34 after Peruvian troops occupied the territory in contravention of a 1922 treaty that had stipulated that the town be transferred to Colombia. Unable to resolve the dispute between themselves, Peru and Colombia had turned to the Council of the League of Nations, which, with the agreement of both States, sent a three-person commission to administer the district at the expense of Colombia for a period of one year.<sup>72</sup> According to a contemporary report, "the commission took over the direct and independent administration of the district and divided its work into maintenance of order and security, care of public works and public health, and examination and payment of claims in respect of property lost [due to attacks]. One commissioner was put in charge of each of these branches of administration."<sup>73</sup> Finally, one of the first major UN peace operations of the cold war period, the Opération des Nations Unies au Congo (ONUC) had a considerable civilian

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<sup>68</sup> Hans Kelsen, *The Law of the United Nations* (1961) at 651.

<sup>69</sup> *Supra* note 67 (*i.e.* Wilde *et al.*)

<sup>70</sup> Robert Kolb, Gabriele Porretto and Sylvain Vité, *L'Articulation des règles de droit international humanitaire et de droits de l'homme applicables aux forces internationales et aux administrations civiles internationales transitoires* (Genève: CUDIH, 2003) at 27 – 31 [hereinafter Kolb/Porretto/Vité].

<sup>71</sup> Zimmermann/Stahn, *supra* note 47 at 431-32. However, it is possible that this administration was actually a form of trusteeship.

<sup>72</sup> That commission was comprised of an American, a Brazilian, and a Spaniard.

<sup>73</sup> L.H. Woolsey, "The Leticia Dispute between Colombia and Peru" (1935) 29 *AJIL* 94 at 96.

administrative component that was created, in the words of the DPKO, when "ONUC became embroiled by the force of circumstances in a chaotic internal situation of extreme complexity and had to assume certain responsibilities which went beyond normal peacekeeping duties."<sup>74</sup>

Many authors argue that the powers of the Security Council under Chapter VII of the UN Charter with respect to the international administration of territory are circumscribed by the *ius cogens* norm of the right to self-determination.<sup>75</sup> This right is engaged when the ability of a people to determine the contours of their own political and economic government is threatened by the activities of the administration. According to this argument, the creation of an international administration does not *a priori* violate the right to self-determination, but the manner in which the powers granted are exercised may subsequently do so.<sup>76</sup> Indeed, international administrations are rarely discussed in academic journals without some reference to whether the action violates the right to self-determination. As Zimmermann and Stahn point out, what is extraordinary about UNMIK and UNTAET is that the Security Council mandate for the administrations prescribes the *way* government institutions must be set up in those territories, even though the international bill of rights leaves it to States to choose their own political and economic institutions.<sup>77</sup> Despite this considerable encroachment on the right to self-determination, however, the consensus is that the Security Council has the power

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<sup>74</sup> For this statement, see the DPKO website, <http://www.un.org/Depts/DPKO/Missions/onucB.htm>. The academic literature categorizes international administrations according to different criteria. Some authors take a "purposive" approach, looking at the aim of the administration. These would group the administration of Leticia, UNTEA, UNTAET and UNTAES together since all deal with the transition of territory from government by one State either to another State or to independence, regardless of the fact that their constitutive instruments and establishing organs vary widely. (See, for example, Simon Chesterman, *You the People*, *supra* note 13.) Others may categorize international administrations according to whether the head of the mission is obliged to govern with the consent of the local population or whether he may simply govern as an omnipotent colonial-style leader. (See *e.g.* Kreilkamp, *supra* note 12 and Beauvais, *supra* note 13.) In my view, when it comes to the accountability of the international administration, the constitutive instrument and the mandate are of vital importance. The purpose of the mission plays a subsidiary role in interpreting the obligations set out therein.

<sup>75</sup> Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford: Hart Publishing, 2004) at 311 ff [hereinafter "Chapter VII Powers"]. Erika de Wet argues forcefully that the UN is bound by *ius cogens* norms; furthermore, she argues that States have a right to reject illegal Security Council measures. See *ibid.* at 375ff. It is important to note that the right of self-determination may be both a limit on the action of the Security Council to create administrations and also an inherent limit on the power that may be exercised by those administrations.

<sup>76</sup> de Wet, *ibid.*

<sup>77</sup> Article 1, paragraph 1 common to the *International Covenant on Economic, Social and Cultural Rights, 1966* and the *International Covenant on Civil and Political Rights* (UNGA res. 2200A (XXI) of 16 December 1966, UN Doc. A/6316 (1966), Annexes, entered into force 3 January 1976 and 23 March 1976 respectively) states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

within Chapter VII to create civil administrations<sup>78</sup> and that it may also endorse such operations under Chapter VI in its capacity to settle international disputes.

### **3. Defining the Legal Obligations and Limitations of International Territorial Administrations**

International administrations may be created through a variety of legal mechanisms. Moreover, they may be comprised of any number of international organisations. The method of creation and the organisations involved are two key factors that will determine the legal framework of the international administration, which will in turn define the road to accountability. The obvious starting point in order to decipher the accountability framework is thus the agreement or resolution that provides for the creation of the international territorial administration. It should be noted that this is a fairly original approach to defining limitations.<sup>79</sup> The vast majority of authors rather begin with general principles of the United Nations.<sup>80</sup> As such, they begin with identifiable principles such as respect for territorial integrity and the right to self-determination. Others start from conceptions of constitutional government, which inevitably leads to analysis of the converging roles of international organisations and States and the changing relationships and subjects of international law.<sup>81</sup> The idea here is to look more closely at the specific grant of power and determine its proper limits and then move to more general principles.

#### *3.1 Constitutive instruments*

##### **3.1.1 Constitutive instruments of subsidiary organs create international legal obligations**

One may query whether the constitutive instrument of a subsidiary body creates binding international obligations, or whether it merely defines internal rules of the organization.<sup>82</sup> Since the subsidiary body is not responsible in and of itself to third parties, but it is the

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<sup>78</sup> As it may create a tribunal, it may create such an administration under Article 42 of the UN Charter since the list of measures that may be taken is not exhaustive.

<sup>79</sup> Markus Benzing, "Case Study: Midwifing a New State: The United Nations in East Timor" (2005) 9 *Max Planck United Nations Year Book* 300 also takes this approach.

<sup>80</sup> See, for example, Irmscher, *supra* note 67 at 362 – 366; de Wet, "Direct Administration", *supra* note 52.

<sup>81</sup> Aleksander Momirov, *Accountability of international organizations in post-conflict governance missions* (Den Haag: Boom Juridische uitgevers, 2005) (LL.M. thesis, on file with the author.)

<sup>82</sup> This raises the question of which UN organs these peace operations may be subsidiary bodies. One author asserts that UNMIK is a subsidiary organ of the Security Council since it was created by a resolution of that organ (Matthias Ruffert, "The Administration of Kosovo and East-Timor by the International Community" (2001) 50 *Int'l & Comp. Law Quarterly* 613 at 622); another argues that it is a subsidiary organ of the Secretary-General, since the resolution requests the Secretary-General to appoint a Special Representative and establish the body. Indeed, when it comes to a study of what powers an organ possesses that it may delegate, this distinction may be of consequence (Irmscher, *supra* note 67 at 355).

organisation as a whole that assumes responsibility, it may appear that such constitutive instruments<sup>83</sup> do not create binding international obligations. However, even in the early years of the United Nations, many eminent scholars considered that internal rules of an international organization may constitute international obligations.<sup>84</sup> In addition, the Commentary to the Draft Articles leaves open the possibility that internal rules of the organisation form part of international law. In indicating why Draft Article 3 does not refer to “internal law” (in contrast to the Draft Articles on State Responsibility), the Commentary explains,

the internal law of an international organization cannot be sharply differentiated from international law. At least the constituent instrument of the international organization is a treaty or another instrument governed by international law; some further parts of the internal law of the organization may be viewed as belonging to international law.<sup>85</sup>

International organizations that offered comments on the Draft Articles appear to agree. The International Criminal Police Organization, expressing its support for the idea that the ILC should somehow include the rules of international organisations in its works, distinguished those rules from the internal law of States. It stated, “[i]ssues implicating the organic principles or internal governance of international organizations are governed by international law. The obligations resting upon international organizations by virtue of their constituent instruments *and the secondary law of international organizations* are international legal norms....”<sup>86</sup> That organization went on to argue, “unlike when States breach their own domestic law, any breach of its own rules by an international organization is by definition a breach of an international obligation of the organization, within the meaning of draft article 3, paragraph 3(b). The existence of such a breach can give rise to the responsibility of organizations towards third parties.”<sup>87</sup>

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<sup>83</sup> Here we must distinguish between constitutive instruments of an international organization, such as the UN Charter, which clearly create international obligations, and the “constitutive instruments” of peace operations, which generally consist of resolutions of an organ of an international organization.

<sup>84</sup> A.J.P. Tammes, “Decisions of International Organs as a Source of International Law” in 94 *Hague Recueil des Cours* (1958) Vol II, 261. See, for a recent and comprehensive study on this question, José E. Alvarez, *International Organizations as Law-Makers* (Oxford: Oxford Univ. Press, 2005).

<sup>85</sup> ILC Report 2003, *supra* note 37, Commentary to Draft Article 3, para. 9.

<sup>86</sup> International Law Commission, 57<sup>th</sup> Sess., *Responsibility of international organizations: Comments and observations received from Governments and international organizations* (12 May 2005), UN Doc. A/CN.4/556 at 30 [hereinafter ILC Comments and Observations 2005].

<sup>87</sup> *Ibid.* at 31. Note that the International Monetary Fund stated that “it would be inappropriate to treat the rules of an international organization as equivalent either to domestic law or as subordinate to general rules of it.” See page 38.

The UN Secretariat unfortunately refused to express an opinion on this matter.<sup>88</sup> A Security Council resolution clearly belongs to the realm of international law, but it remains questionable to what extent other UN documents regarding administration are binding on those administrations. In any case, should a failure to abide by the internal rules bring the whole organisation into breach of other international obligations (such as, for example, the right to self-determination of a territory in the context of international administration), then the international responsibility of the organisation would anyway be engaged.

### **3.1.2 Discerning the obligations or limits set by the documents creating the administrations**

Peace agreements or Security Council resolutions setting up international administrations may look at best like a laundry list of responsibilities for the international administrator, at worst like a grant of absolute power. However, upon closer analysis, it is evident that each one is in fact a kind of mini-constitution. The first step in determining the limits on the powers of the Special Representative of the Secretary-General (or other chief administrator) must therefore necessarily be to examine each instrument.<sup>89</sup> Clearly, there is scope for enormous variation in terms of the powers granted.<sup>90</sup> There is good reason for that diversity: International administrations created by the Security Council under Chapter VII are designed to respond to crisis situations in which international peace and security is threatened by the existence of a territory or State without a government. As a consequence, the mandate is formulated with an “emergency” mindset based also (at least in part) on the concerns of the international community and ensuring overall security. In contrast, international administrations that come into being based on an agreement between the parties presume the existence of a fragile peace. Moreover, in the latter case the parties themselves may more carefully determine the powers the international administrator will have; powers are exercised on behalf of the parties

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<sup>88</sup> *Ibid.* at 39. The Secretariat defended its refusal to take a position thus: “in the absence of any indication as to the nature of the obligations breached by an international organization – other than its treaty obligations – this office is not in a position to express an opinion on whether the Commission should study the question [of internal rules], or what weight should be given to it in the general framework of its study on responsibility of international organizations.”

<sup>89</sup> Other authors begin rather with general principles of the United Nations (see for example Irmscher, *supra* note 67 at 362 – 366). As such, they begin with identifiable principles such as respect for territorial integrity and the right to self-determination. The idea here is to look more closely at the specific grant of power and determine its proper limits.

<sup>90</sup> In fact, many authors argue that the regimes are so disparate that each one must be examined separately, and that only a case by case examination can lead to a valid evaluation of the administration. While this argument may be true when it comes to assessing the effectiveness of an international administration, in my view it is not accurate when it comes to discerning the legal framework of accountability. Certainly, specific obligations and limitations may vary, but there is an identifiable overall structure that must be considered.

as opposed to solely on behalf of the Secretary-General and international community.<sup>91</sup> For our purposes, no matter the differences born of the conditions generating the mandates, it is imperative to inquire whether the power to administer is limited to certain subject matters or if it requires that power to be exercised in a certain way.

### 3.1.2.a Administrations established under Chapter VII

Starting with the three Chapter VII administrations (that is, UNTAES, UNMIK and UNTAET), we may observe that even the documents and resolutions endowing the respective SRSGs with fairly sweeping powers also set discernible limits to those powers. Unfortunately, however, this analysis is complicated by the fact that Security Council resolutions, which are frequently products of strained negotiations and tenuous compromises, are notoriously vague and difficult to interpret.<sup>92</sup>

In the case of Kosovo, the UNSC authorized the Secretary-General to

establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.<sup>93</sup>

According to Security Council resolution 1244 (1999), “the main responsibilities of the international civil presence will include:

- (a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and the Rambouillet accords (S/1999/648);
- (b) Performing basic civilian administration functions where and as long as required;
- (c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;
- (d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo’s local provisional institutions and other peacebuilding activities;
- (e) Facilitating a political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords (S/1999/648);
- (f) In a final stage, overseeing the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement;
- (g) Supporting the reconstruction of key infrastructure and other economic reconstruction;
- (h) Supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid;

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<sup>91</sup> See Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (Oxford: Oxford Univ. Press, 2005) at 14 – 16 on conferral of powers.

<sup>92</sup> See Michael C. Wood, “The Interpretation of Security Council Resolutions” (1998) 2 *Max Planck Yearbook of United Nations Law* 73 – 95; Brahimi Report, *supra* note 16 at para. 56.

<sup>93</sup> SC res 1244 (1999) para. 10.

- (i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;
- (j) Protecting and promoting human rights;
- (k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo".<sup>94</sup>

The critical limitation on powers in this resolution may at first escape notice; the power to administer is not as indefinite as it appears at first glance. Admittedly, the Report of the Secretary-General describing the mission indicated that the Security Council had vested in UNMIK "[a]ll legislative and executive powers, including the administration of the judiciary."<sup>95</sup> However, even though that phrase was echoed by the first SRSG, Bernard Kouchner, in Regulation 1/1999, the sentence that follows in the Secretary-General's report indicates that the grant of power was not in fact absolute: it states, "[the SRSG] will be empowered to regulate *within the areas of his responsibilities...*".<sup>96</sup> This limitation reflects the actual wording of the resolution: according to paragraph (b), the administrative functions that may be assumed by the international community are only those that are "basic" functions. Arguably, if the international administrator begins to take on functions that cannot reasonably be described as "basic", such actions would be *ultra vires* his mandate and therefore unlawful.

This interpretation is supported by the fact that the SRSG's responsibilities with respect to the economy are merely to "*support ...other economic reconstruction*" (emphasis added). The SRSG is not *responsible for* economic reconstruction. But in fact, SRSGs in UNMIK have made extensive changes to the economy, including creating an agency authorized to privatize former socially-owned property (businesses).<sup>97</sup> Arguably, the competence of the SRSG to

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<sup>94</sup> SC res. 1244 para. 11.

<sup>95</sup> *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, (12 July 1999), UN Doc. S/1999/779 at para. 35.

<sup>96</sup> *Ibid.* at para. 39. Emphasis added. The legal weight of the reports of the Secretary-General is obviously trumped by a Security Council resolution; however, those reports do enjoy some interpretive value as exemplified by reliance on the Secretary-General's report on the creation of the ICTY in interpreting that statute. In this particular case it is difficult to know what was thought of Kouchner's approach because the report to the Security Council containing that regulation was discussed in a closed session. Kouchner briefed the Council and answered questions. See UN Doc. S/PV.4061, 5 November 1999 (Communiqué).

<sup>97</sup> See UNMIK/REG/2002/12 (13 June 2002) On the establishment of the Kosovo Trust Agency. See the website of the KTA for examples of the extent of the privatization scheme. The composition of the Board of Directors of the KTA is mixed, with four international directors and four locals (see s. 12). The so-called authorization to privatize is set out in s. 9, which permits the KTA to engage in "voluntary liquidation" of socially-owned enterprises, or under s. 6, which permits creation of subsidiary companies, known as "spin-offs". It should be noted, however, that the Government of Serbia acquiesced to the privatization agenda, conceding that "Kosovo and Metohija will not be able to move forward unless and until an economic recovery begins." At the same time, Serbia and Montenegro expressed dissatisfaction in which the way privatization was being carried out, stating, "...the Republic of Serbia is being held responsible for, and is servicing, \$1.4 billion of debt incurred by entities in Kosovo and Metohija. At the same time, many Serbian banks have substantial receivables due them from entities in the province. UNMIK, however, proposes to carry out privatization while unloading the enormous



create an agency that may privatize FRY property may flow from the obligation in paragraph (a) to “promote the establishment ... of substantial autonomy”. But even if one were to interpret paragraph (a) so generously, it is difficult to reconcile the alienation of State property with the limitations on the powers of the SRSG as set out in the Secretary-General's report, which stipulated that “any movable or immovable property ... registered in the name of [FRY or Serbia] ... will be *administered* by UNMIK”.<sup>98</sup> Under the normal legal rules of administration or usufruct, the administrator has no capacity to sell property. It should not therefore be within the powers of the SRSG to create an agency that privatizes State property. Herein lies the tension of international administration: Economic development (which for many means creating a free market system) is perceived as key to creating a sustainable peace, but it is difficult to see it as an emergency or “basic” function.<sup>99</sup> Nonetheless, wholesale privatization would certainly not appear to fall within the powers granted in resolution 1244 and as interpreted by the Secretary-General's report. This example is intended simply to show that some of the powers exercised by UNMIK that have not raised alarm in human rights communities (unlike those described in the introduction) may also be subject to some doubt regarding their legality.

Some obligations in the mandate may be conflicting. Consider, for example, the simultaneous obligation to protect human rights and to devolve power to local institutions. Which obligation is paramount? In a sense, devolvement of power respects the *ius cogens* right to self-determination. According to the key General Assembly resolution setting cornerstone principles of the end of colonialism, “[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”<sup>100</sup> On the other hand, the primacy of place given to protecting human rights and the absence *de jure* of a colonial regime may imply that the protection of human rights should predominate. Absence of any mechanism of judicial review to make sense of such competing obligations leaves the local population at the whims of the international administration in sorting out paramount obligations. Considering that the speed at which an international administration

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debt burden on a fragile Serbian economy.” See UN Doc. S/PV.4559 (26 June 2002) at 20. See also UNMIK/REG/2005/48, online, *supra* note 10.

<sup>98</sup> Since SC res. 1244 is silent on this matter, one must go to the Report of the Secretary-General, *supra* note 95 at para. 37. Emphasis added.

<sup>99</sup> Beauvais, *supra* note 13; see also the *Report of the Secretary-General's High-level Panel on Threats, Challenges and Change*, (2 December 2004) UN Doc. A/59/565, especially at paras. 224 – 230 [hereinafter *High-level Panel Report*].

<sup>100</sup> *Declaration on the granting of independence to colonial countries and peoples*, UN GA res. 1514 (XV) (1960) at para. 3.

devolves power to the local population is a particular point of contention, the lack of an independent interpretive body is problematic.

The second and third limitations within the mandate are geographical and temporal limitations. While no set time period is defined, as sometimes occurs in other peacekeeping mandates, here the power to administer is granted “where” and for “as long as” required. Although it would be simpler in many respects to have defined a certain time period after which the mandate would cease, the grant of power is nonetheless not infinite. It lasts merely “as long as required”, which is a standard against which continued exercise of power by the international community could be challenged by those under administration.<sup>101</sup> The frustratingly open aspect of this limit is that the purposes for which such continued administration may be “required” are not very clearly defined. With respect to the geographical limitation, we may imagine that a community that can demonstrate its capacity to perform its own “basic civilian administrative functions” may call for an end to international administration in its territory by invoking the limitation on “where” such power is to be exercised, although this possibility is admittedly unlikely.<sup>102</sup>

In terms of whether there are limits on *how* the power to administer is to be exercised, one of the most important provisions is the responsibility to protect and promote human rights set out in subparagraph (j) of the resolution. In my view, this provision simultaneously sets a specific task for the SRSG and also acts as a limitation on the way the SRSG may exercise his other powers. This conclusion is logical: the obligation to protect human rights means that it would be a direct contravention of the mandate to violate or fail to respect them in the course of fulfilling other tasks in the mandate, such as maintaining civil law and order. At the same time, it is clear that the institutions of self-government that the SRSG is mandated to set up and nurture should also respect human rights.<sup>103</sup> This obligation to respect human rights is a limit on the exercise of power comes that from within the mandate. This is distinct from the question as to whether international human rights law applies to peace operations.

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<sup>101</sup> The question as to whether such continued administration could also be challenged by States is beyond the scope of the present study.

<sup>102</sup> Especially considering the situation prevailing in Mitrovica.

<sup>103</sup> The Gazette of UNMIK has a table listing International Human Rights treaties that are binding on the Provisional Institutions of Self-Government, but none of these is declared binding on UNMIK directly. Available online: <http://www.unmikonline.org/regulations/unmikgazette/02english/Eirs/hri.htm>.

That the grant of power was not absolute and that it defined the limits of the SRSG's capacity is insisted upon by the Chinese and Russian members of the UN Security Council at meetings discussing the SRSG's reports. It may be natural, from a political point of view, that those two States defend the sovereignty and territorial integrity of the FRY with regard to Kosovo. Nevertheless, their statements as to the limits on the power of the SRSG may not be disregarded. One year into UNMIK's mandate, the Russian delegate expressed his country's views thus: "It is true that Bernard Kouchner has been endowed with great powers, but they are not unlimited. He is compelled to act strictly within the framework of his mandate."<sup>104</sup>

In the case of East Timor, the Security Council resolution was perhaps bolder, deciding that the United Nations Transitional Administration in East Timor would be "endowed with overall responsibility for East Timor and [would] be empowered to exercise all legislative and executive authority, including the administration of justice".<sup>105</sup> UNTAET is distinct from UNMIK in that the military component was also placed under the supervision and control of the SRSG, as opposed to having a separate command (NATO). UNTAET is also authorized "to take all necessary measures to fulfil its mandate",<sup>106</sup> a broad allocation of discretionary power that applies both to the civilian and military components.<sup>107</sup> On the other hand, the duration of the administration was clearly defined in the resolution.<sup>108</sup>

The Security Council resolution establishing the template for UNTAET was based on a Report of the Secretary-General requested by an anterior Security Council resolution. That report provides more extensive detail on the administration of East Timor. In particular, the report stipulates that UNTAET must establish "administrative institutions" that are "accountable and transparent."<sup>109</sup> On one reading, that may mean that the institutions that are left for the East Timorese on the departure of UNTAET must be designed with those aims in mind. However, it may also mean that UNTAET's own administration must be accountable and transparent. The Secretary-General's Report also sets parameters for the prerogative of

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<sup>104</sup> Comments of Mr. Lavrov of the Russian Federation to the Security Council, *Security Council 55<sup>th</sup> year, 4200<sup>nd</sup> meeting*, (27 September 2000) UN Doc. S/PV.4200 at 9.

<sup>105</sup> SC res. 1272 (1999) at para. 1.

<sup>106</sup> SC res. 1272 (1999) at para. 4.

<sup>107</sup> The paragraph providing for that power is a separate paragraph following the paragraphs authorizing the creation of the civilian and military components. The fact that this power was not simply included in the military component suggests that it was intended to apply to both aspects of the operation.

<sup>108</sup> SC res. 1272 (1999) at para. 17. (The establishment was renewable, but the initial duration was only for 18 months.)

<sup>109</sup> *Report of the Secretary-General on the situation in East Timor*, 4 October 1999, UN Doc. S/1999/1024 at para. 29(k).

the SRSG to determine the composition of the administration. It prescribes building local capacity as a paramount aim of UNTAET, stating “The establishment of a civil administration, including the administration of justice, will be focused on building local capacity of East Timorese to assume responsibility for their own governance. In the appointment of officials and civil servants, this principle will be given full effect.”<sup>110</sup> This requirement could be seen as a limit on the discretionary powers of staff appointments of the SRSG.

The capacity of the Secretary-General’s report to provide greater clarity regarding the legal obligations of UNTAET and limits on its power is however undermined by the loose language used to incorporate the report by reference in the Security Council resolution. In resolution 1272, the Security Council merely “Decides further that UNTAET will have a structure and objectives *along the lines set out in ...the report of the Secretary-General*”.<sup>111</sup> Neither of the examples of the more specific obligations set out above is repeated in the same language in the Security Council resolution. Instead, the resolution merely states that UNTAET “shall have a mandate consisting of the following elements: ... (b) To establish an effective administration; ... (e) To support capacity-building for self government”.<sup>112</sup> Needless to say, an effective administration is not necessarily the same thing as a *transparent* and *accountable* administration, and support for capacity-building does not necessarily curb discretion in appointing civil servants. Nonetheless, it would be possible for a judicial body empowered to adjudicate a dispute regarding the extent of powers to interpret the legal obligations and limitations in the mandate.

The grant of power throughout the resolution is apparently more sweeping and explicit than that granted to UNMIK. This fact is quite telling, considering that the mandate was created only a few months after the establishment of UNMIK. In addition, there is no obligation directly imposed on UNTAET in the resolution to “protect and promote human rights”, but rather an obligation to develop an “independent East Timorese human rights institution”, which clearly does not impose the same limits on the operation itself.<sup>113</sup> The first SRSG adopted Regulation 1999/1, which proclaimed that “In exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally

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<sup>110</sup> *Ibid.* at para. 34.

<sup>111</sup> SC res. 1272 (1999) at para. 3. Emphasis added.

<sup>112</sup> SC res. 1272 (1999) at para. 2.

<sup>113</sup> SC res. 1272 (1999) at para. 8.

recognized human rights standards...”.<sup>114</sup> Moreover, that Regulation explicitly listed the human rights instruments that “reflected” those standards, including the ICCPR and its protocols. In the case of East Timor, the Security Council also “*Stresses* the need for UNTAET to consult and cooperate closely with the East Timorese people”.<sup>115</sup> Many scholars look at these constitutive instruments of international administrations in terms of whether consultation with a local representative body was required in light of whether and how that brought democratic legitimacy to the peace-building process.<sup>116</sup> While that aspect is undoubtedly of critical importance in an overall evaluation of policy, what we are interested in here is consultation as a *legal* requirement or limit on the exercise of power. The critical question is whether that provision creates a real legal obligation defining the manner in which UNTAET must exercise its powers, or whether it is mere rhetoric. The broad allocation of discretionary power (“all necessary means”), which suggests that this is mere rhetoric, has been alluded to above. Moreover, in this case the Security Council only “*Stresses* the need for” consultation, as opposed to the other obligations in the resolution, which are preceded by the Security Council *Requesting* or *Deciding*, etc. The language used in this instance thus suggests that the need for consultation does not have the same binding force as other obligations incumbent upon UNTAET, and perhaps cannot be viewed as a legal limit on the powers of the SRSG. Finally, one may query what an obligation to consult requires. Merely ostensibly hearing the other side? Providing for a formal channel of communication? May it even go so far as requiring an interim administrator to provide written reasons as to why he or she is deviating from the recommendations or advice of the consultative bodies with which he or she is obliged to entreat?

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<sup>114</sup> UNTAET Regulation 1999/1 proclaimed, “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 on Human Rights of 10 December 1948; The International Covenant on Civil and Political Rights of 16 December 1966 *and its Protocols* [emphasis added]; The International Covenant on Economic, Social and Cultural Rights of 16 December 1966; The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979; The Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; The International Convention on the Rights of the Child of 20 November 1989.” (27 November 1999) Available online: <http://www.un.org/peace/etimor/untaetR/etreg1.htm>

<sup>115</sup> SC res. 1272 (1999) at para. 8.

<sup>116</sup> For example, see Kreilkamp, *supra* note 12. See also, for a practitioner’s perspective, David Harland, “Legitimacy and Effectiveness in International Administration” (2004) 10 *Global Governance* 15 – 19; for a political science perspective, see Richard Caplan, *supra* note 13 and Simon Chesterman, *You the People*, *supra* note 13 at 126 - 153. Chesterman considers whether consultation with local actors renders or may render an international administration more accountable in a quasi-democratic sense.

A comprehensive analysis of each mandate is not feasible within the scope of this study. However, the above suffices to illustrate that even broad “Chapter VII” mandates have identifiable legal obligations as well as limits on the power accorded to the SRSG to administer the territory in question. The enforceability of those limits will be the subject of the second part of this study.

### 3.1.2 b Negotiated administrations

In other cases, administrations are created through negotiations between the parties and submitted for approval by the Secretary-General in a report to the Security Council. One can anticipate that a mandate will be more carefully defined when it has gone through such a process. Indeed, one of the first temporary administrations of territory by the United Nations occurred on the basis of a treaty signed between Indonesia and the Netherlands with respect to West New Guinea and was endorsed by the General Assembly in 1962. The General Assembly resolution establishing the United Nations Temporary Executive Authority simply “authorize(d) the Secretary-General to carry out the tasks entrusted to him in the Agreement.”<sup>117</sup> There were two phases to the administration. In the first phase, the SRSG had to replace the Dutch civil servants in the territory with persons having neither Indonesian nor Dutch citizenship in order to provide neutral elements in a territory where sovereignty was contested. However, in the justice sector, the SRSG filled the void left by the departing Dutch magistrates by hiring qualified Indonesian magistrates.<sup>118</sup> In the second phase, the Indonesian authorities had to hold a referendum for the local population to determine its future status. At that time, the Agreement stipulated that Indonesia would accept a certain number of UN civil servants to remain on the territory where necessary.<sup>119</sup> The continued presence of the SRSG was designed to provide technical support and also to guarantee the implementation of the agreement.<sup>120</sup> In terms of accountability mechanisms, the Secretary-General was to appoint a Special Representative who would report back to him; the Secretary-General himself had to report to Indonesia and the Netherlands.<sup>121</sup> This direct reporting to the States involved is similar to ongoing dialogue and consultation in other peace operations, but it is interesting to see it codified as a kind of accountability mechanism in this way.

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<sup>117</sup> UN GA res. 1752 (XVII), *supra* note 8 at para. 3.

<sup>118</sup> Kolb/Porretto/Vité, *supra* note 70 at 33.

<sup>119</sup> The referendum that was eventually held was criticized as having been unrepresentative on many accounts, and the UN is accused in some circles as having betrayed its commitment to the principle of self-determination in that case.

<sup>120</sup> Kolb/Porretto/Vité, *supra* note 70 at 33.

<sup>121</sup> Kolb/Porretto/Vité, *supra* note 70 at 32.

In the case of the United Nations Transitional Administration in Cambodia, the Security Council endorsed an administration whose structure and mandate was based on an agreement between the parties to the conflict (the Paris Agreement) and a Report of the Secretary-General.<sup>122</sup> One of the key features of the administration is that the Supreme National Council, which was the transitional government according to the terms of the Paris Agreement, *delegated* to the UN Transitional Administration “all powers necessary” to ensure the implementation of the agreement.<sup>123</sup> While that delegation is unquestionably extremely broad and open to interpretation, it is nonetheless not a complete abdication of power. Nevertheless, under the Agreement, “all administrative agencies, bodies and offices acting in the field of foreign affairs, national defence, finance, public security and information [were] placed under the direct control of UNTAC.”<sup>124</sup> However, the SRSG had to exercise his powers in such a way as to ensure “the strict neutrality of the political environment in Cambodia”<sup>125</sup>, which provides a basis for a yardstick against which to measure his decisions. Moreover, the SNC had an advisory capacity toward UNTAC and UNTAC was obliged to follow that advice if specified conditions were met. Paragraph 9 of the Section on Transitional Arrangements Regarding the Administration of Cambodia during the Pre-electoral Period states:

The SNC should offer advice to the UNTAC which *will comply* with this advice provided there is a consensus among the members of the SNC, and provided this advice is consistent with the objectives of the comprehensive political settlement. The Special Representative of the UN Secretary-General will determine whether such advice is consistent with the comprehensive political settlement.<sup>126</sup>

Although the SRSG is accorded the power to determine whether UNTAC is bound by the advice, it is not inconceivable for the exercise of such decision-making to be reviewable. As will be seen in more detail below, review of such decisions has been carried out in the context of previous administrations.<sup>127</sup>

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<sup>122</sup> SC res. 745 (1992); Paris Agreement (23 October 1991), 31 ILM 180 (1992) also Annexed to the Letter of the Permanent Five to the Secretary-General UN Doc. A/45/472 (1990) and S/21689 (31 August 1990), Report of the Secretary-General S/23613 (1992) February 19 1992. On Cambodia, see especially Steven Ratner, “The Cambodia Settlement Agreements” (1993) 87 *AJIL* 1 – 41.

<sup>123</sup> *Report of the Secretary-General on Cambodia*, 19 February 1992, UN Doc. S/23613 at para. 6, and Agreement, Annex I: Framework for a Comprehensive Political Settlement of the Cambodia Conflict, para. 8.

<sup>124</sup> *Comprehensive Settlement Agreement*, part I, section 3, article 6 and Annex 1 section B, para. 1.

<sup>125</sup> See Lucy Keller, “Case Study: UNTAC in Cambodia – from Occupation, Civil War and Genocide to Peace” (2005) 9 *Max Planck UNYB* at 162.

<sup>126</sup> Emphasis added.

<sup>127</sup> See *infra*, Free City of Danzig, Case Study at footnote 415 and accompanying text.

The UN Mission in Bosnia and Herzegovina with its EU Office of the High Representative was negotiated in the context of the Dayton Accords. It is distinct from the other missions since the head of the international administration in that case is not a Special Representative of the Secretary-General but rather appointed by the Peace Implementation Council. Initially, the High Representative did not enjoy wide powers of direct rule and could not merely arrogate them to himself by decree. Direct decision-making occurred after the adoption by the Peace Implementation Council (PIC) of the Bonn Conclusions in December 1997 in response to difficulties moving forward in implementing the Dayton Accords. The changes to the High Representative's powers were made through the adoption of the following conclusion:

The Council welcomes the High Representative's intention to use his final authority in theatre regarding interpretation of the Agreement on the Civilian Implementation of the Peace Settlement in order to facilitate the resolution of difficulties *by making binding decisions*, as he judges necessary, on the following issues:

- a. timing, location and chairmanship of meetings of the common institutions;
- b. interim measures to take effect when parties are unable to reach agreement, which will remain in force until the Presidency or Council of Ministers has adopted a decision consistent with the Peace Agreement on the issue concerned;
- c. other measures to ensure implementation of the Peace Agreement throughout Bosnia and Herzegovina and its Entities, as well as the smooth running of the common institutions. Such measures may include actions against persons holding public office or officials who are absent from meetings without good cause or who are found by the High Representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.<sup>128</sup>

Prior to that, the High Representative could make recommendations to the Steering Board of the PIC if the parties were at an impasse, but did not pass laws or regulations that were directly implemented. With the new mandate from the PIC, the High Representative thus swung into action in early 1998, taking binding decisions on everything from a framework law for privatization<sup>129</sup> to the creation of an Independent Media Commission<sup>130</sup> and exercising his power to take “actions against persons holding public office”. In 1998, the High

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<sup>128</sup> *Peace Implementation Council, Bonn Conclusions, PIC Main Meeting*, 10 December 1997, Conclusion XI. Emphasis added.

<sup>129</sup> Decision Imposing the Framework Law on Privatization of Enterprises and Banks in BiH, 22 July 1998, available online: [http://www.ohr.int/decisions/econdec/default.asp?content\\_id=21](http://www.ohr.int/decisions/econdec/default.asp?content_id=21).

<sup>130</sup> Decision of the HR on the establishment of an Independent Media Commission, 11 June 1998, available online: [http://www.ohr.int/decisions/mediadec/default.asp?content\\_id=95](http://www.ohr.int/decisions/mediadec/default.asp?content_id=95).



Representative removed two mayors, one deputy mayor and one newly elected member of the National Assembly of the Republika Srpska, suspended one President of a municipal assembly, and prevented another individual from holding office.<sup>131</sup> In 1999, the High Representative suspended or removed at least 30 individuals from public office (and lifted the ban on one individual banned in 1998). This power continues to be exercised today and is completely discretionary. The High Representative generally issues a written document (either a letter or a decision) giving reasons for the removal of a person from office. However, the action is not well-received in the territory. As Alija Izetbegovic said, “In Sarajevo, they remove a man, label him dishonest, do not present any proof of this, and then talk to us about human rights.”<sup>132</sup> Reports of NGOs nonetheless at times call for international administrators to exercise such powers in order to shore up the implementation of the peace accord.<sup>133</sup> The Secretary-General's recent report on transitional justice and the rule of law deals with UN assistance in vetting the public service in post-conflict societies in order to “screen out individuals associated with past abuses” as an important element of transitional justice.<sup>134</sup> The report stresses the importance of transparency and procedural safeguards in the vetting process, but it is not obvious that the Secretary-General perceived that the same principles should apply to his own administrations.

The fact that the High Representative is not a Special Representative of the UN Secretary-General may have important legal consequences. In the Security Council resolution endorsing the Dayton Accords and the recognition of the High Representative, the Council saw fit to decide that “States ... shall ensure that the High Representative enjoys such legal capacity as may be necessary for the exercise of his functions, including the capacity to contract and to acquire and dispose of real and personal property.”<sup>135</sup> In contrast, in the case of a UN SRSG

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<sup>131</sup> Please see *Decision removing Marko Benkovic from his position as Mayor of Orasje*, 28 August 1998; *Decision removing Drago Tokakcija from his position as Deputy Mayor of Drvar*, 16 April 1998; *Decision removing Pero Raguz from his position as Mayor of Stolac*, 4 March 1998 ; *Decision removing Dragan Cavic from his position as a member of the newly elected Republika Srpska National Assembly*, 8 October 1998 ; *Decision preventing Mijo Tokic from holding any executive position in Canton 10 or any other office*, 20 October 1998 ; and, finally, *Decision suspending Stanimir Reljic from his position as the President of Vlasenica Municipal Assembly*, 15 December 1998. These decisions are available online at <http://www.ohr.int/decisions/archive.asp>.

<sup>132</sup> Cited in Richard Caplan, *supra* note 13 at 189.

<sup>133</sup> See International Crisis Group, *Kosovo after Haradinaj*, Europe Report No. 163, 26 May 2005, especially *Recommendation 9*: “UNMIK should correct the wayward course of the [Kosovo] Assembly to enable it to become Kosovo’s main forum for constructive political debate, including by: (a) the SRSG using his power to dismiss those who obstruct democratic functioning”.

<sup>134</sup> See Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies* (23 August 2004) UN Doc. S/2004/616 [hereinafter *Rule of Law*] at paras. 52 – 53.

<sup>135</sup> SC res. 1031 (1995) at para. 28.

administering territory such legal capacity does not need to be spelled out in a constitutive instrument.<sup>136</sup>

The Dayton Accords (Annex 10) gave the High Representative final authority to interpret the Agreement on the civilian implementation of the peace settlement.<sup>137</sup> This interpretive power was also accorded to the SRSG in UNTAC with respect to whether advice met the conditions for it to be taken into account, but that interpretive power did not extend to the entire agreement. No specific mechanism for reviewing the decisions of the administrator was provided for. In the case of UNMIK and UNTAET, no interpretive power was specifically accorded in the mandates.

### 3.1.2.c Other

In the Balkans, there are two other interesting international administrations that have an unusual genesis. The first is the city of Brcko, which is a town on the edge of the inter-ethnic boundary line between Republika Srpska and the Federation of Bosnia and Herzegovina. The future of Brcko was so contested that it could not be resolved during the negotiation of the Dayton Accords and was left “to be determined.” In the end, an arbitral commission plagued by non-cooperation decided to place Brcko under international administration. The mandate and powers of the administrator are therefore set out in the arbitral award. The mandate created by the arbitral award created a "Supervisor" appointed by the High Representative (of the EU-run OHR) and granted him certain administrative powers to be exercised “in aid of the implementation program and local democratization”.<sup>138</sup> The Supervisor was mandated by the Arbitral Tribunal to “consider assembling an Advisory Council” but was then instructed who to include within such a Council.<sup>139</sup> An evaluation of the limits of power to promulgate binding regulations thus turns on an interpretation of what may be in aid of the

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<sup>136</sup> Article 104 of the UN Charter provides that “The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.”

<sup>137</sup> Dayton Accords, *supra* note 7, Annex 10, Article V.

<sup>138</sup> *Brcko Arbitral Tribunal for Dispute Over the Inter-Entity Boundary in Brcko Area, AWARD*, VII. Award, 1997, para. 104., I. B.1: “The Supervisor will have authority to promulgate binding regulations and orders in aid of the implementation program and local democratization. Such regulations and orders shall prevail as against any conflicting law. All relevant authorities, including courts and police personnel, shall obey and enforce all Supervisory regulations and orders. The parties shall take all actions required to cooperate fully with the Supervisor in the implementation of this provision and the measures hereinafter described.”

<sup>139</sup> *Ibid.* para. B.2: “The Supervisor should consider assembling an Advisory Council and include within its membership representatives of OSCE, UNHCR, SFOR, IBRD, IMF, the Institutions of Bosnia and Herzegovina, local ethnic groups, and such other official and unofficial groups as the Supervisor may deem appropriate to provide advice and liaison in implementation of this Award.”

implementation program. Indeed, other obligations of the “Supervisor” are expressed in fluid language, such that he “should assist” international development agencies and “is invited and encouraged to guide efforts” to revitalize the port area.<sup>140</sup> On one hand, one may argue that there no clear grant of power to promulgate binding regulations for economic development; a converse interpretation might be that the suggestions made to the Supervisor in the Award reflect the implementation program itself.

The European Union Administration of the city of Mostar on the other hand was based on an agreement negotiated between the local representatives of the town and the European Union.<sup>141</sup> It is therefore best considered under the OHR as a whole for the purposes of this paper. Nonetheless, it is important in that it represents an example of individuals (or at least non-State actors) as having a kind of international legal personality to conclude an agreement with an international organization for its international administration.<sup>142</sup> Certainly, the case of Mostar is unique, but then, such administrations generally arise in the context of deeply fragmented societies and it is therefore an important precedent.

Finally, this section would not be complete without a word on the laws administrators write for themselves. May Regulation 1 (according Louis XIV powers to the SRSG of UNMIK) constitute a *legal source* of the powers of the SRSG? From very early days of these administrations, it was considered that the regulations adopted by SRSGs were binding upon the administered territory. The legal construction offered to explain this unnatural effect in international law was that either such regulations form part of the United Nations legal order (based on a reading of the Security Council resolution establishing the mission in concert with the purported consent of the territorial State, such as the direct application of European Community law in member States), or that the resolution and consent agreement constituted a transfer of direct sovereign powers, “short of a cession”.<sup>143</sup> In my view, it is equally possible

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<sup>140</sup> *Ibid.* paras. B. 6 and 7.

<sup>141</sup> See Pagani, *supra* note 64 at 244 for the powers and limitations of the administration. Note that Pagani considered that the administration did not have “coercive” powers, yet it could take direct, binding decisions, and did so. See *ibid.* at 251. The relationship between “coercive” powers (like the Chapter VII powers of the Security Council) and the ability to legislate directly is worthy of further consideration.

<sup>142</sup> Jan Klabbbers, “Legal Personality: The Concept of Legal Personality” (2005) 11 *Ius Gentium* 35 at 57 – 58.

<sup>143</sup> See Michael Bothe and Thilo Marauhn, “The United Nations in Kosovo and East Timor – Problems of a Trusteeship Administration” (2000) *International Peacekeeping* 152 at 155. Note that Erika de Wet goes so far as to consider the “potential inalterability of directly applicable decisions”, arguing that they raise “the question whether regulations... could subsequently be amended or abrogated by the national government in the post-administration phase without the consent of the Security Council.” With all due respect to the learned author, in my view such a contention is extremely legalistic and verges on the absurd. See Erika de Wet, “Direct Administration”, *supra* note 52 at 332 ff. See also Kolb/Porretto/Vité, *supra* note 70 at 147-148 on the quasi-

to construct an argument based on the discussion above regarding the rules of the organization. If we accept either construction, the regulations adopted by the SRSG may constitute a source of his power, and also a limitation (*e.g.* human rights) on it.

### 3.1.3 Conclusion

The constitutive instrument, whether a Chapter VII Security Council mandate or a negotiated agreement, thus forms the starting point for an analysis of the limits on the powers of international administrators. There are no obvious checks and balances built into the mandates in order to render the international organization accountable to the local population. When decision-making power is granted in negotiated instruments, that power is granted to the head of the mission. As noted in the introduction, these mandates do have internal oversight mechanisms in the form of reporting procedures, but no independent, external oversight. It is therefore appropriate to consider whether other international legal regimes apply that provide a more comprehensive framework under which an organization may be held accountable. In this light, it is important to note that the method of creation and establishment of international administrations may not only influence the scope of the powers of the international administrator, but it may also affect the application of other bodies of international law to that administration. The method of creation may, therefore, have a considerable impact on the overall legal framework, influencing paths to accountability. Beyond the powers actually provided for in the constitutive instrument, two bodies of law are obviously crucial to determining the limits of power: international humanitarian law and the law of international trusteeship. Following a brief discussion of the applicability of international human rights law in this context, I will turn to an examination of the application of these bodies of law to international administrations.

### 3.2 *Human Rights Law as a Source of Legal Obligations and Limits*

There are many very sound policy reasons why international organisations, and in particular those that are administering territory, should be bound by international human rights law. Paramount among these may be the fact that an international organisation that is endowed with considerable resources would be setting an extremely bad example for struggling States (let alone for the territory it is actually administering), were it to argue that it cannot fulfil its

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“monist” nature of the territory given the direct applicability of the SRSG’s regulations, and Ruffert, *supra* note 82 at 622, who argues that the regulations promulgated are “United Nations law”.

obligations and respect human rights at the same time.<sup>144</sup> Moreover, the very idea that well-intentioned governments must nonetheless be held to the strict standards of human rights law should mean that well-intentioned international organisations should not escape the same treatment. Finally, the usual protest that international organisations cannot be bound by human rights law because they do not control territory nor have a population cannot be invoked in the context of international administrations.<sup>145</sup>

In this context, it is vital to outline the sound legal reasons why international organisations are bound by international human rights law. While it would seem to go without saying that the United Nations – ostensibly the organisation with the greatest international mandate to protect human rights – must necessarily be bound by the same obligations as states when it acts in place of a State, the legal case, while strong, is not so straightforward. There are a number of theories postulating that international human rights obligations are binding on international organisations, and at the very least, on the United Nations. First, although international organisations are not parties to international human rights treaties, some authors nonetheless suggest those organisations may be bound through the conventional obligations of their member States.<sup>146</sup> Second, customary international law of human rights may bind international organisations<sup>147</sup> or customary law of the organisation may render human rights obligations applicable. Finally, one may argue that the Charter itself serves as the primary legal basis for human rights obligations binding on the UN organisation.<sup>148</sup> Even so, it must be acknowledged that not all scholars are convinced of the applicability of human rights law to the UN, even in this context. For example, Alvarez is inconclusive as to whether the UN as territorial administrator is legally bound to respect human rights or whether the regulations proclaimed by the SRSGs are “merely rhetoric”.<sup>149</sup> He writes, “No one knows for sure whether the matter is a question of legal duty or an *ex gratia* assumption of responsibility, whether it applies to all international organisations and with respect to all its operations, or, even if all of international human rights law does apply to the UN, how it does so.” However, this argument may be countered in two ways. First, Alvarez fails to explain why those

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<sup>144</sup> Frédéric Mégret and Florian Hoffmann, “The UN as a Human Rights Violator ? Some Reflections on the United Nations Changing Human Rights Responsibilities” (2003) 25 *Human Rights Quarterly* 334.

<sup>145</sup> Kolb/Porretto/Vité *supra* note 70 at 123.

<sup>146</sup> *Ibid.*, at 127.

<sup>147</sup> *Ibid.*, at 132 ff.

<sup>148</sup> de Wet, *Chapter VII Powers*, *supra* note 75 at 320 and 198 – 204. Other international organisations administering territory, such as the European Union in Bosnia, obviously cannot be bound by the UN Charter, but may be bound to respect human rights through their own constitutive instruments.

<sup>149</sup> Alvarez, *supra* note 84 at 178 – 183.

regulations adopted by the SRSGs would be any less binding than the other regulations adopted. Consider, for example, why Regulation 2000/47 on immunity is widely viewed as binding,<sup>150</sup> whereas statements to the effect that the UN is bound by human rights obligations would not be. Second, unilateral promises by international organisations may also bind such organisations.<sup>151</sup> In many ways, those regulations may be seen as a kind of unilateral promise that binds the organisation.

It is common to argue for the conventional application of international *humanitarian* law obligations through the treaty obligations of member states, in particular with respect to the participation of national contingents in UN-run peace operations.<sup>152</sup> However, although it has been suggested by rather eminent scholars, in my view the same construction cannot be applied with respect to human rights obligations. Robert Kolb *et al* argue that international organisations may be bound by human rights treaties “par le biais des engagements pesant sur ses Membres participant aux opérations.”<sup>153</sup> With all due respect to the learned scholars, this theory appears rather unconvincing in this context (as they later admit). First of all, it is quite astonishing to see this theory postulated, even tentatively, without immediate reference to extraterritorial application of human rights treaties.<sup>154</sup> Unlike international humanitarian law treaties, international human rights law treaties are *a priori* applicable within the territory of the State party itself. Extraterritorial application of the obligations under human rights treaties requires a certain legal construction, unlike for IHL treaties, which presuppose extraterritorial application of the obligations. For human rights law obligations to find extraterritorial application, courts tend to look for whether persons were “within the jurisdiction of” the State in question.<sup>155</sup> For the military or civilian police components of peace operations,

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<sup>150</sup> See *infra* note 347 and accompanying text.

<sup>151</sup> Klabbers, *International Institutional Law*, *supra* note 38 at 310.

<sup>152</sup> See *infra*, section 3.3.2 of Part I.

<sup>153</sup> Kolb/Porretto/Vité, *supra* note 70 at 127.

<sup>154</sup> Indeed, the only problem with this theory identified by Kolb *et al* at this point is the following: “Il se pose en conséquence des questions relatives à la coordination entre les obligations respectives de ces différents sujets.” *Ibid.* at 127. However, please note that the authors do refer the reader to Chapter IV of their work, on Responsibility, in which there is a section on “L’étendue de la juridiction des Etats aux termes de la Convention européenne : la notion de « contrôle effectif »” (at 203). They furthermore discuss the issue of effective control of a State in terms of a civilian administration. In the end they conclude that it is not realistic to contend that States have responsibility for human rights by virtue of having transferred powers to an organisation in a manner that can be assimilated to a situation such as *Waite and Kennedy v. Germany* (see Kolb/Porretto/Vité at 210 and see *infra* note 379). In my view, and with all due respect, this is a relatively unsatisfactory manner of dealing with the applicability of the conventional law in the first place.

<sup>155</sup> Although it suffers from a lack of coherence, see, in the jurisprudence of the European Court of Human Rights, *Bankovic and Others v. Belgium and 16 other contracting States*, Grand Chamber Decision on Admissibility of 12 December 2001, Application No. 52207/99; *Issa and Others v. Turkey*, Judgement of 16

international human rights obligations may most certainly be binding on peace forces through their sending States' obligations.<sup>156</sup> However, the same is not necessarily true for the civilian component of the mission. Due to the fact that individuals hired by international Organizations to work in international administrations are not sent by their national States, it would seem to stretch the legal imagination excessively to argue that such individuals exercise the jurisdiction of their national State when working for the UN in such a context.<sup>157</sup>

In addition, as Kolb *et al* admit, this theory is further hamstrung by the fact that one would have to sort through the plethora of possible applicable treaties to determine which obligations are binding. It would be nonsensical to suggest that a person whose home is expropriated by a decision issued by a person of a European nationality would be governed by different laws than if the same action had been taken by a person hailing from an African state. *Idem* for a case in which a person from a state that has signed the Optional Protocol to the ICCPR allowing for individual petition violates a right, compared with the same violation by a person from a State that has not done so. Such a theory would seem to provoke endless legal conundrums.

The second argument that international organisations are bound by international human rights law relies on customary law. According to one theory, when a rule becomes part of general international law, it is binding upon all subjects in that legal system, irrespective of their individual consent to be bound.<sup>158</sup> This theory would allow rules that evolve into “general international law” through the practice and *opinio juris* of States to become binding on international organisations, commensurate with their legal personality.<sup>159</sup> The central question then becomes: what, if any, rules of international human rights law constitute customary

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November 2004, Application No. 31821/96; *Ocalan v. Turkey*, Judgement of 12 March 2003, Application No. 46221/99.

<sup>156</sup> See *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004*. Human Rights Committee. Eightieth Session (CCRP/C/74/CRP.4/Rev.6), online: [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf). In paragraph 10, the General Comment states: “This principle [that all persons subject to the jurisdiction of a State Party must enjoy Covenant rights] also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.”

<sup>157</sup> See *infra* Part II section 1 for attribution. However, note that it would seem feasible to apply human rights law to the national armed forces contingents in peace operations through this construction. See especially, John Cerone, “Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo” (2001) 12 *EJIL* 469 at 472 and 475 – 481.

<sup>158</sup> See Gionata Buzzini, “La théorie des sources face au droit international général” (2002) 106 *RDGIP* at 582.

<sup>159</sup> *Cf. Reparation for Injuries, infra* note 322 for legal personality of the United Nations. Note that Kolb/Porretto/Vité presume that general international law is synonymous with customary international law. See *supra* note 70 at 134.

law?<sup>160</sup> Must, as some argue, the identification of non-derogable rights be accompanied by identification of the judicial guarantees necessary for their protection?<sup>161</sup> Although many subscribe to this argument<sup>162</sup> one may query whether this is indeed the way international organisations are bound by customary international law.<sup>163</sup> In my view, the more secure legal peg upon which to hang the argument that international organisations are bound by international human rights law is that such obligations are in fact customary law for the organisation itself. This argument should be considered in combination with the argument that the UN is bound to respect human rights through Articles 1 and 55 of the Charter.<sup>164</sup>

The International Court of Justice has held that certain aspects of human rights law, especially with respect to the right to a remedy, are binding on the United Nations. In that case, the Court held that to leave one of the UN's own civil servants without access to a remedy would hardly be compatible with the explicit aims of the Charter, which are to promote freedom and justice for human beings.<sup>165</sup> In addition, Kolb *et al* provide a careful study of the practice of the United Nations in administering territory in light of the application of human rights law to the organisation. Finding that early practice, before the era of human rights instruments, does not provide much to go on, they turn to an analysis of UNMIK and UNTAET. In those two cases they consider the thorny question of the applicable law and the manner in which the administrations handled the introduction of human rights law norms and their primacy over existing law. In light of the strange division of power, in which UNMIK exercises all sovereign powers but the government of Serbia and Montenegro retains legal sovereignty over the territory, and in the case of UNTAET where there was no other sovereign government, the authors conclude that the applicability of human rights law must be placed within the prism of the sharing of constitutional powers on the territory. Since human rights law is deemed to be applicable on the territory by virtue of regulations passed by the respective SRSGs, that law belongs to the applicable law in the territory and therefore must

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<sup>160</sup> Kolb/Porretto/Vité *supra* note 70 at 135. Oscar Schachter argues that there is a special method of determining which human rights are customary since "evidence is rarely to be found in the traditional patterns of State practice involving claims and counter-claims between two States." Oscar Schachter, *International Law in Theory and Practice* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1991) at 338.

<sup>161</sup> *Ibid.*

<sup>162</sup> See also Abraham, *supra* note 13 at 1319 and Bongiorno, *supra* note 22.

<sup>163</sup> Consider the argument below with regard to customary IHL at footnote 180 and accompanying text.

<sup>164</sup> As postulated by de Wet, *Chapter VII Powers*, *supra* note 75 at 320. See also David Marshall and Shelley Inglis, "Human Rights in Transition: The Disempowerment of Human Rights – Based Justice in the United Nations Mission in Kosovo" (2003) 16 *Harvard Human Rights Journal* 95 at 104 and Kolb/Porretto/Vité, *supra* note 70 at 138.

<sup>165</sup> *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, I.C.J. Rep. [1954] 47 at 57.



bind the whole administration.<sup>166</sup> The problem, they argue, is implementation. Clearly, the tenor of this argument is closely related to the argument presented above regarding the constitutive instruments of the international administrations. However, as presented by Kolb *et al*, recent practice may represent the emergence of a customary norm binding on the organisation in this context.

Further support may come from two additional sources: as noted above, in the Security Council resolution establishing UNMIK, there is a clear obligation for UNMIK itself to respect human rights in the implementation of its mandate. Moreover, the Human Rights Committee, the body responsible for supervising implementation of the ICCPR, has requested UNMIK to report to it on implementation of the ICCPR in Kosovo in a carefully worded response to Serbia and Montenegro's report.<sup>167</sup> The Committee held that "the Covenant continues to remain applicable in Kosovo" and "encourage[d] UNMIK, in cooperation with the Provisional Institutions of Self-Government (PISG), to provide, without prejudice to the legal status of Kosovo, a report on the situation of human rights in Kosovo since June 1999."<sup>168</sup> It is not altogether clear from the report whether the careful wording is solely due to an abundance of caution not to offend Serbia and Montenegro's sensibility with regard to territorial sovereignty, or to an unwillingness to declare that UNMIK is bound by the terms of the ICCPR in Kosovo.<sup>169</sup> However, it is particularly noteworthy that the PISG were only created in May 2001, almost two full years after the start of the reporting period, leaving UNMIK solely responsible for two years of human rights implementation reporting.<sup>170</sup> While the Human Rights Committee is admittedly a treaty body and not a UN organ itself, due to its special place within the UN system, its recognition of the potential for an international organisation to be subject to the Covenant's obligations remains significant.

Finally, one may contend that the protection of human rights is integral to the UN's mission to promote peace and international security.<sup>171</sup> In this vein, I agree wholeheartedly with

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<sup>166</sup> See Kolb/Porretto/Vité *supra* note 70 at 138 – 150.

<sup>167</sup> See *Concluding Observations of the Human Rights Committee: Serbia and Montenegro 12/07/2004*, CCPR/CO/81/SEMO at para. 3.

<sup>168</sup> *Ibid.*

<sup>169</sup> Note that some authors do postulate succession to treaties of the host State by the international administration as one method of finding human rights obligations to be binding on the organisation. See, for example,

<sup>170</sup> UNMIK/REG/2001/9 15 May 2001, *A Constitutional Framework for Provisional Self-Government in Kosovo*, available online, *supra* note 10.

<sup>171</sup> Schachter, *supra* note 160 at 331. However, it must be noted that Schachter's comment was made in respect to human rights obligations of States, not of the United Nations itself.

Professor Kolb *et al*, who observe that although the UN could argue that the human rights language in the Charter is nothing more than “programmatische”, it is difficult to imagine that that organisation, with its declared goals of engendering progress in human rights protection and which insists on protection of such rights by States, could escape all responsibility through narrow legal arguments.<sup>172</sup> *De lege ferenda*, it would seem that the time has arrived to create a clear mechanism through which the UN and other international organisations can participate in human rights treaties. Nevertheless, either through the constitutive instruments discussed above, the regulations adopted by SRSGs, or through the customary law of the organisation, it is fair to conclude that international organisations<sup>173</sup> administering territory are bound to respect human rights law.

### *3.3 IHL as a source of legal obligations and limitations for international administrations*

International humanitarian law is the body of law governing armed conflicts. It prescribes rules for the protection of persons and property *hors de combat*, regulates the conduct of hostilities, and sets out a fairly comprehensive regime for the administration of territory under military occupation. The method of establishing international administrations may have an impact on whether or not international humanitarian law applies to them as a form of peace operation.<sup>174</sup> Detailed studies of IHL and peace operations exist in significant number. This section seeks therefore to underscore key aspects specific to international administration of territory with regard to IHL.

#### **3.3.1 Application of IHL to peacekeeping in general**

In UN peacekeeping doctrine, a peace operation established under Chapter VI of the UN Charter on the basis of an agreement between the host State(s) does not attract the application of IHL.<sup>175</sup> The resistance by the UN of the application of IHL to its operations is partly based in ideology but otherwise stems from rather practical legal concerns.<sup>176</sup> In terms of ideology, the UN argues that it cannot be in a state of armed conflict with a member State; therefore, it cannot attract and does not require the application of IHL. Instead, UN peacekeeping forces

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<sup>172</sup> Kolb/Porretto/Vité *supra* note 70 at 138.

<sup>173</sup> Similar arguments must be made for the European Union for the case of the OHR.

<sup>174</sup> See, in particular, Kolb/Porretto/Vité, *supra* note 70 at 47 – 118, for a detailed overview of the literature on this subject.

<sup>175</sup> Daphna Shrager, “The UN as an actor bound by international humanitarian law” in L. Condorelli, A.-M. La Rosa and S. Scherrer, (eds.), *Les Nations Unies et le droit international humanitaire* (Paris: Pedone, 1996).

<sup>176</sup> Eric David, *Principes de droit des conflits armés* (Brussels: Bruylant, 2002) at 211.

were for a long time bound only to abide by the “principles and spirit” of IHL.<sup>177</sup> Primary among the legal obstacles to being bound by IHL is the fact that the UN as an international organization is not a party to the Geneva Conventions of 1949 and their 1977 Additional Protocols or to other IHL instruments, nor can it be.<sup>178</sup> In addition, the UN has no territorial legal system and no court system through which it can enforce IHL.

However, peacekeeping forces are made up of contingents of national armed forces. Since virtually all States are parties to the Geneva Conventions, it is widely considered that peacekeepers are in any case bound by the Conventions by virtue of their sending States’ obligations. Moreover, Article 1 common to the Conventions obliges States to “respect and ensure respect” for the Conventions, meaning that States retain the obligation to ensure that their nationals abide by the Conventions even when they are placed under UN command in the context of a peace operation.<sup>179</sup> Second, many argue that even if the UN or one of its subsidiary organs is not bound by the Conventions, it is bound by customary international law. It is widely accepted that most of the provisions the 1949 Geneva Conventions and the 1899/1907 Hague Regulations and Annex form part of customary international law.<sup>180</sup> Nonetheless, procedural obligations of treaties do not easily become customary law, such that not all provisions of conventional IHL are necessarily customary law. In addition, as Marco Sassòli persuasively argues, IHL may be customary between States, but it is highly questionable to assert its applicability as customary on international organisations, especially when those organisations have consistently refused to accept *de jure* application of that law.<sup>181</sup> Third, in 1999 the UN Secretary-General developed and issued a Bulletin setting out specific rules of IHL binding on UN peacekeeping forces, such that now UN forces are bound

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<sup>177</sup> This phrase was first used in the regulations issued by former UN Secretary-General Dag Hammarskjöld with respect to UNEF in 1957. See *Secretary-General's Bulletin, Regulations for the United Nations Emergency Force*, UN Doc. ST/SGB/UNEF/1, 20 February 1957, "Chapter VII: Applicability of International Conventions", Art. 44, "The Force shall observe the principles and spirit of the general international Conventions applicable to the conduct of military personnel."

<sup>178</sup> The Geneva Conventions are open only to States.

<sup>179</sup> Marco Sassòli, "Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century" (2004), online: <http://www.ihlresearch.org/ihl/pdfs/sassoli/pdf> [hereinafter "Article 43"]. See also Sassòli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers" (2005) 16 *EJIL* 661 at 686 – 690 [hereinafter "Legislative Powers"]; Kolb/Porretto/Vité, *supra* note 70 at 111 – 121.

<sup>180</sup> International Military Tribunal at Nuremberg, *The United States of America et al. v. Hermann Wilhelm Göring et al*, Trial of the Major War Criminals (1947). See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge Univ. Press and ICRC, 2005), 3 Vols.

<sup>181</sup> Sassòli, *supra* note 179.

by certain defined “principles and rules” of IHL.<sup>182</sup> This development appears to reflect changes to the use of force in consensual peace operations: at the outset, former UN Secretary-General Hammarskjöld insisted that the use of force be strictly limited to only that necessary for self-defence. This has now expanded to include the use of force in defence of the mandate, clearly widening the scope for military action and visibly increasing the obvious need for application of IHL.<sup>183</sup>

In peace *enforcement* operations, on the other hand, being operations designed to address a threat to the peace identified by the Security Council and authorized under Chapter VII of the UN Charter, forces are permitted recourse to “all necessary means” in their efforts to restore peace and security. Since the use of force is *prima facie* not limited to the use of force in self-defence, the general consensus is that international humanitarian law applies to such operations. This conclusion is supported by a plain reading of Article 2(2) of the UN Safety Convention, which states that that “Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.”<sup>184</sup> Indeed, the fundamental separation between *ius ad bellum* and *ius in bello* means that even if a use of force is authorized by the Security Council acting under Chapter VII and therefore does not violate the *ius ad bellum*, the *ius in bello* nonetheless fully applies.<sup>185</sup>

### **3.3.2 Application of the law of military occupation to peacekeeping and peace enforcement operations**

The law of military occupation, as an integral part of IHL, is particularly important to international administrations because of the wealth of rules on civil administration IHL prescribes for an occupying power. Its applicability to an international administration would drastically alter the legal framework of that administration. The regime of military occupation is in large part designed to preserve the *status quo* of the occupied territory, thereby making it,

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<sup>182</sup> *Secretary-General's Bulletin on Observance by United Nations forces of international humanitarian law*, 6 August 1999, UN Doc. ST/SGB/1999/13 [hereinafter *Secretary-General's Bulletin*].

<sup>183</sup> There is some debate as to whether the UN is subject to IHL only in combat operations. See Michael Kelly, *Restoring and Maintaining Order in Complex Peace Operations* (The Hague: Kluwer Law International, 1999) at 176. This position is refuted by Tobias Irmscher, *supra* note 67 at 376.

<sup>184</sup> *Convention on the Safety of United Nations and Associated Personnel*, UN GA res. 49/59, 49 U.N. GAOR Supp. (No. 49) at 299, U.N. Doc. A/49/49, entered into force January 15, 1999.

<sup>185</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, of 8 June 1977 1125 U.N.T.S. 3, at paragraph 5 of the preamble.

many argue, inappropriate for peace operations with a considerable peace-building mandate implying significant transformation of legal, political and economic institutions.<sup>186</sup> The scope of the ability of an occupying power to make changes to the legal, political and economic institutions of an occupied territory is much debated, but it is fair to say that it is restricted.<sup>187</sup>

However, even if IHL applies to a peace operation in general, the UN appears to resist a straightforward application of the IHL of military occupation to peace operations. First, the above-mentioned Bulletin contains no rules whatsoever related to the law of military occupation.<sup>188</sup> Second, even in a UN-run peace enforcement operation in which recourse to "all necessary means" is authorized, thus ostensibly triggering the application of the whole gamut of IHL, the experience of the Australian forces during UNOSOM II shows that the UN does not consider the law of occupation to be applicable. UNOSOM II was the third mandate for humanitarian action in Somalia, following on the heels of UNITAF, the ill-fated peace enforcement mission under US command and control.<sup>189</sup> UNOSOM II was a Chapter VII operation that authorized enforcement measures and clearly drew the application of international humanitarian law to the actions of the forces implementing the mandate.<sup>190</sup> In their sector of responsibility, Australian forces, having concluded that they were bound by the law of military occupation, enacted certain criminal laws in order to maintain law and order.<sup>191</sup> Although this act would have been perfectly legal on a straightforward application of the law of military occupation<sup>192</sup>, the Australian forces were chastised for this action by the Department of Peacekeeping Operations in New York.<sup>193</sup> This suggests that even in such

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<sup>186</sup> David Scheffer, "Beyond Occupation Law" (2003) 97 AJIL 842 - 860. See also, for a more nuanced view, Steven Ratner, "Foreign Occupation and International Territorial Administration: The Challenges of Convergence" (2005) 16 EJIL 695 – 719 [hereinafter "Foreign Occupation"].

<sup>187</sup> Sassòli, "Legislative Powers", *supra* note 179.

<sup>188</sup> See *Secretary-General's Bulletin*, *supra* note 182.

<sup>189</sup> UNOSOM II was established by SC res. 814 (1993). UNOSOM I was created by SC res. 751 (1992) and had a mandate to monitor the ceasefire, provide a security force, and provide humanitarian assistance. It was enlarged and eventually replaced by UNITAF (SC res. 794 (1992)) which had a mandate to use force and which was led by the United States, not the United Nations. UNOSOM II took over from UNITAF.

<sup>190</sup> SC res. 837 in June of 1993 confirmed that res. 814 had authorized the Secretary-General to use "all necessary measures" against those Somalis responsible for attacks against peacekeeping forces.

<sup>191</sup> Kelly, *supra* note 183.

<sup>192</sup> Article 43 of the Hague Regulations obliges an occupying power to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Annex*, 18 October 1907, in D. Schindler and J. Toman, eds., *The Laws of Armed Conflicts: a collection of conventions, resolutions and other documents* (Leiden: Martinus Nijhoff Publishers, 2004)

<sup>193</sup> I thank Marten Zwanenburg for this example, cited at the Colloque de Bruges on IHL of Military Occupation 19 – 21 October 2005. I would argue that the DPKO is incorrect in law in denying the applicability of the law of occupation to such situations; however, it is understandable that there is a need to centralize decision-making powers during large and complex peace operations.

operations, according to the DPKO, the law of military occupation, and particularly aspects dealing with the ability to change laws in the territory, does not apply.

Finally, the argument that UN peacekeepers are not bound by the letter of IHL of military occupation may also have found some support from the key role that consent plays both in determining whether a situation of military occupation exists and as a fundamental principle of peacekeeping. The consent of a government to the presence of foreign forces on its territory is decisive for whether a situation of military occupation exists;<sup>194</sup> logically, therefore, that factor could also be determinative for the application of IHL to peacekeeping forces. In fact, consent may be the factor that overrides other considerations regarding the applicability of the law of occupation to peace operations. Normally, a determination of whether a situation is governed by the law of military occupation depends, as with all IHL, on the facts on the ground. The law of occupation is normally triggered “when [a territory] is actually placed under the control of the hostile army.”<sup>195</sup> (It is noteworthy that this presumption of hostility has been used by the UN to explain why IHL of military occupation does not need to apply to peacekeeping operations, which are supposedly welcomed by the local population.<sup>196</sup>) The definition of occupied territory is broader under the Geneva Conventions, catching even “a patrol of soldiers...”<sup>197</sup> Indeed, Article 2(2) common to the Conventions extends the application of the Geneva Conventions to “all cases of partial or total occupation, even if there is no resistance to that occupation.” Clearly, an international administration meets even the strictest test for military occupation since it places the territory under its control.<sup>198</sup> Consent thus becomes a critical factor in determining whether territory is occupied; otherwise, armies could not be stationed on foreign soil without triggering the application of the legal regime of military occupation.<sup>199</sup>

The consent of the parties to the peacekeeping mission was held by former UN Secretary-General Dag Hammarskjöld as one of the three fundamental elements of peacekeeping.<sup>200</sup>

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<sup>194</sup> See Eyal Benvenisti, *The International Law of Occupation* (Princeton: Princeton Univ. Press, 1993) (2004 reprint); Adam Roberts, “What is a Military Occupation?” (1984) 55 *British YB Int’l Law* 249 – 305.

<sup>195</sup> Article 42 of the Hague Regulations, *supra* note 192.

<sup>196</sup> Shraga, *supra* note 175 at 317.

<sup>197</sup> Jean Pictet, *The Geneva Conventions of 12 August 1949: Commentary IV Geneva Convention relative to the Protection of Civilians in Time of War* (1958).

<sup>198</sup> Admittedly, sometimes military control and civilian control may be divided.

<sup>199</sup> See especially Roberts, *supra* note 194 at 276 ff. See also Kolb/Porretto/Vité, *supra* note 70 at 113 ff.

<sup>200</sup> *Report of the Secretary-General to the General Assembly* 6 November 1956, *First Emergency Special Session, Annexes*, agenda item 5, document A/3302.

Indeed, when consent vanished, the troops left – as illustrated by the departure of UNEF from Egypt on the eve of the Six Day war in 1967.<sup>201</sup> Consequently, with consent being critical to the establishment of peacekeeping missions and simultaneously negating the definition of the host territory as an occupied territory, the applicability of IHL of military occupation appeared to be almost moot. Over time, however, all of the fundamental principles identified by Hammarskjöld have been eroded, and consent is not always necessary. In fact, in 1992, then Secretary-General Boutros Boutros-Ghali publically acknowledged this departure from the original principles in his *Agenda for Peace*. That document, which set the terms for peace operations for the post-Cold War period, defined peacekeeping as "the deployment of a United Nations presence in the field, *hitherto with the consent* of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well."<sup>202</sup> However, there does not appear to have been a concomitant evolution in perception of the applicability of the law of occupation to such missions.<sup>203</sup>

Applying this schema to the international administrations outlined above, we may be tempted to conclude that administrations established under Chapter VI of the UN Charter pursuant to negotiated agreements, such as UNTAC and OHR, would perhaps not attract the application of IHL of military occupation and therefore the powers of the administrators would not be limited by it. Conversely, UNMIK, UNTAES and UNTAET, as missions created through Chapter VII resolutions of the Security Council, should, according to the above, be classified as peace enforcement operations to which all of IHL applies. If indeed this conclusion is accurate, it may mean that like situations are treated differently, which some authors find to be an unfortunate result.<sup>204</sup>

However, UNMIK and UNTAET throw a wrench into this analysis, since those administrations are based both on consent<sup>205</sup> and on a Chapter VII Security Council resolution

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<sup>201</sup> The United Arab Republic (Egypt) withdrew its consent and asked then Secretary-General U Thant to remove all peacekeeping units from its territory. The consent of the Egyptian government to the operation had been clearly set out in the General Assembly resolution establishing the operation (No. 1001 (ES-I) 7 November 1956); within hours of receiving the request, the Secretary-General ordered the removal of the forces.

<sup>202</sup> *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping*, Report of the Secretary-General, 17 June 1992, UN Doc. A/47/277 and UN Doc. S/24111 at para. 20. Emphasis added. Note that calls for a "robust mandate" for the use of force remain in vogue today (Brahimi). While the question of consent is controversial in policy debates, there are relatively few legal debates as to the capacity of the United Nations to engage in such activities.

<sup>203</sup> For example, Somalia, as cited above note 193.

<sup>204</sup> Kolb/Porretto/Vité, *supra* note 70 at 114.

<sup>205</sup> See *infra* note 210 for an explanation of consent to these operations.

(which in the case of UNTAET includes the broad authorization to use “all necessary means”). If there are both consent and a Chapter VII resolution that ostensibly authorises a peace enforcement mission, which one governs the applicable law? Some authors have surmised that the resort to a Chapter VII resolution indicates that the Security Council knew consent was defective and that therefore IHL should apply on the grounds that it is more accurately viewed as a peace enforcement mission.<sup>206</sup> On the other hand, one may legitimately argue that even if consent is somehow defective, no State (and in particular not Serbia and Montenegro) has questioned its validity, therefore the missions should not be perceived as hostile in a sense that would attract the application (and limits) of IHL.<sup>207</sup> Another complication to this analysis is that the existence of consent in each case is not uniformly accepted by scholars, and for some reason, authors seem to be divided as to which mission was consented to. For example, Ratner finds that UNMIK was based on consent but that consent was problematic for UNTAET.<sup>208</sup> Milano, on the other hand, finds that the consent for UNMIK/KFOR was irreparably defective,<sup>209</sup> yet poses no question with respect to UNTAET.<sup>210</sup>

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<sup>206</sup> Enrico Milano, “Security Council Action in the Balkans: Reviewing the Legality of Kosovo’s Territorial Status” (2003) 14 *EJIL* 999.

<sup>207</sup> However, as Enrico Milano points out, acquiescence cannot cure consent to an agreement that was procured by force. *Ibid* at 1019. The Vienna Convention on the Law of Treaties specifies which kind of defective treaties can be rendered valid through acquiescence; Article 52 flaws are not among them.

<sup>208</sup> Ratner, “Foreign Occupation”, *supra* note 186 at 697.

<sup>209</sup> Milano, *supra* note 206 at 1020.

<sup>210</sup> Authors contending that there was consent for the establishment of UNMIK point to the Kumanovo Agreement, signed in Macedonia the day before the adoption of SC res. 1244. In addition, one can invoke Annex II of SC res. 1244 to support the notion that there was consent. Annex II outlines the *principles for an agreement* that were accepted by the FRY government regarding the establishment of a security presence “with substantial North Atlantic Treaty Organization participation” and an interim administration “to be decided by the Security Council”. (SC res. 1244 (1999) Annex II paras. 4 and 5, incorporated by reference in preambular para. 9 of the resolution.) On the other hand, those who argue that there was no consent assert that (1) the Kumanovo (Military Technical) Agreement was invalid under international law because it was procured through a blatant use of force; and (2) that there was no consent to the civilian administration component of UNMIK, but simply to the KFOR presence. (See Milano, *supra* note 206. See also Marten Zwanenburg, *Accountability of Peace Support Operations* (Leiden/Boston: Martinus Nijhoff Publishers, 2005) at 197.)

With respect to UNTAET, the report of the Secretary-General forming the basis for the administration refers specifically to the fact that the governments of Portugal and Indonesia both agreed to transfer the government of East Timor to the UN. (*Secretary-General’s Report*, *supra* note 109 at para. 25 (S/1999/1024).) On the other hand, some authors argue that the consent to UNTAET was not valid because Indonesia’s consent could not form the legal basis for the mission as Indonesia had no valid legal authority over the territory. (E.g. Ratner, “Foreign Occupation”, *supra* note 186 at 697-98.) The question as to which government’s consent is valid is relevant in other missions not established under Chapter VII of the UN Charter, and is particularly a problem for transitional administrations attempting to resolve failed or incomplete decolonization. For example, the peace operation in Western Sahara, MINURSO, which at one point had a mandate for direct temporary administration (but that part of the agreement was never implemented) is founded on the consent of Morocco and local Western Saharan representatives. (*The Situation Concerning Western Sahara: Report of the Secretary-General*, *supra* note 51 at para. 10.) Morocco is in a position exactly analogous to that of Indonesia with respect to East Timor. On the other hand, Spain, the former colonial power of Western Sahara, has never consented to the



In IHL, there is no obvious reason to separate the applicability of IHL on the conduct of hostilities and the protection of persons from the applicability of IHL of military occupation. Even in the case of Iraq, there were no arguments that the law of occupation did not apply in the situation of a purported “war of liberation”; instead, some scholars merely argued that the law of occupation should be interpreted differently in different circumstances.<sup>211</sup> Its overall applicability was not called into question. Indeed, such a separation would seem to contravene accepted doctrine on the immediate applicability of the law of occupation as soon as the first soldier places a foot on foreign territory. Is such separation appropriate for peace operations? Interestingly, authors do not seem to explain the basis for their apparent assumption that in the case of peace operations one may separate the two aspects of IHL. In some respects, recourse to the law of occupation would provide peacekeeping forces with a much-needed legal framework when they must carry out certain tasks such as arresting individuals.<sup>212</sup> In the case of Kosovo, analysis is further complicated by the fact that the civilian administration is run by the UN, but the military component was delegated to NATO by the Security Council. As the entire operation is thus not a purely UN-run peace operation, it should attract the application of IHL. But the civilian administration is controlled by the United Nations, which clearly does not perceive itself to be bound by the law of occupation. In addition, it may be more difficult to argue that the civilians (apart from Civilian Police) in the mission are bound to abide by the law of occupation on the grounds that their sending State must ensure the respect of IHL by its nationals.<sup>213</sup> Indeed, it is rather preposterous to imagine a State sanctioning one of its nationals employed in a civilian administration simply because that individual was involved in drafting laws that went beyond the changes permitted by the law of military occupation. It is intolerable, on the other hand, for a State to fail to sanction its armed forces if they violate IHL.

Having concluded that IHL of military occupation probably does not apply *de jure* to such operations, some authors proceed to argue that this body of law should be applied *de facto* or

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administration (although the UN continues to recognize it formally as the legal administering power over the territory), but the legitimacy of that mission has not been questioned on that ground.

<sup>211</sup> Scheffer, *supra* note 186.

<sup>212</sup> Sassòli, “Article 43”, *supra* note 179; and Marco Sassòli, “Droit international pénal et droit pénal interne: Le cas des territoires se trouvant sous administration internationale” in Marc Henzelin and Robert Roth, eds., *Le droit pénal à l’épreuve de l’internationalisation* (Paris: LGDJ, 2002) at 141 ff.

<sup>213</sup> Please see the discussion below on attribution. Civilian staff are rather officers of the organization as they are hired directly by the UN Secretariat or SRSG. See *infra* Part II section 1.

by analogy to international administrations.<sup>214</sup> The law of occupation certainly provides some helpful and detailed rules for international administrators, and in particular has answers to some of the most pressing problems in such administrations, such as the applicable law<sup>215</sup> and powers of arrest and available security measures for emergency situations.<sup>216</sup> For example, it would seem that the Executive Orders for detention that drew so much criticism for UNMIK would fit neatly into the type of internment of dangerous civilians provided for under the law of military occupation. While Human Rights Law abhors such administrative detention, IHL recognizes a certain latitude for the occupying power but sets important limits to the exercise of that power.<sup>217</sup> There are regular review mechanisms provided for under that regime as well as detailed regulations on treatment of such internees. On the other hand, many argue that the restrictions the law of military occupation imposes on an occupying power to introduce sweeping changes in the occupied territory is entirely inappropriate and antithetical to the important peacebuilding and development aspect of the kind of international administrations in question.<sup>218</sup> Most therefore suggest abandoning reference to that aspect of the law of occupation in that regard.<sup>219</sup> Others may argue that the changes permitted under the law of occupation may be sufficient for such administrations, but this would require reading an extensive development regime into IHL and excessively extends or contorts that law to make

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<sup>214</sup> Sassòli, “Article 43”, *supra* note 179; Kolb/Porretto/Vité, *supra* note 70 at 118 – 121. Interestingly, the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (September 2001) at paras. 5.25 – 5.31 discusses the UN administrations in Kosovo and elsewhere using the term “occupation”, and refers to problems generated by a “poorly administered occupation.” Available online: <http://www.iciss.ca/pdf/Commission-Report.pdf>.

<sup>215</sup> The Brahimi Report underscores the need to have a means of determining the applicable law as crucial for such peace operations. See *supra* note 16 at para. 79. Marcus Brand is particularly critical of the repercussions of this problem – see *supra* note 16. Article 43 of the Hague Regulations says it must be left in place.

<sup>216</sup> Article 43 of the Hague Regulations and Art. 64 of the *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287 [hereinafter Convention IV].

<sup>217</sup> Article 78 of Convention IV, *supra* note 216.

<sup>218</sup> Boon, *supra* note 13. On the other hand, Steven Ratner argues that the changes enabled by Art. 64 of GC IV to carry out obligations under the Convention, may be assimilated to fulfilling a peacekeeping mandate from the Security Council. See his “Foreign Occupation”, *supra* note 186 at 707.

<sup>219</sup> De Wet, “Direct Administration”, *supra* note 52 at 326 – 329. Benzing concludes that the requirement to preserve the legislative *status quo ante* “flies in the face of the mandate of UNTAET”, *supra* note 79 at 333. See also Jürgen Friedrich, “Case Study: UNMIK in Kosovo: Struggling with Uncertainty” (2005) 9 *Max Planck United Nations Year Book* at 281, who merely concludes that since the obligation to leave local legislation in force is inappropriate, the law of occupation must be inapplicable. On the other hand, Irmscher, *supra* note 67 at 392 - 394, holds that the law of occupation is *de jure* applicable to UNMIK and assesses regulations introduced against a reasonable interpretation of Article 43 of the Hague Regulations. He concludes that several regulations are in breach of Article 43. Others simply fail to mention this aspect of the law of occupation when pointing out the useful framework it could provide: Kolb/Porretto/Vité, *supra* note 70 at 118 – 121. This pattern (aside from Irmscher) is ironic considering that many or all of these same authors also warn of encroachment on the right to self-determination. If anything, a direct application of the principles of the law of occupation to legislative change would go a long way to protecting that right.

it fit the international administration regime.<sup>220</sup> In my view, it is not optimal simply to pick and choose different elements of different regimes, nor to distort excessively regimes designed for other contexts, in order to define the applicable legal order for international administrations.

### 3.4 *The International Trusteeship System*

The alternative legal regime for international administration, providing a possible source of legal obligations and limitations for international administrations, is the International Trusteeship System. The International Trusteeship System was the UN Charter's answer to the mandates system of the League of Nations (the "sacred trust") and was designed, in conjunction with the Charter provisions on non-self-governing territories, to fulfil the era's promise of the end of colonialism and the right to self-determination. The lofty aims of the system are enshrined in Article 76 of the Charter, including "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government...", respect for human rights and fundamental freedoms, and the promotion of international peace and security. Under the system, the territory in question and the intended administering power (a State) concluded an agreement for the terms of the trusteeship. While it was legally possible for the UN to assume the role of administering power if so designated in the agreement, this rarely occurred in fact.<sup>221</sup> The implementation of the agreements was overseen by the Trusteeship Council, which has the status of a primary organ of the United Nations.<sup>222</sup>

Some of the very first scholarly articles attempting to analyse the legal pedigree of UNMIK and UNTAET broached the subject from the perspective of trusteeship, some even going so far as to question whether the International Trusteeship System had been triggered.<sup>223</sup>

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<sup>220</sup> For example, while the IHL of military occupation permits changes to legislation by the occupying power in order to implement aspects of human rights law, it is much more controversial whether that may also include implementation of economic, social and cultural rights. In any case, an occupying power may not substitute one type of economic system for another simply on the basis that it believes that system to be the best to protect the rights to work, etc.. However, international administrations are subject to significant involvement of Bretton Woods institutions requiring complete economic transformation as a condition for essential loans. This "development", in any case in a short term administration, is inconsistent with what is permitted under the law of occupation. See Sassòli, "Legislative powers" *supra* note 179.

<sup>221</sup> Article 81 of the UN Charter.

<sup>222</sup> The Trusteeship Council was established in Chapter XIII of the UN Charter.

<sup>223</sup> See Bothe/Marauhn, *supra* note 143; Zimmermann/Stahn, *supra* note 47 at 436 – they conclude that UNMIK is in fact something in between a trust and a peace operation; Benzing concludes that "it is questionable" whether trusteeship rules apply to East Timor, which was originally a non-self-governing territory. See Benzing, *supra* note 79 at 330; See also Ruffert, *supra* note 82.

However, as Article 78 of the UN Charter stipulates that “the Trusteeship system shall not apply to territories which have become members of the UN”, most authors abandon their argument for *de jure* application of trusteeship.<sup>224</sup> While their ultimate conclusion seems correct, their decision to cast aside the possibility purely on this basis may be flawed: in the case of Kosovo, the membership of the then Federal Republic of Yugoslavia in the UN is disputed at best. In the *Legality of Use of Force* case, the International Court of Justice determined that FRY was not a member of the UN in 1999.<sup>225</sup> Although that decision was explicitly made without prejudice, considering that the events in question in that case are precisely the same events that led to the establishment of UNMIK on Kosovo, it would be specious not to apply that reasoning here, too. East Timor, being a non-self-governing territory at the relevant time, was equally not a UN member state. Admittedly, however, Article 78 would likely be an obstacle to apply the trusteeship system in future cases.<sup>226</sup> In my view, a more coherent reason as to why UNMIK and UNTAET do not fall within the ambit of the trusteeship system is that they were clearly not established according to its terms.

In any case, the Trusteeship Council wound up its activities in 1994 when the last trust territory gained its independence. Indeed, the High-level Panel report on UN reforms even went so far as to recommend amending the UN Charter to eliminate the Trusteeship Council.<sup>227</sup> Still, those facts do not seem to deter authors and even UN peacebuilding practitioners from calling for a revival or renewal of a trusteeship system to deal with situations such as those prevailing in Kosovo, Afghanistan and Iraq.<sup>228</sup> Even the International

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<sup>224</sup> *Inter alia*, Zimmermann/Stahn, *supra* note 47.

<sup>225</sup> *Legality of Use of Force (Serbia & Montenegro v. Canada)* Preliminary Objections, Decision of 15 December 2004, I.C.J. Rep. [2004] at paras. 78 and 79. The Court does not actually use the phrase “without prejudice”, but instead insists that the decision is not *res judicata*.

<sup>226</sup> Saira Mohamed argues that Article 78 should rather be interpreted so as not to impede the use of this system. See *infra* note 228 at “part III B: Overcoming Article 78.”

<sup>227</sup> *High-level Panel Report*, *supra* note 99 at para. 299.

<sup>228</sup> See Brian Deiwert, “A New Trusteeship for World Peace and Security: Can an old League of Nations idea be applied to a twenty-first century Iraq?” (2004) 14 *Indiana Int’l and Comparative Law Review* 771; Henry H. Perritt, Jr., “Structures and Standards for Political Trusteeship” (2003) 8 *UCLA Journal Int’l Law and Foreign Affairs* 385; Saira Mohamed, “From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council” (2005) 105 *Columbia Law Review* 809; Tom Parker, *The Ultimate Intervention: Revitalising the UN Trusteeship Council for the 21<sup>st</sup> Century* (2003) (Centre for European and Asian Studies at Norwegian School of Management). For a practitioner’s perspective advocating revival of the Trusteeship Council, see Edward Mortimer, “International Administration of War-Torn Societies” (2004) 10 *Global Governance* 7 – 14. Although he was writing in a personal capacity, Mortimer is director of communications in the office of the UN Secretary-General.

Commission on Intervention and State Sovereignty recommended as much in its report on the *Responsibility to Protect*.<sup>229</sup>

The International Trusteeship System clearly contains principles and directives for an administering power that reflect the peacebuilding and development agenda of the international administrations in question. It also embodies the notion of a trust or fiduciary relationship between the administering power and the local population, in contrast to the law of occupation in which the occupying power may also take steps to protect some of his own interests. However, as a very general framework, it does not provide a comprehensive solution to the very real technical problems encountered by UNMIK and UNTAET regarding laws governing arrests, etc. It may only be helpful if cobbled together with another system or tacked on to another framework. Its application *de jure* is unlikely and its application *de facto* is insufficient to provide an overall solution to the problems of international administrations.

### *3.5 General principles of law on international governance of territory*

When it appears that there are gaps in the applicable treaty or customary law framework governing subjects of international law, one may refer to general principles in order to avoid a *non liquet*.<sup>230</sup> This does not necessarily mean that such principles are subsidiary sources of law.<sup>231</sup> At least two kinds of general principles exist in international law: general principles of law recognized by the community of nations and general principles of international law. In the context of international organisations administering territory, it is important to consider both kinds of principles, but emphasis will be placed on the latter – general principles of international law.

#### **3.5.1 General principles of law recognized by civilized nations**

The “general principles of law recognized by civilized nations”, enshrined as a source of international law in Art. 38(1)(c) of the Statute of the ICJ, are not without controversy. As Oscar Schachter points out, strict positivists argue that principles common to the major legal systems cannot be elevated to the status of international law unless they “receive the

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<sup>229</sup> ICISS, *Responsibility to Protect*, *supra* note 214 at paras. 5.22 – 5-24 (“Administration Under UN Authority”).

<sup>230</sup> Cassese provides this reasoning for general principles of international law; at the same time, he holds general principles common to the community of nations to be a subsidiary source of international law. See Antonio Cassese, *International Law* (Oxford: Oxford Univ. Press, 2003) at 153, 155.

<sup>231</sup> *Contra* Cassese, *ibid.* at 155.

*imprimatur* of State consent through custom or treaty”.<sup>232</sup> Antonio Cassese classifies such principles as a subsidiary source of international law,<sup>233</sup> whereas Ian Brownlie argues that such principles rather “escape[...] classification as a ‘subsidiary means’” in contrast to jurisprudence and the writings of publicists and based on a plain reading of Art. 38(1).<sup>234</sup> Although the practice of courts in referring to them is rather sparse, they have not fallen into desuetude. They must, however, be treated with some caution, as discussed below.

It has been asserted that “when an IGO [Intergovernmental Organisation] ... exercises the functions of a government over a territory and a population ... it is deemed to be subject to all customary rules pertaining to the treatment of nationals by states”.<sup>235</sup> Others insist that UNMIK, for example, “acts in fact as a surrogate state”.<sup>236</sup> It is imperative to examine these claims in some detail; if accurate, they may have a significant impact on the applicable legal framework. What precisely, in legal terms, are the “customary rules” referred to above? Is the author asserting that rules pertaining to the treatment of nationals by States form part of customary international law? It is true that international law increasingly regulates the treatment by a State of its nationals – most conspicuously in the context of human rights law. However, due to the applicability of human rights law more generally, it is hard to see what this would add to our analysis. Or is the author somehow advocating a resort to general principles of law of municipal (i.e. national) government common to the major legal systems in this context?

Dan Sarooshi argues that “[i]t is the inextricable link between domestic public law and the activity of governing that mandates in general terms the application of domestic public law principles to those international organizations that exercise conferred powers of government.”<sup>237</sup> This would seem to support the assertion above. However, Sarooshi carefully distinguishes between *conferred* powers of government in the context of international administrations, and those administrations which are created by the Security Council using its own powers.<sup>238</sup> His careful use of language in terms of conferred powers suggests that this

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<sup>232</sup> Schachter, *supra* note 160 at 50, citing Paul Guggenheim, *Traité de droit international public*, Vol. I (1953) at 152, 162.

<sup>233</sup> Cassese, *supra* note 230 at 155 – 159.

<sup>234</sup> Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford Univ. Press, 1998) at 15.

<sup>235</sup> Acquaviva, *supra* note 47 at 384 - 385, citing Zimmermann/Stahn, *supra* note 47 and Bothe/Marauhn, *supra* note 143.

<sup>236</sup> Kosovo Ombudsperson Institution, *Special Report No. 1*, *supra* note 30 at para. 23.

<sup>237</sup> Sarooshi, *supra* note 91 at 14.

<sup>238</sup> *Ibid.* at 22 – 26.

analysis does not necessarily apply to an international organization exercising “sovereign powers” which it has gained through the use of its own powers (i.e. a Chapter VII resolution of the Security Council). In addition, Sarooshi warns that if the constituent instrument of the organization (in this case the subsidiary organ) specifies “certain competences and institutional and other limitations which attach to the exercise of the power in question, ... these may be of such a nature that it is inappropriate to use a domestic law analogy.” In any case, the principles in question still must be general principles of law recognized by a large number of “member states” of the organization in question.<sup>239</sup>

The most significant principle falling under this category might be the principle of constitutionalism.<sup>240</sup> This principle holds that the power of States to govern must be limited by law, which is usually, but not always, set down in a written constitution. This is a theory that is also beginning to be advanced regarding the Charter of the United Nations<sup>241</sup> and thus is not completely foreign to international law as a whole. Is the fact that the executive and legislative actions of a State may be subject to review by the State’s judicial organs a general principle of law recognized by all the major legal systems? One of the most recent studies seeking the existence of precisely that principle was regretful to conclude that support for it remains lacking.<sup>242</sup> What, then, must we make of the principle of constitutionalism as a restraint on international organisations administering territory?

This approach clearly seeks to graft a domestic legal system directly onto the international legal order. The problem with this approach to this category of general principles is that it fails to heed the warning by Judge McNair regarding a first analysis of whether recourse to such principles is appropriate in these circumstances. In the *South-West Africa* case, the ICJ was asked to pronounce upon the effect of the dissolution of the League of Nations on the Mandate for South-West Africa. It is worth quoting a long passage from Judge McNair's Separate Opinion because the context is so similar to the present case. Referring to general principles of trusts, Judge McNair wrote,

What is the duty of an international tribunal when confronted with a new legal institution the object and terminology of which are reminiscent of the rules and

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<sup>239</sup> *Ibid.* at 16.

<sup>240</sup> As argued by Aleksander Momirov, *supra* note 81 at 64.

<sup>241</sup> See de Wet, *Chapter VII Powers*, *supra* note 75 at 92 – 100 for a helpful overview of the literature on the Charter as a normative framework and interesting arguments on the extent of the analogy.

<sup>242</sup> de Wet, *Chapter VII Powers*, *supra* note 75, especially chapter 3, "Judicial Review as an Emerging General Principle of Law and its Implications for Contentions Proceedings Before the ICJ", at 69 – 129.

institutions of private law? To what extent is it useful or necessary to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38 (I) (c) of the Statute of the Court bears witness that this process is still active....The way in which international law borrows from this source is not by means of importing private law institutions ‘lock, stock and barrel’, ready-made and fully-equipped with a set of rules. It would be difficult to reconcile such a process with the application of “the general principles of law”.<sup>243</sup>

In that case, Judge McNair was referring to the direct application of trust law in order to interpret the new Trusteeship Council. One may distinguish that case from the administrations under examination on the grounds that there is a greater difference between the private law of trust than of public law of government and international government, but the fact that one should not too hastily resort to all domestic law principles is nonetheless apt.<sup>244</sup> For example, as we will see below, the immunity of agents or officials of international organizations presents a significant obstacle to respect or implementation of “all the customary rules pertaining to the treatment of nationals by states”. Consequently, advocates for this interpretation insist that the ideal solution is that immunity should be simply cast aside in this circumstance.<sup>245</sup> This obstacle should, however, be seen as a symptom of the problems of directly importing domestic law principles into the international legal order. Moreover, as international administration may touch on all aspects of governance, it may take years to determine what principles of governance are common to a sufficient number of States and legal systems to render them general principles of law of the community of nations. A preferable approach in order to establish the absolute minimum with which an international administration must comply may therefore be to attempt to discern already established general principles of public international law of governance by international entities.

### **3.5.2 General principles of international law regarding international administration**

General principles of international law, in contrast to the general principles of law recognized by all major legal systems, may be described as those principles that are “derived from the

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<sup>243</sup> *International Status of South-West Africa*, Advisory Opinion of July 11<sup>th</sup> 1950, I.C.J. Rep. [1950], Separate Opinion by Sir Arnold McNair, 146 at 148.

<sup>244</sup> Already in 1998, prior to the creation of UNMIK and UNTAET, Ian Brownlie wondered whether it might not be appropriate to have recourse to domestic public law. See *Brownlie, supra* note 234 at 16, note 92: “A problem worth examination is whether public law is a better source of analogies in the present state of international law and institutions.”

<sup>245</sup> Frederick Rawski, “To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations” (2002) 18 *Conn. J. Int'l L.* 103



specific nature of the international community”<sup>246</sup> or as “primarily abstractions from a mass of rules and have been so long and so generally accepted as to be no longer *directly* connected with state practice.”<sup>247</sup> Others describe these principles as those that “can be inferred or extracted by way of induction and generalization from conventional and customary rules of international law” or that are “peculiar to a particular branch of international law”.<sup>248</sup> Indeed, others also argue that we may discern general principles of international law by “extending existing rules by analogy, inferring the existence of broad principles from more specific rules by means of inductive reasoning” or otherwise interpreting existing sources.<sup>249</sup> In my view, this approach has the advantage of indicating an *absolute minimum standard* by which an international administration must conduct itself.<sup>250</sup>

Application by analogy of the law of military occupation or of the international trusteeship system may be interesting and fruitful; however, a better approach, in my view, is to determine whether there are principles relating to international administration common to both that may then be articulated as general principles of law binding on international organisations. This exercise is not, at first glance, straightforward. As authors are wont to point out, the purpose of each body of law appears diametrically opposed to the other. The law of military occupation seeks to preserve the *status quo* in an occupied territory, whereas the law of trusteeship encourages the administering power to engage in development of the territory, implying considerable legal and economic reform.<sup>251</sup> As a result, an occupying power’s ability to modify existing legislation in a given territory is limited, whereas there are no apparent limits to a trustee’s capacity in that regard. This leads most to discard the constraints that the law of occupation imposes on an administrator’s legislative power as inappropriate for peace building in preference to an application by analogy of the development framework of trusteeship law.<sup>252</sup> However, this paradigm inevitably raises somewhat theoretical questions regarding why one should restrict Iraq to its *status quo* on the

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<sup>246</sup> H.E.H. Mosler, “The International Society as a Legal Community” *Recueil des cours*, Vol. 140, 1974-IV, pp. 1 – 320 at Chapter III, cited in Schachter, *supra* note 160 at 50.

<sup>247</sup> Brownlie, *supra* note 234 at 19.

<sup>248</sup> Cassese, *supra* note 230 at 152.

<sup>249</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7<sup>th</sup> Revised ed., (London and New York: Routledge, 1997) at 48.

<sup>250</sup> Steven Ratner has also argued for such a development, suggesting that the legal framework must “take into account the common aspects of state occupations and international territorial administrations.” Ratner, “Foreign Occupation”, *supra* note 186 at 709.

<sup>251</sup> Compare Article 43 of the Hague Regulations to Article 76 of the Charter of the United Nations.

<sup>252</sup> Perritt, *supra* note 228 at 421 – 422 advocates abandoning occupation for trusteeship; Irmscher, *supra* note 67 and Kolb/Porretto/Vité advocate using the framework of the law of occupation.

grounds that the US and UK are unquestionably occupying powers, yet allow Kosovo to evolve.<sup>253</sup>

Turning to an analysis of commonalities between the two bodies of law, we observe that they share the certain principles. Key among these is the concept that the rule of law applies to international administrators; second, that the administrator must take steps to ensure the security of the people in the territory; third, that the resources of the administered territory cannot be exploited for the benefit of the administrator; and finally, international administrators must respect human rights. There may be others – such as attempts to implement transitional justice (there is certainly *opinio juris* for this) but these provide a good starting point.<sup>254</sup> The effort to find an appropriate legal framework by resorting to one regime or another is certainly laudable and it would doubtless be wise to continue to seek guidance from those regimes. However, the phenomenon of territorial administration requires an elaboration of certain bedrock principles, identifiable in international law and that respect the international legal system that must be respected. What follows is a first elaboration of those principles.

### 3.5.2.a Rule of law

The rule of law is a legally and emotionally charged phrase that may mean different things to different people. For present purposes, it is used to denote the most basic principle it contains, which is that no one is above the law. In common law countries, judicial control over the exercise of public power, including executive prerogative, forms an important mechanism of maintaining the rule of law.<sup>255</sup> The High-level Panel on UN Reform singled out centrality of this very principle to peacekeeping, proclaiming, “the core task of peacebuilding is to build effective public institutions that, through negotiations with civil society, can establish a

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<sup>253</sup> See for example Scheffer, *supra* note 186. Steven Ratner proposes an intriguing synthesis for the purposes of international administration. See his “Foreign Occupation”, *supra* note 186.

<sup>254</sup> We might also note that the law of occupation incorporates an element of trusteeship. See Benvenisti, *supra* note 194 at 6 and note 12 on that page. The development of the law of occupation was indeed intended to protect small states. However, that fact alone is not sufficient to determine a particular legal regime, although it does provide support for an argument that an international administrator has some kind of fiduciary duty toward the administered population.

<sup>255</sup> David Dyzenhaus, “The Rule of (Administrative) Law in International Law” (2005) 68 *Law and Contemporary Problems* 127 at 128. The classical treatises on rule of law for common law states is found in A. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885; 10<sup>th</sup> ed., 1964) and Ivor Jennings, *Law and the Constitution* (1933). See also L. Lon Fuller's *The Morality of Law* (1969). This is similar to the German principle of *Rechtstaat*. In terms of international law, see J.L. Brierly, “The Rule of Law in International Society” in H. Lauterpacht and H. Waldock, eds., *The Basis of Obligation in International Law* (1958) at 250 – 264.

consensual framework for governing within the rule of law.”<sup>256</sup> Consequently, “rule of law reform” is identified as a key factor in peacebuilding by the UN.<sup>257</sup> However, the applicability of the principle to the UN or international organisations administering territory themselves is not self-evident. As one author has written, “[t]hat the international legal order lacks the sanctioning mechanisms of domestic legal orders has often thought to be a problem for international law’s claim to be law.”<sup>258</sup> Important elements of the principle, in the form of mechanisms to hold international administrators to their powers, are nonetheless identifiable in the regime of trusteeship and the law of occupation. Consequently, we may argue that it is a general principle of international law that internationally administered territory must be administered according to the rule of law. Since it deals with enforcing international legal obligations, this principle would normally fit within the regime of secondary legal rules. However, it is important to recognize it also as a primary rule of international law.

That is to say, while the limits on powers themselves may vary widely from one type of administration to another, a crucial commonality is that each allows for the capacity of an independent body to review its legal and administrative acts and, moreover, for individuals to challenge those acts. According to the principles drawn from other systems of international administration, this oversight may not amount to judicial review *per se*, but it nonetheless implies a control that may be triggered by individual petition in an internationally administered territory.

In the case of occupation, courts have, since the existence of the Hague Regulations, judged the validity of laws passed by an occupying power according to the yardstick of Article 43. While most of this adjudication occurred following the end of occupations in the past,<sup>259</sup> the practice of the Israeli High Court of Justice clearly illustrates that courts may also pass judgement on the legality of acts of the occupying power during the course of the occupation if seized by a claimant.<sup>260</sup> Indeed, residents of the Occupied Palestinian Territories have

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<sup>256</sup> *High-level Panel Report*, *supra* note 99 at para. 229.

<sup>257</sup> Secretary-General’s Report, *Rule of Law*, *supra* note 134.

<sup>258</sup> Dyzenhaus, *supra* note 255 at 160.

<sup>259</sup> Felice Morgenstern, “Validity of the Acts of the Belligerent Occupant” (1951) *British Year Book Int’l Law* 291; David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (Albany: State University of New York Press, 2002).

<sup>260</sup> See, in particular, Kretzmer, *ibid*. See also, Eli Nathan, “The Power of Supervision of the High Court of Justice over Military Government” in Meir Shamgar, ed., *Military Government in the Territories Administered by Israel, 1967 – 1980: The Legal Aspects* Vol 1 (Jerusalem, 1982) 109 – 169. Nathan considers whether the establishment of jurisdiction of the High Court over the Occupied Territories in itself constitutes a violation of

challenged decisions of the Military Commander for acts such as the seizure of land to the detention of persons, to the route of various roads and the “wall”.<sup>261</sup> One may be tempted to discard this option as a valid check on power since a court of an occupying power may be presumed to be biased in favour of the occupant. However, courts have proved to be quite resilient and capable of closely guarding their independence and impartiality. While early decisions of the Israeli High Court hinted that it may not have been an entirely impartial adjudicator, recent decisions have been lauded as displaying judicial integrity.<sup>262</sup> While the law of occupation does not oblige an occupying power to provide for capacity to challenge its decisions, it also does not forbid it.<sup>263</sup> As one of the most long-standing occupations of territory in recent history, the State practice of Israel in providing access to a court to challenge decisions of the Military Commander is significant.

Some argue that the oversight mechanisms within the Geneva Conventions are limited since they neither enshrine reporting mechanisms nor a consultative process (the latter being rather foreign to the environment for which the IHL of occupation was conceived), and because judicial review is not guaranteed.<sup>264</sup> Certainly, a Protecting Power has no power of judicial review over the legislation introduced by an occupying power; however, the right of petition to an outside body is guaranteed to protected persons by the Conventions, which nonetheless implies a certain, important check on power.<sup>265</sup> The ICRC Commentary on the Article in Convention IV that protects this right emphasized its importance, stating,

The right in question is an absolute right, possessed by all protected persons both in the territory of a Party to the conflict and in occupied territory, whether they are not detained, or are internees, persons placed in assigned residence or detained. The communication may have a wide variety of causes, and it may take the form of an application, suggestion, a complaint, a protest, a request for assistance, etc.; it is not even necessary for an infringement of the Convention

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international humanitarian law due to Article 66 of GCIV and concludes that it does not violate IHL but rather facilitates its respect.

<sup>261</sup> *Ayub et al. v. Minister of Defence et al. (The Beth El Case)* HCJ 610/78; *Ajuri v. IDF Commander*, 3 September 2002, HCJ 7019/02; HCJ 7015/02, *Beit Sourik Village Council v. The Government of Israel (et al.)* 2004, HCJ 2056/04. All three cases are excerpted or reproduced in Sassòli/Bouvier, *infra* note 289.

<sup>262</sup> Kretzmer, *supra* note 259 at 196 states, “The mere existence of this review has had a significant restraining influence on the authorities.”

<sup>263</sup> Nathan, *supra* note 260 at 110 in fact points to the uniqueness of the Israeli approach. Kretzmer, *supra* note 259 at 196, makes the same observation. Indeed, the US in the context of the Coalition Provisional Authority in Iraq did not permit such actions.

<sup>264</sup> See, for example, Boon, *supra* note 13 at note 103 and accompanying text.

<sup>265</sup> Article 30 of Convention IV, *supra* note 216. Admittedly, passing legislation that goes beyond what is permitted under the Hague Regulations is unlikely to be considered a war crime (unless it creates discrimination or otherwise runs counter to a prohibition).

on the part of the authorities to have occurred. The right of communication may be exercised under all circumstances.<sup>266</sup>

The Rapporteur of the Third Committee of the Diplomatic Conference explained the centrality of the right to petition to the implementation of all other rights guaranteed in the Convention, stating, "it is not enough to grant rights to protected persons and to lay responsibility on the States: protected persons must also be furnished with the support they require to obtain their rights; they would otherwise be helpless from a legal point of view in relation to the Power in Whose hands they are...".<sup>267</sup> This right may only be circumscribed under certain conditions.<sup>268</sup>

While it would certainly go too far to argue that there is an emerging *right* under the law of occupation to judicial review of the legislative and administrative acts of the occupying power based on the Israeli practice, it provides support for the principle of the rule of law in that occupying powers may not exceed their administrative authority. In any case, the fact that laws that were beyond the power of the occupying power to enact are devoid of legal meaning (which is most often determined once the occupation is over) is merely a consequence of the fact that occupying powers must exercise their powers within the bounds of the law if they wish them to have legal effect.<sup>269</sup> Moreover, the right to petition a neutral body with regard to the acts of an occupying power is vital to the regime of occupation.

In terms of the International Trusteeship System, a mechanism for review of the exercise of power by the Administering Authority is enshrined in the Charter of the United Nations. Article 87, defining the functions and powers of the Trusteeship Council, authorizes that Council to "accept petitions and examine them in consultation with the administering authority". In an early resolution on the examination of petitions by the Trusteeship Council, the General Assembly proclaimed that "the right of petition, *which is one of the most fundamental human rights*, is one of the most important factors in the operation of the International Trusteeship System ...".<sup>270</sup> However, the extent to which resulting

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<sup>266</sup> Pictet, ICRC Commentary to Convention IV, *supra* note 197 at 214.

<sup>267</sup> *Ibid.*

<sup>268</sup> Article 5 of Convention IV, *supra* note 216.

<sup>269</sup> On the invalidity of laws going beyond the power of the occupying power, see Oppenheim, *International Law – A Treatise*, 7<sup>th</sup> edition edited by Hersch Lauterpacht, Vol. II, Disputes, War and Neutrality, (London: Longman, 1952) at paras. 140 ff. See also *Mr. P. (Batavia) v. Mrs. S. (Bandoeng)* Court of Appeal, Batavia (10 September 1947) *Ann. Dig. Lauterpacht*, 1947, 260 ; *Vallicelli v. Bordese and Ricco*, Italy, Court of first instance of Turin, (22 January 1947) *Ann. Dig. Lauterpacht*, 1947, 246.

<sup>270</sup> UN GA res. 435 (V) 1950, preambular paragraph 3. Emphasis added.

recommendations by the Trusteeship Council are legally binding on administrative authorities is debatable.<sup>271</sup> States reportedly refused to adopt a resolution stating "*Considering* that the Administrative Authorities have a clear obligation to implement the recommendations of the General Assembly and the Trusteeship Council ...".<sup>272</sup> In a case dealing with South-West Africa, Judge Lauterpacht, in a substantial separate opinion, held that

a Resolution recommending to an Administering State a specific course of action creates *some* legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision.<sup>273</sup>

In addition, the Trusteeship Council is one of the principal organs of the United Nations, which may have given its recommendations greater weight.<sup>274</sup> The Mandates system under the League of Nations also developed an elaborate mechanism to hear individual petitions, even though initially it was not perceived as necessary. As Norman Bentwich explains, the Permanent Commission established to supervise mandates was supposed to “combiner la rigueur de contrôle d'un conseil d'administration de société anonyme avec le sentiment de justice d'une Cour suprême”.<sup>275</sup> Likewise there is a Commission which would be able to hear individual petitions regarding non-self governing territories and bring them before the General Assembly. That commission, under the Fourth Committee on Decolonization, continues to function today.

The Trusteeship Council may also make periodic visits to trust territories and take other actions to supervise the trustee. Such visits resulted in actions such as General Assembly resolutions recommending that administering authorities change discriminatory legislation and legislation permitting corporal punishment.<sup>276</sup> In addition, Article 88 of the UN Charter

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<sup>271</sup> Geiger, “Article 89” in Bruno Simma, ed., *The Charter of the United Nations: A Commentary* (Oxford: Oxford Univ. Press, 1995) [hereinafter Simma] at 969. See also Chittharanjan Amerasinghe, *Principles of the Institutional Law of International Organizations* (Cambridge: Cambridge Univ. Press, 2005) at 174.

<sup>272</sup> Tammes, *supra* note 84 at 358.

<sup>273</sup> *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*, Advisory Opinion of June 7th 1955, I.C. J. Rep. [1955] 67, Separate Opinion of Judge Lauterpacht, 90 at 118 – 19.

<sup>274</sup> As suggested by Parker, *supra* note 228 at 26.

<sup>275</sup> See Norman Bentwich, “Le Système des Mandats” in *Recueil des Cours, Académie de droit international* (1929) IV, Vol 29 at 115 – 186 at 170. The Permanent Commission created its own mechanism to receive petitions from individuals. See Bentwich at 172 – 173.

<sup>276</sup> Parker, *supra* note 228 at 27.

obliges the Trusteeship Council to “formulate a questionnaire on the political, social and educational advancement of the inhabitants” of the trust territory upon which basis the administering authority is obliged to report annually to the General Assembly. Article 88 may look like a simple reporting procedure, but it in fact provides for active supervision of the administering power.<sup>277</sup>

Current and past international administrations have regularly reported to the Security Council on the execution of their mandates and the Security Council has gone on mission to visit<sup>278</sup>; however, these reports are generally taken at face value and no further investigation is made.<sup>279</sup> Indeed, review of the Procès Verbal during the reporting sessions confirms that most States restrict their comments to commendations of the SRSG for a job well done and support for the mission in general. It is not a satisfactory mechanism of supervision. Moreover, in the case of the Trusteeship System, the actions of the administering power, most often a State, were reviewed by an organ of the UN. In the case of many of the international administrations, the organization in effect reviews itself. The lack of a neutral intermediary is contrary to both the law of occupation and the trusteeship and mandates systems.

This obligation is commensurate with international law doctrine on accountability of international organisations more generally, which further supports its classification as a general principle. The International Law Association's Committee on Accountability of International Organizations determined that international organisations are bound by a principle of constitutionality. The ILA sets out the principle thus:

1. *Each IO is under a legal obligation to carry out its functions and exercise its powers in accordance with the rules of the organisation.*
2. *Organs of an IO in carrying out their functions must respect the institutional balance laid down in the constituent instruments of the IO.*
3. *Organs and agents of an IO, in whatever official capacity they act, must ensure that they do not exceed the scope of their functions.*<sup>280</sup>

The third point is no more than a restatement of the admonition by the International Court of Justice when upholding the immunity of a Special Rapporteur that "it need hardly be said that all agents of the United Nations, in whatever official capacity they act, must take care not to

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<sup>277</sup> Parker, *ibid.*, and Perritt, *supra* note 228.

<sup>278</sup> See e.g. Security Council, 56<sup>th</sup> year, 4331<sup>st</sup> meeting, 19 June 2001, UN Doc. S/PV.4331.

<sup>279</sup> Chesterman, *You the People*, *supra* note 13 at 151.

<sup>280</sup> ILA Final Report, *supra* note 43 at 12 – 13.

exceed the scope of their functions, and should so comport themselves as to avoid claims against the United Nations."<sup>281</sup> The ILA does not qualify the obligation to respect the principle of constitutionality as a primary rule of international law; it is instead classified as a Recommended Rule and Procedure.<sup>282</sup> In light of the general principles elucidated above, however, it would be appropriate to conclude that there is a qualified principle of constitutionality binding on international organisations administering territory.

The ICJ held in the Namibia Advisory Opinion with respect to the nature of interpreting the obligations of an administering power that "the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – 'the strenuous conditions of the modern world' and 'the well-being and development' of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the 'sacred trust'."<sup>283</sup> In the case of international administrations, it seems appropriate to tease out a general principle of a right of petition and neutral oversight that may be triggered by individuals in the administered territory. There appears to be no right to judicial review of legislation or administrative action as such, but there is no question that some independent, external checks on the exercise of power must exist. Of primary importance is the fact that a failure to abide by the terms of the mandate and to provide for some kind of a system of petition in international administrations is not only a problem relating to the so-called secondary rules of international law applicable to international organizations, but would in fact be a violation of a primary obligation in and of itself.

### 3.5.2.b Security

The fact that an occupying power has the obligation to take steps to ensure the security of the local population is clear in conventional law and State practice. Article 43 of the Hague Regulations obliges an occupying power to take "all steps in his power in order to ensure, as far as possible, public order and safety," in the occupied territory. The High Court of Justice of Israel, considering a recent petition on the lawfulness of the IDF practice of using a

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<sup>281</sup> *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* Advisory Opinion of 29 April 1999, I.C.J. Rep. [1999] at para. 66 [hereinafter *Cumaraswamy*].

<sup>282</sup> The ILA distinguishes between non-obligations, primary obligations and secondary obligations of international organizations. With respect to this level of obligation, the ILA disclaims, "These RRP's do not necessarily reflect a legal obligation for each IO. They are derived from common principles, objectives and notions related to the accountability of IO-s and reflect considerable practice." See ILA Final Report, *supra* note 43 at 8.

<sup>283</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, I.C.J. Rep. [1971] at 31, para. 53.



Palestinian civilian as an "early warning" when arresting another Palestinian, declared, "safeguarding the lives of the civilian population is a central value in the humanitarian law applicable to belligerent occupation".<sup>284</sup>

As for trusteeship, that system proceeds on the basis of an agreement between the trust territory and the administering State, as approved by the Security Council or General Assembly and Trusteeship Council. The terms of the trust are therefore defined by the parties themselves.<sup>285</sup> Nevertheless, it is apparent that, in addition to the general obligations of an administering authority "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence ...;" and "... to encourage respect for human rights and for fundamental freedoms for all without distinction ...",<sup>286</sup> the administering authority must take steps to ensure the security of the local population.<sup>287</sup> This obligation is implied by the fact that Article 84 of the UN Charter permits an administering authority to make use of volunteer forces "for local defence and maintenance of law and order within the trust territory." In addition, it may be deduced from the fact that ensuring international peace and security requires internal stability in a territory.<sup>288</sup>

### 3.5.2.c Resources

Principles regarding administration of resources in occupied and/or trust territories may be of consequence when one considers the vast privatization programme undertaken in Kosovo and Bosnia. The rules on exploitation of resources by an occupying power are clearly set out in the Hague Regulations of 1907. While an occupying power may use local resources *sur place* in order to feed, clothe and supply its forces present on the territory, it may not exploit public or private resources for the benefit of its population at home.<sup>289</sup> Principles on the exploitation of resources are not defined in the UN Charter provisions on the administration of trust

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<sup>284</sup> See *Adalah et al v. IDF Central Command*, Israel High Court of Justice, 6 October 2005 at para. 23. The High Court consequently held the practice of using such human shields to be in contraction to humanitarian law (para. 25). Decision available online: <http://elyon1.court.gov.il/eng/home/index.html>.

<sup>285</sup> Article 81 of the UN Charter.

<sup>286</sup> Article 75 of the UN Charter.

<sup>287</sup> Parker, *supra* note 228 at 23.

<sup>288</sup> *Ibid.*.

<sup>289</sup> See Articles 42 – 56 of the Hague Regulations as well as, e.g., *The Krupp Trial: Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, US Military Tribunal, Nuremberg, 17 November 1947 – 30 June 1948, excerpted in Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War?* (Geneva: ICRC, 2006) [hereinafter Sassòli/Bouvier] at 1030 – 1036, *N.V. De Bataafsche Petroleum Maatschappij & Ors. v. The War Damage Commission* 22 Malayan L. J. 155 (1956), Court of Appeal, Singapore, excerpted in Sassòli/Bouvier at 1071 – 1077.

territory and must therefore be drawn from an examination of trust agreements, which tend to provide for regulation of resources for the benefit of the local population.<sup>290</sup>

#### 3.5.2.d Human rights

The above discussion on the application of human rights law would make extensive discussion on human rights law redundant. Suffice it to repeat here that human rights law applies in situations of occupation.<sup>291</sup> The fact that human rights must be respected by the administering authority of a trust territory is uncontroversial.<sup>292</sup> The fact that human rights apply *de jure* in both regimes of international administration buttresses the arguments presented above that international administrations are bound to respect human rights law since this body of international law is applicable as a general principle of international law of international administration.

#### 3.5.2.e Principle of self-determination

That the right to self-determination is a peremptory norm of international law is well-settled.<sup>293</sup> Self-determination has both internal and external elements – internal self-determination is the capacity to determine, within a State, its own political and economic systems.<sup>294</sup> This is distinct from self-determination as a right to independence for peoples

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<sup>290</sup> Rauschnig, “Article 76” in Simma, *supra* note 271 at 942-943. Note, however, that Australia, as Administrative Authority in Nauru, proceeded to exploit the phosphate deposits in that territory for its own purposes. The General Assembly had to intervene to prevent Australia from implementing a policy that encouraged the displacement of the entire population in order to further exploit resources. Nauru later brought a claim against Australia before the International Court of Justice (see *Certain Phosphate Lands in Nauru (Nauru v. Australia)* I.C.J., Application Instituting Proceedings, 19 May 1989, online: [http://www.icj-cij.org/icjwww/icasess/inaus/iNAUSpleadings/inaus\\_iapplication\\_19890519.pdf](http://www.icj-cij.org/icjwww/icasess/inaus/iNAUSpleadings/inaus_iapplication_19890519.pdf)). Nauru argued that its right to sovereignty over its natural resources was violated by Australia's policy of exploitation, the respect of which right was an international obligation of Australia as Administering Authority (see Memorial of the Republic of Nauru, April 1990, especially Part III, Chapter III, Breach of international standards applicable in the administration of the trusteeship, available online: <http://www.icj-cij.org/icjwww/icasess/inaus/inausframe.htm>). The case was removed from the list when the two countries reached a settlement, suggesting that Nauru's claims were perceived by the Australian authorities to have legal merit. I.C.J. Rep. [1993] at 322ff. For a survey of some Trusteeship Agreements regarding resources, see Deiwert, *supra* note 228 and Perritt, *supra* note 228.

<sup>291</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, I.C.J. Rep. [1996] at para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Rep. [2004], online: <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> at paras. 106 – 108.

<sup>292</sup> Rauschnig, “Article 76” in Simma, *supra* note 271 at 947.

<sup>293</sup> See *Western Sahara* Advisory Opinion of 16 October 1975, I.C.J. Rep. [1975] at 12; *East Timor (Portugal v. Australia)* Judgement of 30 June 1995, I.C.J. Rep. [1995] 90 at 102, para. 29: “the principle of self-determination... is one of the essential principles of contemporary international law”. See also the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA res. 2625 (XXV) of 24 October 1970 (fifth principle).

<sup>294</sup> The right to such internal self-determination was well-described by the Supreme Court of Canada in the *Reference Re Secession of Quebec* [1998] 2 S.C.R. 217 at paras. 126 and 127: “The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal

under colonial domination. The former aspect of the right is protected in terms of international administrative regimes. In the law of occupation, it may be discerned in the limits imposed on the occupying power with respect to the legislative changes that may be imposed in the legal system and institutions of the occupied territory.

### 3.5.2.f Right to access to a remedy

Closely linked to the rule of law principle elaborated above is the right to a remedy. Karel Wellens, the Chair of the International Law Association's Committee on the accountability of international organisations, writes, "The right to a remedy as a general principle of law...applies in all dealings between an IO and other parties. This right includes both the procedural right of effective access to a fair hearing and the substantive right to a remedy." Furthermore, he argues that "The absence of adequate alternative methods of protection of non-state third parties would not only constitute a structural gap under the evolving accountability regime, but it could easily amount to a denial of justice if combined with a successful claim to jurisdictional immunity."<sup>295</sup>

The right to a fair hearing in quest of a remedy is often considered to be simultaneously an integral part of human rights (as an essential implementation mechanism) and a general principle of international law.<sup>296</sup> It is somewhat difficult to argue that the right of access to a remedy has crystallized into either a principle of customary international law or a general principle of law binding upon international organisations given that access to such *fora* is established through treaties. If a State is not a party to the Optional Protocol of the ICCPR, that State's residents do not enjoy a customary right of access to the Human Rights Committee.<sup>297</sup> On the other hand, the strong rhetoric of "no right without a remedy" is compelling. It is a right enshrined in the Universal Declaration of Human Rights and in the ICCPR. One of the leading authorities on remedies in international human rights law observes that "the basic assumption of the local remedies rule in human rights law [which can be an impediment to accessing international treaty bodies] is that the domestic system affords an effective remedy for the alleged breach, something that is a duty in all major human rights

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self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state ....The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states." See also common Article 1 of the ICCPR and ICESCR, *supra* note 77.

<sup>295</sup> Karel Wellens, "Diversity or Cacophony" (2004) 25 *Mich. J. Int'l Law* 1159 at 1161.

<sup>296</sup> See *infra* note 393 for the Resolution adopted by the Human Rights Commission.

<sup>297</sup> See Zwanenburg, *supra* note 210 at 261 – 264 and Tomuschat, *infra* note 302.

instruments”<sup>298</sup> International organisations standing in place of a State and which are bound by human rights must also be bound by the concomitant duty to provide for a remedy. Finally, the fact that some form of this general principle is binding on the United Nations was affirmed by the ICJ in its early Advisory Opinion on the *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal* of 13 July 1954. In that opinion, the Court held:

It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them.<sup>299</sup>

Thus, while it may be remiss to exaggerate the strength of this principle and its capacity to be binding on international organisations, it would be equally wrong to deny its slow but certain emergence as a general principle of international law. This principle is consonant with the general principle on the rule of law in international administrations discussed above.

#### **4. Conclusion of Part I**

It is time to move beyond tentative calls for "*de facto*" application of parts of bodies of law in our search for a legal framework for international administrations. On this basis, this Part of this paper has sought to derive legally binding general principles of the law of international administration of territory by elucidating principles common to the major regimes of administration by foreign bodies. It is submitted that this exercise, though perhaps incomplete, provides a good starting point to determine limits in addition to those set out in the constitutive instruments of contemporary international administrations. The alternative is to argue that international organizations are bound by all of the obligations binding upon States in the exercise of government. In that case, constitutionalism is the overarching principle.<sup>300</sup>

The advantage of this approach is that it provides an absolute minimum. In the Secretary-General's reports, the rule of law appears to go hand-in-hand with democracy, but international administrations are not democratic, nor should they be. However, tracing the general international legal principles from other legal regimes of international administration,

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<sup>298</sup> Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford Univ. Press, 2005) at 114.

<sup>299</sup> I.C.J. Rep. [1954] 47 at 57. The fact that the UN establishes claims commissions for its peace operations (see *infra*) may indicate that the UN considers itself obliged to do so. See *Financing of UNPROFOR*, *supra* note 25.

<sup>300</sup> Momirov, *supra* note 81; Dyzenhaus, *supra* note 255.

it becomes clear that even in non-democratic situations, individuals must have access to some mechanism to be able to restrain their governments.

## Part II: Responsibility of international organizations to individuals

In Part I, I attempted to sketch the primary rules indicating what may constitute a wrongful act in the context of international administrations. The next most important issue is how those obligations and limitations may be enforced under international law. The fact that the international legal system is a rather primitive one is well-known; methods of “enforcing” international law are not as well-developed as in domestic legal systems. Normally, the responsibility of subjects of international law is enforced by other subjects of international law through mechanisms that are open only to those subjects, and even those are limited. In fact, international organisations cannot be parties before the International Court of Justice.<sup>301</sup> Despite significant evolution in the international legal system, it remains fair to say that individuals have not yet garnered status as *subjects* of international law, although they may be owed obligations under international law.<sup>302</sup> As the ILA observes, “In the relationship between IO-s, non-Member states, and non-state third parties the available effective remedies are considerably fewer in number.”<sup>303</sup>

The responsibility of international organizations *to individuals* is most frequently considered in the context of complaints brought by staff against the organisation. However, mechanisms are increasingly being developed to allow the public to challenge whether an international organization has complied with its own legal rules and obligations.<sup>304</sup> The World Bank Inspection Panel is the prime example in the context of the impact of projects of international organisations on the public at large. That Panel, which may not issue binding decisions but which hears complaints of individuals and issues “Reports” with recommendations, is the international community's answer to the clash between the rights of individuals and the increasing field of competence of international organisations. It is designed to alleviate the

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<sup>301</sup> Article 35 of the Statute of the International Court of Justice provides that only States may be parties in contentious cases before the Court. The ILA has recommended amending the Statute to allow international organisations to be parties in such proceedings. See ILA Final Report, *supra* note 43 at 52 – 53.

<sup>302</sup> In my view, it may be arguable that in the case of administration of a population by an international organization, the individuals subject to administration should be accorded status as subjects of international law. Christian Tomuschat persuasively argues that under contemporary international law, despite considerable evolution, individuals do not benefit “to the same degree as states from the orthodox logic of state responsibility”. He notes that only in European Community law may individuals also invoke obligations incumbent upon states, and only under certain circumstances. See Tomuschat, “Reparation for Victims of Grave Human Rights Violations” (2002) 10 *Tulane Journal Int’l & Comp. Law* 157 at 169. However, it may not be unreasonable to consider the subjectivity of individuals in this instance in light of the maxim that subjects of international law are defined by the fact that they “are able to act, in principle, with no superior entity restricting them, unless they have accepted those restrictions”, that is, *superiorem non recognoscentes*.

<sup>303</sup> *ILA Final Report, supra* note 43 at 32.

<sup>304</sup> American Society of International Law, *Proceedings of the 97<sup>th</sup> annual meeting* (1997) at 349.

imbalance caused by the lack of standing of individuals and NGOs in the face of disputes with the World Bank. Indeed, this level of non-binding decision-making, which nonetheless carries considerable weight, would appear to be consistent with the right of petition in trusteeship and military occupation. It has been lauded by credible NGOs as having introduced a significant degree of accountability into that institution.<sup>305</sup> No one has yet brought a complaint before the Panel in the context of international administrations,<sup>306</sup> but it remains both an example of a possible means of lessening the accountability gap as well as a potential mechanism open to persons in internationally administered territories where there are World Bank projects. This part will explore the existing framework on implementation of accountability and will close with a proposal of a fairly simple potential solution that remains faithful to international law and precedent.

## 1. Attribution

International administrations tend to go hand-in-hand with peace operations involving armed forces. In the latter, States put troops at the disposal of the international organization (due to the failure to implement Art. 43 of the UN Charter) which raises tricky questions and triggers special rules on the attribution of such conduct either to the sending State or to the international organization (*e.g.* the UN or NATO).<sup>307</sup> For example, one may inquire whether the wrongful conduct of a soldier in a peace operation is attributable to the sending State, such that that State's international responsibility is engaged, or whether it is more properly attributed to the international organization itself. Responsibility of international organizations and States may be concurrent.<sup>308</sup>

The general rule on attribution of conduct to an international organization has been codified in Article 4 of the Draft Articles on the Responsibility of International Organizations as follows:

1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law whatever position the organ or agent holds in respect for the organization.
2. For the purposes of paragraph 1, the term "agent" includes officials and other persons or entities through whom the organization acts.

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<sup>305</sup> See, for example, the Centre for International Environmental Law, "Introduction to the World Bank Inspection Panel" <http://www.ciel.org/ifi/wbip.html>

<sup>306</sup> Caplan *supra* note 13 at 205.

<sup>307</sup> Zwanenburg, *supra* note 210.

<sup>308</sup> See ILC Report 2005, *supra* note 38 at 92ff.

3. Rules of the organization shall apply to the determination of the functions of its organs and agents.
4. For the purpose of the present draft article, “rules of the organization” means, in particular: the constituent instruments; decisions, resolutions and other acts taken by the organization in accordance with those instruments; and established practice of the organization.<sup>309</sup>

However, the fact that States lend their armed forces to the IO requires the application of Article 5, which states:

The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.<sup>310</sup>

The test set out in Article 5 is thus “effective control”, which is a standard that is well-recognized in international law.<sup>311</sup> As the ILC observed during its elaboration of the Draft Articles on State Responsibility, “The conduct of a State organ does not lose that quality because that conduct is, for example, coordinated by an international organization, or is even authorized by it.”<sup>312</sup> With respect to the degree of control required to shift responsibility to the organization in the context of peace operations, the UN invokes the “50-year practice of the Organization” with regard to peacekeeping to defend its argument that a slightly different rule applies to determining attribution for such operations.<sup>313</sup> First, the division of responsibility between troop contributing countries and the UN is regulated by a Memorandum of Understanding, and in particular Article 9 of that document.<sup>314</sup> Second, the UN is adamant

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<sup>309</sup> *Report of the International Law Commission on the work of its fifty-sixth session* 3 May – 4 June and 5 July – 6 August 2004, UNGA O.R. 59<sup>th</sup> Sess, Supp. No. 10, UN Doc. A/59/10 [hereinafter ILC Report 2004] at para. 71 (Article 4 of the DARIO).

<sup>310</sup> *Ibid.*

<sup>311</sup> In two important cases, international tribunals have adopted different standards regarding the degree of control necessary in order to attribute conduct to a State. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Judgment of 27 June 1986, I.C.J. Rep. [1986] 4 at paras. 109 – 115, and *Prosecutor v. Tadic* Case No. IT-94-1, Judgment, paras. 116-144 (ICTY, Appeals Chamber 15 July 1999). It is possible that a different degree of control may be necessary or appropriate for different purposes of attribution.

<sup>312</sup> International Law Commission, *Third Report on State Responsibility*, 52nd Session, 1 May – 9 June, 10 July – 18 August 2000, UN Doc. A/CN.4/507/Add.2 at para. 267.

<sup>313</sup> *Responsibility of international organizations: comments and observations received from international organizations*, 25 June 2004, UN Doc. A/CN.4/545 at 16.

<sup>314</sup> See *Model Memorandum of Understanding between the United Nations and [participating State] Contributing Resources to [the United Nations peacekeeping operation]*, 27 August 1997, UN Doc. A/51/967 [hereinafter *Model MoU*]. Article 9 states: The United Nations will be responsible for dealing with any claims by third parties where the loss of or damage to their property, or death or personal injury, was caused by the personnel or equipment provided by the Government in the performance of services or any other activity or operation under this Memorandum. However, if the loss, damage, death or injury arose from gross negligence or wilful misconduct of the personnel provided by the Government, the Government will be liable for such claims.”



that the relevant standard is not “effective control” but “effective command and control” over the conduct in question.<sup>315</sup>

The ILC specifically requested Governments to provide their views to the Committee on “the extent to which the conduct of peacekeeping forces is attributable to the contributing State and the extent to which it is attributable to the United Nations.”<sup>316</sup> Only 2 States responded directly to this question, and both indicated their belief that further study of the matter is required.<sup>317</sup> Other international organizations (besides the UN) tended to concede the existence of a special rule, but expressed a preference not to have that rule codified. The ILC Commentary to the Draft Articles as adopted acknowledges the special standard as defended by the UN.<sup>318</sup> This test raises the question of how command and control is defined, but perhaps more importantly the wider question of whether this regime even applies to civilian international administrations in a Chapter VII mission. While the UN has failed to comment on this precise issue in its comments to the ILC on responsibility (although it has mentioned such administrations in other contexts with regard to responsibility of international organisations), it is clear that the same regime does not necessarily apply to both.

First, as a general rule, States do not send their agents or organs to work in the civilian administration in the same manner as they contribute troops to a peace operation.<sup>319</sup> Rather, individuals apply and are recruited directly by the SRSG to the international administration. Contrary to civilian police and military personnel, the Secretary-General does not list the civilian personnel working for the mission according to the nationality of their home State.<sup>320</sup> Indeed, the Memorandum of Understanding between governments and the UN, although it may be tailored for a specific mission, is not applicable to individuals hired by the Special Representative of the Secretary-General for the civilian administration. The Memorandum is

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<sup>315</sup> See the seminal statement of UN liability for damage by peace keepers, *Financing of UNPROFOR*, *supra* note 25 at para. 17. See also ILC Comments and Observations 2005, *supra* note 86 at 46, statement by United Nations Secretariat regarding the ILC's study on responsibility of international organizations, and in particular the issue “Request or authorization of the conduct of a State by an international organization.”

<sup>316</sup> ILC Report 2003, *supra* note 37 at para. 27. Note that only Mexico, Poland, Austria and Italy bothered to submit comments and observations in response to this request.

<sup>317</sup> See *Responsibility of international organizations: comments and observations received from Governments*, 6 August 2004, UN Doc. A/CN.4/547. Only Mexico and Poland answered this question directly, and both rather called for “further study” by the Commission on the issue.

<sup>318</sup> ILC Report 2004, *supra* note 309, Commentary to Draft Article 5, paras. 5 – 9.

<sup>319</sup> Please note that this paper is excluding consideration of civilian police, which indeed may be sent by States along the same lines as troops are contributed, but this would require a factual determination. In addition, OSCE hires based on a Secondment policy such that it is possible that that policy would trigger Article 5.

<sup>320</sup> See, for example, *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, 23 May 2005, UN Doc. S/2005/335, Annexes (*i.e.* lack of civilian personnel annex).

designed for military personnel; it refers to the obligations of the sending Government with respect to the preparedness of personnel as well as to the UN paying governments for personnel contributed.<sup>321</sup> Such a policy is clearly not commensurate with the way international staff members are recruited. Civilian staff recruited as individuals and directly by the organisation are "agents" or officials of the organization.<sup>322</sup>

In the case of international administrations we cannot generally speak of agents or organs put at the disposal of the organisation, so that Article 5 of the DARIO is not triggered. Each situation will depend on a careful analysis of the facts;<sup>323</sup> however, it appears likely that if the present methods continue to apply, Article 4 will govern the majority of cases of civilian personnel in international administrations.<sup>324</sup> Nevertheless, each will require an individual determination and there are certain cases that may cause some difficulty. Civilian police, for example, constitute a special category (beyond the scope of this paper).<sup>325</sup> Also, there is at least one post in UNMIK, the head of the department of Justice, which, by some unwritten rule, must be filled by a US national.<sup>326</sup> Such practice may prompt further questioning regarding the application of Article 5 DARIO and effective control over that agent.

In addition, current administrations illustrate that the two components are separable and may logically have distinct responsibility regimes. Kosovo presents an excellent case in point. The military operation is assured by NATO, therefore clearly not falling under UN command and control, but the civilian administration is run directly by the UN. There may also be an issue of concurrent responsibility with another international organisation. For example, in Kosovo the OSCE has played a major role in governing alongside the UN administration. In Côte d'Ivoire, many aspects of the operation are shared between the African Union and the UN. The ILC has adopted Draft Articles on the responsibility of an international organisation in

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<sup>321</sup> *Model MoU*, *supra* note 314, see especially Annex A: Personnel. Model Participating State Agreement.

<sup>322</sup> In the I.C.J.'s Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the United Nations* (11 April 1949), the Court defined an "Agent" as "any person who, whether paid official or not, and whether permanently employed or not, has been charged by an organ of the Organisation with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts." See p. 177 of the decision.

<sup>323</sup> As recommended by the Commentary to Article 5, ILC Report 2004, *supra* note 309 at para. 9 of the commentaries.

<sup>324</sup> Consider, for example, the fact that the OSCE hires by secondment, thereby engaging a person who is normally a civil servant of his or her nation.

<sup>325</sup> Note, for example, that the SG in his reports to the Security Council lists Civilian Police in an Annex according to which country they have come from. And that Press Release regarding fact that Timor Leste has sent Police. Not so for civilian staff.

<sup>326</sup> Letter from a former Legal Officer of UNMIK, 11 January 2006, on file with the author.

connection with the act of a State or another international organisation, which may come into play here.<sup>327</sup>

Two further issues must be considered regarding attribution of conduct to an international administration entailing the international responsibility of the organization. It is important to recognize that Article 6 of the Draft Articles extends the attribution of conduct by an agent or organ of the organization to *ultra vires* acts by the agent or organ.<sup>328</sup> The Commentary specifies that international organizations do not possess general competence and therefore may not exceed the competence accorded to them. In addition, the organization as a whole may be competent but the individual agent or organ may have exceeded its own competence; either case still entails the responsibility of the organization.<sup>329</sup> This is particularly important for international administrations considering that a significant number of complaints against them stem from a perceived overreach of authority by the international administrators.

The unique situation of international administration of territory prompts the question whether an international organization may be responsible for the conduct of anyone other than its agents or officials. The fact that the definition of an agent or official of an international organization is very broad and inclusive is well-established in international law.<sup>330</sup> It may catch volunteers and persons in a semi-official capacity; clearly, the definition is broad enough to catch the vast majority of employees of UN-run administrations. But beyond this? Two particular cases are pertinent.

First, it is noteworthy that absent from the Draft Articles on the Responsibility of International Organizations are the Articles in the DASR regarding “conduct carried out in the absence or default of the official authorities”<sup>331</sup> and to “conduct of an insurrectional or other

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<sup>327</sup> See Draft Articles 12 – 14, adopted at the 57th session (2005) of the ILC. See ILC Report 2005, *supra* note 38 at para. 206.

<sup>328</sup> Note that the precise status of the individual in question, be he a paid official or even an erstwhile volunteer, is immaterial to the application of the rule on *ultra vires*. See ILC Report 2004, *supra* note 309 at para. 7 of the Commentary to Article 6. The ILA proposal shares the same view.

<sup>329</sup> ILC Report 2004, *supra* note 309 at 116, Commentaries on Article 6, para. 1.

<sup>330</sup> This principle was most clearly stated by the ICJ in *Certain Expenses*, *supra* note 65 already in 1962. It has been reaffirmed consistently since then in case law and in the Commentaries to the Draft Articles on Responsibility of International Organizations.

<sup>331</sup> *Draft Articles on Responsibility of States for internationally wrongful acts*, United Nations, International Law Commission, *Report on the work of its fifty-third session (23 April - 1 June and 2 July - 10 August 2001)*, UN GAOR, 55th Sess., Supp. No. 10, UN Doc. A/56/10. Online: <http://www.un.org/law/ilc/reports/2001/2001report.htm> at 29-365, Article 9.

movement”.<sup>332</sup> The general ILC Commentary on the rules on attribution regarding international organizations refers to the decision not to include such provisions and makes specific reference to international administrations. It states:

These cases are unlikely to arise with regard to conduct of international organizations because they presuppose that the entity to which conduct is attributed exercises control of territory. Although one may find a few examples of an international organization administering territory [footnote reference to resolution 1244], the likelihood of any of the above issues becoming relevant in that context appears too remote to warrant the presence of a specific provision. It is however understood that, should such an issue nevertheless arise in respect of an international organization, one would have to apply the pertinent rule which is applicable to States by analogy to that organization, either article 9 or article 10 of draft articles on Responsibility of States for internationally wrongful acts.<sup>333</sup>

The UN Secretariat approves of this position. In its comments to the ILC regarding this passage, it indicated its agreement with the principle and indicated that the ILC should include reference to resolution 1272 (UNTAET) in the footnote above.<sup>334</sup> Thus, in the situation of international administration, an international organization may clearly incur responsibility for conduct other than by its agents or officials.

Secondly, as is the case in State responsibility, international organisations administering territory would not normally incur responsibility for the acts of private individuals – *i.e.* the residents of the territory.<sup>335</sup> However, an international organization administering territory may incur responsibility for wrongs committed by individuals who are neither under its command and control nor its agents if that organisation fails to take actions to stop those wrongs from occurring, as in the Teheran hostages case.<sup>336</sup> This application of the rules on State responsibility by analogy is merely an extension of the logic approved by the ILC and the UN Secretariat above. In light of the argument sketched in Part I that an international administration must take steps to ensure public order and safety of the local population under its control, this conclusion is significant. Consider, for example, the riots in Kosovo in March 2004. The Ombudsperson lamented the fact that little was done by UNMIK to stop the harm

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<sup>332</sup> *Ibid.*, Article 10.

<sup>333</sup> ILC Report 2004, *supra* note 309 at 102 – 103.

<sup>334</sup> See ILC Comments and Observations 2005, *supra* note 86 at 23.

<sup>335</sup> ILC Report 2004, *supra* note 309, on Part II, Attribution, at 100 – 104.

<sup>336</sup> *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)* Judgment of 24 May 1980, I.C.J. Rep. [1980] 3 [hereinafter *Tehran Hostages*].

to individuals;<sup>337</sup> arguably, that omission could constitute a breach of the obligation to take means to ensure security on an application by analogy of the hostages case.<sup>338</sup>

This survey of the rules on attribution of conduct to an international administration leads to the conclusion that in most cases for the civil servants, international responsibility of the organization is engaged. Thus, we have established that there are clear minimum obligations incumbent upon international organizations administering territory and there are limits on the powers that they may exercise. Moreover, the actions of agents of officers of an organization engage the responsibility of the organization as a whole. International organizations may also be liable for actions within their mandate that nonetheless cause harm to individuals. The question is, how can all this responsibility be implemented in the context of these administrations?

## 2. Remedies

In terms of remedial action against international organisations, the ILA identified administrative or political action as appropriate for violations of the first level of accountability (that is, elements of conduct that do not meet the level of primary obligations of international law in the proper sense of the term, but that organisations should nonetheless abide by).<sup>339</sup> Appropriate oversight mechanisms are a means of generating accountability in international organisations; at the same time, lacking such mechanisms is an example of a violation of the ILA's first level of accountability. However, these kinds of remedies are mechanisms that are more properly meant to be exercised by the Member States of the international organisation, being actions such as deciding to terminate the head of an organization.<sup>340</sup> Certainly, the Security Council or Secretary-General may decide not to renew the mandate of a particular Special-Representative, which is an accountability mechanism of this order. However, that decision is out of the hands of the individuals in the administered territory.

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<sup>337</sup> Ombudsperson Institution in Kosovo, *Fourth Annual Report 2004*. See also Friedrich, *supra* note 219 at 276.

<sup>338</sup> There were two phases in the response of the Iranian government to the actions of the hostage-takers. First, it had an obligation of due diligence to prevent such an act from being perpetrated against an embassy, even though the acts of the hostage takers could not be attributed to the Iranian government. In the second phase, the government approved the actions of the hostage takers, thereby enabling those acts to be attributed directly for the government. What is important in this analysis is the primary obligation of due diligence as a trigger of responsibility. See *Tehran Hostages*, *supra* note 336.

<sup>339</sup> *ILA Final Report*, *supra* note 43 at 32.

<sup>340</sup> See *ibid.* at 32.

The second level of remedial action identified by the ILA is legal action against the organization in domestic courts. The single-most significant barrier to such action, which is precisely the kind of action normally required for judicial review or to enforce protection of one's human rights, is the immunity enjoyed by international organisations. The circularity of argument in the accountability regime is testament to the degree to which the problem is entrenched: individuals in internationally administered territory lack access to courts or judicial institutions to rectify their lack of access to courts. The legal framework is a tautology in itself. Failure to grasp both elements renders a solution to either problem elusive.

### 2.1 Immunity

The immunity of international civil servants and international organizations draws rather vehement criticism as the primary impediment to preserving the rule of law and protecting human rights – in a word, accountability – in international administrations. Indeed, it appears to be rock solid. The first provision setting out immunity is in the UN Charter itself: Article 105 stipulates that the UN as an organization has immunity in the territory of its Member states and that UN "officials" "shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization". Second, the Convention on the Privileges and Immunities of the United Nations (Immunities Convention) applies among States that have ratified it<sup>341</sup>; it is also incorporated by reference into Status of Forces Agreements.<sup>342</sup> The Immunities Convention defines different degrees of immunity for different UN actors – diplomatic immunity for specified categories of officials and functional immunity for Experts on Mission. In peace operations, the Model Status of Forces Agreement specifies that the Special Representative of the Secretary-General enjoys diplomatic immunity<sup>343</sup> and provides that military observers, civilian police and peacekeeping personnel are "Experts on Mission".<sup>344</sup> In addition, the Model SOFA specifies that civilian personnel from the UN Secretariat who are assigned to a mission enjoy status as an official,

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<sup>341</sup> At present there are 151 States parties to the Immunities Convention. Serbia and Montenegro became a State party on 12 March 2001; Indonesia has been a State party since 1972. *Supra* note 28.

<sup>342</sup> See *Model Status-of-Forces Agreement for Peace-keeping Operations: report of the Secretary-General* 9 October 1990, UN Doc. A/45/594 (1990) [hereinafter Model SOFA]. Immunity is provided for in Article IV para. 15 for the operation as a whole.

<sup>343</sup> As specified in Article VI para. 24 of the Model SOFA, *supra* note 342.

<sup>344</sup> Article VI para. 26 of the Model SOFA, *supra* note 342.

which merely applies Section 18, Article V of the Immunities Convention.<sup>345</sup> This last construction would appear to apply to "internationally recruited civilian professional staff".<sup>346</sup>

In Kosovo, the SRSG also saw fit to pass regulation 2000/47 in May of 2000. That regulation grants KFOR absolute immunity and provides immunity to UNMIK personnel "from legal process in respect of words spoken and all acts performed by them in their official capacity."<sup>347</sup> This is tantamount to functional immunity rather than diplomatic immunity as defined in the Immunities Convention. Regulation 2000/47 defines UNMIK as including other international organizations that comprise it – the civilian component, the EU, the OSCE and UNHCR – and extends immunity to the personnel of those organizations, not all of whom would normally fall under the UN Convention on Immunities. In addition, it stipulates that immunity continues even after the expiry of the mandate of UNMIK and/or after the individuals are no longer employed by UNMIK or KFOR.<sup>348</sup> It is not exactly clear what framework applies to UNTAET but immunity of the civilian staff is presumed by authors to have existed.<sup>349</sup> In the case of OHR in Bosnia and Herzegovina, immunity for the civilian component of the mission was defined in the Dayton Agreement. The Agreement gave diplomatic immunity to the High Representative and the "professional" staff and accorded "the same privileges and immunities as are enjoyed by members of the administrative and technical staff and their families under the Vienna Convention on Diplomatic Relations" to "other" members of the mission.<sup>350</sup> That immunity was not redefined when the High Representative's mandate to co-ordinate as set out in Dayton was amended by the PIC to include the power to administer directly.

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<sup>345</sup> Article VI para. 25 of the Model SOFA, *supra* note 342. Civil servants are thus caught either by Article 18 or Article 22 of the Immunities Convention, *supra* note 28.

<sup>346</sup> See Rawski, *supra* note 245 at 110.

<sup>347</sup> UNMIK Regulation 2000/47, Sections 2 and 3. Available online: see *supra* note 10.

<sup>348</sup> *Ibid.* Please see in particular Sections 1 and 5.

<sup>349</sup> Sergio Vieira de Mello did not adopt a regulation providing for immunity for the civilian staff of UNTAET. (Bongiorno, *supra* note 22 at 661.) Since consent was questionable, one author argues that immunity was provided for in the agreements between the UN and troop contributing countries (Rawski, *supra* note 245 at 108); however, under normal treaty law such agreements could not bind nor be opposable against third parties (VCLT Art. 34). Bongiorno claims, however, that "by custom, the international staff of U.N. missions is immune from prosecution in the country of deployment". See Bongiorno, *ibid.* at 661-662.

<sup>350</sup> Dayton Agreement Annex 10 Article 3(4), *supra* note 7.

### 2.1.1 Functional immunity of individuals and responsibility of organizations

According to the Convention on Immunities, immunity attaches to the individual if he or she is not acting *ultra vires* (when that person benefits from functional immunity).<sup>351</sup> This means that a person may be immune from suit by an individual in a local court if he or she is deemed to be acting within the scope of his or her mandate. The UN Secretary-General is empowered to make this determination, but that decision is subject to review by the International Court of Justice.<sup>352</sup> On the other hand, even if an individual enjoys immunity, the organization may still incur responsibility if the action in question nonetheless causes harm. The fact that the question of immunity of the individual is distinct from the overall responsibility of the organization was underscored by the International Court of Justice in its Advisory Opinion on *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights*.<sup>353</sup> The ICJ clearly states in *Cumaraswamy* that “the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or its agents acting in their official capacity.”<sup>354</sup> Moreover, even if the immunity of an individual is waived because the Secretary-General determines that that person was acting *ultra vires*, the draft rules on attribution of conduct of an agent to an organization stipulate that *ultra vires* acts of an agent may nevertheless be attributed to the organization.<sup>355</sup> In the case of OHR, immunity is not dependent on the UN immunity regime; consequently, the Vienna Convention on Diplomatic Relations and the rules on attribution in the Draft Articles on the Responsibility of International Organizations must apply to that operation. Analysis nonetheless leads to the same conclusion: waiver of immunity for an individual based on a determination that an agent was acting beyond his or her mandate does not absolve the organisation as a whole of responsibility. Recognition of the special relationship between immunity of individuals and responsibility of organizations, stated so clearly in *Cumaraswamy*, is the first step in helping to devise appropriate mechanisms of accountability for international administrations.

It is certainly vital to question whether the degree of functional immunity granted to international civil servants and to the organisation itself is in fact necessary and appropriate

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<sup>351</sup> Immunities Convention, *supra* note 28. Critiques of *Cumaraswamy* argue that the ICJ grants too much deference to the SG in making this determination. In particular, see Rawski, *supra* note 245.

<sup>352</sup> Article VIII Sections 29 and 30 of the Immunities Convention, *supra* note 28.

<sup>353</sup> *Cumaraswamy*, *supra* note 281 at para. 66.

<sup>354</sup> *Ibid.*

<sup>355</sup> ILC Report 2004, *supra* note 309, Draft Article 6.



under these circumstances, and this is the approach all authors take.<sup>356</sup> However, in my view, the two must be considered separately in order to arrive at viable solutions under international law to the problem of immunity.

### 2.1.2 Individual immunity

The functional immunity of individuals in peace operations, and even civilian administrations, is highly unlikely to be diminished as a matter of policy. Organizations already have some difficulty in recruiting capable staff, including CIVPOL, which is the group most susceptible to violating human rights.<sup>357</sup> Eliminating immunity would risk exacerbating recruitment woes. On the other hand, there is international consensus that criminal activity should not go unpunished and some awareness that immunity may play a role in impunity.<sup>358</sup> Predictably, however, despite ostensible efforts to increase accountability in the face of egregious criminal activity by peacekeepers, there is no move on the part of the UN to eliminate functional immunity.<sup>359</sup>

It is significant that the only time regulation 2000/47 was discussed in the Security Council was when China objected that it seemed to encroach on Yugoslav sovereignty.<sup>360</sup> China did not protest on the grounds that immunity was inappropriate vis-à-vis the role of UNMIK staff and their relationship to individuals in the territory. Hédi Annabi, Deputy Secretary-General of Peacekeeping Operations at the time, provided a fairly careful explanation of the adoption of regulation 2000/47 at the same meeting. His point was to emphasize that immunity was not to be seen as a threat to Yugoslav sovereignty. He stated:

First, regarding the regulation that was signed by Kouchner on 18 August on the status of privileges and immunities of the Kosovo Force (KFOR) and UNMIK in Kosovo: since UNMIK has been asked under resolution 1244 (1999) to establish an interim civilian administration, it was felt, after a careful legal review of the matter, that it was necessary to enable this personnel, whether they are from KFOR, UNMIK, the Organization for Security and Cooperation in Europe (OSCE) or from the European Union, to carry out their functions under normal conditions, that it was necessary to grant them the basic privileges and immunities that are normally granted in such situations.

It is for that purpose that this regulation has been adopted, and it has been adopted with one major concern in mind, which is to protect the personnel of these various

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<sup>356</sup> Rawski, *supra* note 245; Bongiorno, *supra* note 22; Ombudsperson Institution in Kosovo, *Special Report No. 1*, *supra* note 30.

<sup>357</sup> Email from former Legal Officer in UNMIK (on file with the author).

<sup>358</sup> *Zeid Report*, *supra* note 48 - because immunity sometimes leads to de facto impunity due to difficulty gathering evidence once an individual returns home, etc.

<sup>359</sup> See *supra* note 48 for the recommendations of the Special Committee on Peacekeeping Operations.

<sup>360</sup> *Security Council, 55th year, 4190th meeting*, 24 August 2000, UN Doc. S/PV.4190 at 13.

organizations as needed in the local courts. This regulation also ensures and clarifies that the OSCE and European Union pillars, which are integral components of UNMIK, and their personnel, have similar privileges and immunities, so it applies not only to KFOR but also to OSCE and European Union personnel who are part of UNMIK.

Finally, it clarifies matters such as liability and procedures for waiver of immunity in Kosovo. It should be seen in that light, and it is in no way meant to detract from the sovereignty or territorial integrity of the Federal Republic of Yugoslavia.<sup>361</sup>

In my view, this defence against China's narrow complaint said enough to show that there may have been some discussion within the DPKO that the regulation went too far. Nonetheless, no other State in the Security Council raised any objection whatsoever. Even after the Ombudsperson in Kosovo published a scathing Special Report taking issue with the regulation one year later, the only State to raise the issue in the Security Council was the FRY. Straying from a usual habit of addressing concerns raised by States, Mr Guéhenno failed to even address the Yugoslav representative's point in his responses to interlocutors at the close of the meeting.<sup>362</sup>

Naturally, no State wants its citizens to participate in a peace operation without the benefit of immunity. But academics correctly point out that civil servants in States have no comparable immunity from their own citizens when carrying out the same tasks as the staff of an international organization.<sup>363</sup> The degree of functional immunity that international civil servants in an international organization should have when administering territory merits careful consideration, especially in regard to the potential impact of that immunity on cultivating a sense of the rule of law. The Secretary-General and High-level Panel have made the development of the rule of law one of the primary goals of peacebuilding, having identified it as fundamental to stable democratic government.<sup>364</sup> Since absolute immunity of civil servants is antithetical to the rule of law – as persons with immunity are *de facto* above the law since, without a means to hold them to it, they tend to believe they are “untouchable”<sup>365</sup> (i.e., not bound by it) – there is a *prima facie* incompatibility of the method

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<sup>361</sup> *Ibid.* at 19.

<sup>362</sup> It is indeed interesting to note that the only participant in the Security Council meeting to raise the complaints by the ombudsperson regarding the “incompatibility” of certain UNMIK regulations with international human rights standards was the FRY representative Mr. Sahovic. See S/PV.4359 (2001) 28 August 2001 at 22. Although Mr. Guéhenno, Deputy Secretary-General for Peacekeeping, was present at the meeting and responded to comments and queries of some States, he made no comment whatsoever on that subject.

<sup>363</sup> Rawski, *supra* note 245 at 123-124.

<sup>364</sup> *High-level Panel Report*, *supra* note 99 and Secretary-General’s Report *Rule of Law*, *supra* note 134.

<sup>365</sup> Email from a former legal officer of UNMIK on file with the author.

of “installing” democracy and respect for the rule of law by civil servants who enjoy immunity.

The discretion of the UN Secretary-General to waive the immunity of any expert or official is subject to the following terms: “The Secretary-General shall have the right and the duty to waive the immunity...in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.”<sup>366</sup> The test is obviously cumulative. The decision of the Secretary-General is subject to review by the International Court of Justice. Section 30 of the Immunities Convention provides, “...If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.” It is the Security Council that has the right to waive the immunity of the Secretary-General, and no conditions are attached.<sup>367</sup> In the case of peace operations, immunity tends to be waived in criminal cases<sup>368</sup> but not for actions within the mandate. In addition, the ICJ tends to allow the Secretary-General a significant margin of appreciation (to borrow language from the ECHR) in determining the scope of the mandate of an agent/official.<sup>369</sup>

The normal procedure to enforce the rule of law in a common law State is through judicial review of administrative or executive action, that is, to bring legal action against the individual (or perhaps agency) perceived to have taken action in excess of his/her/its powers.<sup>370</sup> The Secretary-General is adamant that “immunity from legal process of every kind” as set out in the Immunities Convention “must include immunity from legal proceedings to determine the applicability and scope of that very immunity.”<sup>371</sup> The immunity

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<sup>366</sup> *Immunities Convention*, *supra* note 28, sections 20 and 23.

<sup>367</sup> *Immunities Convention*, *supra* note 28, section 20.

<sup>368</sup> Rawski points this out, although others argue that there are a great many cases in which immunity should be waived but it is not. See Rawski, *supra* note 245 at 118-119.

<sup>369</sup> *Cumaraswamy*, *supra* note 281; Rawski, *supra* note 245 at 114.

<sup>370</sup> A classic Canadian example is *Roncarelli v. Duplessis* [1959] S.C.R. 121, in which an individual sued the former Premier of Quebec on the grounds that he had exceeded his powers when he revoked the claimant's liquor license as a means of punishing him for his support of Jehovah's Witnesses, a completely unrelated matter. The suit was not taken against the government of Quebec as a whole, but against the Premier as an individual in respect of his individual powers.

<sup>371</sup> Written Comments submitted to the International Court of Justice on behalf of the Secretary-General of the United Nations in relation to the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, 2 October 1998, the Legal Counsel of the United Nations, at para. 56, available online: <http://www.icj-cij.org/icjwww/idocket/inuma/inumaframe.htm>.

in regulation 2000/47 is slightly less absolute than “legal process of every kind” for individuals, but it is absolute for the organization.<sup>372</sup> According to the ICJ, the Secretary-General's finding on immunity “creates a presumption which can only be set aside for the most compelling reasons and is thus to be given the greatest weight by national courts.”<sup>373</sup> Given the plain language of the Convention regarding the Secretary-General’s decision on the matter, the Court’s suggestion that a State could “set aside” that decision is surprising. This holding by the ICJ indeed indicates that in fact the Secretary-General does not have the last word on immunity.<sup>374</sup> In theory, courts in internationally administered territories could decide that preserving the rule of law is a “most compelling reason” and set aside immunity in the face of a contrary decision by the Secretary-General. The possibility that courts of an administered territory would override the Secretary-General’s decision is, however, quite unlikely. The immunity regime therefore virtually prohibits the kind of judicial review of administrative action that protects the rule of law in States.

The question that remains is whether that gap can be overcome by the assumption of responsibility by the organization. It is understandable that the Secretary-General would want to protect international civil servants from suit in a foreign State for behaviour that has no criminal character to it and that arises in these circumstances. However, the fact that the organization assumes that it may bear responsibility for damages even when its officials have been acting *intra vires* implies that normally that aspect should not be determinative of the claim as a whole. Therefore, the Secretary-General’s decision on whether an official or agent was acting *intra vires* must be without prejudice to the overall claim of whether the mandate of the operation was exceeded.

Finally, this approach raises the somewhat theoretical question whether responsibility at the level of the organization is sufficient to incite officials to respect the limits of the mandate and to fulfil their obligations under it. The International Court of Justice in *Cumaraswamy* admonished individuals that they should take care in the exercise of their mandates not to create conditions in which the UN would be sued. Even if the ICJ's admonition is not binding

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<sup>372</sup> The precise wording is "UNMIK personnel, including locally recruited personnel, shall be immune from legal process in respect of words spoken and all acts performed by them in their official capacity." (Art. 3.3 UNMIK/REG/2000/47, *supra* note 347).

<sup>373</sup> *Cumaraswamy*, *supra* note 281 at para. 61.

<sup>374</sup> See Klabbbers, *International Institutional Law*, *supra* note 38 at 161. Klabbbers welcomes this approach, observing that it is appropriate for States to have the final say “if only because the Secretary-General will have the natural and understandable inclination to construe immunity as widely as possible.” It is surprising that a greater element of good faith in exercising that discretion is not expected of the Secretary-General.

upon individuals, this approach seems to be the most viable under the international legal system.

### 2.1.3 Immunity of the Organization

The UN organisation may be both liable and responsible to individuals, but it remains protected by immunity. No one (State or other) has the explicit right to waive the immunity of the UN (or its subsidiary bodies) itself. Indeed, the International Court of Justice held that “any such claims [for damage arising out of acts of agents or officials for whom immunity is not waived] against the United Nations *shall not be dealt with* by national courts”.<sup>375</sup> Thus, although there is a process by which immunity of individuals within the organization may be waived, there is no such process by which the immunity of the organization itself may be waived. Instead, the organization is bound to “make provisions for appropriate modes of settlement of: ... (b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.”<sup>376</sup> In effect, then, the UN is under an obligation to provide “reasonable alternative means” to individuals seeking redress, but, unlike in the ECHR cases, there is no entity that is endowed with the capacity to determine whether the means provided actually fulfil that obligation. Indeed, a State upon whose territory an international organisation operates with immunity nonetheless cannot avoid its obligation to provide a remedy for the persons within its jurisdiction despite the immunity of the organisation. In the case of an international organisation administering territory, it enjoys immunity, but there is no State left with the separate obligation to provide a remedy unless one argues that this obligation rests upon all the State members of the organisation. In the context of the ECHR cases, this obligation rather falls upon the host State.<sup>377</sup>

What is unique about international territorial administrations is that they are in fact effectively in the role of the State, which would normally determine whether immunity should be upheld for an international organization through its court system. The problem with immunity of international organizations for States is that it puts them in a situation of having to deal with two conflicting obligations – on the one hand, to provide access to justice for persons under their jurisdiction; on the other, to honour the obligation to provide immunity to certain

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<sup>375</sup> *Ibid.* at para. 66. Emphasis added.

<sup>376</sup> *Immunities Convention*, *supra* note 28, section 29.

<sup>377</sup> It would indeed be specious to suggest that Serbia and Montenegro or Indonesia or Portugal retain such an obligation in the case of UNMIK and UNTAET as somehow the “host states” of the peace operations.

organizations on its territory.<sup>378</sup> The major ECHR cases dealing with immunity of international organisations do not find the organization at fault for having immunity, but rather consider whether the *state* in which the organisation operates and enjoys immunity violated its human rights obligation to provide access to justice.<sup>379</sup> In many respects, this exercise seems to parallel the Secretary-General's consideration as to whether to waive immunity for individuals; in others, it must be compared to immunity of the organization as a whole.

In *Waite and Kennedy v. Germany* and *Beer and Regan v. Germany*, the ECHR set out a test to determine whether Germany's decision not to waive immunity for the European Space Agency (when its former employees sought to sue it in German courts) complied with the European Convention. Affirming that the right of access to courts is not absolute, the ECHR went on to define criteria that would respect that right even if immunity were upheld. First, the Court must “be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.”<sup>380</sup> In addition, the limitation (on access to court, *i.e.* upholding immunity) must pursue a legitimate aim and there must be “a reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.<sup>381</sup> In a crucial passage, the ECHR insisted that the State is not absolved of its obligation to protect human rights simply because it has granted immunity to an international organization.<sup>382</sup> The final “material factor” for the European Court as to whether a grant of immunity from local jurisdiction is permissible is whether there were “reasonable alternative means” for the applicants to protect effectively their rights under the Convention.<sup>383</sup>

In the *Waite and Kennedy* case, the Court was relatively easily satisfied that the immunity had a legitimate objective because it is “an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.”<sup>384</sup> This finding is consonant with the traditional justification for granting immunity to international

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<sup>378</sup> August Reinisch, *International Organizations before National Courts* (Cambridge: Cambridge Univ. Press, 2000) at 278 ff makes this observation, while Sarooshi, *supra* note 91, comments that States rarely seem to see this as directly conflicting.

<sup>379</sup> *Waite and Kennedy v. Germany*, Judgement, (Application no. 26083/94) 18 February 1999, ECHR.

<sup>380</sup> *Ibid.* at para 59.

<sup>381</sup> *Ibid.*

<sup>382</sup> *Ibid.* at para. 67.

<sup>383</sup> *Ibid.* at para. 68.

<sup>384</sup> *Waite and Kennedy*, *supra* note 379 at para. 63.

organizations.<sup>385</sup> Some authors argue that the UN cannot possibly need to protect itself from unilateral interference by governments when it is the government, such that this justification cannot apply in that context.<sup>386</sup> Historically, States also benefited from sovereign immunity but over time this has eroded.<sup>387</sup> Many academic critics are now proclaiming that the time is right to begin the same slow process of erosion of immunity for international organizations. The immunity granted to UN administrations appears indeed to be hypocritical: 119 “New or Restored Democracies” participating in the international conferences run for them by the UN Department of Political Affairs signed a declaration in Ulaanbaatar in 2003 endorsing the principle that democratic societies function under agreed rules of law and accountability *regardless of the challenges they face*.<sup>388</sup> The reasons for immunity in UNMIK (albeit for individuals) as provided by the Deputy Secretary-General for Peacekeeping are set out above; they are indeed quite vague. However, it may be worth noting that at the time, UNMIK was feeling considerable animosity from the local population (had had attacks against its staff) and the then Milosevic government had thrown two international civilian police in Yugoslav jail when they wandered into FRY territory by mistake.<sup>389</sup> Clearly, for the UN, the rules of accountability and democracy apply only to the fledgling local political institutions under its administration and not to itself. Applying the *Waite and Kennedy* test, it is not inconceivable that a court would conclude that ensuring the proper functioning of the peace operation is a legitimate objective for immunity of the organization and that, given the volatility of the situation, it may be necessary to achieve that objective.

The proportionality test of *Waite and Kennedy* appears to be a slightly more refined version of the crude balancing that is the sum total of the process required of the Secretary-General when determining whether to uphold immunity of individuals, but, with all due respect to the justices of the ECHR, in application it amounts to the same thing. In *Waite and Kennedy*, the Court held that “To read Article 6(1) of the Convention and its guarantee of access to court as necessarily requiring the application of national legislation in [employment] matters would, in the Court's view, thwart the proper functioning of international organisations and run counter

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<sup>385</sup> Emmanuel Gaillard and Isabelle Pingel-Lenuzza, "International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass" (2002) 51 *ICLQ* 1 – 15.

<sup>386</sup> Especially Rawski, *supra* note 245 at 123-124.

<sup>387</sup> Gaillard/Pingel-Lenuzza, *supra* note 385.

<sup>388</sup> Ulaanbaator Declaration, 10-12 September 2003, Ulaanbaatar, Mongolia. See <http://www.un.org/depts/dpa/history.html>.

<sup>389</sup> *Security Council, 55<sup>th</sup> year, 4190<sup>th</sup> meeting* 24 August 2000, UN Doc. S/PV. 4190.

to the current trend towards extending and strengthening international cooperation.”<sup>390</sup> Given the prominence of the legitimacy of the aim in the Court's rather loose evaluation of the proportionality of the denial of access to a court, it is also not inconceivable that the importance of being able to maintain international peace and security (which is, after all, the objective of a Chapter VII peace operation) would tip the balance in its favour in a proportionality assessment. While in theory and in principle I certainly agree with those who argue that this immunity is disproportionate in the context of international administrations, a realistic application of the (admittedly disappointing) existing case law forces me to conclude that a court may decide otherwise. On the other hand, however, the “international cooperation” protected by the Court in that case arises at least in part from the principle that no State should be allowed to control the activities of an international organisation since such control could sow imbalance among the sovereign equality of States.<sup>391</sup> Immunity of an organisation protects sovereign equality among States in that it prevents any one State from exercising disproportionate control over the organisation. Clearly, in the case of an organisation administering territory, this basis for immunity is not a factor.

Since the proportionality test will likely not get us very far, in my view it is imperative to consider whether an international organization administering territory is subject to the obligation to provide access to justice. States may violate their obligation to provide access to justice if they uphold the immunity of an international organization when there are no “reasonable alternative means” for an individual to seek redress. This test is very closely linked to the first requirement identified by the ECHR: that “the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.” Applied in this way, it is possible to overcome the failure of the ECHR to examine with rigour the nature of the available alternative in the case of international organisations.<sup>392</sup> If the determination by the Secretary-General not to waive

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<sup>390</sup> *Waite and Kennedy*, *supra* note 379 at para. 72.

<sup>391</sup> Note that the usual theories supporting the reason for immunity of international organisations are first, that a “legation abroad would continue to be the territory of the sending state”; second, that “privileges and immunities somehow derive from the sovereign dignity of the entities concerned”; and third, that organisations must have “functional immunity”. In some respects, the theory presented above may be seen as an aspect of the functional immunity of organisations. At the same time, the “sovereign equality” argument is a distinct rationale for immunity of organisations to subsist despite the erosion of State immunity. See Klabbers, *International Institutional Law*, *supra* note 38 at 147ff and especially at 154.

<sup>392</sup> Karel Wellens laments the lack of courage of the Court and its failure to apply exactly the same test to an international organization that it applies to States. In the case of State immunity, the Court looks for a remedy that is “accessibly, capable of providing redress in respect of the applicant's complaint and [that] offer[s] reasonable prospects of success.” See “Diversity or Cacophony?: New sources of norms in international law



individual immunity also decides the rest of the claim, without providing a mechanism for that claim to be heard, it is evident that “the very essence of the right is impaired”. This can be overcome if the determination of *ultra vires* for the purposes of immunity is deemed to be irrelevant for the rest of the claim. If it were otherwise, no matter the alternative mechanisms provided, if those were bound by the Secretary-General’s decision, there is no effective alternative. In addition, as for States, the UN must not be absolved from its human rights obligations simply because it enjoys immunity.

The fact that the UN is bound by the general principle of access to justice in the context of civilian administrations may find support under human rights obligations (the right to access to justice is described as fundamental).<sup>393</sup> At the very least, we may apply as a minimum yardstick the obligation to provide some right of petition to an independent body as a general principle of international administration as described above. The UN or an international organization administering territory is bound by that primary obligation renders it appropriate to apply the test in *Waite and Kennedy*.

Alternative measures that have been identified by national courts may include suing in the person’s home State or asking one’s State to intervene and declare a person *persona non grata*.<sup>394</sup> These options are clearly not viable alternatives for individuals in internationally administered territory since they have no state to which they can turn. In *Waite and Kennedy*, the ECHR was satisfied that the individuals in question had access to alternative means because there was an Appeals tribunal that had been established by the European Space

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symposium. Article: Fragmentation of international law and establishing an accountability regime for international organizations: the role of the judiciary in closing the gap" (2004) 25 *Mich. J. Int'l L.* 1159 at pp. 1163. The latter test is from the ECHR's decision in *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, Decision as to the Admissibility of Application No. 45036/98, part I.A (13 September 2001).

<sup>393</sup> See especially Karel Wellens, *supra* note 393. See also *Universal Declaration of Human Rights*, 1948, UN GA res. 217A (III) UN Doc. A/810 at 71, Article 8; *international Covenant on Civil and Political Rights*, 1966, UN GA res. 2200A (XXI), UN Doc. A/6316 at Article 2 (2). Recently, the Human Rights Commission adopted a resolution that is the culmination of years of work regarding the right to a remedy. Independent experts Mr. Theo van Boven and Mr. Cherif Bassiouni are credited with having forged the principles, which were adopted in April 2005. However, in my view these principles, which started out looking at reparation for violations of human rights and humanitarian law, are unhelpful to establish a right to a remedy in this case. The final version of the text deals only with *gross* violations of international human rights law and *serious* violations of international humanitarian law. See Human Rights Resolution 2005/35, Commission on Human Rights, Report of the sixty-first Session (14 March – 22 April 2005), UN Doc. E/CN.4/2005/135 at 136 ff. See also *Effects of Awards of Compensation*, *supra* note 165.

<sup>394</sup> Reinisch, *supra* note 378 at 299. The example Reinisch provides is a Spanish case involving the diplomatic immunity of an Italian person who refused to pay his rent. The Spanish courts refused to revoke the immunity on the grounds that the landlady had other means available to her, including suing in Italy and asking Spain to declare the diplomat a *persona non grata*.

Agency itself. The Court held that the tribunal was “independent”, but its analysis of the tribunal was laconic in the extreme. The UN has an obligation under the Immunities Convention to set up mechanisms for certain circumstances.<sup>395</sup> For peace operations, the standard procedure is to set up claims commissions, and, in the case of international administrations, the organisations have also created ombudspersons. The question is whether these institutions are sufficient to meet its obligation to ensure access to justice, in particular to enforce the rule of law and protect human rights.

The UN establishes claims commissions for each peace operation. These are provided for in the Model Status of Forces Agreement, and principles of liability are further developed in a report of the Secretary-General regarding liability for actions of peacekeepers in the Balkans.<sup>396</sup> The principle to establish such commissions was set down prior to the creation of a significant number of peace operations with civilian administration components. Consequently, the terms of compensation refer primarily to acts by soldiers.<sup>397</sup> However, the Secretary-General also averted to “non-consensual use and occupancy of premises” as a basis for liability, which could go a long way to remedying complaints about expropriation by KFOR and UNMIK.<sup>398</sup> In the regulation proclaiming immunity for UNMIK and all its personnel, the SRSG also indicated that a claims commission would be established.<sup>399</sup> However, the Kosovo ombudsperson notes that at least one year after the promulgation of the regulation, no claims commission had yet been established.<sup>400</sup> Indeed, if such a commission has been established, it was not done by a regulation or administrative direction of UNMIK.

As a general rule, claims commissions are similar to an arbitral process. Paragraph 51 of the Model SOFA provides for the creation of such a commission to settle “any dispute or a claim of private law character...over which the courts of the [host/territory] do not have jurisdiction” due to the immunity provided for elsewhere in the Agreement.<sup>401</sup> The structure of the commission is set out in the Model SOFA: a three person panel, one person being appointed by the Secretary-General, one person by the Government, and one person by both the S-G and the Government together. Considering the absence of local government in some

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<sup>395</sup> Section 29 of the *Immunities Convention*, *supra* note 28.

<sup>396</sup> *Financing of UNPROFOR*, *supra* note 25.

<sup>397</sup> *Financing of UNPROFOR*, *supra* note 25.

<sup>398</sup> *Financing of UNPROFOR*, *supra* note 25 at paras. 9 – 10.

<sup>399</sup> UNMIK/REG/2000/47, *supra* note 347 at Section 7.

<sup>400</sup> Ombudsperson Institution in Kosovo, *Special Report No. 1*, *supra* note 30.

<sup>401</sup> See Model SOFA, *supra* note 342 at para. 51.

internationally administered territories, at least until the period at which local government institutions are created, this schema is not possible to implement. It is difficult to see how such a commission could be independent or respect the principles of arbitration given the powers of an SRSG over provisional self-government institutions. Nevertheless, on the language in the Model SOFA, it would appear that such a commission could be established to deal with “disputes” about the reach of the power of an international administration.

However, in the absence of any further evidence that such commissions have been established in international administrations, even on the low standard sought by the ECHR in *Waite and Kennedy*, the mere possibility of such a commission does not satisfy the test for reasonable alternative means. In other instances, the UN has reportedly refused to create such commissions in preference for a unilateral consultative committee for indemnification.<sup>402</sup> One author observes, “ces commissions semblent avoir peu fonctionné en pratique.”<sup>403</sup>

The next candidate for evaluation as a “reasonable alternative” to being able to sue staff or the organisation is the Ombudsperson institution. Ombudspersons have been created in at least four of the recent international administrations.<sup>404</sup> The Ombudsperson is best defined as “an independent public official who receives complaints from aggrieved individuals against public bodies and government departments or their employees and who has the power to investigate, recommend collective action, and issue reports.”<sup>405</sup> The Kosovo Ombudsperson has exhibited enormous independence and vigour, initiating his own investigations and relentlessly pursuing complaints. One has only to leaf through his annual reports, however, and read the phrase “There has been no response to this request”, repeated *ad nauseum*, and consider the failure of the Security Council to pay attention to his reports, to arrive at a conclusion on the unfortunate ineffectiveness of this remedy. Although it is not pertinent to the particular issues addressed in this paper, his field of action was severely curtailed by the exclusion of KFOR from his jurisdiction.<sup>406</sup> Moreover, the SRSG decided to terminate the mandate of the international ombudsperson (ostensibly as a measure of devolving power) despite the fact that there remain serious concerns about local capacity and that, six years into

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<sup>402</sup> Jean-Marc Sorel, “La responsabilité des Nations Unies dans les opérations de maintien de la paix” (2001) 3 *International Law FORUM* 127 at 134.

<sup>403</sup> *Ibid.*

<sup>404</sup> Aside from East Timor, Kosovo, and Bosnia, there was an ombudsperson specifically for Mostar. See Pagani, *supra* note 64 at 247 – 249.

<sup>405</sup> Caplan, *supra* note 13 at 200. Caplan’s definition is similar to that used by the International Bar Association.

<sup>406</sup> See UNMIK/REG/2000/38 establishing the Ombudspersons’ office, available online: *supra* note 10.

the operation, the SRSG retains ultimate authority in the territory.<sup>407</sup> If there is any hope for an institution with no actual powers of enforcement to provide an effective alternative remedy against an international administration, it should at the very least have equal status with those who hold power. However, even the international Ombudsperson proved unable to provide relief for persons who were, *inter alia*, unlawfully detained.<sup>408</sup>

In East Timor, the Ombudsperson had a broad mandate covering both UNTAET and the emerging state institutions.<sup>409</sup> The Ombudsperson in UNTAET only began receiving complaints 17 months into the mandate of the peace operation. Although twenty cases were brought quickly, fully half of those were brought by internationals, which suggests that local persons had limited awareness of any possibility for redress of their grievances.<sup>410</sup> In Bosnia, the establishment of a Human Rights Ombudsman was provided for in the Dayton Agreement; however, his jurisdiction was limited to actions of the Parties to the Agreement.<sup>411</sup> That limitation was logical at the time, considering that the High Representative was not then accorded direct administrative powers. However, that jurisdiction should have been amended when those powers were changed. The fact that it was not means that that institution remains incapable of bridging the accountability gap in that administration.<sup>412</sup>

An ombudsperson would seem to have considerable potential to address many of the grievances in international administrations if given appropriate jurisdiction and the resources necessary to fulfil the mandate. Marten Zwanenburg proposes the creation of a standing institution of ombudsman for UN peace support operations, who “could be appointed by the Secretary-General in consultation with the ICRC and the UN General Assembly Sepcail Committee on Peacekeeping Operations.” In Zwanenburg’s view, creating the ombudsman as a standing institution would contribute to its independence.<sup>413</sup> Virtually all authors advocate for the reinforcement and institutionalisation of the ombudsman as probably the best possible

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<sup>407</sup> LC to provide references to these decisions as well as the terms of the PISG Constitution leaving authority to SRSG.

<sup>408</sup> See the First and Second Annual Reports of the Ombudsperson, online at [www.ombudspersonkosovo.org](http://www.ombudspersonkosovo.org).

<sup>409</sup> Caplan, *supra* note 13 at 201.

<sup>410</sup> See UNTAET Daily Briefing, 1 June 2001, available online: <http://www.un.org/peace/etimor/DB/Db010601.htm>.

<sup>411</sup> Dayton General Framework Agreement, Annex 6, Article V Section 2.

<sup>412</sup> Richard Caplan notes that the Ombudsman in BiH could have jurisdiction over the international actors “insofar as international bodies may be called upon to facilitate redress of domestic violations.” See *supra* note 13 at 200.

<sup>413</sup> Zwanenburg, *supra* note 210 at 310 – 311.

option to enhance accountability in peace operations.<sup>414</sup> This is an excellent idea, and is especially important for peace operations with direct powers of civil administration. However, in certain cases, the lack of enforcement powers proves fatal to its ability to provide adequate alternative means. In such cases, the organisation could nevertheless violate its obligation to provide for some method of access to justice. The immunity of the organization remains impenetrable, denying even the opportunity to challenge the adequacy of the means provided. There is therefore an overarching problem – how can a population in an internationally administered territory enforce the obligation binding on the organization to ensure access to justice?

### **3. Proposal – Advisory Opinions from the ICJ**

One of the early examples of administration of territory by an international organisation provides an interesting precedent and possible solution for the lack of capacity to challenge the adequacy of accountability measures in such contexts. In the 1920s and into the 1930s, the Free City of Danzig was administered by a High Commissioner appointed by the League of Nations, in accordance with the Versailles Treaty.<sup>415</sup> The fledgling local government of Danzig had the power to ask the Council of the League of Nations to request an Advisory Opinion from the Permanent Court of International Justice when it wished to challenge decisions of the High Commissioner. In the *Jurisdiction of the Courts of Danzig* case, the High Commissioner had made a Decision relative to the jurisdiction of courts in the Free City of Danzig to be able to decide cases relating to an agreement on Railways (since Poland was the Administrator of all railways in the Free City) and employment contract issues. The Government of the Free City wished to challenge that decision and therefore appealed to the League of Nations. In response to the Government's request, the Council requested an Advisory Opinion from the PCIJ for an opinion on the well-foundedness of the High Commissioner's decision. The PCIJ examined the matter, looked at the agreements regarding Railways and whether the High Commissioner had interpreted them correctly, and declared that the High Commissioner's Decision was not well-founded in law. Although the

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<sup>414</sup> Bongiorno, *supra* note 22, Rawski, *supra* note 245, Caplan, *supra* note 13.

<sup>415</sup> Articles 100 – 108 of the Peace Treaty signed at Versailles “constituted the City of Danzig with its territory as a Free City under the protection of the League of Nations, and placed its constitution under the League's guarantee.” As described by the PCIJ in *Polish Postal Service in Danzig*, PCIJ Series B No. 11 16 May 1925.

Government of the Free City had requested the PCIJ to annul the Decision, the PCIJ contented itself with a simple declaration that the Decision was not well-founded in law.<sup>416</sup>

This precedent is important for a number of reasons. Above all, it provides support for the argument that decisions by such international administrators may be subject to review by courts, even if the court is limited to issuing an advisory opinion.<sup>417</sup> The Versailles Treaty specifies only that the High Commissioner would have “the duty of dealing in the first instance with all the differences arising between Poland and the Free City of Danzig in regard to this Treaty or any arrangements or agreements made thereunder.”<sup>418</sup> Article 39 of the Treaty of Paris signed between the two entities allowed either Party to appeal decisions by the High Commissioner. As such, the advisory power of the Court was invoked in respect of a quasi-international dispute since the High Commissioner’s decisions could affect both Poland and the Free City. Over time, however, the PCIJ exercised its advisory capacity in situations that were more clearly internal in nature. In fact, the PCIJ continued to exercise advisory jurisdiction regarding the Free City of Danzig regarding the constitutionality of decrees adopted by the local government, on the basis of a request by the High Commissioner to the Council of the League of Nations.<sup>419</sup> That procedure is unquestionably preferable to current practices of a determination of constitutionality by the SRSG or the UN Office of Legal Affairs.

This system could easily be transposed to modern international administrations. The UN Secretary-General’s decision-making powers can be subject to such review, especially in the context of immunity.<sup>420</sup> Moreover, this solution has the advantage of respecting the principles of constitutionality and judicial review, yet remaining within the international legal sphere. It

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<sup>416</sup> See PCIJ, *Jurisdiction of the Courts of Danzig*, 3 March 1928, 15th Advisory Opinion, 13th Extraordinary Session, at 27.

<sup>417</sup> In the case of the ICJ, it would necessarily be an Advisory Opinion since that Court has no jurisdiction to hear contentious cases involving parties other than States. In addition, in the Mandates system, there was a provision in each mandate that gave jurisdiction to the PCIJ in case of dispute between the mandatory and another member of the League of Nations relating to the interpretation or application of the provisions of the mandate that could not be resolved through negotiations. See, on this, Bentwich, *supra* note 275 at 176 – 180. The PCIJ dealt with three cases involving the mandate for Palestine.

<sup>418</sup> Article 103 of the Versailles Treaty of 28 June 1919.

<sup>419</sup> See *PCIJ Consistency of Certain Danzig Legislative Degrees with the Constitution of the Free City*, 4 December 1935, 35th Extraordinary Session, General List No. 63. The decrees in question dealt with Penal Laws.

<sup>420</sup> *Cumaraswamy*, *supra* note 281. Laurence Boisson de Chazournes also advocates such recourse to the ICJ in similar contexts in her “Accountability, Rule of Law and ICJ Advisory Opinions” in Wybo P. Heere, (ed.) *From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal System* (The Hague: T.M.C. Asser, 2004) at 77 – 83.

is admittedly a somewhat cumbersome solution, but it is not meant to resolve the everyday problems of international administration. It is rather a means to enforce existing mechanisms of accountability and to ensure that they meet international obligations. The ideal solution would provide the representatives of an internationally administered territory competence to petition the court directly in such circumstances.

#### **4. Conclusion to Part II**

Under the current international law, attributing acts of individuals to an organisation does not raise the same complex questions when it comes to civilian administrations as it does for the military component of peace operations. Nonetheless, the immunity of both the personnel and the organisation itself represent quasi-insurmountable obstacles to individuals in such territories. An international organisation's need and desire to protect its staff from personal suit is understandable and perhaps even justifiable for acts that are not criminal in nature.<sup>421</sup> The immunity of the organisation itself can only be justified if that immunity does not somehow absolve the organisation of its human rights obligations. I have suggested an application of the test in *Waite and Kennedy*, although admittedly this standard may be too low. Françoise Hampson has suggested that each international administration should make a declaration of application of the First Optional Protocol to the International Covenant on Civil and Political Rights as a means of bridging the accountability gap.<sup>422</sup> Many other excellent suggestions abound, the most significant being the establishment of an ombudsman as a standing institution. One can also envision the creation of a standing administrative tribunal for such operations as an ideal option *de lege ferenda*. As a means of overcoming the lack of a means to enforce the obligation to provide access to justice that is incumbent upon an international organisation administering territory, I have outlined the possibility to request advisory opinions from the International Court of Justice.

### **Conclusion**

Complex peace operations are often comprised of a multitude of different actors hailing from diverse backgrounds – civilians, military, police – and are entrusted with a wide variety of tasks. The potential for violation of rights and international obligations in such circumstances, (aside from infringement of sovereignty) whether intentional or inadvertent, is enormous.

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<sup>421</sup> Of course, this begs the question as to the line between a violation of a human right and commission of a crime. Torture, for example, must be both.

<sup>422</sup> Lunch discussion with Françoise Hampson during the Expert Working Group on Private Military Companies held at Geneva 29-30 August 2005.

Breaches of the trust placed in peacekeepers that cry out for accountability need not be – and indeed rarely are – so egregious or even so blatant as the recent events in Congo involving sexual exploitation of the local population.<sup>423</sup> However, peacekeeping is one of the most visible and sensitive activities undertaken by the United Nations and the lack of a culture of responsibility, ironically, is a common feature of peacekeeping operations. It is therefore only natural that the organisation would seek to maintain and enhance the legitimacy of peacekeeping by responding for calls for greater accountability with investigations, reports, recommendations, guidelines, codes of conduct, training and disciplinary procedures.<sup>424</sup> At the same time, the law of responsibility of international organizations, with a certain focus on the responsibility of the UN for peace keeping operations, is attracting increasing attention.

Both the military forces and civilian police contingents in peacekeeping operations raise important, distinct legal questions with respect to accountability – both that of individuals and of the organisation(s). At least one excellent comprehensive study has been made of the military component<sup>425</sup>; the same is desperately needed for the civilian police.<sup>426</sup> Indeed, the accountability of peacekeeping forces for violations of international humanitarian law is crucial as operations are given more robust mandates. Moreover, criminal accountability of all peace operation personnel is a paramount concern.<sup>427</sup> However, in the unique situation of international territorial administration, the accountability of the international personnel is vital to inculcating a sense of democracy and legitimacy. As this paper has attempted to show by elucidating principles common to the two key legal regimes governing international administration, that accountability is not merely a moral obligation in the sense of “practice what you preach”, but is in fact a legal obligation, with roots in general principles of international law.

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<sup>423</sup> *Zeid Report*, *supra* note 48; see also *Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization in the Democratic Republic of the Congo* 5 January 2005, UN Doc. A/59/661; Refugees International (Sarah Martin), *Must boys be boys? Ending sexual exploitation and abuse in UN Peacekeeping missions* (October 2005), available online: [www.refugeesinternational.org](http://www.refugeesinternational.org).

<sup>424</sup> See, for example, *The Comprehensive Report on Lessons Learned from the United Nations Operation in Somalia* (March 1995) at para 57, available online: <http://pbpu.unlb.org/pbpu/library/UNOSOM.pdf>. See also the *Compilation of Guidance and Directives on Disciplinary Issues for All Categories of Personnel Serving in United Nations Peacekeeping and Other Field Missions*, available online: [http://pbpu.unlb.org/pbpu/library/Disciplinary%20Package%20-full%20version%20\(4%20March%202005\).pdf](http://pbpu.unlb.org/pbpu/library/Disciplinary%20Package%20-full%20version%20(4%20March%202005).pdf).

<sup>425</sup> Zwanenburg, *supra* note 210.

<sup>426</sup> François Hampson’s mandate as Special Rapporteur on Administration of Justice, Rule of Law and Democracy, is a good start but for the moment it is focused almost exclusively on criminal accountability.

<sup>427</sup> *Zeid Report*, *supra* note 48.