# The Accountability of UN Post-conflict Administrations for Violations of International Humanitarian Law and Human Rights Law

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**ABSTRACT**

The Accountability of UN Post-conflict Administrations for Violations of International Humanitarian Law and Human Rights Law

The thesis explores the extent to which the UN post-conflict administrations are accountable towards the populations of the territories they administer. The post-conflict administrations temporarily assume legislative and administrative powers to support the peace processes, to help to resolve the sovereignty issues or to establish administrative structures that might be non-existent in these territories. The thesis argues that, while the exercise of these extensive powers entails the accountability of the UN, in practice this accountability is not effectively engaged.

As opposed to other forms of accountability, the focus is on the international legal responsibility of the UN as the prominent and most meaningful form of accountability, in the accountability relationship between the administrator and the administered, which gives the populations of the administered territories the opportunity to challenge the acts of international administrations and seek redress.

In exploring the legal responsibility of the UN and in line with Article 4 of the ILC Draft Articles on the Responsibility of International Organizations, which states only an act of an international organization that constitutes a breach of an international obligation entails its responsibility, this thesis initially explores the extent of international obligations arising from, and the extent of applicability of, three bodies

of law. First, the thesis discusses the applicability of international humanitarian law, the fundamental principles of which have traditionally been part of UN peace operations practice. Next, it considers the applicability of the law of occupation, which shares stark factual similarities with the UN post-conflict administrations. Finally, the applicability of international human rights law, which is consistently part of the applicable law in post-conflict territories, and the protection and promotion of which is consistently included in the mandates of post-conflict administrations is examined. The thesis argues that the simultaneous application these bodies of law would help to create a legal framework to engage the accountability of UN post-conflict administrations and this legal framework should be complemented by effective accountability mechanisms.

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## TABLE OF ABBREVATIONS

AJIL: American Journal of International Law

BYIL: British Yearbook of International Law

CNRT: National Congress for Timorese Reconstruction

COMKFOR: Commander of KFOR

ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms

EJIL: European Journal of International Law

ESA: European Space Agency

EULEX: European Union Rule of Law Mission

FAO: Food and Agriculture Organization of the United Nations

FSIA: Foreign Sovereign Immunities Act

HRAP: Human Rights Advisory Panel

ICC: International Criminal Court

ICISS: International Commission on Intervention and State Sovereignty

ICJ: International Court of Justice

ICLQ: International and Comparative Law Quarterly

ICRC: International Committee of the Red Cross

ICTY: International Criminal Tribunal for the former Yugoslavia

IHL: International Humanitarian Law

ILA: International Law Association

ILC: International Law Commission

ILM: International Legal Materials

INTERFET: International Force for East Timor

IOIA: International Organizations Immunities Act

KFOR: Kosovo Force

KTA: Kosovo Trust Agency

MINURSO: United Nations Mission for the Referendum in Western Sahara

NGO: Non-governmental Organization

ONUB: United Nations Operation in Burundi

ONUC: United Nations Operation in the Congo

OSCE: Organization for Security and Co-operation in Europe

PISG: Provisional Institutions of Self-government in Kosovo

SOFA: Status of Forces Agreement

SOMA: Status of Mission Agreement

SRSG: Special Representative of the Secretary-General

TMC: Temporary Media Commissioner in Kosovo

TRA: Telecommunications Regulatory Authority in Kosovo

UN: United Nations

UNAMSIL: United Nations Mission in Sierra Leone

UNCITRAL: United Nations Commission on International Trade Law

UNDPKO: United Nations Department of Peace-keeping Operations

UNEF: United Nations Emergency Force

UNGA: United Nations General Assembly

UNHCR: United Nations High Commissioner For Refugees

UNJY: United Nations Juridical Yearbook

UNMACC: UN Mine Action Coordination Centre

UNMAS: UN Mine Action Service

UNMIBH: United Nations Mission in Bosnia and Herzegovina

UNMIK: United Nations Mission in Kosovo

UNMIL: United Nations Mission in Liberia

UNMIS: United Nations Mission in the Sudan

UNMISET: United Nations Mission of Support in East Timor

UNMIT: United Nations Integrated Mission in Timor-Leste

UNOSOM II: United Nations Operation in Somalia II

UNOTIL: United Nations Office in East Timor

UNP: United Nations Publications

UNPROFOR: United Nations Protection Force

UNSC: United Nations Security Council

UNSF: United Nations Security Force in West New Guinea

UNTAC: United Nations Transitional Authority in Cambodia

UNTAES: United Nations Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium

UNTAET: United Nations Transitional Administration in East Timor

UNTAG: United Nations Transition Assistance Group

UNTEA: United Nations Temporary Executive Authority

UNTS: United Nations Treaty Series

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**The Ombudsperson Institution in Kosovo**

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*Kosovo*



*United Kingdom*



*United States of America*

# INTRODUCTION

## Notion of Accountability

A few decades ago, the word 'accountability' was rarely used in the international legal and political context, given its close association with financial 'accounting.'[1] However, in contemporary political and scholarly discourse, accountability has broken free from its semantic ties with finances and has evolved as an umbrella term embodying many distinct principles related to good governance, e.g. transparency, participation, good faith, due diligence, responsiveness, constitutionality, equity.[2] The term 'has come to stand as a general term for any mechanism that makes powerful institutions responsive to their particular publics.'[3]

Despite its frequent usage today, ascertaining the exact meaning of accountability is a hard, inconclusive task. The word does not have an exact equivalence in several other languages.[4] In scholarly discussions, it has been identified as an 'elusive,' and 'evocative'[5] 'chameleon like,'[6] 'evolving,'[7] 'multifaceted'[8] term, or rather as a

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[1] M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13 European Law Journal 447, 448-449.

[2] See for instance ILA, Report of the Seventy-first Conference (Berlin 2004) (the Final Report) 8; Bovens (n 1) 449.

[3] R Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan 2003) 8.

[4] Bovens (n 1) 449; G Hafner, 'Can International Organizations be Controlled? Accountability and Responsibility' (2003) American Society of Law Proceedings 236.

[5] Bovens (n 1) 447, 449.

[6] R Mulgan, 'Accountability': An Ever-Expanding Concept?' (2000) 78 Public Administration 555.

[7] ILA, Report of the Sixty-eighth Conference (Taipei 1998) (the First Report) 598.

'dustbin filled with good intentions, loosely defined concepts and vague images of good governance.'[9]

The most comprehensive study on the accountability of international organizations to date was carried out by a committee of the International Law Association (ILA Committee) between 1996-2004. The ILA Committee, conscious of the apparent ambiguities of the term, decided not to struggle with its definition. According to the ILA Committee:

> Practice and experience has shown how accountability, once accepted, has evolved through the process of further elaboration, refinement and implementation without the need being felt for a continuous and possible inconclusive debate on the definition of accountability. […] During the process the different forms, shapes and modalities of accountability gradually became apparent, unaffected by the lack of a pre-existing precise definition.[10]

Indeed, some studies on accountability focus on various forms, shapes or modalities of accountability practice, rather than a debate on definition.[11] Still, attempts to define the term are crucial in order, at least, to map the common and consistent traits in conceptual understanding of the term. The ILA Committee also made an initial attempt in its First Report 'to approach the notion in a more descriptive way […], in

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[8] Final Report (n 2) 5.

[9] Bovens (n 1) 449.

[10] First Report (n 7) 598.

[11] See for instance, S K Miller, 'Accountability for the Conduct of UN-Mandated Forces Under International Human Rights Law: A Case Study Concerning Sexual Abuse of the UN Mission in the Democratic Republic of Congo (MONUC)' in G JA Knoops & R Arnold (eds), *Practice and Policies of Modern Peace Support Operations under International Law* (Martinus Nijhuff 2006) 261-288; U Garms, 'Promoting Human Rights in the Administration of Justice in Southern Sudan, Mandate and Accountability Dilemmas in the Field Work of a DPKO Human Rights Officer' (2009) 6 International Organizations Law Review 581, 581-600; A Marschik, 'The Administration of Arms Control: Ensuring Accountability and Legitimacy of Field Operations' (2009) 6 International Organizations Law Review 627, 627-653.

order to reach a common understanding of what accountability of international organizations is all about'.[12] A consistent approach in scholarly studies, presupposes a relationship between power-wielders and those holding them accountable in which power-wielders have obligations, or are expected, to act consistently with certain standards of behaviour, and failure to do so might result in the imposition of sanctions.[13] As a matter of principle, accountability is linked to power. As the ILA Committee puts it, 'power entails accountability, that is the duty to account for its exercise.'[14]

In the context of a democratic state, a main accountability relationship would be between those who govern as power-wielders and the citizens of that state who could hold the power-wielders accountable. But today states are not the only power-wielders, and international organizations compete with them in exercising far reaching governmental powers; this is all the more true for UN post-conflict administrations which act as surrogate states. Yet, in democratic states the performance of the governing bodies are evaluated by the governed who entrust them with powers (delegation model);[15] this crucial feature of political accountability cannot be applied to UN post conflict administrations;[16] they are not governments elected by the populations of administered territories, but rather international

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[12] First Report (n 7) 598.

[13] R W Grant & R O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99 The American Political Science Review 29, 29-30; D Curtin & A Nollkaemper, 'Conceptualizing Accountability in International and European Law' (2005) 36 Netherlands Yearbook of International Law 3, 4; Mulgan, 'Accountability': An Ever-Expanding Concept?' (n 6) 555; Bovens (n 1) 447.

[14] Final Report (n 2) 5.

[15] R W Grant & R O Keohane (n 13) 31-34.

[16] See R Caplan, 'Who Guards the Guardians? International Accountability in Bosnia' (2005) 12 International Peacekeeping 463, 463-464.

authorities appointed and sustained by international processes which may seem democratically deficient to many. However, democratic accountability is not the only form that could make post conflict administrations answerable.

**Forms of Accountability- Legal Responsibility as Part of Accountability**

The ILA Committee considers accountability as a notion encompassing legal, political, administrative and financial forms, which are not mutually exclusive and the combination of which would provide the best chances of achieving the necessary degree of accountability.[17] One could add professional or peer, market, hierarchical, reputational and so forth as other recurring forms.[18] This broad understanding of accountability is in contrast to narrower approaches focusing solely on liability and legal responsibility.[19] The work of the ILA Committee gives due regard to liability and legal responsibility as two essential levels of accountability,[20] but emphasizes that by no means do they exhaust accountability, as there remains another level, what the Committee calls the first level: 'the extent to which international organizations in the fulfilment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, *irrespective of potential and subsequent liability and/or responsibility*

[17] Final Report (n 2) 5; see also Curtin & Nollkaemper (n 13) 348.

[18] Grant & Keohane (n 13) 36; A Van Aaken & R Chambers, 'Accountability and Independence of International Election Observers' (2009) 6 International Organizations Law Review 541, 545; M Bovens (n 1) 455-456; P Day & R Klein, *Accountabilities: Five Public Services* (1987) 454.

[19] See First Report (n 7) 603; See I F Dekker, 'Making Sense of Accountability in International Institutional Law' (2005) 36 Netherlands Yearbook of International Law 83, 85-86.

[20] The Final Report defines second level of accountability as 'tortuous liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international law and/or institutional law' while the third level is 'responsibility arising out of acts or omissions which do constitute a breach of a rule of international law and/or institutional law' (the Final Report (n 2) 5).

(emphasis added).'[21] According to the ILA Committee, for each of these three levels the mixture of the various forms of accountability would be different.[22]

The ILA's conceptualization of accountability through three levels is based on a gradual upgrade of accountability from the first level to the second and the third level as responsibility arising out of acts or omissions which do constitute a breach of a rule of international law and/or institutional law. In other words, accountability starts *ex ante*, before any violations of international law occur, with the aim to prevent violations through careful monitoring of activities of international organizations. This is in contrast to the narrow and *ex post facto* approach, focusing on breaches of international law, taken by the International Law Commission of the United Nations (hereinafter ILC) in its authoritative work on the Responsibility of International Organizations that led to the adoption of the Draft Articles in 2011.[23] Both accountability and responsibility are traditionally viewed as retrospective processes, consisting of giving account of actions that have already been taken. The first level of accountability of the ILA Committee as part of its broader approach, focuses more on prospective effects such as increased participation or standard-setting, while legal responsibility belongs to retrospective accounting. However ex post scrutiny could have prospective effects especially in the form of 'lessons-learned,' which could be an important input for the adjustment of policies and standard setting.[24] Moreover, any

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[21] ibid.

[22] ibid; for instance, according to the ILA Committee, in cases of liability and responsibility, legal, political and financial forms of accountability would be predominant (see First Report (n 7) 601).

[23] ILC Draft Articles on the Responsibility of International Organizations, Report of the ILC on the work of its sixty-third session (2011), GAOR 66th Session Supplement no 10 (A/66/10 and add 1).

[24] Bovens (n 1) 453.

prospective effects, albeit important, should not be considered as an alternate for retrospective accountability.[25]

## Accountability and UN Post-conflict Administrations

The ILA Committee pointed out in its initial report that the accountability of international organizations has already been progressing substantially into the areas covered by second (liability) and third level (responsibility).[26] Within the context of the accountability of UN post-conflict administrations such progress can be witnessed. Traditionally, UN post-conflict administrations are accountable to member states and the bodies that appoint them, who are internal stakeholders.[27] The accountability relationship between these bodies would be based predominantly on what the ILA Committee calls the first level of accountability, shaped by regular monitoring of the activities of post-conflict administrations through mechanisms such as the submission of reports, the collection and dissemination of information, carrying out inspections and so forth.[28] Yet, in recognition of its international responsibility for the activities of UN forces, the UN has since the inception of peacekeeping forces, created accountability mechanisms to address the demands of external stakeholders. Within the context of the UN post conflict administrations the effectiveness of accountability mechanisms in addressing the demands of the populations of the administered territories is crucial, since these administrations exercise extensive

[25] Concurring, Curtin & Nollkaemper (n 13) 348.

[26] First Report (n 7) 601.

[27] See S Burall & C Neligan, 'The Accountability of International Organizations', GPPİ Research Paper Series No 2 (2005) 9; Caplan (n 16) 463.

[28] First Report (n 7) 600.

legislative and administrative powers over these territories. Therefore, this thesis explores the extent to which accountability of UN post-conflict administrations has been effective.

In response to the specific question of 'accountability to whom' this research focuses on the accountability of UN post-conflict administrations to the populations of the administered territories as those who are directly affected by the exercise of often excessive, powers by these administrations. As opposed to other forms of accountability some of which would not be applicable to the relationship between the administrators and the administered (i.e. democratic accountability), the legal responsibility of post-conflict administrations stands out as the predominant and most meaningful form in this particular accountability relationship. Traditionally, the UN establishes Claims Commissions within the context of peacekeeping operations following from its official recognition that violations of the Organization's international obligations by its organs or agents in the performance of their duties entail its international responsibility and liability in compensation.[29] Further, the accountability mechanisms that have been established and have functioned within the context of UN post-conflict administrations have aimed to engage the international legal responsibility of the UN for breaches of international human rights law. The legal responsibility is the only form of accountability that gives the populations of the administered territories the opportunity to challenge the acts of international administrations and to seek redress.

[29] Report of the Secretary-General, 'Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations' (20 September 1996) UN Doc A/51/389 [7]; ILC, 'Report of the International Law Commission on the Work of its 56th Session' (3 May-4 June and 5 July-6 August 2004) UN Doc A/CN.4/545, 18.

For the purposes of this research, the term 'legal responsibility' means the responsibility for internationally wrongful acts within the meaning of the ILC Draft Articles. While legal responsibility is the main form of accountability to be explored, a substantial part of this research is devoted to a matter inter-linked with responsibility: the identification of applicable law to the UN post-conflict administrations. As put by the ILA Committee, 'the issue of the identity of the set of international legal rules applicable to IOs is a necessary preliminary to any determination of responsibility problems.'[30] More specifically, as highlighted under Article 4 of the ILC Draft Articles, only an act of an international organization that constitutes a breach of an international obligation entails its responsibility.

Therefore, the research initially explores the extent of international obligations arising from, and the applicability of, international humanitarian law, the law of occupation and human rights law, to UN post conflict administrations in Chapters 2, 3 and 4 respectively. The respect for fundamental principles and standards of IHL is traditionally part of the UN peace operations practice. While the UN considers human rights law to be the part of the law that applies in the administered territories, protection and promotion of human rights has been extensively referred to as a substantial part of the mandates of UN post-conflict administrations. Contrary to that, the relevance of the law of occupation for UN operations has never been acknowledged in the practice of the Organization, although there are strong factual similarities between the occupations and UN post-conflict administrations. The thesis argues that the simultaneous application of these bodies of law could help to create a legal framework that would strengthen the legal responsibility of the UN post-conflict

[30] Final Report (n 2) 19.

administrations. Next, the thesis discusses the extent to which the international legal responsibility of UN post-conflict administrations has been engaged in practice; Chapters 5 and 6 examine the complexities with respect to the attribution of the conduct of UN post-conflict administrations to the Organization as a pre-requisite for establishing legal responsibility, and the impact of the Organization's immunities on that responsibility, while Chapter 7 discusses the practice of accountability mechanisms currently established within the context of UN post-conflict administrations. Finally, the Conclusion (Chapter 8) draws on the analysis of the preceding chapters and assesses the extent to which UN post-conflict administrations are accountable towards the populations they administer, with a view to complementing the applicable legal framework with effective accountability mechanisms.

## CHAPTER I

## THE DIVERSE PRACTICE OF THE UN IN THE POST-CONFLICT ADMINISTRATION OF TERRITORIES AND ITS LEGAL BASIS

### 1. Introduction

The concept of 'post-conflict administration' stands for, in its broad sense, the exercise of governmental power temporarily by an external or international entity over a territory shattered by conflict.[1] An international administration of a territory is not essentially a post-conflict practice, however most international administrations are followed by an international or an internal armed conflict.[2] This thesis mainly draws examples from such administrations that are related to or are established as an outcome of an armed conflict. It further confines itself only to post-conflict administrations that are authorized by the UN Security Council or the UN General Assembly and managed by the UN.

Initially when a post-conflict administration is established on a territory, it would necessarily deal with the consequences of an armed conflict and take up various diverse tasks such as disarmament, maintaining the security and public order, promoting the safe return or resettlement of internally displaced population or refugees. After peace and security is maintained at least to a certain extent on the territory, the administrative tasks gain predominance. Especially, in the face of partial

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[1] For examples of similar definitions of administration of a territory see C Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (CUP 2008) 2, 3; E de Wet, 'The Direct Administration of Territories by the United Nations and its member states in the Post Cold-War Era: Legal Bases and Implications for National Law' (2004) 8 Max Planck Yearbook of United Nations Law 291, 292.

[2] For the criticism that many academic commentators consider international administration as 'essentially a post conflict phenomenon,' see R Wilde, 'Representing International Territorial Administration: A Critique of Some Approaches' (2004) 15 EJIL 71, 82.

or total breakdown of governments of the administered territories, post-conflict administrations would be expected to undertake various tasks ranging from strengthening the rule of law and respect for human rights, and that could reach to the extent of, facilitating the emergence of political and/or judicial institutions, social and economic recovery.

A post conflict administration might serve different or a mixture of different purposes and outcomes unique to the political realities of each administered territory. To exemplify, the United Nations Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium (UNTAES), from 1995, concluded with reincorporation of the said region to the recognized sovereign, i.e. Croatia-.[3] A much earlier example, the administration of Free City of Danzig in the 1920s, served the purpose of realizing or sustaining a recognized autonomous status in the territory.[4] More recently, from 1999, United Nations Mission in Kosovo (UNMIK) with a less clear exit-strategy than examples above, aimed at providing an interim administration for Kosovo until substantial autonomy and self-government in Kosovo is established.[5]

The first introductory chapter of this thesis provides a survey of the UN post- conflict administrations; it focuses on their purposes, powers and tasks. There then follows a discussion on the legal status of UN post-conflict administrations in detail since the

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[3]UNSC Res 1037 (15 January 1996) UN Doc S/RES/1037; M N Shaw, 'Territorial Administration by Non-territorial Sovereigns' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law –Considering Sovereignty, Supremacy and Subsidiarity* (Hart 2008) 29.

[4] The Treaty of Peace between the Allied and Associated Powers and Germany (adopted 28 June 1919, entered into force 10 January 1920) (Treaty of Versailles) section XI, arts 102-108; Shaw (n 3) 31.

[5] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244.

accountability of the UN for the acts of UN post-conflict administrations stems from their legal status as part of UN 'multi-dimensional' peacekeeping operations.

**2. The Early Examples of UN Post- conflict Administrations**

The UN practice in post-conflict administration of territories was preceded by that of the League of Nations (the League) in the early twentieth century when the League undertook the administration of certain territories under the Treaty of Versailles. A Commission representing the League of Nations was entrusted with the mandate to administer the Saar Basin for fifteen years.[6] Another well-known example was the supervisory role of the League in the administration of the Free City of Danzig.[7]

The internationalization of territories continued after the end of the League of Nations era and with the inception of the United Nations. The UN's approach was both experimental and pragmatic. It varied from the level of assistance missions to fully fledged administrations of territories depending on what each situation necessitated.

Already back in the 1960s, the UN had to exercise partial administrative prerogatives due to the conflict in the Congo. The United Nations Operation in the Congo (ONUC), established in July 1960, was initially mandated to ensure that the Belgium Government withdraws its troops from the territory of the Republic of Congo and to provide the Congolese government with military and technical assistance.[8] As the

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[6] See the Treaty of Versailles (n 4) section IV, arts 45-50 and annex.

[7] See ibid section XI, arts 102-8. According to Article 103 of the Treaty of Versailles, the League would be the guarantor of the Constitution of the Free City of Danzig.

[8] UNSC Res 143 (14 July 1960) UN Doc S/4387.

danger of widespread civil war escalated and the Congolese Government's control over the territory diminished, the UN's mandate was broadened with subsequent resolutions.[9] The support provided went beyond military and technical assistance to the government. The UN was expected to maintain the territorial integrity and the political independence of the Republic of the Congo and to assist the Central Government of the Congo in the restoration and maintenance of law and order.[10] In clarifying the mandate of the ONUC, the Secretary-General referred to the 're-establishment of the instruments of the Government.'[11] In practice, however, measures taken by the UN to assist the Congolese government included the primary task of protection of life and property from unlawful violence, and disarmament of the warring tribes on the territory neither of which were part of the ONUC's initial mandate.[12] Importantly, the ONUC is considered to be first peacekeeping operation with substantial civilian elements.[13]

Unlike the situation in the Congo, the administration of the territory of West New Guinea (West Irian) from 1962 was pre-planned and the UN, this time, was more prepared. Upon establishment of the United Nations Temporary Executive Authority (UNTEA), the Secretary General noted that for the first time in its history the United Nations would have temporary executive authority established by and under the

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[9] See UNSC Res 161 (21 February 1961) UN Doc S/4741.

[10] See UNSC Res 169 (24 November 1961) UN Doc S/5002.

[11] First Report by the Secretary-General on the Implementation of Security Council Resolution S/4387 CF 14 July 1960 (18 July 1960) UN Doc S/4389, 2.

[12] D Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (Stevents & Sons 1964) 186-187.

[13] M Goulding, 'The Evolution of United Nations Peacekeeping,' (1993) 69 International Affairs 452.

jurisdiction of the Secretary General over a vast territory.[14] According to the New York Agreement between Netherlands and Indonesia, the UN would administer West Irian, which was under Dutch colonial rule, until the full administrative control over the territory was transferred to the Indonesian government, which claimed to have the rightful title over the territory.[15] The same Agreement further stipulated that after the transfer of full administrative responsibility to Indonesia, a Special Representative to the Secretary General would be appointed to participate in arrangements for the self-determination of West Irianese population which would be the main responsibility of Indonesia.[16]

The UNGA Resolution 1752 (XVII) establishing the UNTEA on September 1962, took note of the New York Agreement entrusting the UNTEA with broad powers and responsibilities including maintaining the law and order,[17] guaranteeing fully the rights of the inhabitants of the territory[18] and power to promulgate new laws and regulations.[19] The UNTEA administered West Irian until the transfer of administration of the territory to Indonesia on May 1963. As result of act of free choice that took place, in accordance with Indonesian practice, on the territory

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[14] UN General Assembly Official Records, 17th Session, 1127th Plenary Meeting (21 September 1962).

[15] Agreement Between the Republic of Indonesia and The Kingdom of Netherlands Concerning West New Guinea (West Irian) (adopted 15 August 1962, entered into force 21 September 1962) 27 UNTS 6311 (the New York Agreement) arts V, XVII, XII. The United Nations Administrator as the chief executive officer of the UN administration would be under the direction of the Secretary General and would have the full authority to administer the territory.

[16] ibid arts XVI-XVIII.

[17] For this purpose, the New York Agreement (ibid) stipulated that a United Nations Security Force (UNSF) would assist the UNTEA (art VII).

[18] The rights to be guaranteed by UNTEA included the rights of free speech, freedom of movement and of assembly (ibid) art XXII.

[19] UNTEA could promulgate new laws and regulations on condition that they were ‘within the spirit and the framework’ of the New York Agreement and the Representative Councils were consulted before the new laws and regulations were promulgated (ibid) art XI.

between July-August 1969, the representatives of the West Irianese population have chosen to remain with Indonesia.[20]

Namibia (South West Africa)[21] was the last territory to be administered by the UN before the end of the Cold War. The General Assembly terminated South Africa's mandate over Namibia in October 1966 and decided to assume direct responsibility for the territory until its independence in accordance with the inalienable right of the people of Namibia to freedom and independence in accordance with the UN Charter and the Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Res 1514 (XV) of 14 December 1960).[22] A UN Council for South West Africa (later named as Council for Namibia) was established and was entrusted with the mandate to administer the territory with the assistance of a UN Commissioner. The Council's mandate consisted of maintenance of the law and order, promulgation of laws, decrees and administrative regulations that are necessary for the administration of the territory until a legislative assembly is established following elections conducted on the basis of universal suffrage.[23] However, South Africa did not withdraw from the territory in contravention of the resolutions and decisions of the General Assembly and the Security Council, as well as of the Advisory Opinion of the ICJ on *Legal Consequences for States of the Continued Presence of South Africa*

[20] UNGA Res 2504 (XXIV) (19 November 1969).

[21] The name of the territory was changed from South West Africa to Namibia by UNGA Res 2372 (XXII) (12 June 1968).

[22] UNGA Res 2145 (XXI) (27 October 1966); UNGA Res 2325 (XXII) (16 December 1967).

[23] UNGA Res 2248 (S-V) (19 May 1967) [II, 1(b)]; UNSC Res 245 (25 January 1968) UN Doc S/RES/245, UNSC Res 246 (14 March 1968) UN Doc S/RES/246, UNSC Res 264 (20 March 1969) UN Doc S/RES/264.

*in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.[24] In order for the people of Namibia to freely determine their own future, the UN decided to supervise and control free elections to be held on the territory and decided to establish the United Nations Transition Assistance Group (UNTAG) in 1978 for that purpose.[25]

### 3. The Post Cold War Experience

The revival of the UN collective security system post Cold War led to the increase in the decisions to establish UN peacekeeping operations as the paralyzing effect of the veto was felt less. Goulding points out that in 1992 the UN peacekeeping activity increased almost five-fold.[26] The deployment of the UNTAG in Namibia in 1989,[27] more than ten years after the initial UN Security Council decision to establish the force was adopted, initiated a model for the UN post-conflict administrations that would follow in the post Cold War era. The UNTAG, according to the Secretary-General was a 'unique' operation at the time, consisting of a civilian component and a military component acting at the disposal of the Special Representative to the Secretary-General to work together towards the overall mandate to ensure the early independence of Namibia through free elections under the supervision and control of

[24] UNSC Res 276 (30 January 1970) UN Doc S/RES/276; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16.

[25] UNSC Res 385 (30 January 1976) UN Doc S/RES/385; UNSC Res 435 (29 September 1978) UN Doc S/RES/435.

[26] Goulding (n 13) 451.

[27] UNSC Res 632 (16 February 1989) UN Doc S/RES/632.

the United Nations.[28] The work of UNTAG was expected to proceed in successive stages, starting with annulment of the discriminatory laws for the conduct of free and fair elections, the release the political prisoners and the return of the refugees, ending with the adoption and entry into force of a Constitution of Namibia and consequent achievement of independence.[29] In April 1990, Namibia joined the United Nations as an independent state.

Compared to the UNTAG, the UN intervention in Cambodian conflict was more intrusive in domestic matters despite that the United Nations Transitional Authority in Cambodia (UNTAC) co-existed and shared the powers of administration with-a 'sui generis body'[30]-the Supreme National Council that acted as the *de facto* government of Cambodia until a new government was established.[31] The UN's involvement in Cambodia was regulated by the Agreement on a Comprehensive Political Settlement of the Cambodian Conflict adopted in 1991.[32] Similar to UNTAG and UN post-conflict administrations to follow, UNTAC consisted of a civilian and a military component under the overall control of the Special Representative to the Secretary-

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[28] Report of the Secretary-General submitted pursuant to paragraph 2 of Security Council Resolution 431 (1978) Concerning the Situation in Namibia (29 August 1978) UN Doc S/12827 [8]; UNSC Res 435 (n 25) [3].

[29] Proposal for a Settlement of the Namibian Situation (10 April 1978) UN Doc S/12636; UN Doc S/12827 (ibid) [14]

[30] E De Wet, 'The Direct Administration of Territories by the United Nations and its Member States in the Post Cold- War Era: Legal Bases and Implications for National Law' (2004) 8 Max Planck Yearbook of United Nations Law 297.

[31] See Agreement on a Comprehensive Political Settlement the Cambodia Conflict (signed 23 October 1991) 28613 UNTS 27 section II, art 3: 'The Supreme National Council [the SNC] is the unique legitimate body and source of authority in which, throughout the transitional period, the sovereignty, independence and unity of Cambodia are enshrined.'

[32] ibid art 6, Annex 1.

General.[33] In accordance with Article 6 of the Agreement on a Comprehensive Political Settlement of the Cambodian Conflict, the UNTAC was delegated administrative powers in various areas, e.g. the foreign affairs, national defence, finance, public security and information. The mandate of the Transitional Authority was broad. All the administrative agencies, bodies and offices would be under its authority.[34] The Special Representative to the Secretary-General had the power to assign the UN Personnel to all administrative agencies, bodies and offices and to remove them from office.[35] The UNTAC had legislative power with respect to the conduct of the free and fair elections, 'including the adoption of an electoral law.'[36] The mandate further included the judicial power to investigate and punish human rights violations.[37] The UN administration lasted until a Constitution for Cambodia was promulgated and a new government was formed in 1993.

In the same year the UNTAC was established, a UN mission was simultaneously performing administrative tasks in Western Sahara. The United Nations Mission for the Referendum in Western Sahara (MINURSO) had the specific mandate to assist the Secretary- General to fulfill his 'sole and exclusive' responsibility over matters in relation to a referendum after which the people of Western Sahara would either become independent or integrate with Morocco.[38] The MINURSO had specifically taken part in monitoring the demining process in the region and has given assistance

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[33] ibid art 2.

[34] ibid Annex 1, section B [1].

[35] ibid Annex 1, section B [4a], [4b].

[36] ibid Annex 1, section D [3(a)].

[37] ibid Annex 1, section E [c].

[38] UNSC Res 690 (29 April 1991) UN Doc S/RES/690.

to Western Saharan Refugees in the implementation of the enhanced refugee protection programme developed by the Office of the United Nations High Commissioner for Refugees.[39] Despite the fact that the UN has neither a direct human rights protection mandate in Western Sahara nor a staff dedicated to monitor the human rights situation, the Secretary-General found it pertinent to point out that the protection of human rights is intrinsic to all UN operations including the MINURSO whereby he stated that 'the United Nations recognizes its duty to uphold human rights standards in all its operations including those relating to Western Sahara.'[40] The importance of improving the human rights situation in Western Sahara has been reiterated in the subsequent UN Security Council Resolutions extending the mandate of the MINURSO that will continue its operations on the Western Saharan territory until 30 April 2014, with a possible extension of its mandate in the near future.[41]

The UN experience in Somalia in the early 1990s necessitated a more broad, more intrusive mandate in the face of total lack of functioning administrative structures on the Somali territory. Initially, a UN Operation in Somalia (UNOSOM I) was established to monitor the ceasefire agreements between the warring factions on the territory, after the downfall of the President of Somali in 1991, and to enable the free movement of humanitarian convoys and safe delivery of humanitarian aid.[42] As the conflict escalated and the humanitarian situation on the territory deteriorated, the UN

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[39] Report of the Secretary General on the Situation Concerning Western Sahara (13 April 2009) UN Doc S/2009/200 [29-32], [34].

[40] ibid [48].

[41] See for instance UNSC Res 1871 (30 April 2009) UN Doc S/RES/1871; UNSC Res 1979 (27 April 2011) UN Doc S/RES/1979; UNSC Res 2099 (25 April 2013) UN Doc S/RES/2099.

[42] UNSC Res 751 (24 April 1992) UN Doc S/RES/751.

Operation in Somalia II (UNOSOM II), established from 1993, necessitated a more strong mandate; UNOSOM II was charged with disarmament of Somali factions, implementation of an arms embargo, to create conditions for the return of refugees and displaced persons and to assist the people of Somalia to re-establish political institutions and to rehabilitate their economy.[43] The Operation included important divisions with major tasks such as assistance for the re-establishment of the Somali police force, the rehabilitation of prisoners and the introduction of an interim judicial system[44] until Transitional National Council decides on the type of the judicial system to be adopted in Somalia.[45] Further, UNOSOM II held investigations into the violations of international humanitarian law by all Somali factions.[46]

UNOSOM II had to be withdrawn -before its mission was completed- in 1995 after it had become the target of attacks by the Somali factions.[47] No political success was achieved, as the Somalia factions were not committed to reach a settlement.[48]

From December 1995 until July 2002, the UN exercised a wide range of administrative functions in Bosnia and Herzegovina. In accordance with Annex 11 of the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), the Security Council established an International Police Task

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[43] UNSC Res 814 (26 March 1993) UN Doc S/RES/814 [5], [7], [9-10], [12].

[44] Further Report of the Secretary General Submitted in Pursuance of Paragraph 18 of Resolution 814 (1993) (17 August 1993) UN Doc S/26317 [11], Annex 1.

[45] Further Report of the Secretary General Submitted in Pursuance of Paragraph 4 of Resolution 886 (1994) (6 January 1994) UN Doc S/1994/12 [14-16].

[46] UNSC Res 814 (n 43) [13].

[47] Report of the Secretary-General on the Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa (13 April 1998) UN Doc A/52/87-S/1998/318 [31].

[48] ibid [31].

Force and a United Nations Civilian Police for an initial period of one year that came to be known as the United Nations Mission in Bosnia and Herzegovina (UNMIBH).[49] The UNMIBH's main tasks were to monitor, observe and inspect law enforcement activities and facilities, and to advice and train the law enforcement personnel.[50] The UNMIBH, headed by the Special Representative of the Secretary-General and the Coordinator of the UN Operations in Bosnia and Herzegovina, had closely worked with the other *ad hoc* and civilian component in Bosnia and Herzegovina; the Office of the High Representative (OHR) that derives its power from Annex 10 of the Dayton Peace Agreement and is responsible from overseeing the implementation of the civilian aspects of the said agreement.[51]

During its existence, the Security Council mandated UNMIBH to perform additional tasks. These included, giving advice to law enforcement agencies on democratic policing principles with full support for human rights, the investigation or assisting with the investigation of allegations of human rights abuses by law enforcement officials,[52] the establishment of a programme to monitor and asses the court system in Bosnia and Herzegovina as part of an overall legal reform programme coordinated by the High Representative.[53] The UNMIBH was terminated on December 2002 after the successful completion of its mandate. According to the Secretary-General 'through UNMIBH, the United Nations has demonstrated its ability to complete a complex

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[49] General Framework Agreement for Peace in Bosnia and Herzegovina (signed 14 December 1995) 35 ILM 89, Annex 11 (Dayton Peace Agreement); UNSC Res 1035 (21 December 1995) UN Doc S/RES/1035.

[50] Dayton Peace Agreement (n 49) Annex 11 art III, 1.

[51] Conclusions of the Peace Implementation Conference (8-9 December 1995) UN Doc S/1995/1029.

[52] UNSC Res 1088 (12 December 1996) UN Doc S/RES/1088.

[53] UNSC Res 1184 (16 July 1998) UN Doc S/RES/1184 [1].

mandate in accordance with a strategic plan and within a realistic and finite time frame.'[54]

The United Nations Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium (UNTAES) set up from January 1996, in accordance with the Basic Agreement on the Region of Eastern Slavonia, Baranja, and Western Sirmium signed between the Government of the Republic of Croatia and the local Serbian Community,[55] had been one of the UN operations with a 'complex mandate but a finite time frame.' The UNTAES was initially established for a period of 12 months to help reintegrate the Region peacefully into Croatia's legal and constitutional system.[56] To achieve this aim, the Transitional Administration was to perform various tasks. These included to introduce schedules and procedures for the supervision of demilitarization of the region,[57] to facilitate the return of the refugees and the displaced persons,[58] to establish a temporary police force, to monitor the prison system,[59] to supply public services,[60] to assist the development and economic

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[54] Report of the Secretary General on the United Nations Mission in Bosnia and Herzegovina (2 December 2002) UN Doc S/2002/1314 [27].

[55] Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium (signed 12 November 1995) UN Doc A/50/757- S/1995/951.

[56] UNSC Res 1037 (15 January 1996) UN Doc S/RES/1037.

[57] ibid [1(a)].

[58] ibid [1(b)].

[59] ibid [11(a)].

[60] ibid [11(c)].

construction of the region[61] and to monitor the respect for human rights and fundamental freedoms.[62]

The Security Council extended the UNTAES' mandate twice[63] and the operation came to end after having accomplished the reintegration of Eastern Slavonia, Baranja and Western Sirmium in Croatia.

The UN Mission in Kosovo (UNMIK) and the United Nations Transitional Administration in East Timor (UNTAET) of 1999 have been recent and often discussed examples of the UN post-conflict administrations. In both instances, a full scale of governance of a territory was placed under the auspices of the UN.

Notwithstanding the fact that the UNSC Res 1244[64] establishing the UNMIK articulated the respect for the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, the UN was empowered with complete legislative, executive and the judicial authority, taking over almost all the powers of governance from the Serbian authorities.[65] The paramount authority of the administration became operative through regulations issued by the Special Representative to the Secretary-General, as the Head of the Mission in Kosovo.[66] The Special Representative was explicitly empowered to change, repeal or suspend existing laws if they were incompatible with

[61] ibid [11(f)].

[62] Ibid [12].

[63] UNSC Res 1079 (15 November 1996) UN Doc S/RES/1079, UNSC Res 1120 (14 July 1997) UN Doc S/RES/1120.

[64] UNSC Res 1244 (n 5).

[65] ibid [11].

[66] ibid [6].

the mandate, aims or purposes of UNMIK.[67] The mission was mandated for an indefinite period of time to fulfill its main responsibility to promote the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo.[68] In fulfilling its mandate, the UNMIK had the support of other international organizations: Organization for Security and Co-operation in Europe (OSCE) has worked closely with UNMIK in democratization and institution building process; the European Union has supported reconstruction and economic recovery and the UN High Commissioner for Refugees (UNHCR) has been actively involved in humanitarian assistance.[69]

The progressive transfer of the administrative responsibilities to local institutions has been an important aspect of the administration.[70] In that respect the establishment of the Assembly of Kosovo on 17 November 2001 was considered as an initial great success.[71] Around seven years after its establishment, the Assembly of Kosovo adopted a 'Declaration of Independence' declaring that Kosovo is a sovereign and independent state.[72] With the entry into force of the 'Constitution of the Republic of Kosovo' on 15 June 2008, the Kosovo authorities intensified efforts to assert

[67] Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo (12 July 1999) UN Doc S/1999/779 [39]; UNMIK Regulation No 1999/1 on the Authority of the Interim Administration in Kosovo (25 July 1999) UNMIK/REG/1999/1 as amended by UNMIK Regulation No 1999/25 (12 December 1999) UNMIK/REG/1999/25 and UNMIK Regulation No 2000/54 (27 September 2000) UNMIK/REG/2000/54.

[68] UNSC Res 1244 (n 5) [11(a)].

[69] UN Doc S/1999/779 (n 67); See Shaw (n 3) 404-405.

[70] UNSC Res 1244 (n 5) [11(d)-(f)].

[71] Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo (15 January 2002) UN Doc S/2002/62, section II, A [3].

[72] Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo (28 March 2008) UN Doc S/2008/211 [3].

Kosovo's statehood.[73] The government of Serbia has not recognized Kosovo as a sovereign state yet but progress was achieved between two sides in some areas of dialogue such as initialing an agreement on principles governing the normalization of relations; the parties further undertook not to block other side's progress in their respective EU integration progress.[74]

Another important development has been the deployment of the European Union Rule of Law Mission in Kosovo (EULEX) from December 2008.[75] The central mission of the EULEX is to assist the Kosovo institutions, judicial authorities and law enforcement agencies in the rule of law area, specifically in the development and empowerment of judicial, police and custom areas.[76] On the other hand, the UNSC Res 1244 remains in force and the UNMIK continues to perform its roles within the framework of the said resolution, despite the changing circumstances on the ground. The major tasks of the Mission-to promote security, stability and respect for human rights in Kosovo remain unchanged. The EULEX works within the framework of

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[73] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (24 November 2008) UN Doc S/2008/692 [2]. As of 2013, the number of states that recognizes Kosovo is ninety one (for an updated list of states that recognize Kosovo see http://www.president-ksgov.net/?page=2,54), twenty one of them declared their recognition after the ICJ delivered its decision concerning *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403.

[74] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (30 April 2013) UN Doc S/2013/254 [3-7].

[75] The mission began operations on 9 December 2008 and became fully operational in April 2009 (http://www.consilium.europa.eu/showPage.aspx?id=1458&lang=EN accessed 25 January 2010).

[76] Council of the European Union, 'Joint Action on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo' (4 February 2008) 2008/124/CFSP.

UNSC Res 1244 and is expected to consistently co-ordinate with UNMIK at both operational and strategic levels.[77]

The ‘twin’ administration of UNMIK, the United Transitional Administration in East Timor (UNTAET), established from October 1999, had ‘the overall responsibility for the administration of East Timor’ and was ‘empowered to exercise all legislative and executive authority, including the administration of justice.’[78] Until East Timor became an independent state on 20 May 2002, the UNTAET held the decision making power on providing security, maintaining law and order, establishing an effective administration, assisting in development of civil and social services, ensuring the coordination and delivery of humanitarian assistance, rehabilitation and development assistance, supporting capacity building for self government and assisting the establishment of conditions for sustainable development.[79] On the very same day East Timor declared independence, the UNTAET’s mandate came to an end. Nevertheless, a peacekeeping force, the United Nations Mission of Support in East Timor (UNMISET)[80] had to succeed the UNTAET, as there were still short term and longer-term security and stability issues, presenting challenges for the newborn State. The UNMISET existed alongside the Timorese government. Still, it exercised crucial administrative powers. These include, providing assistance to core administrative structures critical to the viability and political stability of East Timor, assuming responsibility in interim law enforcement and public security-including the

[77] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (29 October 2010) UN Doc S/2010/562 [4].

[78] UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272 [1].

[79] ibid [2].

[80] UNSC Res 1410 (17 May 2002) UN Doc S/RES/1410.

establishment of the East Timor Police Service, and contributing to the maintenance of external and internal security of East Timor.[81]

Further, the UNMISET assisted the government in financial and central services, internal systems in the Council of Ministers, the Chief Minister's Office and various other ministries, in supplying basic services such as water and sanitation and in the legal and justice systems.[82] The UNMISET's mandate expired on 20 May 2005 after 'important progress has been made towards building the capacity of Timorese state institutions.'[83]

## 4. The Legal Status of UN Post-conflict Administrations

There is no explicit legal basis for the establishment of post-conflict administrations in the UN Charter, but nor is there for many other actions authorized by the UN.[84] Besides, the Security Council does not always finds it necessary to invoke a particular article or a Chapter of the UN Charter as the legal basis of its actions. Today, our understanding of the powers and the functions of the Security Council is shaped by a broad interpretation of its role in 'maintenance of the international peace and security' (Article 24) and the nature of actions it can undertake under Chapter VII in response to 'threat to the peace' or 'the breach of the peace' (Article 39). Accordingly, the

[81] ibid [2].

[82] Report of the Secretary General on the United Nations Transitional Administration in East Timor (17 April 2002) UN Doc S/2002/432 [70].

[83] Report of the Secretary General on the United Nations Transitional Administration in East Timor (12 May 2005) UN Doc S/2005/310, section III A, [9].

[84] Charter of the United Nations, San Francisco (signed 26 June 1945, entered into force 24 October 1945) UNCIO XV 335; R Caplan, 'Transitional Administration' in V Chetail (ed), *Post-Conflict Peacebuilding – A Lexicon* (OUP 2009) 362.

Secretary-General pointed out that […] the language of Chapter VII is inherently broad enough, and has been interpreted broadly enough, to allow the Security Council to approve any coercive action at all, including military action, against a state when it deems this 'necessary to maintain international peace and security.'[85] In other words, the legal basis for the actions of the Security Council could be found in the implied or the customary powers of the organ.[86] It was already recognized back in the 1940s in the Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the United Nations* that 'the rights and duties of an entity […] must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.'[87] Further, such broad understanding of the powers and functions of the Security Council does not only include Chapter VII powers but also seems to extend to any other act of the Council under the Charter.[88]

A prominent example has been the United Nations Peacekeeping practice that has not been provided for in the UN Charter but is developed through UN practice, and therefore is significantly referred as Chapter 6 ½ powers.[89]

The UN doctrine has an evolutionary perspective on peacekeeping. Traditionally, peacekeeping had been considered as a technique to 'help control and resolve armed

[85] Report of the Secretary-General's High Level Panel on Threats, Challenges and Change (2 December 2004) UN Doc A/59/565 [193].

[86] See De Wet (n1) 308-312.

[87] *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, ICJ Reports 1949, 174, 180.

[88] *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion, ICJ Reports1962, 155, 167.

[89] R Wedgwood, 'The Evolution of United Nations Peacekeeping' (1996) 28 Cornell Intl' L J 631, 636.

conflicts.'[90] While there is no agreed definition of it, the purpose of peacekeeping according to the UN is to 'bridge the gap between the cessation of hostilities and a durable peace,' however fragile, by assisting the negotiations or the implementation of the agreements achieved by the hostile parties.[91]

Initially peacekeeping was developed to deal with the inter-state conflicts, however by the 1990s it has increasingly been used in intra-state conflicts. The UN Handbook on United Nations Multidimensional Peacekeeping Operations (the UN Handbook) points out that peacekeeping has evolved from a traditional model of observing cease-fires, patrolling buffer zones to 'multi-dimensional' peacekeeping including many components such as military, civilian police, political, civil affairs, rule of law, human rights, humanitarian, reconstruction, public information and gender.[92]

According to the UN Handbook the administration of territories is one of the aspects of the multidimensional peacekeeping. Peace operations may be required to 'administer a territory for a transitional period, thereby carrying out all the functions that are normally the responsibility of a government.'[93] The Handbook notes that the military still remains vital to most operations however a growing number of tasks have been taken on by civilians.[94]

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[90] Goulding (n 13) 452.

[91] DPKO, 'Peacekeeping Best Practices Unit, Handbook on United Nations Multidimensional Peacekeeping Operations' (December 2003) (the UN Handbook) 1.

[92] ibid.

[93] ibid 2.

[94] ibid.

A post-conflict administration has been considered as a byproduct of the UN Peacekeeping. It has rarely been considered as 'a stand-alone' concept.'[95] Around five years after the publication of the UN Handbook, a recent UN Peacekeeping Operations key guidance document (the Capstone Doctrine,) reiterated this perception in its foreword by stating that

> 'Beyond simply monitoring cease-fires, today's multidimensional peacekeeping operations are called upon to facilitate the political process through the promotion of national dialogue and reconciliation, protect civilians, assist in the disarmament, demobilization and reintegration of combatants, support the organization of elections, protect and promote human rights, and assist in restoring the rule of law.'[96]

The Capstone Doctrine further expressed in clear terms that the multi-dimensional peacekeeping operations could temporarily assume the legislative and administrative powers of a State to facilitate the transfer of authority form one sovereign to another, or to resolve the sovereignty questions, or to introduce administrative structures in a territory.[97]

It has been suggested that the legal basis of the post-conflict administrations derives not only from the UN Peacekeeping practice but also from the notion that it is the responsibility of the international community to rebuild the states and the territories shattered by conflict.[98] The aftermath of a conflict offers opportunities for providing

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[95] Stahn (n1) 12.

[96] DPKO, United Nations Peacekeeping Operations, Principles and Guidelines' (2008) (Capstone Doctrine) available at < http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf> 6 accessed 2 January 2009.

[97] ibid [22].

[98] Caplan (n 84) 363.

security and for facilitating a political process increasing the national capacity to succeed in peacebuilding efforts.[99] Success in these areas means increasing 'the chances for sustainable peace' and reducing 'the risk of relapse into conflict.'[100] The responsibility to rebuild has been considered as one of the three components, the other two being the responsibility to prevent and the responsibility to react, of a recently emerging concept: 'The responsibility to protect'. It was the International Commission on Intervention and State Sovereignty (ICISS) that highlighted the responsibility to protect in its report on December 2001.[101] The Report defined the responsibility to rebuild as 'to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or overt.'[102] It further noted the necessity to commit genuinely to build a durable peace, to promote good governance and sustainable development.[103] A number of ICISS's key recommendations were taken up by the High-Level Panel on Threats, Challenges and Change[104] and the Secretary- General's subsequent report entitled 'In Larger Freedom: Towards Development Security and Human Rights for All.'[105] These developments were

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[99] See UNGA Res 60/180 (30 December 2005).

[100] Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of the Conflict (11 June 2009) UN Doc A/63/881-S/2009/304 [3].

[101] Report of the International Commission on Intervention and State Sovereignty (ICISS) *The Responsibility to Protect* (December 2001) available at <http://www.responsibilitytoprotect.org/index.php/publications/core-rtop-documents>accessed 10 January 2010.

[102] ibid XI.

[103] ibid [5.1].

[104] See UN Doc A/59/565 (n 85).

[105] Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights For All' (21 March 2005) UN Doc A/59/2005.

considered at the 2005 World Summit and the approach to the responsibility to protect was shaped mainly by the outcome of the World Summit.[106]

In his report on implementing the Responsibility to Protect, the Secretary-General refers to the conclusions of the World Summit when he states that it was accepted that the responsibility to protect applies, until the Member States decide otherwise, only to four crimes, namely genocide, war crimes, ethnic cleansing and the crimes against humanity.[107] He states that an effort to extend it to cover other crimes and violations would 'undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.'[108] The scope of the responsibility to protect is kept narrow while the response is expected to be deep, necessitating various prevention and protection instruments available to Member States, the United Nations system, regional and sub-regional organizations and their civil society partners.[109] The responsibility to protect cannot stand alone as the legal basis of post-conflict administrations as none of these administrations were mandated specifically in connection with these crimes. In any case, the history of the post-conflict administrations dates back long before the introduction of the responsibility to protect.

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[106] See 2005 World Summit Outcome (15 September 2005) UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 [138-139].

[107] Report of the Secretary-General on Implementing the Responsibility to Protect (12 January 2009) UN Doc A/63/677 [10 (b)].

[108] ibid.

[109] ibid [10 (c)].

### 4.1. The Relevance of Host State 'Consent' for UN Post-conflict Administrations

If the legal basis of a post-conflict administration is to be found in the peacekeeping practice of the UN, the authority of the post conflict administration will traditionally flow from the 'consent' given by the host state. The rule that force can only be used in self-defence, impartiality and the requirement to obtain the consent of the host state have been accepted as the fundamental characteristics of the UN peacekeeping in the traditional sense.[110] However, in practice the Security Council Resolutions adopted under Chapter VII, of which the consent of the host state is not a prerequisite, often sets the framework for post-conflict administrations.

In contrast to traditional peacekeeping that requires the consent of the host state and limits the use of force only to self-defence, enforcement operations authorized by the Security Council, in response to threats to the peace or breaches of the peace, under Chapter VII are non-consensual and allow use of force to fulfill their mandate.

This distinction between peacekeeping and peace enforcement operations has not always been easily maintained. Peacekeeping operations have increasingly been granted mandates that allowed them to use force in situations other than strictly required conditions of self-defence. These actions have been considered as limited than enforcement actions under Article 42, namely 'peacekeeping operations under Chapter VII'[111] or 'robust peacekeeping.'[112]

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[110] Goulding (n 13) 453- 455; See J Sloan, 'Use of Offensive Force in UN Peacekeeping: A Cycle of Boom and Bust' (2006) 30 Hastings Int'l & Comp L Rev 385, 386.

[111] Bowett (n 12) 414.

[112] The Capstone Doctrine (n 96) 19.

The self-defence principle has been interpreted broadly[113] since 1970s to include the protection of the civilians or the defence of the mandate but this authority has been rarely used due to concerns about the possible loss of impartiality of the UN forces.[114]Despite robust mandates shaped by the tendency to interpret self-defence broadly, the relevance of consent in peacekeeping has not been ruled out. According to the Report of the Panel on United Nations Peace Operations (the Brahimi Report) of 2000, consent should remain as one of the 'bedrock principles of UN peacekeeping.'[115] Further, to distinguish between robust peacekeeping and peace enforcement and to emphasize that the consent is still relevant in that distinction, it has been stated in the Capstone Doctrine that 'while robust peacekeeping involves the use of force at the tactical level with the consent of the host authorities and/or the main parties to the conflict, peace enforcement may involve the use of force at the strategic or international level.'[116]

For UN post-conflict administrations with partial or full administrative prerogatives, the principle of consent has been crucial as it signaled the commitment by the parties to resolve the conflict, to initiation of a political process and the acceptance that the UN was there to support that process. In the lack of such consent, as in all peace-

[113] See Report of the Secretary General on the Summary Study of the Experience Derived from the Establishment and Operation of the Force (9 October 1958) UN Doc A/3943 [179].

[114] Goulding (n 13) 455.

[115] Report of the Panel on Peacekeeping Operations (The Brahimi Report) (21 August 2000) UN Doc A/55/305-S/2000/809 [48]; T Findlay, 'The Use of Force by Peacekeepers Beyond Self Defence: Some Politico-Legal Implications' in A Morrison, D Fraser & J Kiras (eds), *Peacekeeping With Muscle, The Use of Force in International Conflict Resolution* (Canadian Peacekeeping Press 1997) 51, 52.

[116] The Capstone Doctrine (n 96) 19.

keeping operations, the UN would risk becoming an adversary and being drawn to the conflict.[117]

The term consent should further be understood to include more than the consent of the parties to the conflict: It also refers to the consent of the other member states for the establishment of a peacekeeping operation or to contribute forces to it.[118] It is probably fair to conclude in that respect that a broad level of consent has been achieved with regard to the establishment of post-conflict administrations as some of them were directly authorized by the General Assembly, or the Security Council Resolutions authorizing them were endorsed by the General Assembly, and in line with the UN peacekeeping practice, the expenses of the UN post-conflict administrations were accepted as the expenses of the Organization denoting, an indirect support.[119]

In instances where the establishment of a post-conflict administration is based on a preceding agreement between the parties to a conflict, the argument that the consent forms the legal basis of the administration is easier to sustain.[120] However, in majority of the cases the authorizing UN resolution refers to a preceding agreement or the

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[117] ibid 31.

[118] See Sloan (n 110) 386; De Wet (n 1) 7.

[119] Concurring De Wet (n1) 7; See for instance UNGA Res 46/118 (20 November 1991) on the Situation in Cambodia; UNGA Res 53/164 (25 February 1999) on the Situation of Human Rights in Kosovo; See UNGA Res 53/241 (19 August 1999) on Financing of the UNMIK ‘recognizing that the costs of the mission are expenses of the Organization to be borne by Member States in accordance with Article 17, paragraph 2 of the Charter of the United Nations’, similarly see UNGA Res 53/234 (9 July 1999) on Financing the UNTAES and UNGA Res 54/246 C (21 July 2000) on Financing the UNTAET.

[120] For instance the establishment of UNTEA and UNTAC were based on respective agreements between the parties to the conflict. In the case of UNTEA, the UNGA Res 1752 (XVII) (21 September 1962) and for UNTAC, the UNSC Res 745 (28 February 1992) UN Doc S/RES/745 referred to those agreements.

consent of the conflicting parties while at the same time it bestows upon the administration an implicit or an explicit Chapter VII mandate. Therefore, the legal basis of the administrations is hard to decipher.

The debate on the legal basis and the relevance of consent dates back to ONUC. Thus with regard to ONUC, the invitation by the Congo Government to the United Nations has been emphasized repeatedly.[121] On the other hand, as the civil war and violence escalated in Congo, the General Assembly called on the Secretary-General to take 'vigorous' action and to 'assist the Central Government […] in the restoration and maintenance of law and order throughout the territory.'[122] In the aftermath of the murder of the Congolese Prime Minister on February 1961, the Security Council, deeply concerned at the threat to international peace and security authorized ONUC to take 'all appropriate measures to prevent the occurrence of civil war in the Congo, including arrangements for cease-fires, the halting of all military operations, the prevention of clashes, and the use of force, if necessary in the last resort.'[123] On November 1961, the Security Council authorized the ONUC to take further 'vigorous action, including the requisite measure of force, if necessary, for the immediate apprehension, detention […] or deportation of all foreign military and paramilitary personnel […] and mercenaries.'[124]

[121] UNSC Res 143 (n 8) preamble, [2]; First Report by the Secretary General on the Implementation of Security Council Resolution S/4387 CF 14 July 1960 (18 July 1960) UN Doc S/4389: '[…] the force introduced [the ONUC] is to be regarded as temporary security force, present in the Republic of the Congo with the consent of the government for the time and the purpose indicated.'

[122] UNGA Res 1474 (ES-IV) (20 September 1960) [2].

[123] UNSC Res 161 (n 9) [1].

[124] UNSC Res 169 (n 10) [4].

The resemblance of the language of the Security Council Resolutions on the Congo to the 'all necessary means' language of the Resolutions under Chapter VII authorizing an enforcement force, and the coercive nature of the Force itself raised controversy regarding its nature. Despite that some suggested that ONUC was an enforcement force,[125] the ICJ, in a way, foreclosed the discussion by ruling that the Force was not an enforcement force.[126] In its ruling, the Court emphasized the importance of consent in distinguishing peacekeeping from enforcement.

In instances of complete collapse of governments, there has been an additional problem as to whose consent is to be obtained or whether true consent may be obtained. Such was the problem in the Somalia during the 1990s, when the already UN presence in the territory was intensified with the establishment of UNOSOM II. In the absence of an effective government, the Security Council had to address its Resolutions to the 'Somali people, including movements and factions.'

It was observed by the Secretary-General that due to the continuing threat to peace and security in the territory, UNOSOM II should be endowed with enforcement powers under Chapter VII of the UN Charter.[127] In response to Secretary- General's statements, the Security Council, acting under Chapter VII, granted UNOSOM II with a wide range of enforcement powers. These included if required taking appropriate

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[125] Findlay called ONUC a mission 'that would […] take peacekeepers beyond peacekeeping into peace enforcement (Findlay (n 115) 51); McCoubrey & White pointed out that ' [ONUC] amounted to *de facto* enforcement action' (H McCoubrey & N White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996) 53); on the other hand Bowett stated that 'certainly ONUC was not a force created under Article 42; the purposes of the Force were essentially different from those for which, at San Francisco, forces used under Article 42 were contemplated' (Bowett (n 12) 176.

[126] *Certain Expenses of the United Nations* (n 88) 166.

[127] Further Report of the Secretary-General Submitted in Pursuance of Paragraphs 18 and 19 of Resolution 794 (1992) (3 March 1993) UN Doc S/25354 [58].

action against any faction violating the cease-fire, disarming the factions and taking forceful action against the attacks and the threats of attacks against the UN personnel or property and that of its agencies, the ICRC and the NGOs.[128]

After twenty- five peacekeepers were killed in violent armed attacks on 5 June 1993, the Security Council again acting under Chapter VII reaffirmed that the Secretary General is authorized to take 'all necessary means against all those responsible for the armed attacks'[129] against the peacekeepers.

As the violence in Somalia escalated and the causalities continued to grow,[130] the Security Council, still acting under Chapter VII, had to reduce the size of the UNOSOM II and limit its mandate.[131] Despite the fact that UNOSOM II used force amounting to enforcement, it has still been classified as peacekeeping.[132]

Further important examples of the dichotomy between the consent and Chapter VII mandates have been observed with respect to the fully-fledged post-conflict administrations first in Eastern Slavonia, Baranja and Western Sirmium (UNTAES) and later in Kosovo (UNMIK) and East Timor (UNTAET followed by UNMISET). The UNSC Res 1037 establishing the UNTAES under Chapter VII reaffirmed the commitment to the independence, sovereignty and territorial integrity of the Republic

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[128] UNSC Res 814 (n 43) [5].

[129] UNSC Res 837 (6 June 1993) UN Doc S/RES/837 [5].

[130] On 3 October 1993, the US troops organized a raid against the factions that resulted in the death of 18 soldiers and hundreds of civilians. The US had ordered to withdraw its forces on February 1994 (Sloan (n 110) 416.

[131] UNSC Res 897 (4 February 1994) UN Doc S/RES/897.

[132] The UN Handbook (n 91) 27; See UNGA Res 48/239 (18 April 1994) on Financing of the United Nations Operation in Somalia II.

of Croatia in its preamble. The preamble further emphasized that the territories to be administered were integral parts of the Republic of Croatia. Apart from this recognition that UNTAES would be there only to administer the territories temporarily, the consent to its presence was implied where it was stated that the Security Council supports the Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium between the Republic of Croatia and the Federal Republic of Yugoslavia.[133] The UNSC Res 1037 itself articulates expressively that the UNTAES is a peacekeeping force.[134] However, the Security Council acted under Chapter VII with the possible justification of ensuring the security and the freedom of movement of the UN peacekeeping personnel. Indeed, the UNTAES was composed of a civilian and military component endowed with broad tasks in a volatile setting that could risk the safety of the UN personnel.

Similarly, when establishing the UNMIK the Security Council relied on both the consent and the Chapter VII mandate. In deciding the deployment of the UN administration in Kosovo, the Council welcomed the consent of the Federal Republic of Yugoslavia to such presence.[135] Still, the Security Council acted under Chapter VII to 'ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present [UNSC Res 1244] resolution.'[136] According to Gray, the invocation of Chapter VII powers, in this context, were necessary not to give UNMIK 'any wide right to use force, but, first, to

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[133] The UNSC Res 1037 (n 3); Report of the Secretary-General Pursuant to Security Council Resolution 1025 (13 December 1995) UN Doc S/1995/1028.

[134] UNSC Res 1037 (n 3) [1].

[135] UNSC Res 1244 (n 5) [5].

[136] ibid, preamble.

authorize force by member states and, second, to legitimize the very wide powers of UNMIK to restore a semblance of normal life to the province and to make clear that its operations did not depend on the consent of Yugoslavia.'[137] Indeed, the UNSC Res 1244 authorized member states to establish an international security presence in Kosovo, with substantial North Atlantic Treaty Organization and under unified command for the purpose of establishing 'a safe environment for all people in Kosovo.'[138]

The UNTAET in East Timor was also established under Chapter VII. The UNSC Res 1272 establishing the UNTAET did not directly refer to the consent of Indonesia.[139] The Security Council only recalled the Agreement between the Government of Indonesia and the Portugal sanctioning the UN presence in East Timor.[140] Here, the Chapter VII mandate was crucial as the military component of the UNTAET was to replace the multinational force, the International Force for East Timor (INTERFET) in East Timor.[141]

The UNTAET was authorized to take all necessary measures to fulfill its mandate.[142] As the militia threat escalated in East Timor, the UNTAET was reminded of its

[137] C Gray, *International Law and the Use of Force* (OUP 2004) 230.

[138] UNSC Res 1244 (n 5) Annex 2, [4].

[139] UNSC Res 1272 (n 78).

[140] See Report of the Secretary-General on the Question of East Timor (5 May 1999) UN Doc S/1999/513. The INTERFET was established by the UNSC Res 1264 (15 September 1999) UN Doc S/RES/1264. The force was deployed until replaced, as soon as possible, by a UN Peacekeeping Operation: The INTERFET was replaced by the UNTAET on February 2000.

[141] UNSC Res 1272 (n 78) [9].

[142] ibid [4].

forceful mandate on several occasions.[143] The UNTAET was replaced by UNMISET in May 2002, which was not created under Chapter VII and had less forceful mandate than the UNTAET.[144]

## 5. Conclusion

A post-conflict administration functions through integration of civil administration mandates into traditional or more often into robust forms of peacekeeping. Therefore it is not surprising international administrations are qualified both by the UN and by many scholars by using the vocabulary used for peacekeeping.[145] However, there have been criticisms about the normative implications of labeling territorial administrations as peacekeeping operations. Accordingly, Wilde states:

> […] The use of these [‘peace operations’, ‘peacekeeping missions] labels implies that international territorial administration is an enterprise essentially concerned with the promotion of peace and the end of conflict. Taking into account the many different policies that the institution concerned with, one cannot escape the normative implication of this label that each policy-such as, say, internal self-determination for the population of Kosovo- is being pursued because it leads to peace and an end to conflict, and not also because it is of independent value. No doubt, one can debate about whether or not the pursuit of peace is fundamental objective of any political system; the problem with the ‘peace operation’ classification is that it implies that this debate is closed.’[146]

To a certain extent, peace operation classification might cause the different policies undertaken by an international administration to be conceived as less important. Still,

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[143] See for instance UNSC Res 1319 (20 September 2000) UN Doc S/RES/1319 [6] and UNSC Res 1338 (31 January 2001) UN Doc S/RES/1338 [7] expressing in identical words that ‘UNTAET should respond robustly to the militia threat in East Timor, consistent with its resolution 1272.’

[144] The establishment of UNMISET coincides with the proclamation of independence by East Timor; UNSC Res 1410 (17 May 2002) UN Doc S/RES/1410.

[145] Stahn (n 1) 16.

[146] Wilde (n 2) 88.

such technical classification is useful to ascertain the international obligations of the UN forces and who bears international responsibility for the conducts of the international administrations.

To elaborate, classified as part of multidimensional peacekeeping operations, the post-conflict administrations are under the command and the control of the UN. As subsidiary organs of the Organization, their expenses are considered as the expenses of the organization itself and in principle their conducts are attributable to the UN. As put by the UN Secretariat in 2004:

> A United Nations peacekeeping force established by the Security Council or the General Assembly is a subsidiary organ of the United Nations. Members of the military personnel placed by Member States under United Nations command although remaining in their national service are, for the duration of their assignment to the force, considered international personnel under the authority of the United Nations and subject to the instructions of the force commander […]
>
> As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation.'[147]

In enforcement operations under Chapter VII conducted under national command and control, the acts of the force would be imputable to the state or states in charge of the operation. In short, the classification of a post-conflict administration either as part of peacekeeping or peace enforcement –or clarification on the degree to which it is a part of a joint operation- would be desirable as to ascertain where responsibility lies if and

[147]ILC, 'Report of the International Law Commission on the Work of its 56th Session' (3 May-4 June and 5 July-6 August 2004) UN Doc A/CN.4/545,17-18.

when violations of international law occur. Due to the complex command and control structures of the UN operations ascertaining where responsibility lies is a hard task, and the blurred boundary between peacekeeping and peace-enforcement is one complicating factor.

According to the Capstone Doctrine, that defines itself as ‘the highest level of the current doctrine framework for United Nations peacekeeping’[148] the principle of non-use of force except in self-defence should be construed broadly including the defence of the mandate. Accordingly, the ‘robust’ mandates authorizing the peacekeeping forces to ‘use all necessary means’ or in other words, ‘the proactive use of force by the peacekeepers in defence of their mandates’ help the UN post-conflict administrations to improve the security situation and the realization of an environment conducive to longer-term peacebuilding on the territories they are deployed.[149]

However, ‘robust mandates’ is incompatible with host-state consent requirement for peacekeeping. The consent of the host state has been a traditional principle in peacekeeping the relevance of which has been tested in various UN Operations. For instance, when Egypt withdrew its consent to the existence of United Nations Emergency Force (UNEF) on its territory, the UN had to withdraw its forces.[150] While Croatia’s withdrawal of consent led to the withdrawal of United Nations Protection

[148] The Capstone Doctrine (n 96) 9.

[149] ibid 34.

[150] Report of the Secretary General, ‘Summary Study of the Experience Derived from the Establishment and Operation of the Force’ (9 October 1958) UN Doc A/3943.

Force (UNPROFOR) from its territory,[151] Burundi's non-consent prevented the UN from establishing a peacekeeping force on its territory.[152] Especially in instances where there is no representative or effective government on the territory, or where the main parties to a conflict would be different armed groups that do not have strong command and control systems or are internally divided themselves, the local consent could be missing drawing the UN operation into armed conflict as was the case for UNOSOM II.[153]

The UN tends to seek in most cases, if possible, for consent not only of governments but also the warring factions for the purpose of preserving or maintaining the effectiveness of its operations.[154] The presence of consent further secures the conclusion of Status of Forces Agreements (SOFAS) with the host states regarding the rights and duties, privileges and immunities of the UN forces.[155] A UN operation should continuously evaluate if the consent continues to exist throughout the operation or if it is wavered or withdrawn. The fact that in establishment of many peacekeeping operations, and post-conflict administrations for that matter, the consent of the host state or relevant parties is coupled with a Chapter VII mandate, seems to aim at showing that the UN has the determination, the political skills and the

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[151] See C Gray, 'Host-State Consent and UN Peacekeeping in Yugoslavia' (1996) 7 Duke Journal of Comparative and International Law 241.

[152] See The Blue Helmets: A Review of United Nations Peacekeeping (UNP 1996) 366.

[153] See The Capstone Doctrine (n 96) 32; see E Regehr, 'Losing and Recovering Strategic Consent in Afghanistan' (21 April 2010) available at < http://disarmingconflict.ca/2010/04/21/losing-and-recovering-strategic-consent-in-afghanistan> accessed 2 March 2012.

[154] See Gray (n 137) 234.

[155] ibid.

operational resources to continue an operation, even when there is wavering or withdrawal of consent, and has the option to use of force, as a last resort.[156]

[156] The Capstone Doctrine (n 96) 33.

CHAPTER 2

# THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO UN POST-CONFLICT ADMINISTRATIONS

## I. Introduction

This chapter examines the extent to which international humanitarian law (IHL) is applicable to UN Post-conflict Administrations. It examines the UN practice on the applicability of IHL to its peacekeeping operations, highlighting the shortcomings and inconsistencies of the UN practice with respect to these operations that form the legal basis of UN administrations. The chapter concludes by emphasizing the importance of a clear and comprehensive UN approach on the issue.

## 2. The UN Position on the Applicability of IHL to UN Peacekeeping Operations

The question of the applicability of IHL to UN operations became acute, mainly due to the ICRC's intensified efforts to draw the attention of the UN Secretary-General to the application of IHL to the forces under his authority, first in the operations in Korea and then during the operations by UNEF and ONUC.[1]

[1] See D W Bowett, *United Nations Forces, A Legal Study of United Nations Practice* (Stevens & Sons 1964) 484; R Murphy, 'United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers' (2003) 14 Criminal Law Forum 153, 175; see U Palwankar, 'Applicability of International Humanitarian Law to United Nations Peace-keeping Forces' (1993) 294 Int Rev of the Red Cross 227, 228; also see The Declaration of l'Institut de Droit International, 'Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May be Engaged' (1971) Annuaire de I'Institut de Droit International 54, Session de Zagreb art 2, where it is stated that 'the humanitarian rules of the law of armed conflict apply to the United Nations as of right, and they must be complied with in all circumstances by United Nations Forces which are engaged in hostilities'; However, see UN Secretariat, 'Question of the Possible

The necessity to address these concerns and the fact that UN forces were entitled to use force at least in self-defence[2] resulted in inserting provisions into regulations for the UN forces stating that the UN forces would act in accordance with the 'principles and spirit of the general international Conventions applicable to the conduct of military personnel.'[3] Although, the 'principles and spirit' formula was a welcome step, it suggested a certain denial on the part of the UN that it was formally bound by the rules.[4]

The 'principles and spirit' formula nevertheless became a regular feature of status of forces or status of mission agreements between the UN and the host state or in the formal agreements between the UN and the troop contributing states.[5] It can now be considered as the established practice of the Secretary-General, articulated in the

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Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims' (1972) UNJY 153.

[2] Bowett (n1) 502.

[3] Secretary-General's Bulletin, 'Regulations for the United Nations Emergency Force' (20 February 1957) UN Doc ST/SGB/UNEF/I [44]; Regulations for the United Nations Force in the Congo, (15 July 1963) UN Doc ST/SGB/ONUC/1, Regulation 43; Seyersted suggests that the UN did not enter into any formal undertakings in applying the principles of humanitarian law to UN forces in Korea (F Seyersted, *United Nations Forces in the Law of Peace and War* (A Wthof Sijf-Leyden 1966) 184; Further see D Shraga & R Zacklin, 'Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues,' in U Palwankar (ed), *ICRC Symposium on Humanitarian Action and Peacekeeping Operations* (Geneva 1994) 39, for the opinion that the UN accepted to apply *de facto* the humanitarian principles of the 1949 Geneva Conventions, including common Article 3 and the provisions of the Prisoners of War Convention.

[4] See Y A Takahashi, *The Law of Occupation-Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Brill 2003) 589, for criticism that the notion of 'principles and spirit' of IHL rules is 'ostensibly ambiguous'; J Kellenberger, Keynote address (Official Statement by the ICRC) on the 31st Round Table on Current Issues of International Humanitarian Law (4 September 2008) <available at http://www.icrc.org/web/eng/siteeng0.nsf/html/peace-operations-statement-040908)> accessed 10 May 2011

[5] See M Bothe & T Dörschel (eds), *UN Peacekeeping A Documentary Introduction (Kluwer Law International 1999)* 14.

Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations[6] (the Model Agreement), which serve as guidance for agreements with troop contributing states. The Model Agreement clarifies the general international conventions whose 'principles and spirit' are deemed applicable as the four Geneva Conventions of 12 August 1949 and their additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of armed conflict.[7]

Examples of such agreements with the standard 'principles and spirit' formula can also be cited within the context of UN post-conflict administrations. For instance, the SOFA signed between the UN and the Government of the Republic of Croatia on February 1996, after the establishment of UNTAES repeats the clause in the Model Agreement verbatim.[8] However, there is no consistency in that respect. Interestingly,

[6] Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations (23 May 1991) UN Doc A/46/185 (the Model Agreement).

[7] ibid [28]; Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention IV Relative to the Protection of Civilians in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609; Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240.

[8] Agreement Between the United Nations and the Government of Croatia Regarding the Status of the United Nations Forces and Operations in Croatia (signed & entered into force 15 May 1995) UNJY 1995, 42 and Exchange of Letters Constituting an Agreement Between the United Nations and the Government of Croatia, supplementing the Agreement Regarding the United Nations Forces and

the agreement between the UN and Cambodia concerning UNTAC[9] replicated verbatim not the Model Agreement but rather the Model Status of Forces Agreement for Peacekeeping Operations (the Modal SOFA) that was adopted few months before the Model Agreement in 1990 and that did not have any provisions on the applicability of the IHL to UN forces.[10] Despite the fact that the Agreement between UN and the Government of Namibia on status of UNTAG was signed before the Model SOFA was issued, there are strong similarities between the two documents.[11]

Despite the occurrence of the 'principles and spirit' formula in various agreements, the responsibilities of the UN for operationalizing this formula is unclear.[12] The fact that responsibility for disciplinary action with respect to military personnel of the troop contributing state belongs to the officers designated by the Governments of the states[13] indicates that enforcement of and guidance on IHL rest with the states. However, there is further unclarity as to existence of any formal oversight mechanisms to monitor states' actions in that respect.

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Operations in the Republic of Croatia (signed & entered into force on 2 February 1996) UNJY 1996, 14.

[9] Agreement Between the United Nations and the Supreme National Council of Cambodia on the Status of the United Nations Transitional Authority in Cambodia (signed & entered into force 7 May 1992) 1673 UNTS 363.

[10] Report of the Secretary-General, 'Comprehensive Review of the Whole Question of Peace-keeping Operations in All Their Aspects, Model Status- of-forces Agreements for Peace-keeping Operations' (9 October 1990) UN Doc A/45/594.

[11] Agreement between the United Nations Transition Assistance Group and the Government of Namibia concerning the status of UNTAG to Namibia (signed & entered into force 10 March 1989) UNJY 1989, 14.

[12] For similar view see B D Tittemore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations' (1999) 33 Stan J. Int L 61, 89.

[13] The Model Agreement (n 6) [8].

## 2.1 The Implications of the Secretary-General's Bulletin on Observance by UN Forces of IHL

The Secretary General's Bulletin on Observance by UN Forces of IHL issued on August 1999 (the Bulletin) goes some way towards addressing questions about the applicability of IHL to United Nations forces.[14] At the very beginning, in Section I, the Bulletin substitutes the 'principles and spirit formula' with the more straightforward phrase: 'principles and rules.'[15] Section 3 of the Bulletin does not condition the applicability of the principles and rules of IHL on the conclusion of a SOFA by stating that 'the said principles and rules is applicable to United Nations even in the absence of a status-of-forces agreement.' The Bulletin also commits the UN in the same section to undertake to ensure that military personnel are fully acquainted with the principles and rules of humanitarian law. However, what liability the UN would incur in the case of breaches of this duty remains unclear.[16]

The Bulletin has a separate section on violations of international humanitarian law. Section 4 stipulates that in such case it is the duty of the national courts to prosecute the members of the military personnel of a UN force. It is understandable that the responsibility to prosecute is given to national courts since the UN does not have a

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[14] Secretary General's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law' (6 August 1999) UN Doc ST/SGB/1993/13.

[15] ibid Section 1.1 & Section 3.

[16] Murphy (n 1) 177.

judicial system of its own. However, the lack of any UN oversight over national mechanisms is a persistent problem.[17]

Sections 5-9 of the Bulletin list the fundamental norms of IHL[18] (protection of the civilian population, means and methods of combat, treatment of civilians and persons hors de combat, treatment of detained persons and finally protection of the wounded, the sick, and medical and relief personnel) that must be observed by UN forces.

Despite the substantial importance of the Bulletin as an internal UN document regulating the applicability of the IHL to UN forces, it has been criticised for the lack of UN supervision mechanisms and its narrow scope. The Bulletin is only applicable to UN enforcement operations, 'when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement' and to peacekeeping operations 'when the use of force is permitted in self-defence.'[19] The Bulletin ignores the fact that peacekeeping operations might have a wider mandate, for example, to 'use all necessary means' to secure their mission. Further, the approach of the Bulletin is contradictory with the nature of the substantive rules listed in Sections 7-8. Rules on treatment of civilians and *persons hors de combat,* on treatment of detained persons or on the protection of the wounded, the sick and medical and relief personnel are relevant beyond the actual conduct of hostilities.[20]

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[17] There have been instances of ad-hoc oversight. For instance, see the Statute of the Special Court for Sierra Leone (established by the Agreement between the United Nations and Government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000), arts 1 (2) & 2.

[18] See D Shraga 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage' (2000) 94 AJIL 406, 408).

[19] The Bulletin (n 14) section 1.1.1.

[20] J Saura, 'Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations (2006) 58 Hastings L.J 479, 499.

Although the Bulletin is applicable in situations of armed conflict, it does not refer to any threshold that must exist and must be crossed before the application of IHL is triggered. As such, it does not eliminate the risk of leaving the troops or peacekeepers in a limbo of uncertainty about when a conflict is classified as an armed conflict.[21]

Still, the Bulletin influenced the SOFAS signed after it was issued; they have been more clear on the applicability of the IHL. For instance, the 2005 Agreement between the Government of Sudan and the United Nations concerning the Status of the UN Mission in the Sudan (UNMIS), which has been exercising partial administrative powers over the territory, refers to the applicability of the 'principles and rules' of the international conventions applicable to the conduct of military personnel.[22] The 2002 Agreement Between the Democratic Republic of East Timor and the UN Concerning the Status of UN Mission of Support in East Timor contained the same provision verbatim.[23]

Despite the progress achieved with the issuance of the Bulletin, a major factor that affects the applicability of IHL to UN forces is the difficulty to classify the conflicts that the UN is involved in.

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[21] Murphy (n1) 176-177.

[22] Agreement between the United Nations and the Government of Sudan Concerning the Status of the United Nations Mission in Sudan (signed & entered into force 28 December 2005) UNJY 2005, 44, art IV [6 (a)].

[23] Agreement Between the Democratic Republic of East Timor and the UN Concerning the Status of UN Mission of Support in East Timor (signed and entered into force 20 May 2002) 2185 UNTS 367, art 6.

## 2.2 The Problem of Classification of Conflicts

Section I, paragraph 1, of the Bulletin on its Field of Application does not distinguish between the international or non-international conflicts[24] where UN enforcement or peacekeeping operations take place. The lack of reference to the type of conflict might mean that the Bulletin applies regardless of the type of conflict;[25] or that the UN presence does have an affect on the classification of the conflict.

However, paragraph 2 of the same section reveals that the classification of the conflicts in which the UN is involved is important since the promulgation of the Bulletin does not affect the protected status of peacekeepers under the 1994 Convention on the Safety of United Nations and Associated Personnel or *their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict* (emphasis added).

Although it has been argued that 'the distinction between international and non-international armed conflicts has lost much of its significance,'[26] this is not a valid argument in its entirety. The rules applicable in internal armed conflicts are still 'rudimentary and skeletal' compared to those applicable in international armed

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[24] See Common Article 2 of the Geneva Conventions (n 7) & Article 1 of the Protocol I (n 7) for when rules on international armed conflicts apply, see Common Article 3 of the Geneva Conventions (n 7) and & Article 1 of the Protocol II (n 7) for when rules on non-international armed conflicts apply.

[25] Saura (n 20) 513.

[26] D Schindler, 'Significance of the Geneva Conventions for the Contemporary World' (1999) 836 Int Rev of the Red Cross 715, 715-729; See for instance *Prosecutor v Tadic*, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, (2 October 1995) [83-137]. Also see T Graditzky, 'Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-international Armed Conflicts' (1998) 322 Int Rev of the Red Cross 29, 29-56; Rome Statute of the International Criminal Court (adopted 17 July 1998) 2187 UNTS 90) expands the list of war crimes in non-international armed conflicts under Article 8(2) e as well.

conflicts.[27] Further, not all the provisions of the law of international armed conflicts apply in internal conflicts.[28]

Still, it is revealing that recent treaties on IHL, especially on disarmament, are applicable both in international and non-international armed conflicts. For instance, The 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects as Amended in 2001, states explicitly in amended Article 2 that the Convention and its annexed Protocols 'shall also apply […] to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949.'[29] The States parties to the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction undertake to apply the Convention 'in all circumstances'.[30]

When UN forces are deployed in a conflict setting, two important questions still arise: When does the IHL applicable to international armed conflicts constitute a frame of reference? When does the IHL applicable to non-international armed conflicts constitute the frame of reference?[31] Arguably, the 'multinational' character of the UN

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[27] Murphy (n1) 163.

[28] Schindler (n 26); for instance, the rules relating to prisoners of war and to occupation of territories could not as such be applied in internal conflicts.

[29] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed Excessively Injurious or to Have Indiscriminate Effects (as amended on 21 December 2001) (adopted 10 0ctober 1980, entered into force 2 December 1983) 1342 UNTS 137.

[30] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti- Personnel Mines and Their Destruction (adopted 18 September 1997, entered into force 1 March 2009) 2056 UNTS 241, art 1.

forces binds the UN to rules of IHL governing international armed conflicts vis-à-vis the organized armed forces of states. According to Bowett, 'it is difficult to see how hostilities in which United Nations is involved can be regarded as 'not of an international character'.[32] Writing more than 30 years after Bowett, however in the same vein, Tittemore states that 'this is the case regardless of whether a given conflict would be classified as international or domestic without UN involvement.'[33] Indeed, even back in 1960s during the operations in the Congo the UN accepted to apply *de facto* the humanitarian principles of the 1949 Geneva Conventions and did not confine itself only to the application of Common Article 3 to the Geneva Conventions.[34] On the other hand, in Somalia in 1990s the Organization did not seem to consider itself involved an international armed conflict. There was no SOFA agreed, as the fighting was not against a state but against the Aideed faction, which did not have the military, political or judicial organization of a State.[35] Greenwood suggests that the UN seems to characterize the conflict it was involved in Somalia as non-international in contrast to approach taken earlier in the Congo.[36] Tittemore goes one step further in suggesting that at least in conflicts that would be considered domestic without UN involvement, the UN would be bound only by the law governing domestic armed conflicts, with respect to non-state actors involved.[37] For

[32] Bowett (n1) 509.

[33] B Tittemore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Operations' (1997) 33 Stan. J. Int'l L 61, 110.

[34] ibid 509-510; Saura (n 20) 513-514.

[35] C Greenwood, 'International Humanitarian Law and Military Operations' (1998) 1 Yearbook of International Humanitarian Law 3, 26.

[36] Greenwood (ibid).

[37] Tittemore (n 33), Australia and US accepted that only common Article 3 was applicable to the conflict in Somalia (J Simpson, Law Applicable to Canadian Forces in Somalia 1992/1993: A Study Prepared For the Commission of Inquiry into the Deployment of Canadian Forces to Somalia, Ottawa Government of Canada, 1997 26).

peacekeeping operations with robust mandates, this would mean that in non-international conflicts facing non-state actors, the peacekeepers might not benefit from the protections given to civilians under the international law of armed conflict.[38]

While the majority of the recently established UN forces operate in non-international armed conflicts,[39] and it is arguable whether the involvement of a UN enforcement or peacekeeping force renders the conflict international, the UN address the issue of classification of conflicts pragmatically. It appears that the Organization feels bound by the principles and rules of the international conventions applicable to the conduct of military vis-à-vis the organized armed forces of other states, and more probably but less clearly towards to non-state actors as well, since the Bulletin does not distinguish between conflicts affecting its applicability, without the necessity for classification of the conflict. The UN approach as such is heavily influenced by the necessity to protect the UN personnel and the need for 'reciprocity' between the UN forces and the organized forces of a State or non-state actors. However, it may be unrealistic to demand reciprocity from non-state actors in observing the IHL at all times.[40] Greenwood exemplifies this whereby, referring to conflict between the UN and the Somali factions, he states that '[…] to have maintained that both sides were obliged to apply the Prisoners of War Convention would have had an air of unreality.'[41]

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[38] See the Bulletin (n 14) section 1(2).

[39] See for instance UNSC Res 1270 (22 October 1999) establishing the United Nations Mission in Sierra Leone (UNAMSIL) UN Doc S/RES/1270, UNSC Res 1509 (19 September 2003) establishing the United Nations Mission in Liberia (UNMIL) UN Doc S/RES/1509, UNSC Res 1545 (21 May 2004) establishing the United Nations Operation in Burundi (ONUB) UN Doc S/RES/1545, UNSC Res 1590 (24 March 2005) establishing the United Nations Mission in the Sudan (UNMIS) UN Doc S/RES/1590.

[40] Saura (n 20) 515.

[41] Greenwood (n 35) 26.

Likewise, Schindler accepts that 'the fact that UN forces apply humanitarian principles does not automatically oblige the opposing side to do the same. As a result, UN forces themselves are not sufficiently protected.'[42]

## 2.3 The Implications of the Convention on the Safety of United Nations and Associated Personnel

The Convention on the Safety of United Nations and Associated Personnel of 1995 (the Safety Convention)[43], adopted few years after the Bulletin was issued gives further insight on the applicability of the IHL, especially to peacekeeping forces.

The purpose of the Safety Convention is to protect the UN and associated personnel from deliberate attacks and give them better protection for carrying out their mandate.[44] The Safety Convention is a criminal law instrument aiming to criminalise attacks against UN personnel and property.[45]

The idea that the neutrality of the UN and its universal role in maintenance of international peace and security would be recognized and respected by every state and people was shattered even at the very early stages of the inception of the organization

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[42] D Schindler, 'United Nations Forces and International Humanitarian Law' in C Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (1984) 525.

[43] Convention on the Safety of United Nations and Associated Personnel, UNGA Res 49/59 (17 February 1995), 2051 UNTS 363.

[44] See ibid, Preamble.

[45] M H Arsanjani, 'Convention on the Safety of United Nations and Associated Personnel' (2009) UN Audiovisual Library of International Law 1.

with the killing of UN peacekeepers in Palestine and the assassination of the Palestine Mediator, Count Bernadotte in Jerusalem.[46] However, it was with the proliferation of UN operations after the Cold War that the number of fatalities of United Nations Personnel increased.[47] Thus, the Secretary-General suggested in his report entitled as 'An Agenda for Peace Preventive Diplomacy, Peacemaking and Peace-keeping' that 'as the variety and scale of threat widens, innovative measures will be required to deal with the dangers facing United Nations personnel.'[48]

At the request of the Security Council, the Secretary-General prepared an extensive report on the measures to be taken, suggesting both long-term and short-term strategies to enhance the security and safety of personnel involved in UN operations.[49] Referring to the possibility of drafting a new convention as a long-term strategy, the Secretary-General stressed that such an instrument 'would make possible the consolidation in a single document of the set of principles and obligations contained in current multilateral and bilateral treaties' and would provide an opportunity to 'codify and further develop customary international law [relating to the security and the safety of United Nations forces and personnel] as reflected in the recent practice of the United Nations and Member states.[50]Against this background, in 1993 New Zealand and Ukraine proposed the drafting of a new convention for the protection of

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[46] See Cablegram From Foreign Minister of Provisional Government of Israel dated 17 September 1948 addressed to the Secretary-General Concerning Assassination of United Nations Mediator (17 September 1948) UN Doc S/1005.

[47] Kirsch, states that in 1994, the average of fatalities among UN peacekeepers was one every two days (P Kirsch, 'The Convention on the Safety of United Nations and Associated Personnel' (1995) 2 International Peacekeeping 102).

[48] UN Doc A/47/277-S/24111 (17 June 1992) [66].

[49] Report of the Secretary General on Security of United Nations Operations (27 August 1993) UN Doc A/48/349-S/26358.

[50] ibid [34].

the UN personnel that led to the adoption of the Safety Convention.[51]

Although it addresses a critical gap in the law regulating the consequences of attacks or threats against the UN personnel, the Safety Convention is ambiguous with respect to the applicability of IHL to UN operations. Article 2 lays down the scope of the Safety Convention, which applies in respect of United Nations and associated personnel and United Nations operations as defined in Article 1. The operations covered by the Safety Convention are those established by the competent organ of the UN in accordance with UN Charter and conducted under UN authority and control (Article 1 (c)), for the purpose of maintaining or restoring international peace and security (Article 1 (c) (i). The Safety Convention further applies where the Security Council or the General Assembly has declared that there exists an exceptional risk to the safety of the personnel participating in an operation (Article 1(c) (ii). Therefore, the Safety Convention suggests that the first category of operations are either peacekeeping or enforcement operations and the second category are any other operations where an exceptional risk is declared. However, Article 2(2) declares an exclusion clause stating that the Safety Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the UN Charter in which any of the personnel are engaged as combatants against organized armed forces to which the law of international armed conflict applies. The exclusion clause seems to imply that IHL only applies to enforcement operations under Chapter VII and only to those personnel who are engaged as combatants. Interpretation of the exclusion clause as such would be a setback in the debate on the applicability of IHL to multi-dimensional peacekeeping

[51] Arsanjani (n 45) 1.

operations. In relation to Article 2(2), Bloom rightly raises a yet more pressing issue, namely, that an action taken by the Security Council under Chapter VII is not necessarily an enforcement action, and asks what is the threshold for that determination.[52] The term enforcement is neither defined in the UN Charter nor used consistently by the Security Council resolutions mandating the UN operations. Neither the consent of the host state, nor the mandate to use force is necessarily a determinative factor to distinguish between different types of operations with blurred boundaries.

A more fundamental problem with the exclusion clause or the Safety Convention in general is that it seems to make 'the applicability of the law of international armed conflict one of the conditions for the Safety Convention ceasing to apply.'[53] The term, armed conflict is not defined in the Geneva Conventions. However, Article 2(1) common to four Geneva Conventions has been interpreted broadly. An authoritative commentary on the 1949 Geneva Conventions defines armed conflict as 'any difference arising between two states and leading to the intervention of the members of the armed forces […] even if one of the parties denies the existence of a state of war.[54] The commentary further states that, 'it makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human person as such is not measured by the number of victims.'[55] The problematic aspect of the

[52] E Bloom, 'Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel' (1995) 89 AJIL 621, 625.

[53] C Greenwood, 'Protection of Peacekeepers: The Legal Regime Symposium: The United Nations, Regional Organizations, and Military Operations' (1996-1997) 7 Duke J Comp & Int'l Law 185, 199.

[54] J Pictet (ed*.), Commentary on The Geneva III Convention Relative to The Protection of Civilian Persons in Time of War (1960)*, 20-21.

[55] ibid.

Safety Convention is that the tendency to interpret Article 2(1) broadly might be weakened due to the desire to retain the applicability of the Safety Convention in conflicts where the UN is involved. Greenwood warns against the possible attempt to raise the threshold for the application of the law of international armed conflict in conflicts in which the UN is involved where he points out that such attempts would risk harming the progress made in 'widening the sphere of application of the 1949 Geneva Conventions' in history.[56]

The Safety Convention has a 'savings clause' that adds more ambiguity to it: Article 20(a) states that nothing in this Convention shall affect the applicability of international law and universally recognized standards of human rights as contained in international instruments in relation to the protection of UN operations and UN and associated personnel or the responsibility of such personnel to respect such law and standards. The Article could be interpreted to make room for concurrent application of the Safety Convention and the IHL. Indeed, it has been suggested that this could be deduced from the text of the Convention and negotiations leading up to its adoption.[57] Article 8 was used as an example to support such interpretation[58] where it is stated that, except as otherwise provided in an applicable SOFA, captured or detained UN and associated personnel should be treated in accordance with universally recognized standards of human rights and the principles and spirit of Geneva Conventions of 1949.

[56] *Contra* W G Sharp 'Protecting the Avatars of International Peace and Security Symposium: The United Nations, Regional Organizations, and Military Operations' (1996-1997) 7 Duke J. Comp. & Int'l Law 93, 149).

[57] A Bouvier, 'Convention on the Safety of UN and Associated Personnel' 309 Int'l Review of the Red Cross 638.

[58] ibid.

Referring to Article 20(a), Bouvier submits that the material scope of the Safety Convention covers two types of situations. The first is where the Safety Convention and IHL apply concurrently (or rather complementarily), and the second is where only IHL is applicable (i.e. exclusion clause Article 2(2).[59] According to him, the concurrent applicability is not problematic and is explained by the distinction between *jus ad bellum* and *jus in bello:* While both the Safety Convention and the IHL share the common aim of ensuring the safety of the UN personnel, the Safety Convention prohibiting the attacks against the UN and the associated personnel comes under *jus ad bellum* not under *jus in bello.*[60] Therefore, the prohibition of attacks against the UN and associated personnel would not remove the protection and obligations of IHL in case that prohibition is violated.[61] However, Bouvier further suggests that Art 20(a) 'felicitously' supplements the exclusion clause in Article 2(2) of the Convention by guaranteeing that whenever the Convention proves insufficient to ensure the protection of UN and associated personnel IHL should take effect.'[62] Bouvier's argument as such is in stark contrast to Bloom's assertion that it was the negotiators' intention to have a clear separation between 'the new legal regime' under the Safety Convention and the Geneva Conventions so that 'UN and associated personnel and those who attack them would be covered under one regime or the other but not both.' According to Bloom, the reason for such distinction is to avoid undermining an important principle of the IHL, namely, the equal application of its provisions to all

[59] ibid.

[60] ibid.

[61] ibid.

[62] ibid.

parties to an armed conflict. Indeed, where the UN forces are engaged as combatants, they should be subject to the IHL, the Safety Convention should be deemed inapplicable and attacks against them should not be considered as criminal offences. While Greenwood seems to agree with Bloom that the legal regimes of the Safety Convention and the IHL were mutually exclusive, he contributes to the debate on the scope of Article 2(2) by stating that it is far from straightforward in distinguishing between the two legal regimes. One example Greenwood gives is the situation in which a peacekeeping force could find itself engaged in protracted hostilities with organized armed forces when it exercises its right of self-defence. He states that the Safety Convention would apply to peacekeepers in such situations.[63] Bloom concurs with Greenwood's position, when he states that use of force by the UN in self-defence, without sustained fighting, does not remove the coverage of the Safety Convention, as in such isolated cases the UN forces are not engaged as combatants.[64] It is, at least, unclear if the Safety Convention applies to peacekeepers when they use force in self-defence. Such debate could have different consequences depending on how self-defence is construed (e.g. narrowly or broadly including the defence of the mandate?). Article 21, providing that nothing in this Convention 'shall be construed so as to derogate from the right to act in self-defence' is a provision that could intensify the debate over self-defence. Actually, the implications of this clause and its effect on the application of other provisions of the Safety Convention are ambiguous. However, it is certain that the Safety Convention does not have the purpose of limiting the right of self-defence of the UN and the associated personnel. Still, interpreting Article 21 in a way that allows the application of the Safety Convention

[63] Greenwood, 'Protection of Peacekeepers' (n 53) 198.

[64] Bloom (n 52) 627.

to peacekeepers when they use force in self-defence is hard to sustain, especially after the promulgation of the Secretary-General's Bulletin on the Observance by UN Forces of IHL applying the principles and rules of IHL in peacekeeping operations when the use of force is permitted in self-defence.[65]

Final remarks should be made with respect to Article 1(c) (iii) of the Safety Convention where the second category of UN operations to which the Safety Convention applies is defined as an operation established by the competent organ of the United Nations, in accordance with the UN Charter and conducted under UN authority and control 'where the Security Council or the General Assembly has declared for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation'. Article 1(c) (iii) could be seen as a progressive provision, foreseeing the difficulties that may arise in distinguishing between enforcement and peacekeeping operations when the provisions of the Convention are put into practice. The provision gives the Security Council or the General Assembly the opportunity to apply the Safety Convention independent of the type of the operation. Interestingly, neither the Security Council nor the General Assembly has ever made a declaration of risk in relation to any operation.[66] As a result there has been severe criticism that the scope of the Safety Convention is too limited.[67] The Secretary-General himself joined the criticisms on the insufficiencies of the protective regime of the Safety Convention. In his report on

[65] The Bulletin (n 14) Art 1.1.

[66] See Arsanjani (n 45) 3.

[67] ibid; M Meyer & C Garraway, 'The Geneva Conventions and United Nations Personnel (Protocols) Act 2009: A Move Away From the Minimalist Debate' (2010) 59 ICLQ 171,178; H Llewellyn, 'The Optional Protocol to the 1994 Convention on the Safety of United Nations and Associated Personnel' (2006) 55 ICLQ 718.

November 2000, he pointed to the ‘emerging consensus among member states on the inadequacies of the [Safety] Convention’ and recommended the ‘development of a protocol extending the scope of its legal protection to all United Nations and Associated Personnel not presently covered’.[68] In 2001, an Ad Hoc Committee was established to consider the recommendations of the Secretary-General on measures to strengthen and enhance the protective legal regime for United Nations and Associated Personnel.[69] The discussions on a new protocol intensified in 2003 following the bombing of the UN headquarters in Baghdad killing the Special Envoy to Iraq and 20 UN employees.[70] On September 2003, a Working Group was established in order continue the work of the Ad Hoc Committee.[71] The Secretary-General’s proposal that the Safety Convention should automatically apply to all UN operations under UN control and authority, eliminating the requirement of declaration of risk, has been supported by New Zealand and by some delegations.[72] However, some objections were raised against the proposal, in particular on the ground that such an expansion would place a greater burden on the host states.[73] The developing states as present or potential host states were more cautious about the automatic application of the Safety Convention to all operations under UN control and authority as opposed to the more

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[68] Report of the Secretary-General on Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel (21 November 2000) UN Doc A/55/637 [2].

[69] UNGA Res 56/89 (25 February 2002) [7].

[70] See UNGA Res 58/82 (8 January 2004).

[71] See Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, ‘Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel’ 58th Session (21 October 2003) UN Doc A/C.6/58/L. 16.

[72] ibid Annex II [3].

[73] ibid.

expansive views of the developed states.[74] Eventually, the delegations agreed to expand the scope of the Safety Convention but not as far as the Secretary-General suggested. The Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel was adopted by consensus on 8 December 2005 (the Optional Protocol).[75] The Optional Protocol supplemented the Safety Convention and introduced two new categories of UN Operations where the Safety Convention would apply automatically. It was stated under Article 1 of the Optional Protocol that the Parties shall:

> in addition to those operations as defined in article 1(c) of the Convention, apply the Convention in respect of all other United Nations operations established by a competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control for the purposes of:
> (a) delivering humanitarian, political or development assistance in peacebuilding, or
> (b) delivering emergency humanitarian assistance.

Furthermore, during negotiations discussions revolved around a proposal made by the UK on behalf of the EU to provide a procedure by which a host state could state the non-applicability of the Optional Protocol with respect to an emergency humanitarian assistance operation conducted for the sole purpose of responding to a natural disaster.[76] The delegations were of the view that natural disasters had an inherent element of risk.[77] Therefore, there was no need to make the applicability of the Safety Convention, to emergency humanitarian assistance operations, dependent on the declaration of risk. Nevertheless, they agreed to include an 'opt-out' in article 2 (3) of

[74] Llewellyn (n 67) 722.

[75] UNGA Res 60/42 (8 December 2005).

[76] Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel 60th Session (10 October 2005) UN Doc A/C.6/60/L.4 [15].

[77] ibid [16].

the Optional Protocol to provide an opportunity for a State to decide whether the conditions in a particular natural disaster necessitated the application of the Safety Convention. It was recognized by some delegations that the 'opt-out' constituted a 'balanced compromise between delegations that preferred to apply the Optional Protocol to all such operations and those that wanted to exclude them from its scope.'[78]

The notion of risk has been a determinative factor in expanding the scope of the Safety Convention. The delegations discussed the inclusion of only those operations that were considered as inherently risky, such as political, peacebuilding and humanitarian operations. In the end, article 1(c)(a) was drafted in such a way that the catch-all phrase 'humanitarian, political or development assistance' that could be the common denominator of many UN operations, was qualified by the term 'peacebuilding,' which limits the scope of the application of the Optional Protocol.[79] The discussion in the negotiations focused on whether or not to give a definition of peacebuilding and whether peacebuilding activities were limited to post-conflict phases or if they could also include pre-conflict situations. According to some, since peacebuilding was an evolving concept, it was difficult to arrive at a generally agreed definition.[80] On the other hand, some delegations suggested that the inclusion of a general definition of peacebuilding would 'add clarity and precision to the concept.'[81] There were also disagreements on how to define the concept. The view was expressed

[78] ibid [17].

[79] Llewellyn (n 67) 722-723.

[80] UN Doc A/C.6/60/L.4 (n 76) [7].

[81] ibid [6].

that peacebuilding should be defined in line with paragraph 97 of the 2005 World Summit Outcome.[82] That paragraph is focused on post-conflict peacebuilding, referring to 'countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development.'[83] According to another view, the concept should be defined based on the elements of peacebuilding incorporated in the Statement by the President of the Security Council, on behalf of the Security Council at the meeting in connection with the Council's consideration of the item entitled 'Peace-building: Towards a Comprehensive Approach' on February 2001.[84] In his statement, the President of the Security Council emphasized both the pre-conflict and post-conflict phases of the peacebuilding:

> The Security Council recognizes that peacebuilding is aimed at preventing the outbreak, the recurrence or continuation of armed conflict and therefore encompasses a wide range of political, developmental, humanitarian and human rights programmes and mechanisms. This requires short and long-term actions tailored to address the particular needs of the societies *sliding into conflict or emerging from it* (emphasis added).

However, there was clear opposition by some delegations to the inclusion of pre-conflict situations in the definition. In the end, the concept was left undefined. The fact that the meaning of 'peacebuilding' is likely to crystallize further through the Peacebuilding Commission's practice might be one of the reasons why at least some delegations did not insist on inclusion of a definition of the concept in the Optional Protocol.[85]

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[82] ibid [8].

[83] UNGA Res 60/1 (2005 World Summit Outcome) (24 October 2005) Doc A/RES/60/1.

[84] Statement by the President of the Security Council (20 February 2001) UN Doc S/PRST/2001/5.

[85] Llewellyn (n 67) 723-724.

The delegations were not only unable to come to an agreement on the definition of peacebuilding, but also they partly addressed the concerns and criticisms towards the Safety Convention as the ambiguity about the circumstances in which IHL is applicable to peace operations remained unsolved.

Interestingly, the necessity to address this ambiguity was considered only by one state, namely Costa, which put forward the following proposal:

> The parties to this Protocol shall not apply the Convention in respect of any acts governed by IHL performed during an armed conflict and directed against any United Nations or associated personnel who are not entitled to the protection given to civilians under international law of armed conflict.[86]

The rationale for the proposal, as recalled by Costa Rica, was to restore balance between the protection afforded by IHL and the protection under the Safety Convention.[87] The proposal further highlighted the mutual exclusivity of both regimes. In that respect, the Costa Rican proposal sought to address a concern that was first raised by the Secretary-General in his report on the Scope of Legal Protection under the Safety Convention, wherein it was noted that Article 2(2) of the Safety Convention gave rise to the wrong assumption, namely that enforcement operations carried out in situations of internal armed conflict, like UNOSOM II, are covered by the protective regime of the Safety Convention.[88] The Secretary-General

[86] Report of the Working Group on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel, 59th Session (15 October 2004) UN Doc A/C.6/59/L.9 Annex I, 5.

[87] ibid Annex 2 [20].

[88] UN Doc A/55/637 (n 68) fn 3.

argued that the type of the conflict that the UN is involved with should not determine the applicability of IHL to UN forces, but rather that whether the UN forces were actively involved as combatants at any time during the conflict, or were otherwise entitled to protection accorded to civilians under the international law of armed conflict, should be determinative. Indeed, this position is supported by the provisions of the Rome Statute of the ICC by the terms of which attacks against the UN personnel and property are considered war crimes under article 8(2) (b) (iii) and 8(2) (e) (iii) in relation to international armed conflict and an armed conflict not of an international character respectively.[89]

The Costa Rican proposal was discussed by the delegations but eventually rejected. An opportunity was missed to clarify, at least to some extent, the dichotomy between the Safety Convention and the rules of IHL. Still, the discussions on the Costa Rican proposal are worth mentioning here, as the proposal was the only attempt during the negotiations to reflect on this complex issue, acknowledged as such by the delegations as well.[90] Those who expressed support for the proposal noted the narrow and specific scope of Article 2 (2) and agreed that it would assist in covering both international and non-international armed conflicts.[91] Those who opposed the proposal seemed reluctant to address the ambiguities already inherent in the Safety Convention when they stated that insertion of the Costa Rican amendment in the Optional Protocol, would necessitate making determinations on the combatant or non-combatant status of UN forces in volatile settings or on whether the status of UN forces would be

[89] Rome Statute of the International Criminal Court (n 26).

[90] UN Doc A/C.6/59/L.9 (n 86) Annex II [23].

[91] ibid.

altered if they were acting in self-defence.[92] Ironically, it was concluded that 'the possibility of such ambiguities in interpretation would be unwelcome.'[93] It was also argued that the Costa Rican proposal would afford "less protection to UN personnel." To support this argument, Article 8 of the Safety Convention, whose meaning is far from clear, is interpreted in a way to create a special status for the UN forces with respect to detention issues even when they are acting as combatants. To put it more clearly, the opposing delegations stated that under IHL prisoners of war maybe held until the end of hostilities, however the UN personnel who are captured or detained should be released immediately under the current regime.[94] The negotiations on the proposal ended with a crucial remark by Costa Rica, which stressed that its proposal was 'intended to strengthen protection of United Nations and associated personnel and such protection was assured by the equal observance of international humanitarian law on the basis of the principle of reciprocity.'[95]

### 3. The UN and Accession to the Geneva Conventions and Additional Protocols

Whether the UN could be bound by the conventional rules of IHL is controversial. The UN's possible accession to Geneva Conventions and Additional Protocols has been rejected for several reasons. These include the normative character of the UN as an organization acting on behalf of the international community as a whole, as opposed to states who pursue their own interests and can become parties to conflicts, the UN's lack of juridical and administrative powers to discharge many of the

[92] ibid [26].

[93] ibid.

[94] UN Doc A/C.6/59/L.9 (n 86) Annex II [26].

[95] ibid [28].

obligations arising from the Geneva Conventions and Additional Protocols, and the fact that the final clauses of the Geneva Conventions and Additional Protocols do not provide for the accession of the international organizations.[96]

Indeed, it is difficult to assume that the drafters also had international organizations in mind, when they introduced the word "Power," to indicate the parties to a conflict, into the Geneva Conventions and Additional Protocols. Proposals have been made on the possible accession of the international organizations to the Geneva Conventions for the Protection of War Victims at the Second Session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1972).[97] An important suggestion was made to insert in the draft Additional Protocol to the Conventions a clause providing for accession by the UN.[98] The UN Secretariat rejected these proposals, as mainly on two grounds. The first argument was that the Geneva Conventions contain many obligations that can only be discharged by states, e.g. the Organization does not have the authority to exercise criminal jurisdiction over members of the Forces, nor does it possess any administrative competence with regards to territorial sovereignty. Secondly, the UN Secretariat maintained that the UN urges the troop contributing states, through exchanges of letters or Regulations issued by the Organization, to

[96] See Bowett (n 1) 509; R Murphy, 'United Nations Military Operations and International Humanitarian Law' What Rules Apply to Peacekeepers?' (2003) 14 Criminal Law Forum 153, 154-155; Y Arai-Takashi, *The Law of Occupation, Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (Brill 2009) 587; D Shraga & R Zacklin, The Applicability of International Humanitarian Law to United Nations Peacekeeping Operations: Conceptual, Legal and Practical Issues,' in ICRC Symposium on Humanitarian Action and Peace-Keeping Operations Report (1994) 43. However, see *contra* F Seyersted, United Nations Forces in the Law of Peace and War (A W Sijthoff-Leyden 1966), 352-353.

[97] UN Secretariat, 'Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims' (15 June 1972) UNJY 1972, 153.

[98] ibid.

respect the principles and spirit of the Geneva Conventions.[99]

Since then, the UN's position on accession has not changed, and, from a formal point of view, the UN is still not competent to become a party to the Geneva Conventions and Additional Protocols. However, as shown above, the UN has declared its commitment to the application of principles and rules of IHL several times in several ways without necessarily clarifying the specific applicable rules. Therefore, in the absence of any treaty obligations, the principles and rules that apply to UN operations would be customary rules of IHL.[100] Applying the customary rules of IHL to UN operations is a challenging task, for two main reasons. First, it rises the question to what extent the existing IHL conventions reflect or have become part of customary international law.[101] Secondly, the concern that some obligations in the conventions of

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[99] ibid 153-154.

[100] The ICJ recognized that international organizations, as subjects of international law, are bound by any obligations incumbent upon them under general rules of international law, in *Interpretation of the Agreement of 25 March 1981 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73, 89-90. The majority view in the legal literature is that customary rules of IHL apply to the UN operations: According to Seyersted, the UN is bound by customary IHL as long as it is engaged in activities governed by the IHL (Seyersted (n 3) 187, 201-202, 314, 395-396); Schindler notes that it is uncontested that the UN is bound by the customary rules of IHL when engaged in hostilities (Schindler (n 42) 526). Also, Zwanenburg states that the UN is subject to general international law, namely customary international law and general principles of law as it owes its legal personality to this legal system (M Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff 2005) 151); Further, see C F *Amerasinghe, Principles of Institutional Law of International Organizations* (CUP 2005) 240-241; Murphy (n 1) 189; In contrast Sassòli suggests that due to the UN's denial that the IHL applies *de jure* to its operations, there are 'some doubts as to whether the IHL rules that are customary between states are customary in armed conflicts involving international organizations' (M Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 EJIL 661, 687); Bowett also sounds doubtful where he states that 'if the customary law of war *is found to be applicable* (emphasis added) as a matter of law to United Nations Forces, its principal impact is on the regulation of the actual combat' (Bowett (n 1) 506).

[101] By the end of the Second World War, it had already been confirmed by the International Military Tribunal for the Trial of German Major War Criminals that the Hague Regulations of 1899 and 1907 were part of customary international law (Trial of German Major War Criminals, 1946 CMD. 6964, Misc. No. 12, 65) Similarly, it was stated by the International Military Tribunal for the Far East in 1948 that the Hague Regulations were 'good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation (Re Hirota, 15 Ann. Dig. & Rep. of Pub. Int'l L Cases 356, 366) The ICJ had pronounced on the customary rules of IHL on many occasions. In the *Legality of the Threat or Use of*

IHL can only be discharged by states could be equally valid for the application of customary rules of IHL.

### 3.1 Article 1 Common to the Geneva Conventions: The Obligation to "Ensure Respect"

Article 1 common to the Geneva Conventions is a provision that could create obligations for both states and international organizations. The provision calls on

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*Nuclear Weapons*, it stated that 'a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and elementary considerations of humanity' […] [that they are] 'to be observed by all States whether or not they have ratified the Convention that contain them, because they constitute intransgressible principles of international customary law' (Advisory Opinion, ICJ Reports 1996, 226, [79]). In the Court's view, these rules incorporate obligations, which are essentially of an erga omnes character (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, ICJ Reports 2004, 136, [157]). Also see *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v US), Judgment, ICJ Reports (1986) [217-220]. Further evidence for the international customary law status of the Hague Regulations and the Geneva Conventions can be found in military manuals. It is stated in the US Manual on the Law of Land Warfare that the Hague Conventions and the four Geneva Conventions are law making treaties and law making treaty provisions are 'in large part but formal and specific applications of general principles of the unwritten law' (US Department of the Army, the Law of Land Warfare (Field Manual No. 27-10, 1956) Change No 1 (15 July 1976). The UK Manual on the Law of War on Land also states that the Hague Regulations embody rules of customary international law (The Law of War on Land being Part III of the Manual of Military Law, (The War Office 1958) 4; see also The Manual of the Law of Armed Conflict, UK Ministry of Defence, (OUP Oxford 2005) 9, 14; The Secretary-General's Report on the setting up of the International Criminal Tribunal for the Former Yugoslavia (ICTY) referred to the Geneva Conventions, the Hague Convention and Charter of the International Military Tribunal of 8 August 1945 as 'part of conventional international law which has beyond doubt become part of international customary law' (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (3 May 1993) UN Doc S/25704); The question of the customary law status of the Additional Protocols I and II is much debated. There has been a remarkable increase in the number of States Parties to the Protocols [The number of States Parties for Additional Protocol I and Additional Protocol II is 172 and 166 respectively (information available at <http://www.icrc.org/eng/assets/files/annual-report/current/icrc-annual-report-map-conven-a3.pdf> accessed 20 August 2013)]. The most up to date and extensive study on the customary status of the Geneva Conventions of 1949 and their Additional Protocols has been carried out by the ICRC and the results were published in two volumes: J M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (vols I & II) (CUP 2005). To point out the focus of this study it has been stated by one of the contributors, J M Henckaerts that 'the great majority of the provisions of the Geneva Conventions, including common Article 3, are considered to be part of customary international law. […] Therefore, the customary nature of the provisions of the Conventions was not the subject as such of the study. Rather, the study focused on issues regulated by treaties that have not been universally ratified, in particular the Additional Protocols […]' (J M Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and the Respect for the Rule of Law in Armed Conflict' (2005) 87 Int Rev of the Red Cross 175, 187). The online version of this study has been launched recently by the ICRC at http://www.icrc.org/customary-ihl/eng/docs/home. The database provides rapid access to the ICRC study on the customary rules of IHL and includes regularly updated examples of state practice.

contracting parties to 'respect and to ensure respect for the present Convention in all circumstances'. This provision has come to be interpreted as 'implying a universal obligation to implement' and to enforce the Geneva Conventions.[102] To emphasize the significance of the said provision, the ICJ has pointed out in relation to obligations of the United States in *Military and Paramilitary Activities in and against Nicaragua* that the obligation to respect and to ensure respect 'does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give expression.'[103] Therefore, the UN or international organizations in general would be expected to fulfil the obligations under the said article as well.

The extent of obligations under Article 1 has been much disputed. There is evidence suggesting that the drafters of this article only intended to emphasize the obligation of all States to enforce humanitarian law at the domestic level, and apply it to all relevant actors within the State structure.[104] However, the article has been reinterpreted more expansively by the ICRC and by a number of commentators.[105] It has been suggested in an Official Statement by the ICRC that the obligations under Article 1 extend to third parties and, in particular, that states not involved in an armed

[102] A Roberts & R Guelff, *Documents on the Laws of War* (OUP 2005) 33.

[103] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), Judgment, ICJ Reports (1986) 14, [220]; See Laurence Boisson de Chazournes & Luigi Condorelli, 'Common Article 1 of the Geneva Conventions revisited: Protecting Collective Interests' (2000) 837 Int Rev of the Red Cross 67, 85-86).

[104] See F Kalshoven, 'The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 Y B Int'l Humanitarian L 3, 3-23; Saura (n 20) 493.

[105] See for instance H P Gasser, 'Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations' in H Fox and M Meyer (eds), *Effecting Compliance, vol II of Armed Conflict and the New Law* (BIICL 1993) 24-25; U Palwankar, 'Measures Available to States for Fulfilling Their Obligation to Ensure Respect for International Humanitarian Law' (1994) 298 Intl Rev of the Red Cross 9, 9-25; Saura (n 20) 511.

conflict have the duty to take the appropriate actions against those states which violate IHL.[106] Further, an authoritative ICRC commentary to Geneva Convention IV (the ICRC Commentary IV) states:

> In the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may and should, endeavour to bring it back into an attitude of respect for the Convention. The proper working system of protection provided by the Convention demands in fact that the contracting Parties should not be content merely to apply its provisions to themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally.[107]

Further the ICRC Commentary IV extends the obligation to 'ensure respect' during peacetime as well.[108] The interpretation of Article 1 as such begs the question whether the drafters of the Geneva Conventions really wished to extend the obligations of the contracting parties under Article 1 to *jus ad bellum* when regulating the *jus in bello*.

A main problem with Article 1 is that the obligation to respect and ensure respect seems to impose an obligation on the contracting parties to 'act'. However, it does not indicate what course of action they are expected to follow to ensure respect for IHL. The ICJ in its Advisory Opinion concerning *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* affirmed that Article 1 entails third party obligations[109] and elaborated on the content of the obligations

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[106] ICRC, Official Statement by Dr Jakob Kellenberger, ICRC President, 'International Humanitarian Law at the Beginning of the 21st Century', 26th Round Table in San Remo on current problems of international humanitarian law: "The two Additional Protocols to the Geneva Conventions: 25 years later — challenges and prospects" (5 September 2002) available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5e2c8v> accessed 3 May 2012.

[107] J Pictet (ed), *Commentary to Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (1958) 16.

[108] Pictet (ed), *Commentary to Geneva Convention IV*) (n 107) Article 1.

[109] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 101) [158].

specific to the subject matter of the case.[110] While the ICJ did not specify the ways in which compliance by Israel with the Geneva Conventions would be ensured, it has emphasized that states should 'respect the UN Charter and international law' when fulfilling their obligations under Article 1 common to the Geneva Conventions.[111] The UN's obligations were also highlighted where it was pointed out that,

> '[…] the Court is of the view that the United Nations, and especially the General Assembly and the Security Council should consider what further action is required to bring an end to the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion.'[112]

It is hard to find evidence in practice showing that States see themselves under an obligation to 'act' to ensure that other states respect IHL, but even harder to prove that the UN considers itself bound by the same obligation. On the contrary, the UN seems reluctant to acknowledge an obligation as such. This view can be supported by the fact that the exact content of the 'principles and rules' formula used by the UN still remains unclear and that there is no reference to common Article 1 in the Secretary General's Bulletin.

The specific mandate of a UN operation trumps any general legal obligation to ensure respect for IHL. In fact, as Greenwood rightly points out, the obligation to ensure respect faces 'considerable practical difficulties,' particularly because a UN force might not have the strength and features for such an operation.[113]

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[110] ibid [159].

[111] ibid

[112] ibid [160].

[113] Greenwood (n 35) 33.

## 4. Conclusion

From a formal point of view, the UN cannot be a contracting party to the Geneva Conventions or the Additional Protocols as their final clauses do not allow accession by international organizations. However, the customary rules of IHL remain directly relevant to UN operations. Section 1, paragraph 1.1 of the Secretary General's Bulletin states in its first sentence that:

> […] The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement.

The reference to 'fundamental principles and rules of international humanitarian law' in the Secretary General's Bulletin could be understood as a solemn undertaking by the UN to respect the customary IHL. However, it has never been clear on what exactly is entailed by the principles and rules/spirit of IHL, in the sense of the phrase that has constantly been repeated in the SOFAs or SOMAs or in the agreements between the UN and the troop contributing states. In order that the UN's obligations should be clear under IHL, Schindler has suggested that the UN could adopt a declaration where it accepts the provisions of the Geneva Conventions under Article 2 (3) common to the four Geneva Conventions and the declaration should also regulate how the Conventions should be implemented.[114] A UN declaration accepting the wholesale application of the Geneva Conventions is unlikely to happen since the UN Secretariat has consistently argued that they contain many obligations that can only be

[114] Schindler (n 42) 530.

discharged by states. Furthermore, any political attempts to request the UN to adopt a declaration accepting the applicability of the Geneva Conventions 'would create the risk of opening a sensitive debate' on the Additional Protocols.[115]

Under these circumstances, the UN is expected to apply the IHL rules that have attained the customary status only. As already indicated, the majority of the rules in the Geneva Conventions are customary and the ICRC's extensive study of state practice has demonstrated the customary international law status of many rules in Additional Protocols. Therefore, the UN ought to adopt a clearer approach towards the application of customary rules rather than relying on obscure phrases. This approach should also be more comprehensive. Currently its main focus seems to be only on the 'conduct of hostilities,' as Section 1 paragraph 1. 1 of the Secretary General's Bulletin states that the fundamental principles and rules of international humanitarian law are applicable to the UN forces when in situations of armed conflict *as long as they are actively engaged as combatants* and for the duration of their engagement. However, the rules of IHL have an intrinsic value beyond conduct of hostilities.

This narrow scope of the Secretary General's Bulletin might be linked to two reasons. The first is that many rules other than those on the conduct of hostilities necessitate a state structure with legislative, administrative and judicial powers that the UN obviously lacks. As already noted, because the UN does not have courts to prosecute members of the military personnel of a United Nations force in case of violations of IHL, they are subject to prosecution in their national courts. Similarly, the UN has to

[115] Palwankar (n 1) 229.

rely on the contributing states in instances where the Geneva Conventions require parties to 'enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.'[116]

The other aspect of the UN's narrow approach to the application of IHL is the lack of clarity on the applicability of this body of law to forces other than enforcement. Neither the Secretary-General's Bulletin nor the Safety Convention sufficiently addresses the applicability of IHL to peacekeeping operations. The multidimensional aspects of peacekeeping operations have only been acknowledged, albeit partly and only for the purpose of protecting the peacekeepers, in the Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel where the protective regime of the Safety Convention has been extended to UN operations delivering humanitarian, political or development assistance in peacebuilding. Despite some discussions that took place during the negotiation process, the ambiguity regarding the applicability of IHL to operations other than enforcement has remained unresolved.

The applicability of IHL to UN operations is more than purely academic. A clear and more comprehensive approach indicating when and to which operations IHL applies and more clarity about the extent of its application is crucial in deciding the question of legal responsibility. Such an approach is all the more crucial where the UN becomes the authority exercising state like powers.

[116] Geneva Convention I (n 7) art 49, Geneva Convention II (n 7) art 129, Geneva Convention IV (n 7) art 146.

The UN experience in Somalia exemplifies the shortcomings of current UN practice. When allegations were made that the UN forces in Somalia violated the IHL, the Court Martial Appeal of Canada held in *R. v. Brocklebank*[117] that Private Brocklebank, who was accused of aiding and abetting the torture of a Somali teenager, was not under the obligation to ensure the safety of a prisoner as neither the Geneva Conventions nor the Additional Protocols applied to peacekeeping operation in Somalia. The outcome of the *Brocklebank* trial shows not only that there is a great deal of confusion regarding the applicability of IHL to various kinds of UN operations but also that this confusion can create undesired consequences in real life.

[117] *R. v. Brocklebank* CMAC-383, April 2, 1996.

# CHAPTER 3

# THE APPLICABILITY OF THE LAW OF OCCUPATION TO UN POST-CONFLICT ADMINISTRATIONS

## 1. Introduction

The analogy between the administration of territories by international organizations and occupation by states has been acknowledged -albeit, partially sometimes[1]- in the legal literature[2] but wholly rejected by the UN in practice. There have been very few instances of the application of the law of occupation to UN mandated operations and those were mainly through individual initiatives of the nations contributing troops[3] to the multinational forces on the ground.

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[1] See for instance D Shraga, 'Military Occupation and UN Transitional Administrations-The Analogy and its Limitations' in M G Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (Brill 2007) 479-498; M Sassòli, 'Article 43 of the Hague Regulations and Peace Operations in the 21st Century' Background Paper Prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Programme on Humanitarian Policy and Conflict Research at Harvard University, 25-27 June 2004, 19-22; R Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (OUP 2005) 4.

[2] See for instance M Zwanenburg, 'Substantial Relevance of the Law of Occupation for Peace Operations' in G L Beruto (ed), Human Rights and Peace Operations, Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, 4-6 September 2008, 157-166; M J Kelly, *Restoring and Maintaining Order in Complex Peace Operations, The Search for a Legal Framework* (Kluwer Law International1999) 178-184; S R Ratner, 'Foreign Occupation and International Territorial Administrations: The Challenges of Convergence' (2005) 16 EJIL 695, 695-719; J Saura 'Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations' (2006-2007) 58 Hastings L J 479, 506-510; T H Irmscher, 'The Legal Framework for the Activities of United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation' (2001) 44 German Yearbook of International Law 353, 376-394; S Wills, *Protecting Civilians: The Obligations of Peacekeepers* (OUP 2009) 171-245.

[3] Australia has been the only nation that has been consistently receptive to the application of the law of occupation to its forces: As the lead nation of the International Force for East Timor (INTERFET) mandated under UNSCR 1264 of 15 September 1999, it applied the law of occupation *de facto*, to its activities in East Timor. Similarly, the Australian contingent of UNOSOM II, mandated under UNSCR 814 of 26 March 1993, decided that the law of occupation was applicable *de jure*: See Kelly (n2) 17,63; M J Kelly, T McCormack, P Muggleton and B Oswald 'Legal Aspects of Australia's Involvement in the International Force in East Timor' (2001) Int Rev of the Red Cross available at

The Secretary General's Bulletin On Observance by United Nations Forces of International Humanitarian Law[4] seems to preclude the law's application to UN peacekeeping operations as there is no explicit mention of the specific rights and obligations that could arise for the UN out of the law of occupation. Nevertheless, the law of occupation is a subset of IHL and the list of the provisions of IHL set out in the Bulletin is not exhaustive.[5] To the extent that the law of occupation is part of 'fundamental principles and rules of IHL,' they would be applicable to UN peacekeeping operations (provided that conditions for their applicability are met).

When the UN carries out complex, multidimensional operations involving exercise of certain degree of legislative, executive and judicial powers, analogous to occupations, the theoretical possibility of the applicability of the law of occupation could become a reality. However, none of the UN Security Council Resolutions creating such forces has ever made reference to the law of occupation.[6]

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<http://www.icrc.org/eng/resources/documents/misc/57jqz2.htm>accessed 1 February 2011; Shraga (n1) 8; The situation of the multinational forces in Iraq during and after the invasion and occupation of the territory in 2003 has been complex. The invasion started without obtaining a Security Council Resolution so initially there was no UN mandate. The UNSC Res 1483 of May 2003 subsequently mandated the Multi-National Force and identified the status of UK and US as occupiers. The preamble of the Resolution stated that 'other States that are not occupying powers are working now or in the future may work under the Authority [Coalition Provisional Authority]. Interestingly, however, paragraph 5 of the same Resolution called upon 'all concerned to comply with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907' which suggests that even 'other States that are not occupying powers' (as 'all concerned') should observe the law of occupation. See concurring, Wills (n2) 203, note 189.

[4] UN Doc ST/SGB/1993/13 (6 August 1999).

[5] ibid section 2.

[6] Ratner (n 2) 403.

Despite the UN's hesitation to apply this body of law, *de jure* or *de facto,* to its forces, this Chapter explores the extent the law of occupation could be deemed applicable to UN post-conflict administrations, focusing on the similarities between the UN administrations and occupations, and the relevance of this body of law for their activities.

## 2. Do UN Post-conflict Administrations Constitute Occupations?

The law of occupation is set out in the Regulations annexed to Hague Convention IV Respecting the Laws and Customs of War on Land, 1907[7] (the Hague Regulations) and expanded by the Geneva Convention IV Relative to the Protection of Civilians in Time of War, 1949[8] (Geneva Convention IV) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 1977[9] (Protocol 1).

### 2.1 Article 42 of the Hague Regulations

The international conventions on IHL listed above do not provide a definition of occupation. However, Article 42 of the Hague Regulations states that:

[7] Regulations annexed to Hague Convention IV Respecting the Laws and Customs of War on Land (signed at The Hague, 18 October 1907, entered into force 26 January 1910) UKTS 9 (1910) Cd. 5030.

[8] Geneva Convention IV Relative to the Protection of Civilians in Time of War, (adopted Geneva 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1977 (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

> Territory is considered occupied when it is actually placed under the authority of the *hostile army*. The occupation extends only to the territory where such authority has been established and can be exercised (emphasis added).

The first sentence of Article 42 links occupation to war.[10] Therefore, the presence of foreign troops on a territory with the consent of that territory's government would preclude the application of Article 42, since there would not be any hostility between the host state and foreign troops. This assumption would totally be valid for peacekeeping operations as traditionally conceived, but even so, as discussed in the first chapter, a SOFA/SOMA that forms the basis of the presence of the foreign troops on that territory could be unilaterally terminated by the host state, if the terms of the agreements allow it, and the consent would disappear.[11] The government that gave the consent could even collapse, obliging the peacekeeping force to exercise authority over the territory.[12] In the most extreme cases, a government that is capable of giving consent could be non-existent as was the case in Somalia in 1993 when UNOSOM II was established; and the parties to the conflict could easily consider the UN forces as an adversary.[13]

In some cases the consent could also be tainted. Whether Article 52 of the Vienna Convention on The Law of Treaties[14] could be invoked to question the validity of

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[10] E Benvenisti, *The International Law of Occupation* (Princeton 1993) 4.

[11] See Special Report by the Secretary-General on the United Nations Emergency Force (18 May 1967) UN Doc A/6669, 9.

[12] For instance, in the face of breakdown of law and order in the Congo between 1960-1964, the UN had to exercise the functions of a government, see A Roberts, 'What is a Military Occupation' (1984) 55 BYIL 249, 290-292.

[13] See M Zwanenburg, 'Pieces of the Puzzle: Peace Operations, Occupation, and the Use of Force' (2006) Revue de Droit Militaire et de Droit de la Guerre 239, 241-242.

[14] Vienna Convention on the Law of Treaties (signed 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 52 provides that: 'A treaty is void if its conclusion has been procured

consent under certain circumstances has been discussed in the legal literature:[15] It is doubtful if the consent of the Afghan government was genuine, when the Soviet Union deployed its forces to the territory during the late 1979s to stop the opposition against the new Afghan government that had strong ties with the Soviet regime.[16] It had been claimed that a treaty was signed between the Soviet Union and the Afghan government related to the temporary presence of the Soviet forces on the Afghan territory, however the text of the treaty was neither published nor submitted to the UN.[17] Benvenisti takes the view that the invitation of the Afghan government was a 'mere fabrication' and the Soviet Union was an occupant bound by IHL.[18] But, Gasser argues that the events that occurred in Afghanistan could have been characterized as an international armed conflict between the two parties to the Geneva Conventions, however the Afghan government's consent to the presence of the Soviet forces 'may have put an end to the conflict between these two countries.'[19] Nevertheless, by 1978s, Afghanistan was heavily dependent on the Soviet trade, military and economic

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by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.'

[15] See T Ferraro, 'The Applicability of the Law of Occupation to Peace Forces' in G L Beruto (ed), Human Rights and Peace Operations, Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, 4-6 September 2008 139; Saura (n 2) 507. Referring to the Military Technical Agreement signed between the FRY and KFOR after NATO's military intervention, J Cerone claims that 'formal consent may itself be lacking in this case' (J Cerone, 'Minding the Gap: Outlining KFOR accountability in Post-Conflict Kosovo' (2001) EJIL 469, 484).

[16] For an account of the Soviet invasion in Afghanistan see Benvenisti (n 10) 160-163; A Hyman, *Afghanistan under Soviet Domination 1964-1983* (London 1984); J B Amstutz, *Afghanistan: The First Five Year of Soviet Occupation* (Washington 1986).

[17] Benvenisti (n 11) 161.

[18] ibid.

[19] H P Gasser, 'Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon' (1983-1984) 33 American University Law Review 145, 151.

assistance and the Soviets enjoyed ‘a degree of influence probably unmatched by them elsewhere.’[20]

Another example of a ‘tainted’ consent is of the Federal Republic of Yugoslavia (FRY) for the UN presence in Kosovo that came after a heavy NATO bombing in 1999. As stated by Caplan, ‘from the standpoint of the unwilling “host”- for instance Serbia in the case of Kosovo- there may be little difference between a NATO backed administration and a foreign military occupation.’[21]

While the issue of obtaining consent is obviously a very complicated matter, and the host-state consent might be tainted or rather be a formality at times, it would still not be convincing to state that, the UN peacekeeping forces be it traditional or robust could be considered as ‘hostile army’ under Article 42 of the Hague Regulations.

### 2.2 Common Article 2 to the Geneva Conventions and ‘Consensual’ Occupation

Common Article 2 gives occupation a wider meaning than it had under Article 42 of the Hague Regulations. The first paragraph of the Article encompasses occupations taking place during the hostilities, even if the state of war is not recognized. The second paragraph encompasses ‘all cases’ of occupation, not preceded by armed hostilities, even if the armed resistance was useless. The ICRC Commentary to the Geneva Convention IV states that the way the second paragraph was drafted was based on the Second Word War experience during which the territories were occupied

[20]Amstutz (n 16) 26.

[21] Caplan (n 1) 3.

without hostilities, as any resistance to the occupying powers would be futile.[22] Further, it was stated that the main importance of the article is its focus on the protection of the individuals:

> So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 […]. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. [….]. The Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left.[23]

It is obvious from the wording of Common Article 2 and the ICRC Commentary that the Article's field of application is broader than Article 42 of the Hague Regulations, however what exactly is meant by or included in 'all cases' of occupation is far from clear. It has been argued that cases covered by Article 2 seem to be broadened further in the practice of the states to include other forms of occupation such as 'peacetime' or 'consensual' occupation.[24] However, this is also not without doubt. According to Von Glahn, conventions on the law of occupation recognize only one type of occupation and that is 'belligerent' occupation.[25] Yet, he accepts that there exist other types of non-belligerent occupation, which he calls as 'conventional' occupation and states that unless the parties involved regulate the rules applicable to a conventional occupation the occupant would still be bound by the Hague Regulations and

[22] J Pictet (ed), The Geneva Conventions of 12 August 1949: Commentary (Geneva: ICRC 1952-1960) 21.

[23] ibid 60.

[24] Shraga (n1) 480; Kelly (n 2) 145.

[25] G Von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis 1957) 27.

subsequent international lawmaking treaties.[26] What is referred as conventional occupation by Von Glahn, is called 'peacetime occupation by consent' by Roberts which he identifies as one type of non-belligerent occupations, the other being 'forcible peacetime occupation'.[27] Similarly, Bothe uses the phrase 'pacific occupation' to refer to non-belligerent occupation and makes a distinction between pacific occupations based on an agreement and pacific occupations that are coercive.[28] Accordingly, 'peacetime occupation by consent' – or pacific occupation based on agreement- is, as the phrase itself suggests, the presence of foreign troops on a territory in accordance with an agreement with its government.[29] On the other hand, 'forcible peacetime occupation' is the occupation of a territory without the consent of the government, but also without causing any hostilities with that state.[30] The Hague Regulations and the Geneva Convention IV are deemed applicable to forcible peacetime occupations since, by definition, this type of occupation is not regulated by any specific agreements between the occupier and the occupied state.[31] The applicability of the Hague Regulations and Geneva Convention IV to peacetime occupation by consent is more problematic since there is no hostility but an agreement between the parties. There are not many examples of a peacetime occupation by consent. Roberts and Bothe give the occupation of the left bank of the Rhine by the

[26] ibid.

[27] Roberts (n 12) 274.

[28] M Bothe, 'Occupation Pacific' in *Encyclopaedia of Public International Law published under the auspices of Max Planck Institute for Comparative Public Law and International Law under the direction of Rudolf Bernhardt*, vol 3 (Amsterdam 1997) 766.

[29] Roberts (n 12) 276; Bothe (ibid).

[30] Roberts (n 12) 274.

[31] ibid 274-276.

Allied and Associated Powers under the terms of the Treaty of Versailles of 1919[32] and the Rhineland Agreement as an often mentioned example in the legal literature.[33] There had been debate on whether it was the Rhineland Agreement or the Hague Regulations that formed the basis of the occupant's authority.[34] Interestingly, the Rhineland Agreement itself acknowledges the importance of the Hague Regulations.[35]

Roberts cites another type of peacetime occupation by consent where the foreign troops are 'invited' by the host state government and find themselves in a position to exercise important administrative functions over that territory analogous to an occupier. However, he acknowledges two problems associated with such analogy. First, the conflict on that territory would most probably be an internal conflict, and second the foreign troops would not be occupiers as they are invited by the host state.[36]

Article 2(2) of the Geneva Convention IV gives a broader meaning to occupation but it fails to resolve the question whether the law of occupation applies to different types of peacetime or consensual occupations. Nevertheless, the Geneva Conventions embody fundamental rules for the protection of civilians who find themselves, in any

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[32] Treaty of Peace Between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) (Treaty of Versailles).

[33] However, as Roberts adds, this would hardly be a 'paradigmatic example' as the occupation of the left bank of the Rhine was the continuation of an already existing armistice occupation (Roberts (n 12) 278); Bothe (n 28) 767.

[34]Roberts (n 12) 278.

[35] Article 6 of the Rhineland Agreement states: 'The right to requisition in kind and to demand services in the manner laid down in the Hague Convention 1907, shall be exercised by the Allied and Associated Armies of Occupation' (for text of the Rhineland Agreement see E Fraenkel, *Military Occupation and the Rule of Law, Occupation Government in the Rhineland, 1918-1923* (OUP 1944) 234.

[36] ibid.

manner whatsoever, in the hands of foreign powers,[37] and these rules should be observed at all times even when the situation is not classified as occupation.

### 2.3. The Necessity for 'Actual Control' over the Territory

A stronger argument allowing the law of occupation to apply to non-belligerent or consensual occupations, or to situations resembling them, is that the applicability of the law is dependent on factual circumstances. Indeed, Article 42 puts emphasis on the facts on the ground where it states that the occupation exists when the occupier has actual control over the territory and that the occupation extends only to the territory where such authority has been established and can be exercised. Neither the Hague Regulations nor the Geneva Convention IV requires a formal declaration of occupation. It is clear that the existence of the state of occupation should be based on an objective assessment of the factual circumstances, but the conventions on the law of occupation neither name any international body nor suggest the establishment of any body that could make this assessment.[38]

Article 42 does not define what is meant by 'actual control.' According to Benvenisti and Dinstein, effectiveness of control is a *conditio sine qua non* of occupation. Benvenisti sets forth that the law of occupation applies to all instances of 'effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title,

[37] Geneva Convention IV (n 8) art 4.

[38] See S Wills, 'Occupation Law and Multi-National Operations: Problems and Perspectives' (2006) 77 BYIL 256, 260).

without the volition of the sovereign of that territory.'[39] While Dinstein concurs with him, he further adds that 'defining the exact amount of control deemed objectively "effective" is an imponderable problem.'[40] Roberts argues that in order for an occupation to exist the foreign forces on the territory should either replace or show a physical ability to displace the territory's government with its own command structure.[41] And, Bothe merely states that the state of occupation is the actual control of the territory of another state (or parts of it).[42]

The UK Manual on the Law of Armed Conflict gives more insight into what the actual control is by setting two conditions that must be satisfied in order to determine whether a state of occupation exists: (1) The former government should be rendered incapable of publicly exercising its authority in that area, (2) The occupying power should be able to substitute its own authority for that of the former government.[43] Likewise, the US Manual establishes two conditions to be fulfilled: (1) The invaded government must be incapable of publicly exercising its authority; (2) The invader should successfully substitute its own authority for that of the legitimate government in the territory invaded.[44] The differences between the US & UK position are potentially significant. In order for the law of occupation to apply, the UK Manual

[39] Benvenisti (n 10) xvi.

[40] Y Dinstein, *The International Law of Belligerent Occupation* (CUP 2009) 43.

[41] Roberts (n 12) 300; see also D A Graber stating that the occupation gives authority to the occupant as he has the physical force to exercise it (D A Graber, *Studies in History, Economics and Public Law, The Development of the Law of Belligerent Occupation 1863-1914* (1949) 58).

[42] Bothe, 'Occupation Belligerent' (n 28), 763; see also Y Dinstein, 'The International Law of Belligerent Occupation and Human Rights' (1978) 8 Israel Yearbook on Human Rights 104, 105.

[43] The Manual of the Law of Armed Conflict, UK Ministry of Defence, (OUP Oxford 2005) [11.3, 275].

[44] US Department of the Army, the Law of Land Warfare (Field Manual No. 27-10, 1956) Change No 1 (15 July 1976) [355].

finds it sufficient that the occupying power has the *potential to substitute* its own authority for that of the government of the territory occupied, on the other hand, the US manual sets a higher threshold by stating that the law applies when the invader *successfully substitutes* its authority for that of the government of the territory occupied. In that respect, the US Manual also differentiates the invasion phase from the occupation phase. The US Manual further adds that the occupation must be both actual and effective, 'that is, the organized resistance must have been overcome and the force in possession must have taken measures to establish its authority.'[45] However, in order to ensure that civilians affected by an armed conflict including occupation receive the greatest protection possible, rather pragmatically the ICRC does not distinguish between invasion and occupation in terms of application of the law of occupation.[46] Accordingly, the laws of occupation should apply as soon as the troops enter a foreign territory and encounter the civilian population.[47] While the US Manual seems to establish a higher threshold than the UK Manual for the law of occupation to apply, the ICRC seems to lower the threshold too much as Article 42 clearly requires the control of the occupying power over the territory for the law of occupation to apply.[48] The differences between the approaches of the military manuals and the ICRC do not create very different results in practice in terms of application of the provisions of the Geneva Conventions on the protection of civilians

[45] ibid [356].

[46] D Thürer, Official Statement by the ICRC, 'Current Challenges to the Law of Occupation', ICRC 6th Bruges Colloquium, 20-21 October 2005, available at <http://www.icrc.org/eng/resources/documents/statement/occupation-statement-211105.htm>accessed 20 February 2011.

[47] ibid; Pictet (n 22) 59.

[48] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004) ICJ Reports 2004 136 [78], [89] and *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda), Judgment ICJ Reports 2005 168 [172].

that apply not only during the occupation but also in all circumstances in which the conventions are deemed applicable.[49]

### 2.4. Factual Similarities Between the Occupations and UN Post-conflict Administrations

The similarities between occupations and post conflict administrations cover their establishment, functioning and termination.

#### 2.4.1 Establishment of Direct Administration Over the Territory

Article 42 of the Hague Regulations expects the occupant, upon gaining control of the territory, to establish and exercise its authority over the occupied area. The occupier is under a duty to introduce a system of direct administration.[50] However, neither the Hague Regulations nor the Geneva Conventions regulates expressly how the occupier should structure the administration. Therefore, a UN post-conflict administration consisting of significant military and civilian components with partial or full control and governance powers[51] could easily be considered as one type of administration that an occupier could establish. Still, it has been suggested that an administration established during a belligerent occupation would predominantly be military in character. The US Manual emphasizes this when it states, 'it is immaterial whether

[49] Wills (n 2) 177-178.

[50] Benvenisti (n 10) 4.

[51] See for instance UNSC Res 1037 (15 January 1996) establishing the United Nations Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium (UNTAES) UN Doc S/RES/1037; UNSC Res 1244 (10 June 1999) establishing the United Nations Mission in Kosovo (UNMIK) UN Doc S/RES/1244; UNSC Res 1272 (25 October 1999) establishing the Transitional Administration in East Timor (UNTAET) UN Doc S/RES/1272.

the government over an enemy's territory consists in a military or civil or mixed administration. Its character is the same and the source of its authority is the same. It is a government imposed by force, and the legality of its acts is determined by the law of war.'[52]

### 2.4.2 The Exercise of 'Temporary' Control over the Territory

The law of occupation is based on an understanding that the occupant has temporary control over the territory and that the occupation does not confer on the occupant sovereignty over the occupied territory.[53] According to Kelly, 'the lack of UN's capacity to assume sovereignty sits well with the fundamental nature of the laws of occupation as a purely temporary status with no bearing on the matter of sovereignty during the administration of territories.'[54] Indeed, this is mirrored by the UN practice. The temporary character of the UN post-conflict administrations has been highlighted in their mandates. For instance, UNMIK has been charged with 'promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo.'[55] Similarly, UNTAET has facilitated a process towards independence in East Timor.[56] UNTAES' temporary role was to facilitate the reintegration of Eastern Slavonia, Baranja and Western Sirmium peacefully into

[52] The US Army's Field Manual (n 44) [368]; the UK Manual (n 43) [11.19].

[53] See for instance Hague Regulations (n 7) art 43; Geneva Convention IV art 6 (n 8); Benvenisti (n 10), 8; Graber (n 41) 58.

[54] Kelly (n2) 173.

[55] UNSC Res 1244 (n 51) [11(a)], also see [11(c)] & [11(e)].

[56] UNSC Res 1272 (n 51).

Croatia's legal and constitutional system.[57] In another example, the temporary role of the United Nations Transitional Authority in Cambodia (UNTAC) was to 'promote national reconciliation and to ensure the exercise of the right to self-determination of the Cambodian people through free and fair elections.'[58] Similar to occupations, in cases where the administered territory is part of an existing State, the government is prevented from exercising its authority during the UN administration. Nevertheless, to point out that the administration of these territories is a purely temporary status respecting the inalienability of sovereignty, the resolutions mandating the UN presence refer to the continuing sovereignty and the territorial integrity of the sovereign state.[59]

Traditionally, the law of occupation recognizes only one way to end an occupation, the return of the territory to the ousted government.[60] However, the way an occupation could end went through important changes towards the middle of the 20th century, especially as the principle of people's right to self- determination[61] and

[57] UNSC Res 1037 (n 51); see also UNSC Res 814 (26 March 1993) establishing the United Nations Operation in Somalia (UNOSOM II) UN Doc S/RES/814 and UNSC Res 690 (29 April 1991) concerning the situation in Western Sahara UN Doc S/RES/690.

[58] Agreement on a Comprehensive Political Settlement the Cambodia Conflict (signed 23 October 1991) 28613 UNTS 27 preamble; UNSC Res 745 (28 February 1992) UN Doc S/RES/745.

[59] See for instance, UNSC Res 1037 (15 January 1996) (n 51) preamble; UNSC Res 1244 (10 June 1999) (n 51) preamble.

[60] See Benvenisti (n 10) 214; Dinstein, *International Law of Belligerent Occupation* (n 40) 270. The unilateral annexation of the occupied territory by the occupant would end an occupation as well however it is prohibited under customary international law, see Article 2(4) of the UN Charter and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970). Also, see Geneva Convention IV (n 8) art 47, Protocol I (n 9) art 4. 96).

[61] The principle of self-determination of peoples' is contained in the Charter of the United Nations, San Francisco (signed 26 June 1945, entered into force 24 October 1945) UNCIO XV 335 (the UN Charter) art 1 (2), see also art 55; Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960) [2], and Declaration on Principles of

international human rights gained momentum. The specific shift of emphasis of the law of occupation under the Geneva Convention IV, from merely regulating the conduct of the occupant to increasing the protection afforded to the civilians was in line with these developments. Under certain circumstances, the acts of self-determination by the inhabitants of the occupied territory came to be recognized as a way that could terminate an occupation. Examples include Namibia, the West Bank and Gaza, East Pakistan, Cambodia, East Timor and Western Sahara.[62] Likewise, the resolutions mandating the UN post-conflict administrations refer to the self-determination of people of the UN administered territories where applicable.[63]

Despite the understanding that the return of the territory to the ousted government or a meaningful self-determination ends an occupation, the conventions on the law of occupation do not provide in explicit terms for when exactly an occupation ends. The only provision of IHL that could be construed as setting a time limit to occupation is Article 6 of the Geneva Convention IV. Article 6 provides that in the case of occupations, the application of Geneva Convention IV ceases 'after the general close

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International Law Concerning Friendly Relations Among Nations, UNGA Res 2625 (XXV) (24 October 1970) Annex [(e)], explicitly refer to the principle of self-determination. Further, Common Article 1(1) of the International Covenant on Civil and Political Rights, (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171, and International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1996, entered into force 3 January 1979) 993 UNTS 3, recognize the principle of self-determination.

[62] See UNSC Res 246 (14 March 1968) UN Doc S/RES/246 and UNGA Res 43/26 (17 November 1988) [2] on the question of Namibia; UNGA Res 2672 C (XXV) (8 December 1970) on Palestine; see Benvenisti (n 10) 173-175, on the occupation of East Pakistan by India and the establishment of the People's Republic of Bangladesh in 1971, UNGA Res 3203 (XXIX) (17 September 1974) on Admission of the People's Republic of Bangladesh to membership in the United Nations; UNGA Res 36/5 (21 October 1981), UNGA Res 41/6 (21 October 1986), UNGA Res 43/19 (3 November 1988) on Cambodia; UNGA Res 3485 (XXX) (12 December 1975), UNGA Res 31/53 (1 December 1976) and UNGA Res 36/50 (24 November 1981) on East Timor, UNGA Res 38/40 (7 December 1983) and UNGA Res 43/33 (22 November 1988) on Western Sahara.

[63] See, for instance UNSC Res 435 (n 57), UNSC Res 745 (n 58), UNSC Res 1244 (n 51), UNSC Res 1272 (n 51).

of military operations'. However, for the duration of the occupation and to the extent that the occupant exercises government functions in the occupied territory specific enumerated provisions remain in force. The referral of article 6 to the close of military operations suggests that it only covers belligerent occupations. According to the ICRC, the omission of occupations under Article 2(2) of the Geneva Convention IV from the coverage of Article 6 is deliberate and must be understood to mean that 'Convention [Geneva Convention IV] will be fully applicable in such cases, so long as the occupation lasts.'[64] When this line of thinking is followed for peacetime occupations, Geneva Convention IV in its entirety would be applicable during the forcible peacetime occupations, if the occupant is a state -party to it, otherwise it would apply to the extent that it is customary law. In case of peacetime occupations by consent the Geneva Convention IV would still apply only to fill the gaps in the agreements between the parties.

Protocol I has addressed this distinction created by Article 6, between the belligerent occupations and non-belligerent occupations. Under Article 3(b) of Protocol I the application of the four Geneva Conventions and Protocol I cease to apply 'on the termination of the occupation.' Just as the facts on the ground are crucial for deciding when occupation begins, they are crucial in determining when the occupation ends. Therefore, most legal writings suggest that 'occupation comes to an end when an occupant withdraws from a territory, or is driven out of it.'[65] In many instances, the occupation ends without any complications. However, as Roberts indicates 'the withdrawal of occupying forces is not the sole criterion of the ending of an

[64] Pictet (n 22) 63.

[65] L Oppenheim, *International Law: A Treatise*, *Volume 2: Disputes, War and Neutrality* (London 1952) 436; Von Glahn (n 25) 29; Kelly (n 2) 160.

occupation; and the occupant has not necessarily withdrawn at the end of all occupations'.[66] One example, where the occupying forces remain in the occupied territory after it has been declared or has been assumed that the occupation has ended, is when a treaty that allows the foreign forces to stay on the same territory accompanies the treaty that ends an occupation,[67]or some provisions of the treaty that ends an occupation allow the presence of the foreign troops on the occupied territory. In West Germany, on May 1952 the Convention on Relations between the Three Powers and Federal Republic of Germany ended the intervention of the Three Powers into the domestic affairs of the Federal Republic,[68] however the very same Convention retained the rights related to the continued presence of their armed forces in West Germany.[69] Likewise, in East Germany, on March 1954 the Soviet Union announced the end of its activities in the German Democratic Republic, and in the meantime the Soviet statement allowed the presence of Soviet troops on the East German territory for the purposes of maintaining security.[70] Another important example is the Allied occupation of Berlin that ended on 12 September 1990 with the conclusion of the Treaty on the Final Settlement with Respect to Germany.[71] Article 4 of the Treaty emphasized that withdrawal of the Soviet armed forces from the territory of the German Democratic Republic and of Berlin would be completed by

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[66] A Roberts, 'The End of Occupation: Iraq 2004' (2005) 54 ICLQ 27, 28.

[67] ibid 29.

[68] Convention on Relations between the Three Powers and Federal Republic of Germany (signed 26 May 1952) as amended by Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany (signed 23 October 1954, entered into force 5 May 1955), art 1(1) & art 1(2); see also Roberts, 'The End of Occupation: Iraq 2004' (n 66) 29 and B Ruhm von Oppen, *Documents on Germany under Occupation*, 1945-1954 (OUP 1955) 600-48.

[69] Convention on Relations between the Three Powers and Federal Republic of Germany (ibid) art 2(1).

[70] Roberts, 'The End of Occupation: Iraq 2004 (n 69) 29; See also Von Oppen (n 68) 597-98.

[71] Treaty on the Final Settlement with Respect to Germany (signed 12 September 1990) 29 ILM 1186 (1990).

the end of 1994. While Article 7 stated that the USSR, UK and the USA 'hereby terminate their rights and responsibilities relating to Berlin and Germany as a whole', Article 5(2) allowed for Soviet, French, UK and US forces, upon German request, to remain stationed in Berlin by agreements to this effect.

A recent example on the complexity of ending occupations is the military occupation of Iraq by the US and the UK (the Coalition Powers) between April 2003 and 28 June 2004. UN Security Council Resolution 1483 of 22 May 2003 affirmed the existence of occupation in Iraq and set the basic framework for occupation.[72] Similarly, it was the Security Council that set the termination date to the occupation as by 30 June 2004.[73] However, even after the occupants officially declared the end of occupation of Iraq on 28 June 2004 and the Iraqi interim government was formed, its sovereignty was constrained. UN Security Council Resolution 1546, which endorsed the formation of the interim government, limited its sovereign powers: The interim government was prevented from 'taking any actions affecting Iraq's destiny beyond the limited interim period until an elected Transitional Government of Iraq assumes office.'[74] The same Resolution further stated that 'the presence of the multinational force in Iraq is at the request of the incoming Interim Government of Iraq […] '(Paragraph 9). The Resolution further provided that 'the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or

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[72] UN Doc S/RES/1483 (2003); UNSC Res 1511 (16 October 2003) UN Doc S/RES/1511 details the framework for occupation of Iraq. For a detailed account of the occupation see Roberts, 'The End of Occupation: Iraq 2004 (n 66) 30-39; Wills (n 2) 202-211; G H Fox, 'The Occupation of Iraq' (2005) 36 Georgetown Journal of International Law 195, 196-295; D Glazier, 'Ignorance is not Bliss: The Law of Belligerent Occupation and the US Invasion of Iraq' (2005) 58 Rutgers Law Review 121, 184-193; S Wheatley, 'The Security Council, Democratic Legitimacy and Regime Change in Iraq' (2006) 17 EJIL 531, 531-37.

[73] UNSC Res 1546 (8 June 2004), UN Doc S/RES/1546 (2004).

[74] ibid art 1.

twelve months from the date of this Resolution […] and […] that it will terminate this mandate earlier if requested by the Government of Iraq' (Paragraph 12). Elections in Iraq were held in February 2005 and foreign forces remained in Iraq, this time, at the 'invitation' of the sovereign government.[75]

The complexity and the many gradations towards ending occupation are equally observed when UN post-conflict administrations come to an end. For instance, when the mandate of the UNTAC was terminated following the establishment of the constitutional government in Cambodia on 24 September 1993, the withdrawal of the military component of the administration was planned to be more immediate than the withdrawal of the mine clearance unit, training unit, the elements of the military police and medical components of UNTAC whose period of withdrawal was extended.[76] Further, the UN established a team of military liaison officers for a single period of six months who would report on matters affecting security in Cambodia.[77] Likewise, after the mandate of UNTAES ended on 15 January 1998, the UN presence on the territory continued for a single period of up to nine months through the establishment of a support group of civilian police to monitor the performance of the Croation police in the Danube Region, particularly in connection with the return of the displaced persons.[78] By contrast, the situation in East Timor unfolded differently than expected, as the UN presence on the territory had to re-strengthened, due to instability of the newly established state, after UNTAET was replaced by less

[75] Wills (n 2) 209.

[76] UNSC Res 880 (4 November 1993) UN Doc S/RES/880 [9], [10] & [11].

[77] ibid [12].

[78] UNSC Res 1145 (19 December 1997) UN Doc S/RES/1145(1995) [1], [13].

intrusive successor missions. On the day that East Timor became an independent state (20 May 2002),[79] UNTAET was replaced by a successor mission for an initial period of 12 months[80] and with limited administrative powers compared to the all-encompassing authority of UNTAET. Another difference between UNTAET and its successor missions was that neither of them was mandated under Chapter VII. Their presence was based on the consent of the newly established government of the territory. In that sense, their presence was similar to the post occupation presence of the foreign forces on a territory based on agreement with, or invitation by the government of the territory. The mandate of the United Nations Mission of Support in East Timor (UNMISET) included 'to provide assistance to core administrative structures critical to the viability and political stability of East Timor', 'to provide interim law enforcement and public security,' and 'to contribute to the maintenance of external and internal security of East Timor.'[81] About one year after its establishment, the military component of the UNMISET was gradually downsized with the aim of devolving all operational responsibilities to East Timorese people as soon as possible.[82] UNMISET was replaced by a one-year follow up special mission, the United Nations Office in Timor- Leste (UNOTIL); this continued the UN presence in East Timor until 20 May 2006 but at a much reduced level.[83] However, in the face of a series of events culminating in a political, humanitarian and security crisis of major

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[79] Following independence the new state officially changed its name to Timor-Leste.

[80] UNMISET's mandate has been extended by UNSC Res 1573 (16 November 2004) UN Doc S/RES/1573.

[81] UNSC Res 1410 (14 May 2002) UN Doc S/RES/1410 (2002) [2(a)], [2(b)] & [2(c)].

[82] UNSC Res 1473 (4 April 2003) UN Doc S/RES/1473 [2].

[83] UNSC Res 1599 (28 April 2005) UN Doc S/RES/1599.

dimensions in Timor Leste between May-June 2006,[84] the UN Security Council had to prolong UNOTIL's mandate and ultimately replace it in August 2006 with a new strengthened UN presence on the territory: the United Nations Integrated Mission in Timor Leste (UNMIT).[85] UNMIT functioned in the calm albeit fragile environment of Timor Leste with the purpose of supporting the Government and relevant institutions, consolidating stability, enhancing a culture of democratic governance, and facilitating democracy in the country.[86] UNMIT completed its mandate in December 2012.[87]

Finally, Kosovo has been an interesting case of the complexities of terminating the administration of a territory. Kosovo declared its independence on 17 February 2008,[88] despite the statement by Serbia that the declaration was a unilateral secession of a part of its territory.[89] UNMIK is to remain in Kosovo but its role is being adapted to the changes on the ground as the European Union Rule of Law Mission in Kosovo (EULEX) that works under the framework of UNSCR 1244 has gradually assumed increasing roles in the area of rule of law, specifically related to police, judiciary and customs.[90]

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[84] See Report of the Secretary-General on Timor-Leste pursuant to Security Council Resolution 1690 (8 August 2006) UN Doc S/2006/628.

[85] UNSC Res 1704 (25 August 2006) UN Doc S/RES/1704.

[86] ibid.

[87] Report of the Security Council Mission to Timor Leste, 3 to 6 November 2012 (28 November 2012) UN Doc S/2012/889.

[88] Kosovo's Declaration of Independence is available at <http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf> accessed 20 March 2011.

[89] Report of the Secretary-General on the United Nations Interim Administration in Kosovo (12 June 2008) UN Doc S/2008/354 [5].

[90] ibid [16].

## 3. Legal Perspective: To What Extent the Law of Occupation Can Be Deemed Applicable to UN Post-conflict Administrations

### 3.1 The UN Position

The applicability of IHL to UN forces has been acknowledged by the UN to a certain degree but the law of occupation has not yet found a place in UN practice. There are various reasons why the UN has never considered this body of law as relevant to its operations: Firstly, the word 'occupation' is perceived as carrying negative connotations, is closely related to colonial domination and oppression, and is a reminder of the experiences of the World War II and the prolonged occupation of Palestinian territories by Israel.[91] From the UN perspective, the pejorative connotations associated with occupation would probably put its impartiality and trustworthiness at risk.[92] Secondly, the law of occupation regulates the relationship between the occupant and the inhabitants of the occupied territory, which is based on a 'conflict of interest' between the two.[93] According to Benvenisti, at the heart of all occupations an inherent or a potential conflict of interest exists as a result of the administration of the occupied territory by an entity that is not its sovereign government.[94] It has been argued that, the conflict of interest does not apply to the UN

[91] Kelly (n 2) 179.

[92] Ratner (n 2) 711.

[93] Roberts, 'What is a Military Occupation?' (n 12) 300-301; also see Shraga (n1) 481.

[94] Benvenisti (n 10) 4.

presence on a territory due to the organization's altruistic nature as compared to the self-interested nature of states.[95] At the core of the perception, or self-perception, that the UN is an international organization with altruistic goals lays the concept of multi-nationality.[96] From this perspective, the broad multi-nationality of the UN makes the organization selfless as compared to the 'selfish' state occupiers that are inevitably in a confrontational relationship with the population of the occupied territory. To explain why a UN administration is different from an occupation, Shraga emphasizes that the essence of an occupant-occupied relationship is that of conflict of interest, while a UN administration is characterized by co-operation with the local population.[97] She further notes that

> [t]he laws of occupation strike a balance between the rights of the inhabitants to protection and humane treatment and the security needs of the occupying forces. The UN Administration, on the other hand, has no interest of its own other than to facilitate a transition to another administration or form of governance, and in so doing act solely for and on behalf of the population of the administered territory.[98]

However, it is an oversimplification to suggest that the UN does not have interests of its own. The multi-nationality of the UN is not always reflected in its practice. As Wills points out

> The Security Council in mandating a UN administration acts in the interests of maintaining international peace and security as those interests are perceived by its member States, particularly the Permanent Five. The inhabitants of the administered

[95] Sassòli (n 1) 18.

[96] Ratner (n 2) 711-12.

[97] D Shraga 'The UN as an actor bound by international humanitarian law' in L Condorelli, AM La Rosa, S Scherrer (eds), Les Nations Unies et le droit international humanitaire, Actes du Colloque international à l'occasion du cinquantièe anniversaire des Nations Unies, Genè 19, 20 et 21 Octobre 1995 (Pedone Paris 1996) 317, 328.

[98] Shraga, 'Military Occupation and UN Transitional Administrations-The Analogy and its Limitations' (n1) 496.

> territory may only be marginally concerned with the wider matters of international peace and security (and may not share the view of the Permanent Five on these matters) but they may have very strong feelings and beliefs regarding nationality, territorial claims, religious affiliation, clan affiliation and relationship with neighbouring States, among other things. They may have a different perspective, or many different perspectives, to the UN on all of these issues and may not always regard the UN as an impartial representative of their interests.[99]

Occasionally, the relationship between the UN administration and the local population could be defined by 'coercion' rather than co-operation: In East Timor, to fulfil its mandate of restoring international peace and security, INTERFET troops had to detain a number of East Timorese 'within hours of deploying.'[100] UNTAET was harshly criticized by Amnesty International[101] due to the lengthy detention periods under the Transitional Rules of Criminal Procedure.[102] In Kosovo, the Ombudsperson was highly critical of the deprivations of liberty imposed under 'Executive Orders' or any other form of executive instruction, decree or decision issued by the Special Representative of the United Nations.[103]

Finally, the long-standing concern that the Geneva Conventions contain many obligations that can only be discharged by states[104] is based on an unjustified

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[99] Wills (n 2), 227-228.

[100] B M Oswald, 'The INTERFET Detainee Management Unit in East Timor' (2000) 3 Yearbook of International Humanitarian Law 347, 350.

[101] Report of Amnesty International, 'East Timor: Justice Past, Present and Future' ASA 57/001/2001, 26 July 2001.

[102] UNTAET Regulation No 2000/30 on Transitional Rules of Criminal Procedure (25 September 2000) UNTAET/REG/2000/30.

[103] Ombudsperson Institution in Kosovo, Special Report No 3 on the Conformity of Deprivations of Liberty under 'Executive Orders' with Recognized International Standards (29 June 2001)

[104] UN Secretariat, 'Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims' UNJY 1972, 153.

apprehension of the extent of obligations under the Geneva Convention IV.[105] There are very few provisions that are clearly inapplicable to the UN, such as the prohibition on individual or mass forcible transfers, and deportations of protected persons from occupied territory to the territory of the occupant (Art 49(1) as the UN does not possess a territory of its own. However the Organization would definitely be under the obligation not to transfer the protected persons to any other country, occupied or not.

### 3.2 The Extent to Which the Law of Occupation Has Attained Customary International Law Status

The law of occupation regulates in detail the rights and obligations of the occupant in administering the occupied territory and towards the inhabitants of the territory. This body of law could be highly relevant for the UN post-conflict administrations. However, the formal application of the conventional law of occupation is currently not possible as the UN is not, and does not consider becoming, a Party to the conventions regulating the law of occupation. Therefore, it would be only be the laws that attained customary international law status that would be applicable to UN operations,[106] if conditions for their applicability are met and unless the UN were willing to apply the whole body of conventional law of occupation *de facto* to its operations.

[105] Kelly (n 2) 179-180.

[106] See Chapter 2, 27 *et seq.*

The customary status of the Hague Regulations seems uncontentious.[107] By the end of the Second World War, it had already been confirmed by the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East that the Hague Regulations of 1899 and 1907 were part of the laws and customs of war.[108] The question of the customary status of the Geneva Convention IV, however, has been subject to much discussion.[109] The Convention itself gives no information as to which of its provisions are declaratory of customary international law or constitute new principles.[110] As Article 154 of the Geneva Convention IV sets forth, the Convention is 'supplementary' to the corresponding sections of the Hague Regulations. In order words, the Convention does not supersede the Hague Regulations but elaborates and extends them. It has been suggested that to the extent to which the legal duties of the occupant are not elaborated but extended, the Geneva Convention IV is constitutive and applies only between the parties.[111] Still, many substantive provisions of the Geneva Convention IV are considered to be part of customary international law.[112]

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[107] Kelly (n 2) 147; Pictet (n 22) (613-614); G Schwarzenberger, *International Law as applied by International Courts and Tribunals: Vol II (1968)* 164-165.

[108] Trial of German Major War Criminals 1946 CMD 6964 Misc No 12 at 65: Referring to the Hague Convention IV and its annexed Hague Regulations, the Military Tribunal stated that '[…] by 1939 these rules laid down in the Convention were recognized by all civilised nations, and were regarded as being declaratory of the laws and customs of war'; Re Hirota, 15 Ann. Dig & Rep of Pub Int'l L Cases 356, 366; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226 [80]; T Meron, 'The Geneva Conventions As Customary Law' (1987) 81 AJIL 348, 359.

[109] *See* M Sassòli & A Bouvier (eds.), *How Does Law Protect in War? Cases, Documents and Teaching Materials in Contemporary Practice in International Humanitarian Law* (ICRC Geneva 1999) 108-109; Kelly (n 2) 146-180; Schwarzenberger (n 107) 164-166; Dinstein, *The International Law of Belligerent Occupation* (n 40) 5-7.

[110] Schwarzenberger (n 107) 165.

[111] ibid 165-166; see also Dinstein (n 40) 6-7.

[112] T Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989) 46-47; Schwarzenberger (n 107) 165-166; Kelly (n 2), 157-159).

The ICJ has considered the customary international humanitarian law, albeit in a rather limited way.[113] The Court determined in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* that the Geneva Conventions are in some respects a development and in other respects no more than the expression of the fundamental principles of humanitarian law. [114] Accordingly, the common article on denunciation,[115] common article 3 which provides a minimum standard for any conflict of an international or non-international character, and common Article 1, requiring respect and ensure respect for the Geneva Conventions in all circumstances are fundamental principles of humanitarian law.[116] The Court did not indicate whether any other provisions of the Geneva Conventions were declaratory of customary international law.[117] In *Legality of the Threat or Use of Nuclear Weapons t*he Court said that:

> It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity as the Court put in its Judgment of 9 April 1949 in the *Corfu Channel Case* (ICJ Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.[118]

However, the Court refrained from elaborating which rules of humanitarian law were fundamental and intransgressible.

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[113] Kelly (n 2) 157.

[114] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v US) Merits, ICJ Rep (1986) 14 [218].

[115] Geneva Convention I (n 8) art 63.

[116] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (n 114) [218-220].

[117] Kelly (n 2) 157.

[118] *Legality of the Threat or Use of Nuclear Weapons* (n 108) [79]; See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 48) [157].

All four Geneva Conventions of 1949 enjoy a near universal participation. Therefore, it is difficult to trace the non-state party practice in determining whether they constitute customary international law.[119] Another problem is that the actual practice of the states is not easily followed as it often consists of omissions.[120] The ICTY Appeals Chamber has observed that:

> When attempting to ascertain state practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments.[121]

The most extensive and recent research on the customary international humanitarian law has been the ten-year project conducted by the ICRC, published in March 2005 as a two-volume study on rules and practice.[122] The ICRC Study does not purport to be an exhaustive assessment of all rules of IHL and the 'Customary IHL Database' launched by the ICRC in 2010 supplies an updated version of the Study.[123] Interestingly, the original two volume study and the updated version on the IHL database have established the customary character of only a few rules of IHL specific or related to the law of occupation. These include, the obligation that the occupying

[119] Kelly (n 2) 157.

[120] Sassòli & Bouvier (eds) (n 109) 108; Wills (n 2) 187.

[121] *Prosecutor v Tadic*, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, (2 October 1995) [99]

[122] J M Henckaerts & L D Beck, *Customary International Humanitarian Law* (CUP 2005). During this research the ICRC consulted over 100 eminent authorities (Foreword by J Kellenberger (ibid) xi).

[123] http://www.icrc.org/customary-ihl/eng/docs/home.

power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory,[124] the prohibition against taking hostages,[125] the prohibition against transfer by the occupant of its own civilian population into occupied territory,[126] and the rules related to confiscation and administration of public and private property in occupied territory.[127] The Study does not consider the customary character of much discussed rules of the law of occupation such as Article 6 (regulating when the Geneva Convention IV ceases to apply), Article 47 (prohibiting the deprivation of protected persons of the benefits of the Geneva Convention IV by any change introduced as the result of the occupation of a territory) and Article 64 (I) of the Geneva Convention IV (prohibiting changes in the penal laws of the occupied territory and its exceptions). This lack of consideration could have been related to difficulties in ascertaining the customary nature of the rules of law of occupation, for the reasons discussed above. However, in his article explaining the rationale behind this Study, Henckaerts, the head of the ICRC's research project on customary IHL and one of the editors of the Study, has stated that:

> The great majority of the provisions of the Geneva Conventions including common Article 3 are considered to be part of customary international law. […] Therefore, the customary nature of the provisions of the Conventions was not the subject as such of the study. Rather, the study focused on issues regulated by treaties that have not been universally ratified, in particular the Additional Protocols, the Hague Convention for the Protection of Cultural Property and a number of specific conventions regulating the use of weapons.[128]

[124]Henckaerts & Beck (n 122) 135.

[125] ibid 334.

[126] ibid 462.

[127] ibid 178.

[128] J M Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and the Respect for the Rule of Law in Armed Conflict' (2005) 87 IRRC 175, 187.

If this line of reasoning is followed, one reaches the uneasy conclusion that since the majority of the rules on the law of occupation in the Geneva Convention IV have attained the customary status, they were not subject of the ICRC study. However, it should be reiterated that in the light of the discussions above, it is safer to assume that further clarification is necessary on the customary status of the Geneva Convention IV.

### 3.3 Restoring and Ensuring Public Order and Safety, and Respect for the Local Law (Article 43 of the Hague Regulations)

Any discussion on the relevance of the law of occupation for UN Post-conflict Administrations necessarily starts with Article 43 of the Hague Regulations as the 'cornerstone' of the law of occupation.[129] Article 43 provides:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

The rationale behind the article is that the sovereignty of the ousted government is preserved and the occupant temporarily assumes government functions, ensuring, as far as possible, that life in the occupied territory continues normally during occupation.[130] Article 43 confers both rights and obligations on the occupant,[131] '[I]ts

[129] Benvenisti (n 10) 9.

[130] ibid 28.

[131] Kelly (n 2) 185, Benvenisti (n 10) 9.

general guidelines permeate any prescriptive measure or other acts taken by the occupant.'[132]

The authoritative French text of the Article uses the phrase 'l'ordre et la vie publics,' that has been commonly referred to as 'public order and safety'. It has been suggested in the legal literature that 'l'ordre et la vie publics' should be construed broadly encompassing the entire social, commercial and economic life of the occupied country.[133] Kelly submits that this broad approach goes beyond the purpose of the Hague Regulations.[134] The phrase 'public order and safety' has not been interpreted as a definite concept and is susceptible to the changing role of the central government in a society.[135] As governments became more intrusive in the economic and social affairs of their country through the 20th Century, the occupants' rights and duties related to public order and safety came to cover a wide spectrum of affairs.[136]

Under Article 43, the occupant is expected to 'restore' and 'ensure' public order and safety, while respecting unless absolutely prevented, the laws in force in the occupied territory.[137] 'Restore' expresses concern for bringing the daily life, as far as possible,

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[132] Benvenisti (n 10) 9.

[133] C Greenwood, 'The Administration of Occupied Territory in International Law' in E Playfair (ed), *International Law and the Administration of the Occupied Territories: Two Decades of Israeli Occupation of the West Bank* (Oxford 1992) 245; Sassòli (n 1); E H Schwenk, 'Legislative Power of the Military Occupant Under Article 43, Hague Regulations' (1944-1945) 54 Yale Law Journal 393, 398; D P Goodman, 'The Need for Fundamental Change in the Law of Belligerent Occupation' (1985) 37 Stanford Law Review 1573, 1578.

[134] Kelly (n 2) 189.

[135] Benvenisti (n 10) 10; Schwenk (n 133) 399-400.

[136] E Benvenisti (n 10) 10.

[137] A literal understanding of Article 43 might imply that the duty to respect the laws in force in the country applies only to measures for ensuring and restoring public order and safety however it is widely accepted that the duty to respect the local law applies to entire field of legislation of the

to the state of affairs prior to the conflict.[138] While 'restore' meant preserving the status quo in the occupied territory, 'ensure' came to be interpreted as giving more leeway to the occupant in managing the political and social activities of the occupied territory, in support of the broad approach to public order and safety.[139] As for 'unless absolutely prevented', controversies persist as to the precise meaning of this vague phrase. Some suggest that 'unless absolutely prevented' refers to 'military necessity' as the criterion that could prevent the occupant from respecting the laws in force in the occupied territory.[140] However, Article 43 was in fact a combination of Article 2 and 3 of the Brussels Declaration of 1874, and the said articles only referred to 'necessity' rather than 'military necessity.'[141] Also, 'military necessity' has been interpreted broadly: Greenspan suggests that the occupant could be prevented from respecting the existing laws, 'if demanded by exigencies of war.' He further adds that those exigencies could demand a great deal as exemplified by the elimination of undemocratic and inhuman institutions in an occupied territory.[142] In a similar vein, Schwenk argued that during the Allied Occupation of Germany in the Second World War, the allies were permitted under Article 43 to change the civil and criminal laws that reflected the Nazi ideology, based on express racial, religious or political

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occupied territory (Schwenk (n 133) 397, Benvenisti (n 10) 13, note 24; Sassòli (n 1); see also Benvenisti (n 10) 17.

[138] Goodman (n 133) 1578; Benvenisti (n 10) 11.

[139] Benvenisti (n 10) 11-12; Goodman (n 133) 1578.

[140] M Greenspan, *'The Modern Law of Land Warfare'* (University of California Press 1959) 224; M Bothe 'Occupation Belligerent' (n 28) 765; C Meurer, *'Die Völkerrechtliche Stellung der vom Feinde besetzten gebiete'* (Tübingen 1915) 23; Goodman (n 133) 1578.

[141] Project of an International Declaration Concerning the Laws and Customs of War, Brussels, 27 August 1874 (The Brussels Declaration of 1874), available at <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument> accessed 12 March 2011, Schwenk (n 133) 401; Sassòli (n 1); Benvenisti (n 10) 8.

[142] Greenspan (n 140) 224; Goodman (n 133) 1578.

discrimination, as the Nazi system constituted a threat to the security of the occupant's army.[143] He further stated that changes in the German laws were not only justified on the grounds of military necessity but also on the grounds of necessity in the interest of the German population.[144] Indeed, non-military goals have also been influential in justifying changes in the local law: According to Oppenheim, 'in the exceptional cases in which the law of the occupied state is such as to flout and shock elementary conceptions of justice and the rule of law, the occupying state must be deemed entitled to disregard it.'[145] Von Glahn contends that some category of laws that might be necessary during the occupation have nothing to do with military necessity in the strict sense of the term, they aim safeguarding the welfare of the native population.[146]

This expansive approach towards Article 43 suggests a positive view regarding change and implies more discretion for the occupant.[147] However, there are long-accepted limits for the exercise of such discretion stemming from the fact that occupant cannot make fundamental changes in the institutions of the occupied state.[148] Feilchenfeld writing in 1942, reflects on this when he points out that an

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[143] Schwenk (n 133) 407.

[144] ibid.

[145] Oppenheim (n 65) 446.

[146]An example von Glahn gives is the 'proclamation of a moratorium on the payment of debts, enacted purely for the benefit of a distressed indigenous population (Von Glahn (n 25) 97).

[147] Benvenisti (n 10) 15; Benvenisti suggests that less aversion towards change introduced by the occupant can be observed in the writings of the post Second World War scholars: Thus, some argued that 'absolutely prevented' meant 'absolute necessity' or just 'necessity (ibid); Schwenk states that the term 'empêechement absolu' means nothing but 'absolute necessity'(Schwenk (n 133) 401; Dinstein argued that 'absolute prevention means necessity' (Dinstein, *The International Law of Belligerent Occupation* (n 40) 112.

[148] P Fauchille, *Traité de Droit International Public*, Vol 2 Guerre et Neutralité (Paris, 1921-1926) 228.

occupant 'may not transform a democratic republic into an absolute monarchy or engage in other measures of similar kind.'[149] Fifty years after him, Greenwood reiterated the same principle: 'existing administrative and legislative structures and the political process may be suspended for the duration of the occupation but an occupant will exceed its powers if it attempts, for example, to create a new state, to change a monarchy into a republic or a federal state into a unitary government.'[150] Nevertheless, the positive attitudes towards the abolition of abhorrent regimes and the developments with respect to self-determination of people seem to erode this well-established principle. The ICRC recognizes that certain institutional and governmental changes in the occupied territory might be 'necessary and even an improvement.'[151]

More generally, what is regretted with respect to Article 43 is that it does not offer an objective criterion to test the legality of the legislative changes introduced by the occupant.[152] An objective criterion as such has been suggested by the Israeli Supreme Court:

> Alongside an occupant's right to do all that is necessary in the occupied territory for military purposes and the safety of its forces, is a duty imposed by international law to be concerned with the welfare of the population in the territory. A prolonged military occupation brings in its wake social, economic and commercial changes, which oblige him to adapt the law to the changing needs of the population. The words "absolutely prevented" in Article 43, should, therefore, be interpreted with reference to the duty upon him vis-à-vis the civilian population, including the duty to regulate economic and social affairs. In this context, *it is of special importance whether the*

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[149] E H Feilchenfeld, *The International Law of Belligerent Occupation* (1942) 89.

[150] Greenwood (n 133) 257.

[151] Pictet (n 22) 274.

[152] Sassòli (n1) 11; S Vité, 'L'applicabilité du droit international de l'occupation militaire aux activités des organisations Internationales' (2004) 853 Int Rev of the Red Cross 9,17; Benvenisti (n 10) 15.

> *motive for change was the furtherance of the occupant's interests or concern for the welfare of the population* (emphasis added).[153]

### 3.3.1 The Relationship Between Article 43 and Article 64 of the Geneva Convention IV

Article 64 of the Geneva Convention IV is supplementary to Article 43.[154] Article 64 (1) provides that:

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.

And, according to Article 64 (2):

> The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

While the first paragraph of Article 64 refers to the 'penal laws of the occupied territory', the second paragraph does not contain any qualification as to the scope of 'provisions' referred to.[155] The ICRC takes the view that the reason for the express reference only to respect for penal laws was that 'it had not been sufficiently observed during past conflicts; [and] there is no reason to infer *a contrario* that the occupation

[153] *Christian Society for Holy Places v Minister of Defence et al*, H.C. 337/1 (1972) 2 Israel Yearbook on Human Rights 355.

[154] Geneva Convention IV (n 8) Article 154; Pictet (n 22) 335.

[155] Sassòli (n1) 6; Benvenisti (n 10) 101.

authorities are not also bound to respect the civil law of the country, or even its constitution.[156]

The *travaux préparatoires* of Article 64 reveal that the drafting committee was not unanimous on the question of adding the restrictive adjective 'penal' to the noun 'provisions' in the second paragraph. The minority preferred to refer only to 'penal provisions; however the majority of the delegates voted in favor of the version which referred to 'provisions' only.[157] Thus, the second paragraph, referring to 'provisions' with no qualifications allows the occupant to subject the population of the occupied territory to modifications in any laws (penal, civil, administrative etc.) that are essential for the purposes enumerated in the article.[158]

The two grounds for legislative powers of the occupant -for the purposes of the security of the occupant's forces and the maintenance of orderly government- have already been recognized under Article 43. The new contribution of Article 64 has been the recognition of the occupant's power and duty to legislate to fulfill its obligations under the Geneva Convention IV.[159] The occupant may also legislate to fulfill its obligations under any part of the applicable IHL, 'since IHL cannot possibly require specific conduct from an occupying power and also prohibit it to legislate for that purpose.'[160] The *travaux préparatoires* provide some examples of areas for which legislation would be necessary, such as care and education of children, regulating

[156] Pictet (n 22) 335.

[157] Final Record of the Diplomatic Conference of Geneva of 1949, Vol III, 139-140.

[158] Sassòli (n1) 7; Dinstein, *The International Law of Belligerent Occupation* (n 40) 111.

[159] Sassòli (n1) 12; Benvenisti (n 10) 104.

[160] Sassòli (n1) 12.

labour conditions, ensuring food and medical supplies of the population, and ensuring public health and hygiene.[161]

Geneva Convention IV has been described as a 'bill of rights' with a catalogue of fundamental rights for the protection of civilians.[162] The occupant is not only expected to respect these rights but also is bound by the other applicable human rights obligations with respect to the population of an occupied territory.[163] Thus, it has the power and the duty to legislate for the protection of human rights or change any legislation contrary to their protection.[164]

Article 43 of the Hague Regulations combined with Article 64 of the Geneva Convention IV prohibits any modifications to the laws in force in the occupied territory, except when such modifications are required for the security of the occupant, to restore and ensure public order and safety, and to implement obligations under IHL and human rights law. Since the occupant is not the sovereign, any modification in the legislation must be required to fulfil the enumerated purposes only and the occupant 'must stay as close as possible to similar local standards and the

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[161] Final Record of the Diplomatic Conference of Geneva of 1949, Vol II-A, 672, 833; Geneva Convention IV (n 8) articles 50-52, 55-56.

[162] H P Gasser, 'Protection of the Civilian Population' in D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (OUP 1995) 242; Benvenisti (n 10) 211; the protections contained in the Geneva Convention IV (n 8) include Part II- General Protection of Populations Against Certain Consequences of War (articles 13-26), Part III-Status and Treatment of Protected Persons (articles 27-34), see also for instance, articles 40, 49, 50- 62, 95, 97; Protocol I (n 9) art 75 (1)

[163] ICJ ruled in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (n 61) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 48), and *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) (n 48) that the protections of human rights law does not cease during armed conflict or occupation.

[164] Sassòli (n 1) 12; Wills (n 2) 183; also see Greenwood (n 133) 245.

local cultural, legal and economic traditions.'[165] However, the ICRC Commentary qualifies the legislative powers of the occupant as 'very extensive and complex'[166] and in the practice of the occupants they were interpreted as such, encompassing changes in a wide range of state affairs and sometimes on all existing local laws.[167]

### 3.3.3 The Assessment of the Applicability of the Law of Occupation to UN Post-conflict Administrations

Irrespective of the question whether the UN administration of territory amounts to occupation or not, the relevance of the law of occupation for the activities of these administrations has been observed in the Organization's practice. Similar to occupations, the UN post-conflict administrations have had to restore and ensure public order and safety, make critical determinations as to the status of the local laws; and, using similar justifications to change/repeal existing legislation or enact new laws.[168] For instance, the United Nations Assistance Group in Namibia (UNTAG) repealed the 'discriminatory laws' reminiscent of the colonial repression and

[165] Sassòli (n 1) 14; S Wills (n 2) 183.

[166] Pictet (n 22) 337.

[167] Sassòli (n1) 7; For instance, during German occupation of Belgium (1914-1918) 'a vast amount of legislation' covering a wide field and dealing with almost every phase of the social, economic and industrial life of the Belgian people (trade, agriculture, education, health, language, business, industrial pursuits, criminal and civil justice…) has been introduced by Germany. Moreover, Belgium was divided into two administrative districts (Flemish and Walloon). The German practice was highly criticized for going beyond the lawful rights of an occupant under Article 43 of the Hague Regulations (J W Garner, *International Law and the World War* Vol 2 (Longmans-Green1920) 64-91); McCoubrey & White point out that 'it is clear that in many cases occupying powers have far exceed their very limited 'legislative' capacities (H McCoubrey & N DWhite, *International Law and Armed Conflict* (Aldershot: Dartmouth1992) 284).

[168] Ratner (n 2) 707.

apartheid in Namibia.[169] Considering that the laws and judicial institutions were 'inadequate to ensure order and human rights' throughout most of Cambodia, the UNTAC introduced Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period until the 'Legislative Assembly resulting from the elections amends them or adopts new legislation in this area.'[170] To restore and ensure the public order, the UNTAES issued a directive on May 1997 abrogating the legislation enacted by the local Serb authorities and restored the Croatian law.[171]

The UNMIK and the UNTAET legislated through a 'wide range of general and abstract' Regulations,[172] some of which clearly surpassed any constraints set by the laws of occupation. The UN Security Council Resolutions establishing these administrations have at most implied, but did not contain an explicit authorization to legislate.[173] However, the very first Regulation issued by the UNMIK on the authority of the interim administration in Kosovo unequivocally confirmed its legislative authority (together with the executive authority, including the administration of judiciary) vested by the UNSC Res 1244, and exercised by the Special Representative

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[169] UNSC Res 643 (31 October 1989) UN Doc S/RES/643 [38]; C Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (CUP 2008), 223.

[170] Provisions Dated September 10, 1992 Relating to the Judiciary And Criminal Law and Procedure Applicable in Cambodia during the Transitional Period, available at < [http://www.eu-asac.org/programme/arms_law/UNTAC%20Law.pdf](http://www.eu-asac.org/programme/arms_law/UNTAC%20Law.pdf)> accessed 2 April 2011.

[171] Report of the Secretary-General on the United Nations Transitional Administration for Eastern Slavonia Baranja and Western Sirmium (4 December 1997) UN Doc S/1997/953, [23].

[172] C Stahn, 'Accountability and Legitimacy in Practice: Lawmaking by Transitional Administration' (2005) 5, available at <http://www.esil-sedi.eu/fichiers/en/Stahn_604.pdf> accessed 2 April 2011, also see, the author's comments on the legal nature of the Regulations as a 'specific type of legislation,' 'new and unique' (ibid).

[173] UNSC Res 1244 (n 51), UNSC Res 1272 (n 51); Irmscher (n 2) 391; Stahn (n 169).

of the Secretary-General (SRSG).[174] The UN administration showed partial respect to the local law: Originally, the laws applicable in Kosovo prior to 24 March 1999, were ordered to remain in force, insofar as they do not conflict with 'internationally recognized human rights standards', including the 'prohibition against discrimination'.[175] The justifications for modifications in the local law echoed the exceptions with respect to respect for local law in the law of occupation. The SRSG however, had an absolute legislative authority and could issue Regulations that would prevail over the existing law.[176] Regulations of the SRSG would remain in force until repealed by UNMIK, or superseded by rules subsequently issued by the institutions established under a political settlement in Kosovo.[177] The law applied in Kosovo prior to 24 March 1999 was the law introduced by the FRY in 1989 as a result of the revocation of Kosovo's autonomous status and it was perceived as discriminatory against Albanian Kosovars.[178] In order to give effect to the prohibition against discrimination and to comply with human rights,[179] the SRSG amended the law applicable in Kosovo as the law in force in Kosovo on 22 March 1989, the date when the autonomous status of Kosovo was revoked, however the supremacy of the

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174 UNMIK Regulation No 1999/1 on the Authority of the Interim Administration in Kosovo (25 July 1999) UNMIK/REG/1999/1, section 1.1.

175 ibid, section 2 & 3.

176 ibid section 2.

177 ibid section 4.

178 Shraga (n 1) 488.

179 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (23 December 1999) UN Doc S/1999/1250, [55]; for the same reasons the discriminatory legislation affecting housing and rights in property was repealed (UNMIK Regulation No 1999/10 on the Repeal of Discriminatory Legislation Affecting Housing and Rights in Property (13 October 1999) UNMIK/REG/1999/10.

Regulations of the SRSG over the extant law remained.[180] In view of the discriminatory character of the laws introduced by FRY, the amendment of the applicable laws would be justified under the law of occupation. The SRSG introduced changes in the substantial criminal law. These included the application of the most favorable provisions to the defendant in force any time, on or after 22 March 1989,[181] abolition of capital punishment[182] and the introduction of new offences such as the prohibition against inciting to national, racial, religious or ethnic hatred, discord or intolerance, and the prohibition of trafficking persons in Kosovo.[183] In 2003, the SRSG introduced more extensive changes by promulgating the Provisional Criminal Code and the Provisional Criminal Procedure Code of Kosovo,[184] which included many of the provisions of the applicable law, including significant criminal offences introduced by UNMIK (terrorism, trafficking in persons, crimes against sexual integrity, organized crime and corruption) together with important modifications in criminal procedure law.[185] The laws of occupation allow the occupant to modify not

[180] UNMIK Regulation No 1999/24 on the Law Applicable in Kosovo (12 December 1999) UNMIK/REG/1999/24 as amended by UNMIK/REG/2000/59 (27 October 2000), section 1.1(a) & 1.1 (b); UNMIK/REG/1999/25 (12 December 1999) Amending UNMIK Regulation No 1999/1 on the Authority of the Interim Administration in Kosovo, section 1.

[181] UNMIK/REG/1999/24 (n 180) section 1.4.

[182] ibid section 1.5.

[183] UNMIK Regulation No 2000/4 on the Prohibition Against Inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance (1 February 2000) UNMIK/REG/2000/4 and UNMIK Regulation No 2001/4 on the Prohibition of Trafficking in Persons in Kosovo (12 January 2001) UNMIK/REG/2001/4.

[184] UNMIK Regulation No 2003/25 on the Provisional Criminal Code of Kosovo (6 July 2003) UNMIK/REG/2003/25 and UNMIK Regulation No 2003/26 on the Provisional Criminal Procedure Code of Kosovo (6 July 2003) UNMIK/REG/2003/26.

[185] SRSG's Remarks on the Entry into Force of the Provisional Criminal Code and the Provisional Criminal Procedure Code (6 April 2004) UNMIK/PR/116); These codes are still in force but amended and supplemented by Law on Supplementing and Amending of the Criminal Code of Kosovo (2008/03-L-002) and Law on Supplementing and Amending of the Kosovo Code of Criminal Procedure (2008/03-L-003); Similarly the UNTAET issued an extensive set of transitional rules of criminal procedure: UNTAET/REG/2000/30 (n 102).

only the substantial penal laws but also the procedural rules within limits set especially by Article 64 of the Geneva Convention IV.[186] An important test for the changes in penal laws would be that the occupant cannot abrogate or suspend penal laws 'merely to make it accord with their own legal conceptions.'[187]

The legislative powers of the UN administration in East Timor were stated in its mandate: The UNTAET was given 'overall responsibility for the administration of East Timor' and was empowered to 'exercise all legislative and executive authority, including the administration of justice.'[188] The components of its mandate included 'to provide security and maintain law and order throughout the territory of East Timor', establishment of an 'effective administration,' 'to assist in the development of civil and social services' and 'to support capacity- building for self-government.'[189] A special representative to the Secretary-General (SRSG) was responsible for all aspects of the administration and had 'the power to enact new laws and regulations and to amend, suspend or repeal existing ones.'[190] Shortly after he was appointed, the SRSG in East Timor began to exercise his authority through the issuance of regulations in much the same manner as the SRSG for Kosovo. In his first regulation, he ordered that the laws applied in East Timor prior to 25 October 1999 [the date UNTAET is established] would apply in East Timor insofar as they did not conflict

[186] Pictet (n 22) 335.

[187] ibid 336.

[188] UNSC Res 1272 (n 51) [1].

[189] ibid [2].

[190] ibid [6].

with the internationally recognized human rights standards,[191] and the fulfillment of the mandate given to UNTAET under the UNSC Res 1272, or any other regulation issued by the Transitional Administrator.[192] At the same time, he immediately abolished a series of law that conflicted with the internationally recognized human rights standards, together with capital punishment.[193]

Similarly to occupants, both UNMIK and UNTAET set as immediate priorities restoring and ensuring the public order and safety in the administered territories, through the reconstruction and establishment of governmental structures essential for the restoration and sustainable delivery of public services (e.g., health services, education, police services,) and the recruitment and training of administrators and civil servants.[194]

Article 64(1) of the Geneva Convention IV refers to the continued functioning of the courts of the occupied territory. However, the occupant could depart form this principle and intervene in the local justice system to prevent the application laws contrary to the Geneva Conventions (e.g. to prevent the application of inhumane or discriminatory laws) or for the purposes of ensuring 'effective administration of justice.'[195] Especially, where the total local system of justice has broken down the

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[191] UNTAET Regulation No 1999/1 on the Authority of the Transitional Administration in East Timor (27 November 1999) UNTAET/REG/1999/1, section 2.

[192] ibid section 3.1.

[193] ibid sections 3.2. & 3.3.

[194] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (12 July 1999) UN Doc S/1999/779 [54-65]; Report of the Secretary-General on Transitional Administration in East Timor (26 January 2000) UN Doc S/2000/53 [38-39].

[195] Pictet (n 22) 336.

occupant would be expected to intervene.[196] Faced with lack of a properly functioning justice system, both UNMIK and UNTAET established new courts and provided for the appointment of judges and prosecutors.[197]

Under Article 53 of the Hague Regulations the occupant has rights related to security and regulation of the media; all appliances related to the transmission of news may be seized, even if they belong to private individuals, but must be restored and compensation must be made after the occupation is over. The SRSG promulgated important Regulations on licensing and regulation of the print and broadcast media in Kosovo.[198] Insofar as the purpose of these regulations is to protect the order and safety and protect the interests and the rights of the population (e.g. preventing incitement to violence, protecting freedom of expression), they would be in line with the law of occupation.

According to Article 55 of the Hague Regulations, the occupant is only the administrator of the public immovable property of the occupied territory and should safeguard the capital and administer these properties in accordance with the rules of

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[196] Kelly (n 2) 197.

[197] UNMIK Regulation No 1999/5 on the Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor (4 September 1999) UNMIK/REG/1999/5; UNMIK Regulation No 1999/7 on Appointment and Removal From Office of Judges and Prosecutors (7 September 1999) UNMIK/REG/1999/7 as amended by UNMIK Regulation No 2000/57 (6 October 2000) UNMIK/REG/2000/57; UNMIK Regulation No 1999/18 on Appointment and Removal From Office of Lay-Judges (10 November 1999) UNMIK/REG/1999/18; UNTAET Regulation No 2000/11 on the Organization of Courts in East Timor (6 March 2000) UNTAET/REG/2000/11; UNTAET Regulation No 2000/16 on the Organization of Public Prosecution Service in East Timor (6 June 2000) UNTAET/REG/2000/16.

[198] UNMIK Regulation No 2000/36 on the Licensing and Regulation of the Broadcast Media in Kosovo (17 June 2000) UNMIK/REG/2000/36; UNMIK Regulation No 2005/34 on the Promulgation of the Law on the Independent Media Commission and Broadcasting Adopted by the Assembly of Kosovo (8 July 2005) UNMIK/REG/2005/34, UNMIK Regulation No 2006/14 on the Promulgation of the Law on Radio Television of Kosovo adopted by the Assembly of Kosovo (11 April 2006) UNMIK/REG/2006/14.

usufruct. The occupant is not entitled to sell the property and should leave it as intact as possible.[199] Therefore, the overall authority of UNMIK to administer movable or immovable property which is in the territory of Kosovo, including monies, bank accounts and other assets[200] and the establishment of a housing and property directorate by the SRSG, charged with establishing an inventory of abandoned private, state and socially-owned housing, allocating them to rightful owners and administering them[201] is in compliance with Article 55. However, UNMIK's policy of the privatization of public, state and socially owned property (as a third category of property that does not exist under the law of occupation) and the creation of the Trust Agency to fulfill the purposes of privatization[202] does not comply with the role envisaged for the occupant under Article 55. Shraga suggests that '[t]he privatization process in Kosovo was carried out in full respect of the right of owners and creditors, "without prejudice to ownership titles in the socially-owned Enterprise."'[203] Still, privatization has important economic and financial implications for the territory. According to Feilchenfeld, 'an occupant has no right to transform a liberal into a

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[199] Kelly (n 2) 213.

[200] UNMIK Regulation No 2000/54 amending UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo (27 September 2000) UNMIK/REG/2000/54 section 6.1.

[201] UNMIK Regulation No 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission (15 November 1999) UNMIK/REG/1999/23; see also UNMIK Regulation No 2005/13 on the Long-Term Allocation of Socially-Owned Immovable Property Managed by Municipalities in Kosovo (4 March 2005) UNMIK/REG/2005/13 and UNMIK Regulation No 2006/5 on the Allocation of Land Assets Currently Under the Administrative Authority of the Kosovo Trust Agency to Municipal Administrations for Public Benefit Purposes (16 February 2006) UNMIK/REG/2006/5, both of which were repealed by the Assembly of Kosovo, Law on Allocation for Use and Exchange of Immovable Property of Municipality (2010-03/L-226).

[202] UNMIK Regulation No 2002/12 on the Establishment of the Kosovo Trust Agency (13 June 2002) UNMIK/REG/2002/12; UNMIK Regulation No 2005/18 Amending UNMIK Regulation No 2002/12 on the Establishment of the Kosovo Trust Agency (22 April 2005) UNMIK/REG/2005/18; Irmscher (n2) 389; The Kosovo Trust Agency has been succeeded by the Privatization Agency of Kosovo established by the Assembly of Kosovo

[203] Shraga (n1) 490; UNMIK Regulation No 2003/13 on the Transformation of the Right of Use to Socially Owned Immovable Property (9 May 2003) UNMIK/REG/2003/13.

communist or fascist economy, except so far as military or public order needs should require individual changes.'[204] Since the real emphasis is on prohibition against fundamental changes to the institutions of the occupied territory, any kind of fundamental change in the economic system is not allowed. However broadly construed, it is difficult to justify an extensive privatization process under the exceptions to the respect for local law. Similarly, the implementation of substantial provisions of the UN Convention for the Sale of Goods for the purposes of creating a 'viable market-based economy' implied a fundamental change for the economic and legal system in Kosovo and distanced it from the economic and legal system of the FRY.[205] Likewise, the UNTAET took steps to facilitate the development of a dynamic market economy in East Timor.[206]

Articles 48 and 49 of the Hague Regulations give guidance on taxation and other money contributions that could be levied by the occupant in the occupied territory. There is no clarity if the occupant can introduce new taxes.[207] The necessity of imposition of new taxes appears to be justified on a case-by-case basis under the occupant's right and duty to restore and ensure public order and safety.[208] In a case on extending the value added tax to occupied territories, the Israeli Supreme Court ruled

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[204] Feilchenfeld (n 149) 89.

[205] UNMIK Regulation No 2000/68 on Contracts for the Sale of Goods (29 December 2000) UNMIK/REG/2000/68; Irmscher (n 2) 393.

[206] Relevant regulations are: UNTAET/REG/1999/1 (n 191); UNTAET Regulation No 2000/5 on the Licensing of Currency Exchange Bureaux (20 January 2000) UNTAET/REG/2000/5; UNTAET Regulation No 2000/7 on the Establishment of a Legal Tender for East Timor (24 January 2000) UNTAET/REG/2000/7; UNTAET Regulation No 2000/8 on Bank Licensing and Supervision (25 February 2000) UNTAET/REG/2000/8; UNTAET Regulation No 2002/4 on Registration of Business (23 April 2002) UNTAET/REG/2002/4.

[207] Feilchenfeld (n 149) 49; Von Glahn (n 25) 150-154.

[208] Feilchenfeld (n 149) 49.

that 'the imposition of the additional excise task in the occupied territory would be considered as legitimate in view of Article 43 of the Hague Regulations if it could be established that a genuine necessity for its imposition really existed.'[209] The only express limitation on levying taxes and money contributions is that they should 'only be for the needs of the army or of the administration of the territory in question.'[210] The SRSG introduced various taxes in Kosovo such as excise taxes, sales tax and the services taxes; all revenues derived were deposited in the Kosovo Consolidated Fund contributing to the budget of the administration.[211] The SRSG also introduced a new currency in Kosovo,[212] which is allowed under the law of occupation.[213] Likewise, in East Timor, the Transitional Administrator introduced an extensive tax system conducted by East Timor Revenue Service and contributing to East Timor's budget.[214] The Transitional Administrator also issued regulations on the currency

[209] *Abu Aita et al v. (a) Commander of The Judea and Samara Region, (b) Officer-in-Charge of Customs and Excise*, H.C. 69/81 [357].

[210] Hague Regulations (n 7) art 49.

[211] UNMIK Regulation No 2000/2 on Excise Taxes in Kosovo (22 January 2000) UNMIK/REG/2000/2; UNMIK Regulation No 2000/3 on Sales Tax in Kosovo (22 January 2000) UNMIK/REG/2000/3; UNMIK Regulation No 2000/5 on the Establishment of a Hotel, Food and Beverage Service Tax (1 February 2000) UNMIK/REG/2000/5 as amended by UNMIK Regulation No 2000/31 (23 May 2000) UNMIK/REG/2000/31.

[212] UNMIK Regulation No 1999/4 On the Currency Permitted to be Used in Kosovo (2 September 1999) UNMIK/REG/1999/4; Administrative Direction No 1999/2 (4 October 1999) UNMIK/DIR/1999/2, as amended by Administrative Direction No 2001/24 Implementing UNMIK Regulation No 1999/4 of 2 September 1999 on the Currency Permitted to be Used in Kosovo (21 December 2001) UNMIK/DIR/2001/24.

[213]Feilchenfeld (n 149) 80; Benvenisti (n 10) 16; Irmscher (n 2) 389.

[214] UNTAET Regulation No 2000/18 on a Revenue System for East Timor (30 June 2000) UNTAET/REG/2000/18 as amended by UNTAET Regulation No 2000/32 (29 September 2000) UNTAET/REG/2000/32, UNTAET Regulation No 2000/35 (20 December 2000) UNTAET/REG/2000/35, UNTAET Regulation No 2001/16 (21 July 2001) UNTAET/REG/2001/16 UNTAET Regulation No 2001/20 (21 July 2001) UNTAET/REG/2001/20.

circulated in East Timor.[215]

## 4. Conclusion

The negative connotation associated with occupation is one of the reasons why the occupants refrain from acknowledging their status. A second equally important reason is the extensive duties that this body of law places on the occupant. However, the obligations imposed by the law of occupation are not absolute: Under Article 43 of the Hague Regulations the occupant is expected to restore and ensure public order and safety only *as far as* possible.[216] And, since Article 43 is sort of a 'miniconstitution' setting general guidelines for the occupation administration, many duties and powers under the law of occupation are subject to its overriding delimiting character.[217]

The laws of occupation could be part of a normative framework for UN post-conflict administrations irrespective of a formal determination that the law applies to UN forces. While the application of these laws guarantees basic humanitarian standards for the treatment of the populations of the administered territories,[218] they further provide guidelines for the administrations to restore and ensure order and safety and

[215]UNTAET Regulation No 2000/2 On the Use of Currencies in East Timor (14 January 2000) UNTAET/REG/2000/2; UNTAET Regulation No 2001/14 On the Official Currency and Legal Tender of East Timor (20 July 2001) UNTAET/REG/2001/14.

[216] For instance, under Article 54 of the Geneva Convention IV (n 8), the occupant has the duty of ensuring the food and medical supplies of the population 'to the fullest extent of means available to it'; Article 24(1) of the Geneva Convention IV (n 8) states that '[t]he parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, *as far as possible*, be entrusted to persons of a similar cultural tradition.

[217] Benvenisti (n10) 9.

[218] Kelly (n2) 216; J Pictet (n 22) 9; Benvenisti (n 10) vii, x.

to take into consideration the interests of the population.[219] Indeed, despite the fact that the law of occupation was not applicable *de jure,* the laws of occupation, together with the Security Council mandate and the application of human rights law, proved to be an effective framework for Australian contingent leading INTERFET, deployed in East Timor on September 1999, for the purposes of ensuring public order and safety, and regulating the relationship between the civilian population and INTERFET, and establishing an interim justice system (e.g. establishment of a detention management unit).[220] Therefore, Kelly and et al, conclude that '[t]he Australian approach to many of the legal principles [of the law of occupation] confirmed the existence of some fundamental general principles and issues that must be planned and considered before any future military deployment into complex emergency situations.'[221]

Finally, the dichotomy inherent in all types of occupations between the suspended sovereignty of the ousted sovereign and all-inclusive administrative power of the occupant has been one major challenge that the post-conflict administrations and occupations shared in common.[222] The assumption that the UN acts for the benefit of the population of the administered territories and does not have interests of its own, allowed more liberal institutional changes in the administered territories. Moreover, the fact that many of these administrations were mandated under Chapter VII gave them a wide discretion.[223] They enacted various laws ranging from regulating public

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[219] Kelly (n 2) 216.

[220] B Oswald, 'The INTERFET Detainee Management System in East Timor' (n 100) 347-361.

[221] Kelly et al (n 3).

[222] Shraga (n1) 491.

[223] See the UN Charter, art 25; M J Matheson, 'United Nations Governance of Postconflict Societies: A Plea for Good Faith and Informed Decision Making' (2001) 95 AJIL 579; UNSCR Res 1244 (n 51); UNSC Res 1277 (n 57)

services, substantial and procedural criminal laws, and to fiscal and commercial laws. The temporary character of the administrations was emphasized in the Resolutions mandating them or in the Regulations they issued, where it was stated that the Regulations of the SRSG would remain in force until repealed by the administrations or superseded by rules subsequently issued by institutions established at the end of the administrations.[224] In reality, laws and institutions established were irreversible. The main shortcoming of this "parachuting" preconceived "package" solutions"[225] into legal systems by the UN was that since the local actors were absent from the lawmaking, local voice was missing. Therefore, Stahn suggests:

> If one takes local ownership seriously, the hard question is whether transitional administration should at all be entitled to adopt legal acts with a long-term and possibly irreversible impact on the domestic population, such as the introduction of a liberal market economy in territories under transition, or changes in criminal law and criminal procedure which lead to final convictions.[226]

Therefore, observing the constraints under the law of occupation would also help to achieve modesty in lawmaking, giving the population of the occupied territories the genuine opportunity for shaping their future after the termination of a post-conflict administration.

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[224] UNMIK/REG/1999/1 (n 174) section 4; UNTAET/REG/1999/1 (n 191) section 4.

[225] Stahn, 'Accountability and Legitimacy in Practice: Lawmaking by Transitional Administration' (n 172) 19.

[226] ibid 23.

# CHAPTER 4

# HUMAN RIGHTS LAW AND UN POST-CONFLICT ADMINISTRATIONS

## 1. Introduction

The key features of a UN post-conflict administration is its engagement with a political process that leads to the autonomy or independence of the administered territory, or to the formation of a new government on the territory concerned, and its extensive administrative powers to make decisions on a whole range of matters that would normally be the preserve of a government.[1] In the exercise of these powers, the administrations rely on their mandates, the agreements establishing them, and the directives or regulations they have issued.[2] The protection and promotion of human rights have been honoured by these documents to an extent; and the human rights practice of the UN post-conflict administrations derived from them, aimed to strengthen human rights on administered territories. However, two significant challenges still persist with respect to the human rights practice of the UN post-conflict administrations. The first challenge is the extent to which human rights law apply to the UN post-conflict administrations themselves, and the second is the extent to which the application of human rights law on the administered territories is

[1] R Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* (OUP 2005) 2.

[2] See for instance UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244 [11(j)]; UNMIK Regulation No 1999/24 on the Law Applicable in Kosovo (12 December 1999) UNMIK/REG/1999/24 section 1.3; UNTAET Regulation No 1999/1 on the Authority of the Transitional Administration in East Timor (27 November 1999) UNTAET/REG/1999/1 section 2.

compatible with IHL and the law of occupation as the other two normative frameworks relevant to the acts of the UN post-conflict administrations.

This chapter first addresses the legal basis of the applicability of human rights law to the UN in general, and then proceeds to examine the legal basis specific to the human rights obligations of UN post-conflict administrations. The Chapter further addresses the relationship between human rights law and IHL, and human rights law and the law of occupation with a view to evaluate the simultaneous application of these regimes.

## 2.The Legal Basis of the Applicability of Human Rights Law to UN Operations

In the absence of any contractual obligations under human rights law and the unequivocal acceptance by the UN that human rights are binding on the Organization at all times, one is left with theories- in varying degree of persuasiveness- that explain why human rights apply to the UN. Megrét and Hoffmann have three main theoretical suggestions on the subject, influenced by arguments put forward in the legal literature.[3] The first of these suggestions is what the authors call as 'the external conception.' Accordingly, as a subject of international law[4] the UN is bound by human rights rules that have acquired customary international law status, and the rules treaties embody, which reflect universally recognized standards of human rights.[5] The

[3] F Megrét & F Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25 Human Rights Quarterly 314, 314-342.

[4] See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, 180.

[5] F Megrét & F Hoffmann (n3), 317; H G Schermers & N M Blokker, *International Institutional Law: Unity Within Diversity* (1995), 824; B Kondoch, 'Human Rights Law and UN Peace Operations in Post-conflict Situations' in N D White & D Klaasen (eds), *The UN, Human Rights and Post-conflict Situations* (Manchester University Press 2005), 36; However for the view that 'there is little clarity on to the extent to which international human-rights norms govern the UN by virtue of customary

Convention on the Safety of the United Nations and Associated Personnel,[6] (Safety Convention), supplies evidence for the view that the UN is bound by such universally recognized human rights standards. Article 20(a) of the Safety Convention reads:

> Nothing in this Convention shall affect:
>
> (a) The applicability of international humanitarian law and universally recognized standards of human rights as contained in international instruments in relation to the protection of United Nations operations and United Nations and associated personnel or the responsibility of such personnel to respect such law and standards.

However, the Safety Convention does not clarify the scope of the universally recognized human rights standards. Clapham argues that their scope covers not only the customary international law but also the standards contained in various UN instruments.[7] The examples he gives include the Code of Conduct for Law Enforcement Officials,[8] the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Basic Principles on the Use of Force),[9] and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[10] Other relevant examples would involve*, inter alia,* Standard

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international law' see A Devereux, 'Selective Universality? Human-rights Accountability of the UN in Post-conflict Operations' in B Bowden, H Charlesworth and J Farrall (eds), *The Role of International Law in Rebuilding Societies After Conflict: Great Expectations* (CUP 2009), 203; For the view that customary international law can apply to international organizations only *mutatis mutandis* see D Shraga & R Zacklin, 'Applicability of International Humanitarian Law to United Nations Peace-keeping Operations: Conceptual, Legal and Practical Issues,' in U Palwankar (ed) ICRC *Symposium on Humanitarian Action and Peacekeeping Operations* (Geneva 1994), 48.

[6] Convention on the Safety of United Nations and Associated Personnel, UNGA Res 49/59 (17 February 1995), 2051 UNTS 363.

[7] A Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 122-124.

[8] UNGA Res 34/169 (17 December 1979).

[9] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

[10] UNGA Res 43/173 (9 December 1998).

Minimum Rules for the Treatment of Prisoners,[11] the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)[12] and the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).[13] Within the context of peacekeeping, instruments such as the UN Military Observers Handbook (UNDPKO 2005), the UN Civilian Police Handbook (UNDPKO 2005), and documents involving the norms of conduct for UN peacekeepers, i.e. 'We Are United Nations Peacekeepers'[14] and 'Ten Rules: Code of Personal Conduct for Blue Helmets'[15] also refer to human rights.[16]

Indeed, to a certain extent, the abovementioned documents serve to give some scope to universally recognized standards applicable to the UN. Under Article 2 of the Code of Conduct for Law Enforcement Officials (Code of Conduct), during the performance of their duties UN law enforcement officials are expected to 'respect and protect human dignity and maintain and uphold the human rights of all persons.' The Commentary to Article 2 lists the international conventions, rules and declarations of relevance to the human rights in question.[17] Article 5 of the Code of Conduct further regulates the prohibition of torture or other cruel, inhuman or degrading treatment or

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[11] Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

[12] UNGA Res 40/33 (29 November 1985).

[13] UNGA Res 45/110 (14 December 1990).

[14] Available at <http://www.un.org/en/peacekeeping/documents/un_in.pdf> accessed 3 October 2011.

[15] Available at <http://www.un.org/en/peacekeeping/documents/un_in.pdf> accessed 3 October 2011.

[16] Ten Rules Code of Personal Conduct for Blue Helmets: Rule 5- Respect and regard human rights of all.

[17] Code of Conduct for Law Enforcement Officials, UNGA Res 34/169 (17 December 1979), art 2, Commentary.

punishment, derived from the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment.[18] A similar principle exists in the Basic Principles on the Use of Force.[19] Both the UN Military Observers and Civilian Police Handbooks have the Universal Declaration of Human Rights[20] annexed. However, in evaluating the applicability of human rights to the UN, the legal value of the documents stated is an important consideration. These documents are issued as policy and guidance documents and, as such, they do not provide a clear set of enforceable human rights obligations.

The 'internal conception' is the second theory that Megrét and Hoffmann argue for, and it is based on an 'axiomatic approach.'[21] The gist of the argument is that the UN must abide by the international human rights standards that it is commissioned to promote in its constitutional order.[22] Many commentators share this view.[23] The main support for the internal conception theory is found in the Charter of the United Nations,[24] as the constituent instrument for the UN. The UN Charter in its Preamble

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[18] UNGA Res 3452 (XXX) (9 December 1975).

[19] Basic Principles on the Use of Force (n 9) Principle 6.

[20] UNGA Res 217 A (III) (10 December 1948).

[21] A Clapham, *Human Rights Obligations of Non-State Actors* (n 7), 127; Report of the Amnesty International, 'Peacekeeping and Human Rights' (1994) AI Index: IOR 40/01/1994.

[22] Megrét & Hoffmann (n 3) 317.

[23] Kondoch (n 5), 33; Clapham (n 7), 127; N D White, 'Towards a Strategy for Human Rights Protection in Post-conflict Situations' in N D White & D Klaasen (eds), *The UN, Human Rights and Post-conflict Situations* (Manchester University Press, 2005), 464; J A Frowein 'The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation' (1999) 28 Israel Yearbook of Human Rights 1, 15; K Kenny 'Accountability for Its Human Rights Impact' in N D White & D Klaasen (eds) *The UN, Human Rights and Post-conflict Situations* (Manchester University Press 2005), 442; T H Irmscher, 'Legal Framework for the Activities of United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation' (2001) 44 GYIL 353, 369.

[24] Charter of the United Nations, San Francisco (signed 26 June 1945, entered into force 24 October 1945) UNCIO XV 335.

reaffirms 'faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small'; and the operative paragraphs have a number of general references to human rights. The most common examples given are Articles 1 and 55 of the UN Charter read together. Under Article 1(3) one of the purposes of the UN is listed as achieving 'international co-operation […] in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'; and Article 55 (c) sets out that the UN 'shall promote' universal respect for, and observance of human rights and fundamental freedoms for all. All members commit themselves 'to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55' (Article 56). According to Kenny, the fact that Article 1 lists human rights as a substantive purpose of the UN together with the peremptory language ('shall promote') of Article 55 makes it clear that the UN should strictly promote observance of and universal respect for human rights.[25] The argument that follows is that this task can only be fulfilled if the UN's own actions respect and observe human rights.[26] However, it is not self-evident in the UN Charter that the UN's human rights obligations exceeds *promoting* respect and observance and includes an obligation on the Organization itself to respect and observe human rights. In 1964, Scwarzenberger noted that 'in the Charter, a clear distinction is drawn between the promotion and encouragement of respect for human rights, and the actual protection of these rights. The first one is entrusted to the

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[25] Kenny (n 23) 442; Kondoch (n 5) 33.

[26] Kenny (n 23) 442.

United Nations. The latter remains in the prerogative of each member State.'[27] The UN Charter is 'ambivalent' in the sense that while it commits the UN to promote respect for human rights, that became a subject of great concern when the UN Charter was being drafted, especially due to the atrocities committed before and during the Second World War, it also refrains from intervening in matters which are essentially within the domestic jurisdiction of a member state (Article 2(7).[28] The underlying reason for this ambivalence has been the necessity to strike a balance between the establishment of respect for human rights and conserving the traditional principle of the sovereign equality of states.[29] This stance of the UN Charter corresponds to the traditional view that human rights apply within states, affecting generally the relationship between the governments and the citizens of a state.[30] Despite the fact that the understanding of human rights as purely an intra-state matter has gone through significant changes over time, the basic premise that it is the duty of the states to protect human rights persists. The UN has contributed to this premise by agreeing that 'the promotion and protecting of human rights is a matter of priority for the international community' but 'the primary responsibility for standard-setting lies with States.'[31]

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[27] G Schwarzenberger, *Power Politics: An Introduction to the Study of International Relations and Post War Planning* (1964), 462.

[28] Z Stavrinides, 'Human Rights Obligations under the United Nations Charter' (1999) 3 International Journal of Human Rights 38, 39; see also K Waldheim, *In the Eye of Storm: the Memoirs of Kurt Waldheim* (London 1985).

[29] Stavrinides (n 28) 3.

[30] A Roberts, 'The Applicability of Human Rights Law During Military Occupations' (1987) 13 Review of International Studies 39, 40.

[31] Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (12 July 1993) preamble, [4]&[38].

The final theory that Megrét and Hoffmann propose as a legal basis for the applicability of human rights to the UN is called as the 'hybrid conception.' Accordingly, the UN is bound by human rights in a 'transitive way', i.e. 'as a result and to the extent that its members are bound.'[32] These three conceptions are not mutually exclusive and could be combined to form the legal basis for human rights obligations of the UN; therefore the hybrid conception is actually a mixture of both 'the "internal" conception (since the binding character flows from membership of the Organization) and the "external" one (since states "bring in" binding international human rights norms "from the outside."'[33] To exemplify, according to Reinisch the transfer of "governance" tasks to an international organization could be considered as a 'functional treaty' succession by international organizations to member states' international obligations and 'states should not be allowed to escape their humanitarian obligations by forming an international organization to do the 'dirty work.'[34] The example the author gives for the functional treaty succession is a concrete one with respect to the EC's functional succession to the General Treatment on Tariffs and Trade (GATT) obligations of its member States before it formally became a contracting party to the World Trade Organization (WTO) after the Uruguay round ended.[35] It is important to note here that the UN system is a very different composition from the EC, but within the specific context of UN post-conflict

[32] Megrét & Hoffmann (n 3), 318; A Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 Global Governance 131, 141-43.

[33] Megrét & Hoffmann (n 3) 318.

[34] Reinisch (n 32), 137, 143; see *Waite and Kennedy v Germany*, ECtHR, Judgment, 26083/94, (18 February 1999) [67].

[35] Reinisch (n 32) 137 (note 42).

administrations the functional treaty succession, as will be discussed later, might have more meaning and importance.

On a different level but applying the same logic, the hybrid conception stands for a 'delegated' responsibility by the UN member States to the UN in the field of human rights. This argument sees the UN as 'an agent of its members' and 'a sum of its parts, member states.'[36] However, the problem with this argument is that the UN is a separate entity with international personality independent of its member states, and its rights and duties are derived from its constituent instrument, the UN Charter.[37] The UN member states represent a range of legal and political systems and they don't necessarily show the same level of commitment to the protection of human rights. If the respect for customary international law or universally recognized human rights standards should be considered as a common ground for the member states' human rights commitments, the obligations arising from those sources would equally apply to the UN without a delegation of responsibility from its members states or without the necessity to rely on a theory like hybrid conception for that matter.

Another theory, resembling the external conception but in a less convincing way, regards protection of human rights as an 'inherent obligation' of the UN: Since the Organization has the power to affect the enjoyment of human rights, it should have the corollary obligations to protect them. As Kenny states, 'the thrust of the argument is that where there is such power to impact on human rights there must be

[36] Kenny (n 23) 441.

[37] Concurring Devereux (n 5) 204.

accountability.'[38] This may sound plausible but it is difficult to prove convincingly that international law has reached such level of universalism.[39]

## 2.1 The Legal Basis Specific to the Human Rights Obligations of UN Post-conflict Administrations

A more convincing argument specific to the context of post-conflict administrations is the 'functionality view' suggesting that in so far as the UN undertakes governmental functions it acts like a state authority and therefore, it should be bound by human rights law.[40] A variant of the functionality view is the 'dual functionality.' An important aspect of the 'dual functionality' is that unlike the functionality view it does not rely on the analogy between the acts of the UN administrations and a state but it rather substitutes the acts of the Organization to the acts of an agent of the state when they create effect on the domestic law of the state: Accordingly, within the context of the UN post-conflict administrations, the UN actions are twofold: it first acts as an international organization, and second as an agent of the state.[41] As Wilde explains:

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[38] Kenny (n 23) 440-441.

[39] Devereux (n 5) 203.

[40] J Cerone, 'Reasonable Measures in Unreasonable Circumstances: A Legal Responsibility Framework for Human Rights Violations in Post-conflict Territories under UN Administrations' in N D White & D Klaasen (eds) *The UN, Human Rights and Post-conflict Situations* (Manchester University Press 2005), 45; Devereux (n 5) 205.

[41] R Wilde, 'The Accountability of International Organizations and the Concept of 'Functional Duality' in W P Heere (ed), *From Government to Governance, The Growing Impact of Non-State Actors on the International and European Legal System* (The Hague 2004), 165-169; see also C Stahn, *The Law and Practice of International Territorial Administration, Versailles to Iraq and Beyond* (CUP 2008), 633-636 and B Knoll, 'Beyond the *Mission Civilisatrice*: The Properties of a Normative Order Within an Internationalized Territory' (2006) 19 Leiden Journal of International Law 275, 303.

> As a matter of international law, the missions involve one legal person- the international actor-taking on, in whole or in part, the role of agent for another legal person- the State or non-State/sub-State territorial entity-without losing its own distinctive legal personality in the process. As a result, the international actor manifests the 'functional duality' […].[42]

In practice, there have been few examples of the adoption this functional duality with respect to the acts of the post- conflict administrations. One example that authors elaborate on[43] is the decision of the Constitutional Court of Bosnia and Herzegovina on the Law on State Border Service in 2000.[44] The Court remarked that:

> Taking into account the prevailing situation in Bosnia and Herzegovina, the legal role of the High Representative, as agent of the international community is not unprecedented, but similar functions are known from other countries in special political circumstances. Pertinent examples are the mandates under the regime of the League of Nations and, in some respect, Germany and Austria after the Second World War. Though recognized as sovereign, the States concerned were placed under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision.[45]

The Court further stated that:

> Such a situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual. The same holds true for the High Representative: he has been vested with special powers by the international community and his mandate is of an international character. In the

[42] Wilde (n 41) 167.

[43] ibid; Stahn (n 41); Knoll (n 41) 295-296.

[44] *Request for Evaluation of Constitutionality of the Law on State Border Service*, Constitutional Court of Bosnia and Herzegovina, U 9/00, (3 November 2000).

[45] *Request for Evaluation of Constitutionality of the Law on State Border Service* (n 44) [5].

> present case, the High Representative [… intervened in the legal order of Bosnia and Herzegovina substituting himself for the national authorities. In this respect, he therefore acted as an authority of Bosnia and Herzegovina and the law which he enacted is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina.[46]

From the perspective of human rights law, since the same acts could be considered both as the acts of an international organization and the acts of a State agent (as long as they intervene in domestic law of the state) they could trigger different, but sometimes overlapping human rights obligations. So, we could have not only the human rights obligations of an international organization but also the human rights obligations of a state at play.[47] The logic behind this argument with respect to responsibilities arising from human rights law is that the administered state's responsibility could be triggered by the acts of the Organization that acts as its agent. However, from this perspective the functional duality would enhance the effective protection of human rights as long as the state in question has a functioning legal system that honours its international human rights obligations.[48]

A final argument is that of 'functional treaty succession.' This builds on the idea that a post-conflict administration automatically succeeds to the human rights treaties that bind the administered state because they 'form an integral part of the status of the territory and the *acquis* of the population; no matter who governs them.[49] Such

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[46] ibid; see also *Request for the Evaluation of Constitutionality of the Law on Travel Documents of Bosnia and Herzegovina*, Constitutional Court of Bosnia and Herzegovina, 25/00, (23 March 2001) [30].

[47] Wilde (n 41) 168.

[48] Stahn (n 41) 636.

[49] C Stahn, 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis' (2001) 5 Max Planck Yearbook of United Nations Law 105, 163; J Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-conflict Kosovo' (2001) 12 EJIL 469, 475; Irmscher (n 23), 371.

understanding of the functional treaty succession is in line with the views of the Human Rights Committee under its General Comment 26 on the Continuity of Obligations whereby it is stated that:

> The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, *that once the people are accorded the protection of the rights under the Covenant*, *such protection devolves with territory and continues to belong to them*, notwithstanding change in government of the State Party, including dismemberment in more than one State or State succession or any subsequent action of the state party designed to divest them of the rights guaranteed by the Covenant (emphasis added)[50]

The treaty succession by the UN is only 'functional' since the UN post-conflict administrations are not technically successors to any states and they do not claim sovereignty in the sense that they will permanently administer the territories. Rather, they act as temporary administrators deriving their legal basis from the consent of the territorial sovereigns or by the Security Council Resolutions.

Finally, functional treaty succession would not always create the desired results in terms of human rights protection since sovereignty over internationally administered territories is often disputed, raising complex and highly political issues of state succession.

### 3. The Human Rights Practice of UN Post-conflict Administrations

Despite the efforts to articulate theoretical bases to show that the UN has obligations under human rights law, the Organization referred to various human rights obligations in the context of post-conflict administrations without necessarily stating the reasons

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[50] The Human Rights Committee, General Comment No 26: Continuity of Obligations (12 August 1997) CCPR/C/21/Rev.1/Add.8/Rev.1 [4]; See Report of the Amnesty International, 'Federal Republic of Yugoslavia (Kosovo): Amnesty International's Recommendations to UNMIK on the Judicial System' (4 February 2000) AI Index: EUR70/006/2000; see also, by analogy, the Vienna Convention on Succession of States in Respect of Treaties, 17 ILM (1978) 1488 Article 34 1 (a).

behind such steps. Shraga, a Principal Legal Officer at the United Nations Officer of Legal Affairs, claims that the UN applied 'the obligation to respect and ensure respect for international human rights standards' as the 'foremost' principle of the post-conflict administration of territories.[51]

Indeed, the mandates of the post-conflict administrations and the international agreements establishing them included the protection of human rights, albeit sometimes articulated in broad but vague terms. One of the very first examples was the 1962 Agreement between Indonesia and the Netherlands concerning West New Guinea (West Irian) (the Agreement Concerning West New Guinea). Under Article XXII of the Agreement Concerning West New Guinea, the United Nations Temporary Executive Authority (UNTEA) and Indonesia would 'guarantee fully the rights, including the rights of free speech, freedom of movement and of assembly of the inhabitants of the areas. These rights would include the existing rights of the inhabitants of the territory at the time of the transfer of administration to the UNTEA.'[52] The Agreement Concerning West New Guinea did not list which human rights were at stake other than the rights of free speech, freedom of movement and assembly.

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[51] D Shraga, 'Military Occupation and UN Transitional Administrations- The Analogy and its Limitations' in M G Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (Brill 2007), 489.

[52] Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian), (signed 15 August 1962, entered into force 21 September 1962), 6311 UNTS 274.

Another partially vague articulation was under Article 15 of the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict,[53] which stated that 'all persons in Cambodia and Cambodian refugees and displaced persons shall enjoy the rights and freedoms embodied in the Universal Declaration of Human Rights and other relevant international human rights instruments.' While Article 16 gave the responsibility to foster an environment in which respect for human rights would be ensured to UNTAC, it was not specified anywhere what the phrase 'relevant international human rights instruments' stands for. Similarly, the Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium referred to the obligation of respect for highest level of internationally recognized human rights standards and fundamental freedoms in the region[54] without clarifying what those standards are.

The practice of the post-conflict administrations elaborated on the human rights obligations, initially hinted in their founding documents. The UN Security Council Resolution 1244 establishing the UN Mission in Kosovo (UNMIK) in 1999 listed the protection and promotion of human rights as one of the main responsibilities of the Kosovo administration.[55] Under the UNMIK Regulation No 24, 'all persons undertaking public duties or holding public office in Kosovo' were expected to observe internationally recognized human rights standards non-exhaustively listed

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[53] Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, (signed 23 October 1991) 28613 UNTS 27.

[54] Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium, (signed 12 November 1995) UN Doc A/50/757- S/1995/951, annex article 6.

[55] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244 [11(j)].

under the Regulation.[56] While UNMIK Regulation No 24 stopped short of declaring clearly that this includes UNMIK as well, the phrase 'all persons' would suggest so.

Effectively, the Regulations promulgated by the SRSG and the subsidiary instruments issued thereunder and the law in force in Kosovo on 22 March 1989, the day before the Serbian government unilaterally ended Kosovo's autonomous status, were the applicable laws in territory.[57] In the case of a conflict, the Regulations and subsidiary instruments would take precedence.[58]

Considering the fact that UNMIK's wide range of governmental powers would create significant effects on the human rights of the citizens of Kosovo, in its first report on UNMIK addressed to the UN Security Council, the UN Secretary General found it pertinent to highlight that '[i]n assuming its responsibilities, UNMIK will be guided by internationally recognized standards of human rights as the basis for the exercise of its authority in Kosovo' and that 'UNMIK will embed a culture of human rights in all areas of activity, and will adopt human rights policies in respect of its administrative functions.'[59] Still, the UN Secretary General's choice of words is significant as he refrained from articulating that UNMIK is 'bound' by human rights

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[56] UNMIK Regulation No 1999/24 on the Law Applicable in Kosovo (12 December 1999) UNMIK/REG/1999/24 as amended by UNMIK Regulation No 2000/59 (27 October 2000) UNMIK/REG/2000/59 section 1.3, sections 1.4 & 1.5.

[57] UNMIK/REG/1999/24 (n 56) section 1.1;UNMIK/REG/1999/1 (On The Authority of the Interim Administration in Kosovo) (25 July 1999); see Report of the Secretary-General on the United Nations Interim Administration in Kosovo (23 December 1999) UN Doc S/1999/1250, [55]; see also UNMIK Regulation No 1999/25 Amending UNMIK Regulation No 1999/1 On the Authority of the Interim Administration in Kosovo (12 December 1999) UNMIK/REG/1999/25.

[58] UNMIK/REG/1999/24 (n 56) section 1.1.

[59] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc S/1999/779 (12 July 1999) [42].

and found it suffice to state that the administration will only be ‘guided’ by human rights.[60]

The supremacy of the regulations and subsidiary instruments issued by UNMIK over the other applicable laws could be understood to mean that the later regulations having the same status could easily derogate from the human rights standards that were listed under UNMIK Regulation 1999/24. The Ombudsperson of Kosovo raised a similar concern in its first report where it was pointed out that in exercising executive and legislative powers, UNMIK should observe the rule of law; should be bound by the law and should not be above it.[61]

Nonetheless, UNMIK has put its “external” human rights mandate into practice and introduced strategic changes in the laws applicable in Kosovo. These included, the abolition of capital punishment,[62] the introduction of new offences such as the prohibition against inciting to national, racial, religious or ethnic hatred, discord or intolerance and the prohibition of trafficking persons in Kosovo,[63] promulgation of the Provisional Criminal Code and the Provisional Criminal Procedure Code of Kosovo,[64] establishment and protection of the rights of persons arrested by law

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[61] 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 the Implementation of the above Regulation (26 April 2001) [24].

[62] UNMIK/REG/1999/24 (n 56) section 1.5.

[63] UNMIK Regulation No 2000/4 on the Prohibition Against Inciting to National, Racial, Religious or Ethnic Hatred, Discord or Intolerance (1 February 2000) UNMIK/REG/2000/4, UNMIK Regulation No 2001/4 on the Prohibition of Trafficking Persons in Kosovo (12 January 2000) UNMIK/REG/2001/4.

[64] UNMIK Regulation No 2003/25 on the Provisional Criminal Code of Kosovo (6 July 2003) UNMIK/REG/2003/25 and UNMIK Regulation No 2003/26 on the Provisional Criminal Procedure Code of Kosovo (6 July 2003) UNMIK/REG/2003/26.

enforcement authorities.[65] While the developments in criminal law and criminal justice were welcomed, detentions under executive orders issued by the SRSG were harshly criticized.[66] UNMIK's focus was not only on criminal law. Notably, for the purpose of securing property rights, the administration repealed the discriminatory legislation affecting housing and rights in property[67] and established the Housing and Property Directorate and the Housing and Property Claims Commission.[68] Still, the Ombudsperson received some complaints against UNMIK with respect to the right to property under Article 1 of Protocol 1 to the European Convention on Human Rights and the right to respect home under Article 8 of the European Convention on Human Rights.[69]

Two substantial developments with respect to UNMIK's human rights policy, denoting a certain degree of acceptance of human rights obligations by the administration, have been, first, the establishment of the Ombudsperson Institution[70] and second the establishment of the Kosovo Human Rights Advisory Panel[71] almost

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[65] UNMIK Regulation No 2001/28 on the Rights of Persons Arrested by Law Enforcement Authorities (11 October 2001) UNMIK/REG/2001/28.

[66] Ombudsperson Institution in Kosovo, Special Report No 3 on the Conformity of Deprivations of Liberty under 'Executive Orders' with Recognised Standards (29 June 2001).

[67] UNMIK Regulation No 1999/10 On the Repeal of Discriminatory Legislation Affecting Housing and Rights in Property (13 October 1999) UNMIK/REG/1999/10.

[68] UNMIK Regulation No 1999/23 On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission (15 November 1999) UNMIK/REG/1999/23.

[69] Ombudsperson Institution in Kosovo, Special Report No 1 (n 61) [29-30] et seq & [45] et seq.

[70] UNMIK Regulation No 2000/38 On the Establishment of the Ombudsperson Institution in Kosovo (30 June 2000) UNMIK/REG/2000/38.

[71] UNMIK Regulation No 2006/12 On the Establishment of the Human Rights Advisory Panel (23 March 2006) UNMIK/REG/2006/12.

seven years after the establishment of UNMIK. Both institutions will be examined in detail with their contributions and shortcomings in Chapter seven.

Less than a year after the establishment of UNMIK, the UN Security Council Resolution establishing the UNTAET[72] contained only 'discrete' references to human rights[73] unlike the mandate of UNMIK, which included the comprehensive duty to promote and protect human rights. Nevertheless, UNSC Res 1272 underlined the importance of supplying UNTAET personnel with appropriate training in international humanitarian, human rights and refugee law (paragraph 15).[74] The very first Regulation issued by UNTAET on 27 November 1999 on the applicable law in East Timor, repeated UNMIK Regulation No 1999/24 almost verbatim in stating that 'all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards' under the international human rights documents (non-exhaustively) listed.[75] Under Section 3 of UNMIK Regulation No 1999/24, the laws applied in East Timor prior to the establishment of UNTAET would apply insofar as they do not conflict with the internationally recognized human rights standards, the fulfilment of the mandate given to UNTAET under UNSC Resolution 1272 (1999), or the present Regulation or any other regulation and directive issued by the Transitional Administrator, *but until they are*

[72] UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272.

[73] A Devereux, 'Searching for Clarity: A Case Study of UNTAET's Application of International Human Rights Norms' in N D White & D Klaasen (eds), *The UN, Human Rights and Post-conflict Situations* (Manchester University Press 2005), 297; See for instance UNSC Res 1272 (n 72) preamble, [8] & [10].

[74] See Report of the Secretary-General on the Situation in East Timor (4 October 1999) UN Doc S/1999/1024 [29 (h)].

[75] UNTAET/REG/1999/1 (n 2) section 2.

*replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor* (emphasis added).

UNTAET perceived its human rights role to be broad and diverse.[76] UNTAET Regulation 1999/1, section 3.2 abolished some of the laws that were infringing human rights.[77] Under section 3.3 of the same Regulation capital punishment is abolished. UNSC Resolution 1272 itself condemned all acts of violence in East Timor and demanded that those responsible for such violence be brought to justice (paragraph 16). Within this background UNTAET established District Courts and one Court of Appeal, which would have jurisdiction in respect of crimes committed in East Timor and in respect of the civil claims that arose in East Timor prior to the establishment of UNTAET on 25 October 1999.[78] The District Court of Dili had exclusive jurisdiction over genocide, war crimes, crimes against humanity, murder, sexual offences and torture, insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999.[79]

In exercising their jurisdiction, the courts in East Timor would apply the law in East Timor as promulgated under section 3 of UNTAET Regulation No 1999/1.[80] The SRSG had a strong say not only on the applicable law but also in the composition and

[76] See A Devereux, 'Searching for Clarity: A Case Study of UNTAET's Application of International Human Rights Norms' (n 73) 30.

[77] These included Law on Anti-Subversion, Law on Social Organizations, Law on National Security, Law on National Protection and Defence, Law on Mobilization and Demobilization, and Law on Defence and Security.

[78] UNTAET Regulation No 2000/11 On the Organization of Courts in East Timor (6 March 2000) UNTAET/REG/2000/11 sections 4, 5.2 & 5.3.

[79] ibid sections 10.1 &10.2.

[80] ibid section 5.1.

functioning of the courts in general, with the result that the independence of the judiciary in East Timor was occasionally questioned.[81] Each district court was composed of judges who were appointed by the SRSG in accordance with Regulation No 1999/3.[82] Further, the SRSG retained the authority to establish special panels with expertise to exercise exclusive jurisdiction over the most serious offences listed under section 10.1. Such panels would be composed of both East Timorese and international judges, in whose appointments the SRSG would have the final say (section 10.3).[83] Clearly, neither the district courts or special panels nor the court of appeal had jurisdiction over any future offences that could be committed by the transitional administration itself.

Another development that aimed to address the consequences of atrocities committed in East Timor, and to promote national reconciliation and healing following a year of political turmoil in the territory was the establishment of the Commission for Reception, Truth and Reconciliation in East Timor (hereinafter the Commission).[84] The members of the Commission were appointed by a Selection Panel where the SRSG was serving as Chair, and he had the final decision in appointing the members upon recommendation of the Selection Panel, after a selection procedure involving broad consultation.[85]

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[81] US Department of State, *East Timor, Country Reports on Human Rights Practices*, (4 March 2002) available at <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8300.htm> accessed 12 April 2011.

[82] UNTAET Regulation No 1999/3 On the Establishment of a Transitional Judicial Service Commission (3 December 1999) UNTAET/REG/1999/3 section 9.4.

[83] See also UNTAET Regulation No 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (6 June 2000) UNTAET/REG/2000/15.

[84] UNTAET Regulation No 2001/10 On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor (13 July 2001) UNTAET/REG/2001/10.

[85] UNTAET/REG/2001/10 (n 84), sections 4.2 & 4.3.

Apart from regulating the composition of courts in East Timor, UNTAET introduced new legislation notably in the field of criminal justice and human rights. Transitional Rules of Criminal Procedure were extensive, paying attention to fair trial and due process rights, rights of the suspect and the accused, and rights of habeas corpus.[86]

While the significance of human rights as part of the political systems of the new governments, in the process of being constructed, in the administered territories was recognized in the practice of UN post-conflict administrations, the human rights obligations of the administrations themselves were vague, their human rights practice was abundant and their authority was unchallenged. These practices were often praised as serving to promote human rights in the administered territories but were also criticized on the level that they did not necessarily address the consequences of potential human rights violations by the administrations themselves.

### 4. The Relationship Between Human Rights Law and International Humanitarian Law

The applicability of human rights law to UN post-conflict administrations raises the question of the relationship between human rights law and international humanitarian law (IHL) since both bodies of law could be simultaneously relevant for the acts of a post-conflict administration. Traditionally, human rights law and IHL have been two distinct bodies of law. Whereas IHL is one of the oldest branches of public international law, human rights law is relatively new and began to rise after the

[86] UNTAET Regulation No 2000/30 on Transitional Rules of Criminal Procedure (25 September 2000) UNTAET/REG/2000/30.

Second World War, especially in response to the practices of fascist and totalitarian regimes in the 1930s. The UN Charter was one of the very first documents bringing effectively into juxtaposition human rights and armed conflict.[87] In its preamble, it referred to the determination of the peoples of the United Nations to:

> […] to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind and to reaffirm faith in fundamental human rights, in the dignity and the worth of the human person, in the equal rights of men and women and of nations large and small […]

### 4.1. Developments During the 1960s and 1970s

The 1960s were identified with colonial struggles for self-determination and the conflict in the Middle East. The Tehran International Conference on Human Rights in 1968 was convened in this background and with the outcome of the Conference, the relationship between human rights law and IHL was becoming more concrete. The Final Act of the Tehran International Conference highlighted the importance of eliminating the consequences of 'massive denials of human rights arising out of aggression or any armed conflict.'[88] Shortly after the Tehran International Conference, the Secretary-General pointed out the respect for human rights in armed conflict as a pressing issue.[89]

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[87] G I A D Draper, 'The Relationship Between the Human Rights Regime and the Law of Armed Conflicts' (1971) 1 Israel Yearbook on Human Rights 191, 193.

[88] Final Act of the International Conference on Human Rights, (22 April to 13 May 1968), UN Doc A/Conf.32/41.

[89] Reports of the Secretary General on Respect for Human Rights in Armed Conflict (20 November 1969) UN Doc A/7720 & (18 September 1970) UN Doc A/8052.

By the late 1960s and early 1970s the UN General Assembly and the UN Security Council had affirmed that human rights law remained substantially relevant during armed conflicts.[90] UNSC Res 237 (14 June 1967) on the situation in Middle East noted that 'essential and inalienable human rights should be respected even during the vicissitudes of war' and recommended to the Governments concerned, in the area of conflict in the Middle East, 'the scrupulous respect of the humanitarian principles governing the treatment of prisoners of war and the protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949' (paragraph 2). The approach of the Security Council here was that IHL embraces the 'essential and inalienable human rights' that apply in armed conflict.[91] Indeed, common Article 3 to the Geneva Conventions encompassed minimum human rights guarantees in a non-international armed conflict, and substantial provisions of the Geneva Convention IV referred to inalienable rights. [92] Therefore, Schindler had rightly stated back in the late 1970s that 'a tendency may be detected in the Geneva Conventions of 1949 for their provisions to be considered not only as obligations to be discharged by the High Contracting Parties but as individual rights of the protected persons.'[93]

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[90] See for instance UNSC Res 237 (14 June 1967) UN Doc S/RES/237 on the Situation in Middle East; UNGA Res 2443 (XXII) (9 December 1968) on Respect for and Implementation of Human Rights in Occupied Territories; UNGA Res 2444 (XXIII) (19 December 1968) on Respect for Human Rights in Armed Conflicts; UNGA Res 2675 (XXV) (9 December 1970) on Basic Principles for the Protection of Civilian Population in Armed Conflicts; UNGA Res 2676 (XXV) (9 December 1970) and UNGA Res 2677 (9 December 1970) and UNGA Res 2853 (20 December 1971) on Respect for Human Rights in Armed Conflict.

[91] Concurring S Wills, *Protecting Civilians: The Obligations of Peacekeepers* (OUP 2009), 120.

[92] See Geneva Convention IV Relative to the Protection of Civilians in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, arts 27, 31, 32, 48, 52; For further examples, see Y Dinstein, 'The International Law of Belligerent Occupation and Human Rights' (1978) 8 Israel Yearbook on Human Rights 104, 104-144.

[93] D Schindler 'The International Committee of the Red Cross and Human Rights' (1979) 208 Int Rev of the Red Cross 3, 3-14.

In addition to the referral of the UN resolutions to the applicability of human rights during armed conflict, the pressure was also mounting for developing new rules of IHL that would incorporate human rights standards.[94] In that respect, human rights law influenced the development of IHL. For instance, UNGA Res 2677 of 9 December 1970 on Respect for Human Rights in Armed Conflict held that 'because humanitarian rules do not adequately meet all contemporary situations of armed conflict it is necessary to develop the substance of these rules and procedures for their implementation.'

The Geneva Conference 1974-77 for the adoption of two Protocols intended to supplement Geneva Conventions was convened in the spirit for developing new rules of IHL with human rights emphasis. Protocol I Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I),[95] overlaps 'with human rights law much more directly than the 1949 Conventions that it supplemented.'[96] Protocol I provides for minimum standards of human rights protection for those 'who are in the power of a Party to the conflict and who do not benefit from a more favourable treatment under the Conventions.'[97] Protocol II Additional to the Geneva Conventions of 1949, and Relating to the

[94] Wills (n 91) 120.

[95] Protocol I Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflict (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

[96] A Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights' (2006) 100 AJIL 580, 591.

[97] See Protocol I (n 95) art 75. This article is directly derived from the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); See also J M Henckaerts and L D Beck, *Customary International Humanitarian Law Volume 1: Rules* (CUP 2005), 299-305.

Protection of Victims of International Armed Conflict (Protocol II)[98] contains all non-derogable rights of the ICCPR.[99]

In the light of these developments, it is hard to argue that human rights law is entirely displaced by IHL in armed conflicts. Therefore, the focus of debate is rather on how the relationship between these two regimes is operationalized, than on the question of applicability of human rights law in armed conflicts.

### 4.2. Developing Theories for Co-existence of Two Regimes

A crucial starting point in finding clues to operationalize the inter-action between human rights law and IHL has been the evaluation of the jurisprudence of the International Court of Justice (ICJ). Indeed, the ICJ had several opportunities to pronounce on the issue, starting with *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* where the Court touched upon it by stating that the non-performance of 'certain general conventions such as those of a humanitarian character' might adversely effect the people of Namibia.[100]

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[98] Protocol II Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

[99] Y Sandoz *et al* (eds), ICRC, *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva 1987), 1365-66.

[100] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970*), Advisory Opinion, ICJ Reports 1971, 16, [122].

Pictet identifies at least three humanitarian principles that are fundamental and common to human rights law and IHL. He lists them as inviolability, non-discrimination and security of person.[101] These fundamental principles form the basis of a variety of human rights such as right to life, right to a fair trial, protection from arbitrary arrest or detention, prohibition of discrimination and so on- which exist in both bodies of law albeit sometimes with variations.[102]*Legality of the Threat or Use of Nuclear Weapons* highlighted the possible variations in human rights law and IHL with respect to the protection of the 'right to life.' The Court stated that:

> […] The protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[103]

While the ICJ confirmed the co-existence of human rights law and IHL, it further suggested that, at least within context of protection of the right to life, where IHL is applicable it would be the *lex specialis.* The Advisory Opinion on the *Construction of*

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[101] J Pictet, *Humanitarian Law and the Protection of War Victims* (Geneva 1974), 34 et seq.

[102] O Ben-Naftali & Y Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003-4) Israel Law Review 17, 52-53.

[103] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, [22-25].

*a Wall in the Occupied Palestinian Territory* reiterated and detailed the ICJ's position on the relationship between human rights law and IHL:

> […] The Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[104]

The introduction of the *lex specialis* principle in the debate on the relationship between human rights law and humanitarian law has generated mixed reactions.[105] At the core of the substantial criticisms, was the lack of clarity on how to operationalize this principle[106] especially due to the fact that international legal system lacks the

[104] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, [106].

[105] The full expression is *'lex specialis derogat legi generali'* and could be translated as 'the more specific rule has precedence over the more general rule.' The principle dates back to Roman law, however it is not clear whether the principle applies only when there is a conflict between two rules or also as a principle of interpretation; See C Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situation of Armed Conflict (2007) 40 Israel Law Review 310, 338; F Hampson, 'The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body' (2008) 90 Int Rev of the Red Cross 549, 558; See Y Dinstein, *The International Law of Belligerent Occupation* CUP 2009, 85, for the view that *the lex specialis* principle must not be construed as a 'total exclusion of the law of human rights'; Hampson (ibid) 549-572, highlights the lack of clarity in ICJ's jurisprudence, on how the *lex specialis* principle operates and suggests various possibilities on how the principle should work in practice; see H Krieger, 'A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11 Journal of Conflict & Security Law 265, 265-191 for the view that the ICRC Study on Customary International Humanitarian Law is an example of how the normative relationship between human rights law and IHL can be conceived on the basis of the *lex specialis* principle.

[106] Krieger (n 105), 270; M Koskenniemi points out in the ILC Report*,* 'Study on the Function and Scope of Lex Specialis Rule and the Question of 'Self-Contained Regimes' (7 May 2004) ILC (LVI)

hierarchical structures of domestic legal systems where relationships between sources of law are defined, it would not be successful in providing unequivocal solutions to conflicts of norms in international law.[107]

Lindroos has summarised these concerns as follows:

> [T]he application of lex specialis faces difficulties when we need to determine the relationship between two different normative orders or rules deriving from different areas of law, such as environmental norms and trade norms […] If two specialised norms stand side by side, the lex specialis maxim cannot be applied, given its inability to establish whether environmental protection is more special than human rights law, the law of the sea, or trade law.
>
> As the maxim is a mechanic principle without a clear content it does not provide guidance in determining what is general and what is special. This is the second difficulty faced in the application of lex specialis to different normative orders. Giving priority to a special norm within the system of unclear norm relations in which a decision cannot rely on such relations, the decision actually relies on political or other considerations […].
>
> Thirdly, lex specialis is in some sense a contextual principle. It is difficult to use when determining conflicts between two normative orders in abstracto, and is, instead, more suited to the determination of relations between two norms in a concrete case.[108]

Similarly, Koskenniemi concluded in his Report for the International Law Commission that *lex specialis* is a contextual principle.[109]

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SG/FIL/CRD.1 [76], that it was not the intention of the *lex specialis* principle to suggest that human rights were abolished in armed conflict. The principle 'did not function in a formal or absolute way but as an aspect of the Court's [ICJ] reasoning.

[107] I Scobbie, 'Principle of Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict' (2010) 14 Journal of Conflict & Security Law 449, 453; A Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis'* (2005) 74 Nordic Journal of International Law 27; W Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict and the Conundrum of Jus Ad Bellum' (2007) 40 Israel Law Review 592.

[108] Lindroos (n 107) 41-42.

[109] Report of the Study Group of the ILC, finalized by M Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682 [119].

In the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) Case,*[110] the ICJ did not refer to the *lex specialis* principle and some have taken the view that the ICJ has abandoned this principle completely.[111]Similarly, the Human Rights Committee avoided referring to *lex specialis* to determine the relationship between human rights law and IHL, but pointed out that these two bodies of law complement each other and they are not mutually exclusive.[112]

### 4.2.1 Towards a 'Convergence' of Human Rights Law and IHL?

In scholarly discussions of the relationship between human rights law and IHL complementarity theory, which suggests that human rights law and IHL are two distinct bodies of law, (however) they complement each other to fill the gaps in the other is gaining influence.[113] However, some also advocate a more assertive view of convergence between these two bodies of law. Pictet, writing back in 1975, argued that the efforts to merge human rights and IHL would have been 'absurd' since they are two undoubtedly interrelated yet independent disciplines.[114] In his view, 'the two systems are complementary, and indeed they complement one another admirably, but

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[110] *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgment, ICJ Reports 2005,168, [216].

[111] N Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40 Israel Law Review 355, 385; I Scobbie (n 108) 453.

[112] Human Rights Committee, General Comment No 31 on The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add [11].

[113] Scobbie (n 107), 456; N Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 IRRC 737, 739.

[114] Pictet (n 101) 14.

they must remain distinct, only for the sake of expediency.'[115] One of the reasons he put forward was that 'The Geneva Conventions are universal and of a mandatory nature which 'is certainly not the case with human rights instruments.'[116] According to Pictet, the efforts to converge these two bodies of law would compromise the effectiveness of IHL and carry the risk of politicizing it since 'in case of war, only a neutral and non-political body [the ICRC] has any chance of access to the scene of hostilities and ensure the protection for the victims […].'[117]

From a human rights law perspective, Schabas also argued that the efforts to converge the two bodies of law would overlook a fundamental distinction between them namely the attitude they take to aggressive war. IHL, he claimed, is based on an indifference to the cause of the conflict-or in other words *jus in bello* is independent from *jus ad bellum*- while human rights law has an anti-war, pacifist stance.[118] However, he agreed that the two bodies of law complement each other as both have the protection of individual's human rights and dignity as their purpose; the paradigm is that of 'belt and suspenders' as each body of law supports the other by filling the gaps in the other.[119]

Bothe, Partsch & Solf in their Commentary on the two Protocols Additional to the Geneva Conventions have also argued that human rights law and IHL complement

[115] ibid 15.

[116] ibid.

[117] ibid.

[118] Schabas (n 107) 593-608.

[119] ibid 598.

each other, however the focus of their argument was the protection of the individual. Therefore they suggested that where human rights and IHL were both applicable the rules that provide the highest standard of protection would apply.[120] Bothe, Partsch & Solf exemplify their stance as follows:

> […] When Protocol II establishes a higher standard of protection than the ICCPR, the higher standard prevails, on the basis of the fact that the Protocol is 'lex specialis' to the Covenant. On the other hand, provisions of the Covenant which have not been reproduced in the Protocol or which provide for a higher standard of protection than the Protocol should be regarded as applicable irrespective of the relative times at which the two instruments came into force for the respective state. It is a general rule for the application of concurrent instruments of Human Rights-and Part II "Humane Treatment" is such an instrument- that they implement and complete each other instead of forming a basis for limitations.'[121]

The problem with this approach is that it would introduce the process of merging these two bodies of law. As Wills has rightly points out, it is not easy to separate the IHL provisions into those that are concerned with human rights and that are not, especially since the Additional Protocols are not independent documents but are supplementary to the Geneva Conventions of 1949. Therefore, giving priority to the rule that provides higher degree of protection would influence the way in which the whole IHL regime is regarded and, rightly or wrongly, enhance the process of convergence between the two bodies of law.[122]

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[120] M Bothe, K J Partsch & W A Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague 1982,) 635-637; See also Wills (n 91) 137-138.

[121] M Bothe, K J Partsch & W A Solf (n 120) 636.

[122] Wills (n 91) 114.

Meron, writing in 1987, stated that:

> The convergence between humanitarian and human rights law is progressing rapidly. Although these systems of protection continue to have different institutional "umbrellas" (for the humanitarian law, the ICRC and the Red Cross movement; for human rights, the United Nations and various specialized and regional organizations), a strict separation between the two is artificial and hinders the efforts to maximize the effective protection of human rights.[123]

In 1995, the Declaration of Minimum Humanitarian Standards ('Turku Declaration') voiced the concerns of a number of academics about violations of human rights and IHL in situations of internal violence and disturbances, tensions and public emergencies, and pointed out the importance of cumulative application of minimum humanitarian standards available under both regimes.[124] Fifteen years after the adoption of the Declaration of Minimum Humanitarian Standards, the UN General Assembly accepted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law treating the two regimes as if they converge with respect to individual rights.[125]

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[123] T Meron, *Human Rights in Internal Strife: Their International Protection* (1987) 28; See also T Meron, 'Human Rights in Time of Peace and in Time of Armed Strife: Selected Problems' in T Buergenthal (ed), *Contemporary Issues in International Law, Essays in Honor of Louis B Sohn* (1984) 21.

[124] UN Doc E/CN.4/1995/116; See also, A Rossas & T Meron 'Combating Lawlessness in Grey Zones Conflicts Through Minimum Humanitarian Standards' (1995) 89 AJIL 215.

[125] UNGA Res 60/147 (16 December 2005).

Those who are in favour of convergence of two regimes rely on incorporation of IHL principles into relatively newer human rights treaties. A commonly cited example of convergence, has been the Convention of the Rights of the Child[126] as a human rights treaty normally applicable in peacetime but also incorporating an IHL rule:[127] Article 38(1) of the Convention on the Rights of the Child states that 'States parties undertake to respect and ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.' However, this referral shows that IHL is *lex specialis* over human rights law for that matter rather than convergence between two systems as has been suggested. To exemplify, under Article 1 of the Convention on the Rights of the Child, 'a child means every human being below the age of eighteen years' and the Convention has an obvious negative stance against the recruitment of 'child soldiers.'[128] However, the succeeding paragraphs of Article 38 acknowledge this undesirable possibility under IHL whereby it is stated that states should take all feasible measures to prevent those who have not attained the age of fifteen years from taking direct part in hostilities and should refrain from recruiting them into their armed forces (paragraphs 2 & 3), and that in recruiting among those who have attained the age of fifteen years but who have not attained the age of eighteen years, priority should be given to the oldest (paragraph 3). These paragraphs directly refer to the Article 77 of Protocol 1, and give it a *lex specialis* status.

[126] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

[127] Frowein (n 23), 7; HJ Heintze, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law' (2004) 86 IRRC 789, 792.

[128] See for instance Convention on the Rights of the Child (n 126) Article 38(4).

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (European Convention)[129] has also been considered as an example of substantial overlap between human rights law and IHL. The European Committee for the Prevention of Torture, established under the European Convention could make inspection visits to places of detention of the state parties; the European Convention allows for an exception to the obligation of state parties to open their places of detention for visit for reasons of "national defence" (Article 9), showing that the Convention could also apply during wartime. Moreover, the Convention directly refers to the work of the ICRC under Article 17 paragraph 3 where it is stated that: 'The Committee shall not visit places which representatives or delegates […] of the ICRC effectively visit on a regular basis by virtue of the Geneva Conventions of 12 August 1949 and the Additional Protocols.' This phrase has been taken to mean that, the Committee has competence in the situations where IHL is applicable, however its competence on visiting places of detention during armed conflicts is dependent on the actual visiting practices of the ICRC.[130]

Last but not least a recent human rights treaty, the Convention on the Rights of Persons with Disabilities[131] has also been considered in support the convergence theory, which states under Article 11 that:

> States parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies, and the occurrence of natural disasters.

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[129] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted on 26 November 1987, entered into force 1 February 1989) 27 ILM 1152.

[130] Frowein (n 23) 8.

[131] Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 11.

A concrete example of how convergence of human rights law and IHL could be operationalized was observed with respect to the occupation of Kuwait by Iraq from 1990. Walter Kälin, who served, between 1991-1992, as the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Kuwait under Iraqi occupation, wrote in the introduction of his report to the Commission on Human Rights in 1994 that human rights law and IHL should be applied cumulatively whenever possible as they from 'a unified complex of human rights norms under different institutional umbrellas.'[132] Within the context of occupation of Kuwait by Iraq the Special Rapporteur based the convergence or the cumulative application of human rights and IHL on Article 5 paragraph 2 of the ICCPR pointing out that States Parties to the ICCPR should continue to apply the fundamental rights recognized or existing in their states pursuant to other 'law, conventions, regulations or custom' and that the ICCPR should not be interpreted as not recognizing those rights or as recognizing them to a lesser extent; and on Article 158 of the Geneva Convention IV, the Marten's Clause, which refers to the obligations of the States arising from 'the principles of the law of nations, as they result from the usages among civilized peoples, the laws of humanity and the dictates of the public conscience.[133]

According to this approach, the convergence between human rights law and IHL is possible at least in three ways. To start with, one set of laws could be interpreted in

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[132] Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, prepared by W Kälin, Special Rapporteur of the Commission on Human Rights, in accordance with Commission Resolution 1991/67 (16 January 1992) UN Doc E/CN.4/1992/26 reproduced in W Kälin (ed), *Human Rights in Times of Occupation: The Case of Kuwait* (1994) 26.

[133] See preamble of Hague Convention IV with Respect to the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) UKTS 9 (1910) Cd. 5030, and annexed Regulations.

the light of the other. The example that the Special Rapporteur gives is that the Geneva Convention III Relative to the Treatment of Prisoners of War could help with the interpretation of the phrase ‘inhuman treatment’ in human rights law, in light of its detailed provisions on the treatment of prisoners of war.[134] Another example, he suggests, is the interpretation of the phrase, under Article 3 common to the Geneva Conventions, of ‘all the judicial guarantees, which are recognized as indispensable by civilized peoples’ by recourse to the human rights law since judicial and procedural guarantees are more developed under the latter body of law.[135] This is also in line with the complementarity approach. However, the convergence approach does not stop here and comes very close to a unified understanding of these two bodies of law by suggesting the reinforcement of IHL through human rights law or vice versa. The example that the Special Rapporteur gives for the reinforcement of IHL through human rights law is that the gravity of the serious violations of Article 55 and Article 56 of the Geneva Convention IV by Iraqi occupation forces, resulting in the destruction of the health system in Kuwait, could only be assessed by recourse to the right to health as guaranteed by the ICESCR, as the Geneva Conventions do not allow for an assessment as such. He suggests that reinforcement of human rights law through humanitarian law is also possible, e.g. the application of the Geneva Conventions III and IV to determine Iraq’s obligations with respect to missing persons in occupied Kuwait was helpful, as ‘disappearance’ of persons constitutes a serious violation of human rights, albeit the respective human rights law regarding the

[134] Kälin (n 132) 27.

[135] ibid 28.

duties of states to prevent disappearances were underdeveloped, at least at that time.[136]

The cumulative reinforcement of the two bodies of law begs the question who has the authority and expertise of reinforcing each in the light of the other, that is to say to apply both bodies of law cumulatively to identify the obligations and violations of a State under each or both of them with the purpose of giving an individual the maximum protection. Those who are in favour of convergence, suggest that various international bodies are already applying the bodies of law cumulatively and their jurisprudence reflect a growing acceptance of convergence.

### 4.2.2 The Jurisprudence of International Bodies: Reinforcing the Convergence of Human Rights Law and IHL?

The jurisprudence of the ICJ on the relationship between human rights law and IHL reflected particularly in the *Legality of the Threat or Use of Nuclear Weapons*,[137] the *Construction of a Wall in the Occupied Palestinian Territory*,[138] and the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*,[139] clearly shows that human rights obligations are not easily displaced by

[136] ibid 28-29.

[137] *Legality of the Threat or Use of Nuclear Weapons* (n 103).

[138] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 104).

[139] *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* (n 110).

IHL in the situations of armed conflict. The Court's omission of any reference to the *lex specialis* principle in the *Armed Activities on the Territory of the Congo* and its conclusion that both international human rights and IHL apply to the actions of the UPDF [Uganda People's Defence Forces] and its members in the occupied territory of the DRC,[140] have been interpreted by some as reinforcing a process of convergence between human rights law and IHL.[141] Gross argues that the ICJ's jurisprudence on the relationship between the two regimes is significant 'not only because they stamp this 'convergence' process with the ICJ's seal of approval but also they explicitly concretize the convergence by stating that human rights norms apply in occupied territories and will be the standard for judging the actions of occupying powers.'[142]

The ICTY is among the other international bodies that have contributed to the discussions on the relationship between human rights law and IHL. A Trial Chamber of the ICTY in *Prosecutor v Kunarac et al,*[143] pointed out that:

> […] because of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law.

[140] ibid [178] & [220].

[141] See Wills (n 91) 136-137; Heintze (n 127) 797.

[142] A M Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 EJIL 1, 3.

[143] *Prosecutor v Kunarac et al*, ICTY, Judgment of the Trial Chamber, Case IT-96-23-T & IT-96-23/1-T (22 February 2001) [467].

While the Trial Chamber signalled a degree of convergence with respect to some aspects of human rights law and IHL, it was also aware of the 'crucial structural differences'[144] between the two regimes. The Trial Chamber referred to the different role and position of the State as an actor in both regimes. Accordingly, human rights law is essentially born to protect the citizens against the abuses of the State who is the ultimate guarantor of the rights of the citizens and who can be hold accountable for their violations.[145] On the other hand, IHL has a very different aim; to regulate the conduct of warfare between the parties to an armed conflict and to afford protection to the victims of hostilities. In IHL, the role of the state is peripheral with respect to accountability, as individual criminal responsibility for violations of IHL is not dependent on the participation of the State.[146] Due to the differences between the two regimes, the Trial Chamber was 'wary not to embrace too quickly and too easily concepts and notions developed in a different legal context; and contended that 'notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law.'[147] To exemplify, the Trial Chamber of the ICTY, in *Prosecutor v Furundzija* referred to human rights law[148] to determine the definition of torture under customary international law as IHL outlaws torture but does not provide a definition of the prohibition.[149] However, the Trial Chamber also pointed out that it should 'identify or spell out some specific elements that pertain to torture as considered from

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[144] ibid [470].

[146] ibid.

[147] ibid [471].

[148] *Prosecutor v Furundzija*, ICTY, Judgment of the Trial Chamber, Case IT-95-17/1-T (10 December 1998), [160-161] and *Prosecutor v Delalic and Others*, ICTY, Judgment of the Trial Chamber, Case IT-96-21-T (16 November 1998) [459].

[149] *Prosecutor v Furundzija* (n 148) [159].

the specific viewpoint of international criminal law relating to armed conflicts.'[150] Effectively, the approach of the Trial Chamber of the ICTY is on the side of complementarity rather than the convergence between human rights law and IHL.

The Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court) are two other, regional, bodies that have extensively dealt with the relationship between human rights law and IHL. *Juan Carlos Abella v Argentina* that came before the Inter-American Commission concerned an armed attack by 42 civilians on army barracks in Argentina in 1989, which lasted for 30 hours and ended with the death of 29 of the attackers and several state agents.[151] The Inter-American Commission concluded that the violent clash between the attackers and the members of Argentinean armed forces triggered the application of common Article 3 to the Geneva Conventions and other relevant rules of IHL pertaining to non-international armed conflicts. According to the Inter-American Commission, the IHL rules could inform its interpretation of relevant provisions of the American Convention on Human Rights (the American Convention),[152] since '[t]he American Convention […] and the 1949 Geneva Conventions share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity.'[153] Similar to the ICTY, the Inter-American Commission also acknowledged the differences between human rights law and IHL by specifying that human rights treaties apply both in peacetime and during situations

[150] ibid [162]; see also *Prosecutor v Kunarac et al* (n 143) [469].

[151] *Juan Carlos Abella v Argentina*, Inter-American Commission on Human Rights, Report No 55/97, Case 11.37 (18 November 1997), [1].

[152] American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

[153] *Juan Carlos Abella v Argentina* (n 151) [156-158].

of armed conflict; and, in contrast, IHL generally applies only during armed conflicts. Moreover, the Inter-American Commission further added that it is during situations of internal armed conflict that human rights law and IHL most converge and reinforce each other and it was the Commission's belief that in some situations the American Convention and IHL should apply concurrently as the Commission's ability to resolve some violations arising out of armed conflicts would not be possible without referral to IHL.[154] An example the Inter-American Commission gave was on the necessity to have guidance from IHL when interpreting the non-derogable right to life, under Article 4 of the American Convention, in situations of armed conflicts.[155]

However, in *Las Palmeras v Colombia* steps that have been taken by the Inter-American Commission to apply human rights and IHL concurrently have been stopped by the Colombian government's objection. The case was submitted to the Inter-American Court by the Inter-American Commission and concerned the execution of six unarmed civilians by the National Police Force [of Colombia].[156] The Colombian government's objection to the application of IHL to the present case was based upon that states have only given the Inter-American Court competence to determine whether the acts or norms of the States are compatible with the American Convention itself, and not with the 1949 Geneva Conventions.[157] The Inter-American Court admitted the objections and refrained from applying the IHL.

[154] ibid [158-161].

[155] *Juan Carlos Abella v Argentina* (n 151) [161].

[156] *Las Palmeras v Colombia*, Inter- Am Ct. H.R, Preliminary Objections, Ser. C. No. 67 (4 February 2000), [1-2].

[157] ibid [33].

In contrast, in the later case of *Bamaca Velasquez v Guatemala*, the Inter-American Court applied Article 3, common to the Geneva Conventions as a 'valuable parameter' for the purposes of interpreting the provisions of the American Convention as regards to the treatment of Bamaca Velasquez by Guatemalan State Agents.[158] The application of IHL was possible in this case since Guatemala indicated that 'although the case was instituted under the terms of the American Convention', since the Inter-American Court had 'extensive faculties of interpretation of international law, it could [apply] any other provisions that it deemed appropriate.'[159]

Unlike the jurisprudence of the Inter-American Commission and the Inter-American Court, another regional human rights body, the European Court of Human Rights (the ECtHR) has never made an overt use of IHL. On the contrary, the ECtHR has been quite comfortable with applying human rights law in situations that could be classified as armed conflicts without direct reference to IHL. The argument has been put forward that since the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[160] refers to derogations from the Convention in times of war under Article 15(1), this gives a hint as to its applicability during armed conflicts.[161]

Article 15(2) further specifies that:

[158] *Bámaca-Velásquez v Guatemala,* Inter- Am Ct. H.R, Judgment, Ser. C. No. 70 (25 November 2000), [203] section 3(d).

[159] ibid [204].

[160] European Convention for the Protection of Human Rights and Fundamental Freedoms, (signed 4 November 1950, entered into force 3 March 1953) 213 UNTS 221.

[161] Frowein (n 23) 2.

> No derogation from Article 2, except in respect of deaths resulting from lawful acts of war […] shall be made under this provision.

With respect to derogations and their effects on the simultaneous application of human rights law and IHL, the commonly shared view is that in order for the ECtHR to apply IHL as a framework of analysis the state in question should have derogated from the ECHR.[162] The example that Hampson gives is that under Article 2 of the ECHR the permitted grounds for opening fire are listed, and in order to bring into play the additional grounds for opening fire under the IHL, it would be necessary for the state to derogate.[163] This approach seems in line with the ECtHR's jurisprudence as the Court stated clearly in *Isayeva v Russia* that:

> No martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention […]. The operation in question therefore has to be judged against a normal background.[164]

However, the lack of reference to IHL by a human rights body does not compromise its applicability to situations of armed conflict since IHL applies as a matter of fact based on the circumstances on the ground, independent of the acceptance of the parties to a conflict of its applicability.

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[162] Hampson (n 105) 564; Wills (n 91) 143-144;W Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 EJIL 741, 745-746.

[163] Hampson (n 105) 564.

[164] *Isayeva v Russia*, ECtHR, Judgment, 57950/00, (24 February 2005) [191]; *Cyprus v Turkey*, European Commission on Human Rights, 6780/74 and 6950/75, (10 July 1976) [528]; see also *Brannigan and McBride v UK,* ECtHR, Judgment, 14553-4/89, (24 May 1993) [66] & [74].

The case law of the ECtHR addressing international armed conflicts is sparse by comparison with that dealing with situations amounting to internal armed conflicts. The European Commission of Human Rights (the European Commission) partially accepted the relevance of IHL with respect to Turkish intervention in Cyprus in the summer of 1974. The Report of the European Commission of July 1976 concerning the first two applications concerning *Cyprus v Turkey* stated as follows:

> The Commission has taken account of the fact that both Cyprus and Turkey are parties to the (third) Geneva Convention of 12 August 1948, relative to the treatment of prisoners of war, and that, in connection with the events in the summer of 1974, Turkey in particular assured the International Committee of the Red Cross (ICRC) of its intention to apply the Geneva Convention and its willingness to grant all necessary facilities for humanitarian action. In fact ICRC delegation made regular visits to soldiers and civilians who had been granted prisoner-of-war status by the authorities on either side. […]

Then, the European Commission concluded that:

> Having regard to the above, the Commission has not found it necessary to examine the question of a breach of Art 5 of the European Convention on Human Rights with regard to persons accorded the status of prisoners of war.[165]

Although the European Commission was not very explicit about its reasons for not examining if a violation under Article 5 occurred with respect to the treatment of prisoners of war, it has been suggested that it gave IHL the *lex specialis* status, and the Geneva Convention Relative to the Treatment Prisoners of War took precedence

[165] *Cyprus v Turkey* (n 164) [313].

over the ECHR.[166] However, it is pertinent to note that the Commission confined its reference to IHL only within the context of Article 5 and even in that context it did not apply, or even discussed whether it has the competence, to apply the IHL rules in substance but only referred to the visits conducted by the ICRC to detention centres. For the rest of the matters arising out of the case with regard to persons or property in North Cyprus, the Commission only applied the ECHR and did not refer to IHL as Turkey neither derogated nor declared a state of emergency in relation to Cyprus.[167] A dissenting minority held that IHL was applicable in the case as a matter of law, and the application of IHL would increase the permitted grounds for detention.[168]

In *Loizidou v. Turkey,*[169] the ECHR referred to the Turkish occupation of North Cyprus from 1974, however the Court did not question whether it has the competence to apply the law of occupation. The question as to whether it would have been possible to reach the same results if the ECtHR resorted to IHL remains unanswered.

As regards situations that could amount to non-international armed conflicts, Abresch argues that the ECtHR only applies human rights law rather than turning to IHL.[170] He explains the reasons for his argument as follows:

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[166] Frowein (n 23), 11; Heintze (n 127) 807.

[167] *Cyprus v Turkey* (n 164) [528].

[168] ibid, Dissenting Opinion of Mr G Sperduti joined by Mr S Trechsel on Art. 5 of the Convention; See Hampson (n 105) 565, for the criticism that the non-application of IHL led to some 'absurd' results in this case.

[169] *Loizidou v Turkey*, ECtHR, Judgment, 15318/89, (18 December 1996).

[170] Abresch (n 162) 743.

> First, the rules espoused by the ECHR are not limited by any conflict intensity threshold; they form a single body of law that covers everything from confrontations between rioters and police officers to set-piece battles between rebel groups and national armies. Second, while in humanitarian law the independence of the jus in bello from the jus ad bellum is axiomatic, the ECHR's approach to evaluating the lawfulness of armed attacks assesses the means used within the terms of the justified grounds for employing lethal force. Third, in contrast to humanitarian law's principle of distinction, the ECHR permits the use of lethal force only where the capture is too risky, regardless of whether the target is a 'combatant' or 'civilian.'[171]

This approach is in contrast to the views of those who claim that ECtHR 'combine[s] standard human rights law with certain principles analogous to some core IHL concepts.'[172] For instance, Orakhelashvili comments that the ECtHR's approach is mostly based 'on the implicit application of the standards of humanitarian law, albeit, cloaked in the Convention-specific categories of legitimacy, necessity, and proportionality.'[173] According to Reidy, '[t]he Court's reference to means and methods in the conduct of a military operation is one of the clearest examples of the Court borrowing language from international humanitarian law when analysing the scope of human rights obligations.'[174] However, 'borrowing' language from IHL does not tell much as terms like civilian, proportionality, armed attack, are part of the general discourse of war and are also used frequently under human rights law.[175]

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[171] ibid 742-743.

[172] Wills (n 91) 140.

[173] A Orakhelashvili, 'The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?' (2008) 19 EJIL 161, 174.

[174] A Reidy, 'The Approach of the European Commission and Court of Human Rights to International Humanitarian Law' (1998) 324 IRRC available at <http://www.icrc.org/eng/resources/documents/misc/57jpgg.htm> accessed 10 May 2011.

[175] Abresch (n 162), 746; Wills (n 91) 140.

Both above approaches focus on the ECtHR's jurisprudence on the use of force. However, a close reading of the ECtHR's jurisprudence on this subject matter reveals that those who contend that the ECtHR is not necessarily influenced by IHL, when deciding the cases on the use of force, have a stronger position.

Article 2(2) of the ECHR allows the use of force only when it is 'no more than absolutely necessary' in order to achieve the permitted aims which are listed as the 'defence of any person from unlawful violence,' to 'effect a lawful arrest or to prevent escape of a person lawfully detained' and, 'in action lawfully taken for the purpose of quelling a riot or insurrection.' In analysing whether permitted grounds for using force existed with respect to a certain conflict, the ECtHR does not find it necessary to qualify a conflict as international or non-international armed conflict, a riot or insurrection. The case of *McCann and Others v The United Kingdom* concerned an attempted arrest by three UK soldiers in civilian clothing of three suspects belonging to Irish Republican Army (IRA) expected to conduct a terrorist mission in Gibraltar in 1988. The Court held that:

> '[….] it is not clear whether they [the soldiers] had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.
> Their reflex action in this vital respect lacks *the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society*, even when dealing with dangerous terrorist suspects (emphasis added).[176]

Whilst discussing the battle between the Russian federal military forces and more than one thousand Chechen fighters, the ECtHR stated:

[176] *McCann and Others v The United Kingdom*, ECtHR, Judgment, 18984/91, (27 September 1995) [212].

> The Court considers that using this kind of weapon in a populated area, outside wartime and without prior evacuation of civilians, is impossible to reconcile with *the degree of caution expected from a law-enforcement body in a democratic society* (emphasis added).[177]

The ECtHR applies the same standard –the degree of caution expected from a law-enforcement-body in a democratic society- irrespective of the classification of conflict. In contrast, under IHL the qualification of a conflict is essential to decide which set of rules are applicable to the particular conflict. Further, for ECtHR, the addressee of the rules is the government, while under IHL the rules apply to all parties to a conflict.[178]

The 'principle of distinction,' a fundamental principle of IHL, is another area of contention. In international armed conflicts, and national liberation struggles, the distinction between 'civilians' and 'combatants' is essential. Combatants have the right to kill other combatants. In non-international armed conflicts, this distinction is not very clear as neither the common Article 3 nor Additional Protocol II recognizes combatant status. However, the distinction still exists between 'civilians' and those who are 'taking direct part in hostilities; in spite of the ongoing debate on what it means to take direct part in hostilities.[179] For purposes of comparison with the ECtHR

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[177] *Isayeva v Russia,* (n 164).

[178] Abresch (n 162) 752-753.

[179] See N Melzer, Legal Adviser to ICRC, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' ICRC May 2005. This study of the ICRC that has been published after six years of expert discussion and research aims to clarify the meaning and consequences of direct participation in hostilities under IHL; D Kretzmer, 'Targeted Killing of Suspected Terrorists; Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16 EJIL 171, 197-200.

jurisprudence, the crucial point is that according to the ECtHR, 'the recourse to use of lethal force should be minimized to the greatest extent possible' under all circumstances, even when the person to be attacked is a combatant or could be considered as someone taking active part in hostilities.

In *McCann and Others v the United Kingdom*, the ECtHR decided that the UK violated the right the life of the three members of IRA. The soldiers who shot the IRA members have been told that a car bomb had been deployed and in the light of this information, they shot to kill the suspects in order to prevent them from detonating the bomb.[180] The ECtHR held that:

> […] the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest care in evaluating the information at their disposal before transmitting it to soldiers whose use of fire arms automatically involved shooting to kill.[181]

According to the Court, this lack of appropriate care by the authorities in the control and organization of the arrest operation resulted in the violation of the right to life of the IRA members.[182] *McCann and Others v the United Kingdom* concerned a low-intensity confrontation between three soldiers and three members of the IRA.[183] However, what is interesting is that even in the high-intensity conflicts like the Chechen cases the ECtHR still referred to its jurisprudence in the *McCann and Others v the United Kingdom* without any reference to any possible 'combatant', 'civilian'

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[180] *McCann and Others v the United Kingdom* (n 176) [200].

[181] ibid [211] et seq.

[182] ibid.

[183] See Abresch (n 162).

distinction that could influence the interpretation of the right to life by the Court.[184]Referring to this case, the Court pointed out in the *Isayeva, Yusupova and Bazayeva v Russia a*nd *Isayeva v Russia* that

> […] it is necessary to examine whether the operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimised. The Court must also examine whether the authorities were not negligent in their choice of action.[185]

Last but not least, 'the principle of proportionality,' which is utilized both under human rights law and IHL, is interpreted differently by each regime. Even where Article 2(2) of the ECHR applies, the ECHR rules require that the use of potential lethal force should not be more than 'absolutely necessary' and should only be employed for the purposes listed under Article 2(2). Under Article 2 the protection of right to life is the ultimate aim, and *the use of force should be proportional to* that aim. In contrast, IHL allows for collateral damage to a certain degree, provided that an incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof is *proportional to the concrete and direct military advantage anticipated* (emphasis added).[186]

The judgment in *Isayeva v Russia* exemplifies the ECtHR's understanding of proportionality. The Court accepted that the situation existed in Chechnya at the

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[185] *Isayeva, Yusupova and Bazayeva v Russia,* ECtHR, Judgment, 57947/00, 57948/00 and 57949/00, (24 February 2005) [171]; *Isayeva v Russia* (n 164) [175]; See also *Ergi v Turkey*, ECtHR, Judgment, 66/1997/850/1057, (28 July 1998) [79].

[186] Protocol I (n 95) Article 51 5(b).

relevant time called for exceptional measures by Russia to regain control over its territory and to suppress the insurgency, and held that:

> Given the context of the conflict in Chechnya at the relevant time those [exceptional] measures could presumably include the deployment of army units equipped with combat weapons, including military aviation and artillery. The presence of a very large group in Katyr-Yurt, and their active resistance to the law-enforcement bodies, which are not disputed by the parties, may have justified use of lethal force by the agents of the State, thus bringing the situation within paragraph 2 of Article 2.[187]

However, the Court further stated that:

> Even when faced with a situation where, as the Government submit, the population of the village had been held hostage by a large group of well-equipped and well-trained fighters, the primary aim of the operation should be to protect lives from unlawful violence. The massive use of indiscriminate weapons stands in flagrant contrast with this aim and cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State Agents.[188]

The IHL analysis of this case would include into the equation the concrete and direct military advantage sought in order to evaluate if the attacks were indiscriminate, and would exclude the evaluation of whether the use of force by Russia or the insurgents is justified, as this belongs to *jus ad bellum*.

In light of the fact that the ECtHR has never stated that it applies IHL to the cases before it and that its decisions do not reflect reliance on the substantial rules of IHL but rather exclusion of those rules, it is hard to convincingly argue that its

[187] *Isayeva v Russia* (n 164) [180].

[188] ibid [191].

jurisprudence contributes to the operationalization of the relationship between human rights law and IHL in general, let alone the convergence between the two systems.

## 5. The Relationship Between Human Rights Law and The Law of Occupation

A military occupation could be characterized as midway between hostilities and peace; although it often carries a risk of resumption of hostilities, in various respects normal life in an occupied territory can be resumed to a certain degree and a particular relationship between the occupying power and the civilian population of the occupied territory can be established. The rights and obligations of the occupying power are extensively regulated under IHL, but owing to its special characteristics of being an intermediate situation between conflict and peace, human rights law could also be relevant for the acts of the occupying power.

The relationship between human rights law and the law of occupation has been addressed by the ICJ, in the proceedings concerning its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[189] and in its judgment on *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v Uganda).*[190] In order to determine whether the human rights instruments to which Israel was a party were applicable in the Occupied Palestinian Territory, the ICJ first addressed the issue of the relationship

[189] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 104).

[190] *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* (n 110).

between human rights law and IHL,[191] as already discussed above. The Court next considered whether the ICCPR, the ICESCR and the Convention on the Rights of the Child were capable of applying outside the State's national territory, and whether they applied in the Occupied Palestinian Territory, and answered in affirmative.[192] In analysing the extraterritorial application of these treaties to the occupied territory, the ICJ referred to the scope of application of Article 2(1) of the ICCPR and the constant practice of the Human Rights Committee with respect to that Article, which 'has found the Covenant applicable where the State exercises its jurisdiction on foreign territory; and the Court then referred to several reports and concluding observations of the Committee with respect to 'the long standing presence of Israel in [the occupied territories], and 'the exercise of effective jurisdiction by Israeli Security Forces therein.' With regard to the ICESCR, which contains no provision on its scope of application, the Court cited the view of the Committee on Economic, Social and Cultural Rights that the obligations of the State Parties under the Covenant apply to all territories and populations under their effective control. Finally, with respect to the Convention on the Rights of the Child the Court pointed out that Article 2 provides that 'states parties shall respect and ensure the rights set forth in the […] Convention to each child within their jurisdiction' and therefore '[t]hat Convention is […] applicable in the Occupied Palestinian Territories.[193] The ICJ reached the overall conclusion that the construction of the wall and its associated regime constitutes breaches by Israel of various of its obligations, under the applicable IHL and human rights instruments, such as the requirements of Article 49(6) of the Geneva

[191] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 104) [106].

[192] ibid [108-113].

[193] ibid [107-113].

Convention IV, the liberty of movement of the inhabitants of the Occupied Palestinian Territory as guaranteed under Article 12, paragraph (1) of the ICCPR, the right to work, to health, to education and to an adequate standard of living as proclaimed in the ICESCR and in the Convention of the Rights of the Child.[194]

Referring *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ concluded in the case concerning the *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v Uganda*, that Uganda has responsibilities both under IHL and human rights law in the occupied territory of the Congo.[195] Having decided on the basis of evidence that Uganda was an occupying power in Ituri district at the relevant time the Court held that:

> As such it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC [Democratic Republic of the Congo]. This obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.[196]

The Court then stated that Ugandan forces should observe the obligations rising from customary international law and treaties on IHL and human rights law, to which Uganda is a party.[197]

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[194] ibid [133-137].

[195] ibid [216].

[196] *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* (n 110) [178].

[197] ibid [217].

The approach taken by the ICJ in the above cases appears to have been that once a territory is occupied, the human rights jurisdiction of the occupying power extends to that territory with respect to the entire body of human rights treaties to which the occupant is party.[198]

However, this view was not shared by the UK courts in the Al-Skeini case which concerned the claim that the jurisdiction of UK under the ECHR and the Human Rights Act of 1998 (HRA) extends to the allegedly unlawful killings of six civilians by UK occupying forces in the Iraqi region of Basra.[199] Lord Justice Brooke of the UK Court of Appeal, in considering the applicability of ECHR and HRA to UK occupying forces in Basra, argued that:

> ‘ […] it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time. If it had been it would have been obliged, pursuant to the *Bankovic* judgement, to secure to everyone in Basrah City the rights and freedoms guaranteed by the ECHR. One has only to state the proposition to see how utterly unreal it is. The UK possessed no executive, legislative or judicial authority in Basrah City, other than the limited authority given to its military forces […] For the purposes of completeness, I should make it clear that I reject the arguments by the claimants to the effect that occupation for the purposes of the Hague Regulations must necessarily be equated with effective control of the occupied area for ECHR purposes.[200]

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[198] See also Wills (n 91) 150-151.

[199] *The Queen on the Application of Mazin Jumaa Gatteh Al-Skeini and others v. Secretary of State for Defence* [2005] EWCA Civ 1609 21 December 2005.

[200] ibid [124-127].

While Lord Justice Sedley disagreed with Lord Justice Brooke, his approach was compatible with that of ICJ in some respects:

> In respectful disagreement with what Brookes LJ says in paragraph 124, I do not see why the presence or absence of adequate civil power for effective control in international law should be tested by asking whether there is sufficient control to enforce the full range of Convention [ECHR] rights […] What seems to me more material is the fact that, as Brooke LJ explains in his preceding paragraphs, the United Kingdom was an occupying power within the meaning of Article 42 of the Hague Regulations because the Basrah region was under the authority of its armed forces. Article 43 then makes it incumbent upon the UK, "to take all measures in [its] 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". […] The obligations are predicated not on effective control but on "the authority of the legitimate power having in fact passed into the hands of the occupant."

However, Lord Justice Sedley further added that:

> No doubt it is absurd to expect occupying forces in the near-chaos of Iraq to enforce the right to marry vouchsafed by Art. 12 or the equality guarantees vouchsafed by Art.14. But I do not think effective control involves this. If effective control in the jurisprudence of the ECtHR marches with international humanitarian law and the law of armed conflict, as it clearly seeks to do, it involves two key things: the de facto assumption of civil power by an occupying state and a concomitant obligation to do all that is possible to keep order and protect essential civil rights. It does not make the occupying power the guarantor of rights; nor therefore does it demand sufficient control for all such purposes. What it does is place on an obligation on the occupier to do all it can.[201]

The thrust of the arguments put forward by Lord Justice Brookes and Lord Justice Sedley revolves around the different understandings of a key concept; i.e. 'control

[201] ibid [195-196].

over a territory', which is essential to the applicability of the law of occupation and the human rights law for the actions of states outside their own territories. Under Article 42 of the Hague Regulations, 'territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.' The Article does not clarify the amount of control necessary to trigger the applicability of the law of occupation, but the effectiveness of control under the law of occupation is considered to be *conditio sine quo non* of occupation;[202] however, it is not clear whether it could be equated with effective control under human rights law. As seen above, the ICJ barely touches on the concept and does not elaborate on whether the interpretation of 'effective control' for the purposes of the human rights law is synonymous to what it entails under the law of occupation. According to Lord Justice Brooke, the occupation of a territory for the purposes of the Hague Regulations does not necessarily mean that the territory is under effective control of the occupant for its obligations under the ECHR to come into effect. However, Lord Justice Sadley does not mainly rely on 'effective control' of a territory but rather on a liberal interpretation of Article 43 for human rights obligations to come into effect in the occupied territory. Still, he argues that effective control for the purposes of the law of occupation does not make the occupying power guarantor of all the rights under the ECHR, but it obliges the occupier to guarantee these rights as far as possible, as Article 43 would suggest.

The ECtHR has frequently used the concept of 'effective control', as criteria triggering the extraterritorial application of human rights in instances of occupation or

[202] See Chapter 3, 11 et seq.

in other instances of exercising control and authority over a territory or an individual falling short of occupation.[203] In its rulings, the Court emphasized the preponderance of the territorial principle in the application of the ECHR, but also acknowledged that in exceptional circumstances the acts of contracting States performed outside their territory, or which produced effects there, may amount to exercise by them of their jurisdiction under Article 1 of the ECHR. Therefore, the Court has often stated that:

> […] According to the relevant principles of international law, a State's responsibility may be engaged where as a consequence of military action-whether lawful or unlawful-it exercises in practice effective control of an area situated outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control, whether it be exercised directly, through its armed forces, or through a subordinate local administration […].[204]

The ECtHR seems to use the concepts of 'effective control' and 'overall control' interchangeably and sometimes merges the two as 'effective overall control.'[205] And, even an overall control of a territory might be enough for the ECHR to be applicable. So, the Court pointed out in *Ilaşcu and Others v Moldova and Russia* that:

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[203] See for instance *Al-Skeini and Others v The United Kingdom*, ECtHR, Judgment, 55721/07, (7 July 2011) [138]; *Ilaşcu and Others v Moldova and Russia*, ECtHR, Judgment, 48787/99, (8 July 2004) [314-316]; *Bankovic and Others v Belgium and Others*, ECtHR, Admissibility Decision, 52207/99, (12 December 2001) [70-71]; *Cyprus v Turkey*, ECtHR, Judgment, 25781/94, (10 May 2001) [76]; *Loizidou v Turkey* (n 169) [56]; see also Human Rights Committee, General Comment No 31 (n 112) [10]

[204] *Ilaşcu and Others v Moldova and Russia* (n 203) [314]; *Catan and Others v The Repulic of Moldova and Russia,* ECtHR, Judgment (Grand Chamber), 43370/04, 18454/06, 8252/05 (19 October 2012) [105-107]; see also *Issa and Others v Turkey*, ECtHR, Judgment, 31821/96, (16 November 2004) [69]; *Al-Skeini and Others v The United Kingdom* (n 203) [138].

[205] See for instance *Loizidou v Turkey* (n 169) [56].

> It is not necessary to determine whether a Contracting Party actually exercises detailed control over the policies and actions of the authorities in the area situated outside its national territory, since even overall control of the area may engage the responsibility of the Contracting Party concerned.[206]

In *Al-Skeini* case, the Court reiterated this position:

> Where the fact of such domination [the exercise of effective control outside the national territory] over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.[207]

However, in its ruling in the *Al-Skeini* case, the ECtHR avoids the question whether the threshold of control necessary to trigger the applicability of ECHR is identical or lower, or indeed higher than that of belligerent occupation as held by Lord Justice Brooke. In assessing whether the UK had jurisdiction over any of the applicants' relatives when they died, the Court found it sufficient to state that as occupying powers in Iraq, the US and the UK were exercising some of the public powers normally exercised by the sovereign government, and it follows that there was a

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[206] *Ilaşcu and Others v Moldova and Russia* (n 203), [315]; *Al-Skeini and Others v The United Kingdom* (n 203) [138].

[207] *Al-Skeini and Others v The United Kingdom* (n 203).

jurisdictional link for the purposes of Article 1 of the ECHR between the UK and the deceased.[208]

## 5.1 Assessment of the Simultaneous Application of Human Rights Law and the Law of Occupation

The ECtHR seems to share the same approach with the ICJ in the sense that, once a territory is occupied, the human rights jurisdiction of the occupying power is extended to that territory with respect to ECHR, in its entirety. From the perspective of human rights law, this aims to create the desired result of protection; however to hold an occupant responsible, in the absence of derogation, from the entire range of substantive human rights set out in treaties to which it is a party would not be without problems. A territory might be under the actual control of occupying forces, but their position could be challenged to an extent that it might become impossible in practice for them to discharge some of their international obligations. As Lord Justice Sedley contends, it would not be feasible to expect an occupying force to uphold the right to marry under Article 12 of the ECHR in a situation of chaos or to assume responsibilities with respect to right to health, education, property etc.[209] As Hampson states 'it may be that IHL recognizes occupation as consisting of different stages and accepts that the scope of obligations will vary.'[210] Certainly, in a prolonged occupation where the situation in the territory occupied returns to 'normality' the applicability of the whole range of civil, political, and social and economic rights

[208] *Al-Skeini and Others v The United Kingdom* (n 203) [143] et seq.

[209] See also the opinion of Lord Rodger of Earlsferry, *Mazin Jumaa Gatteh Al-Skeini and others v. Secretary of State for Defence,* House of Lords, [2007] UKHL 26, [83].

[210] Hampson (n 105) 568.

could be viable. Nevertheless, the wholesale application of human rights law to cases of occupation without carrying out an effective control test under the law of occupation would be too rigid.[211]

Another concern with respect to the application of human rights law in occupied territories is the fact that the government of an occupied territory is not the same as a State's ordinary elected government and that a military occupation does not correspond to a democratic regime where protection and promotion of human rights and the attainment of the welfare of the population form an essential part of the relationship between the state and the citizens.[212] Rather, the occupation is special, an 'undemocratic' regime that puts the occupant and the occupied on an unequal plane. The law of occupation gives the population of the occupied territory a protected status during the temporary regime of occupation and against the occupant, whose main purpose is military gain. The danger of merging these two regimes, as Vite puts it, is that 'under cover of fulfilling its international obligations [under human rights law], an occupier could carry out structural transformations in the occupied country without conducting a democratic consultation of the people concerned.'[213] Further, there is also the challenge that should the occupying power introduce a higher standards of human rights law especially with respect to social and economic rights than was previously available, then the termination of occupation would potentially lead to regressive measures if the sovereign government is unable to sustain the same level of protection of human rights.

[211] ibid.

[212] See Dinstein, The International Law of Belligerent Occupation and Human Rights' (n 91) 116.

[213] S Vité, 'The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property' (2008) 90 IRRC 629, 636.

However, if the specificities of the law of occupation are taken into consideration when applying human rights law to situations of occupation, a coherent relationship between the two bodies of law could be achieved. Indeed, there are many areas that they could complement each other. The Geneva Convention IV has been described as a 'bill of rights' with a catalogue of fundamental rights for the protection of civilians, Protocol I overlaps with human rights law even more. An advantage of complementarity between the two bodies of law could be that even though states could take measures derogating from [derogable] provisions of human rights treaties, they cannot derogate from IHL rules.[214]To illustrate, Dinstein gives the example that under Article 8 (3) of the ICCPR, freedom from forced labour (with its several exceptions) is derogable, and if derogation from this Article is proclaimed, compulsory work could only take place 'subject to a series of cumulative and rather stringent conditions' under the Geneva Conventions.[215] According to Roberts, the non-derogable nature of the law of occupation could also be a mitigating factor for the tension between human rights law and the law of occupation with respect to individual liberty and political freedoms.[216] For instance, under Article 9 (1) of the ICCPR, arbitrary detention is prohibited and 'anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.' By contrast, under Article 78 (1) of the Geneva Convention IV, 'if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at

[214] See Human Rights Committee, General Comment No 29, States of Emergency (Article 4) UN doc CCPR/C/21/Rev.1/Add.11 (2001) [9]; See Dinstein, *International Law of Belligerent Occupation* (n 91) 82-83.

[215] See J M Henckaerts& L Doswald-Beck, *Customary International Humanitarian Law Volume 1: Rules*, ICRC (CUP 2005), 330-331, Geneva Convention IV arts 40 & 51.

[216] Roberts (n 96) 593.

the most, subject them to assigned residence or to internment', such measures must be taken 'according to a regular procedure.' By giving leave to the administrative detention of protected persons, this provision is 'more draconian,'[217] still there is a right to appeal against this measure and the decision to intern is subject to periodic review. The incompatibility between the law of occupation and human rights law as such could be mitigated in instances when the occupant derogates from Article 9 (1) of the ICCPR and renders Article 78 (1) as *lex specialis.*[218]

It is often thought, wrongly, that human rights law always gives the individual better protection than IHL. However, IHL might guarantee the protection of certain rights to a greater extent than a non-derogable human rights provision.[219] For instance, under Article 7 of the ICCPR, 'no one shall be subjected without his free consent to medical or scientific experimentation.' Geneva Convention III regulates this non-derogable right more rigidly: Article 13, taking into consideration the vulnerable position of prisoners of war, forbids under any condition subjecting them to 'medical or scientific experiments of any kind which are not justified by the medical, dental, or hospital treatment of the prisoner concerned and carried out in his interest'; similarly, under Article 32 of the Geneva Convention IV a protected person can not be subjected to 'medical or scientific experiments not necessitated by the medical treatment.' Further, Protocol I, Article 11 prohibits physical mutilations, medical or scientific experiments or removal of tissue organs for transplantation to be carried out on internees, detainees or on the persons who are in the power of the adverse party even with their

[217] ibid.

[218] ibid.

[219] Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP 2004) 24.

consent, except where these acts are justified in conformity with the conditions stated in paragraph 1.

With respect to social, economic and cultural rights, human rights law generally complements and concretizes the law of occupation. However, in some aspects the law of occupation could provide better protection to the inhabitants of the occupied territories. Although economic, social and cultural rights do not receive the same attention as civil and political rights in debates on the relationship between human rights law and IHL,[220] some economic, social and cultural rights are already included in the law of occupation, and the two regimes interact especially with respect to people's right to an adequate standard of living, food, health and property.[221] To the fullest extent of the means available to it, the occupying power has the duty of ensuring food and medical supplies, medical and hospital establishments and services, public health and hygiene in the occupied territory.[222] The law of occupation contains the essential core of these rights and they can be complemented especially by the detailed requirements the ICESCR.[223] In contrast to civil and political rights, economic, social and cultural rights are programmatic in nature and are based on a progressive realization, apart from some minimum obligations of immediate effect.[224] This flexibility is in line with the overarching principle of the law of occupation that

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[220] Scobbie (n 107) 454; Lubell (n 113) 751.

[221] Vité (n 213), 633; Scobbie (n 107) 455-456.

[222] Geneva Convention IV (n 92) arts 55 & 56; See also Protocol I (n 95) arts 14 (1) & 69 (1).

[223] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1996, entered into force 3 January 1979) 993 UNTS 3 (ICESCR), arts 11 & 12.

[224] Committee on Economic, Social and Cultural Rights, General Comment No 3, The Nature of States Parties Obligations (Article 2, paragraph 1 of the Covenant) (14 December 1990) UN Doc E/1991/23 [9].

the occupant takes all the measures *in his power* to restore, and ensure, *as far as possible,* public order and safety (emphasis added).

In the first stages of the occupation the occupant would be under the duty to ensure the obligations of immediate effect, however as the occupation prolongs, the occupant would need a strategy complemented by human rights law to ensure the realization of social, economic and cultural rights.[225] For instance, the occupant might need to devise a strategy on the education of children through complementing the related provisions of the Geneva Convention IV (Articles 24 & 25) with the provisions of ICESCR (Articles 13 & 14). However, as regards to right to property in the occupied territory, the occupant could mainly rely on the law of occupation, which seems to surpass human rights law in that respect.[226] However, a word of caution seems appropriate here that, the realization of economic, social and cultural rights in the occupied territories should not lead to radical reforms transforming the societies.

**6. Conclusion**

The changes introduced by the UN post-conflict administrations on the territories administered can be extensive, they vary from reconstruction and re-establishment of public services (health, hygiene, water, education)[227] to substantial modifications in or

[225] Vité (n 213) 35-36.

[226] See for instance Geneva Convention IV (n 92) Articles 33, 46, 53 and 147; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, (adopted 14 May 1954, entered into force 7 August 1956), 249 UNTS 240, and Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, (adopted 14 May 1954, entered into force 7 August 1956), 249 UNTS 358; Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (singed 26 March 1999, entered into force 9 March 2004) 38 ILM (199) 769; Vité (n 213) 48 et seq.

[227] See for instance Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo (12 July 1999) UN Doc S/1999/779, [54-65] and Report of the Secretary-General on Transitional Administration in East Timor (26 January 2000) UN Doc S/2000/53, [38-39].

the abolition of-the existing laws, e.g. introduction of anti-discriminatory legislations, modifications in criminal laws, criminal procedure laws, property laws.[228] Many of these changes create direct effects on the human rights of the populations of the territories, and the application of human rights law gives the UN the flexibility to transform societies that have either ineffective institutions or no institutions at all.

Although there is substantial emphasis on maintaining and further realizing human rights in the territories under the UN administration, this is contrasted with the supremacy of the regulations and administrative directives issued by UN administrations over any other applicable laws, including human rights law.[229] If 'the obligation to respect and ensure respect for international human rights standards' were the 'foremost' principle of the post-conflict administration of territories,[230] why were human rights not given the highest place in the hierarchical construction of the applicable laws in the administered territories?

If the UN were clearly to accept concrete human rights obligations, it would not be necessary to spend so much time examining the theoretical legal bases on which to argue the existence and the content of these obligations. However, none of the theories, i.e. the 'internal conception', the 'external conception,' the 'hybrid conception,' and the 'functional treaty succession', are convincing alone. Only the combination of these theories and the fact that the UN has an 'objective international

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[228] See for instance UNMIK/REG/1999/10 (n 67), UNMIK/REG/1999/23 (n 68), UNMIK/REG/2000/4 (n 63), UNMIK/REG/2001/4 (n 63); UNMIK/REG/2003/25 and UNMIK/REG/2003/26 (n 64); See for instance also, UNTAET/REG/1999/3 (n 82); UNTAET/REG/2000/11 (n 78); UNTAET/REG/2000/15 (n 83).

[229] See for instance UNMIK/REG/1999/24 (n 2) section 1.1

[230]Shraga (n 51).

personality,[231]' and as such can be a bearer of international rights and obligations, give a satisfactory answer as to the applicability of human rights law to the UN. Moreover, in the absence of any treaty obligations, the UN would be bound by human rights law to the extent that it has acquired the status of customary international law.

The application of human rights law as part of the normative framework applicable in the territories under administration necessitates the evaluation of its relationship with IHL, and its subset, the law of occupation, as the other relevant bodies of law for the actions of international administrations. The jurisprudence of the ICJ on the relationship between human rights law and IHL reflected particularly in the *Legality of the Threat or Use of Nuclear Weapons*, the *Construction of a Wall in the Occupied Palestinian Territory*, the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda*) reveal that human rights law is not entirely displaced by IHL by the military exigencies or even in situations where IHL could be considered as *lex specialis*. There is also an abundance of scholarly view to the same effect. However, since international jurisprudence is not explicit on how the relationship between human rights law and the IHL works in practice, the focus of the arguments has been shifting more towards the operationalization of the relationship between these two regimes. There is an apparent tendency to rely on a degree of convergence between these two bodies of law, not necessarily supported by international jurisprudence but influenced by the desire to afford the individual the maximum protection in situations of conflict. However, these two systems developed as two different bodies of law with different purposes. As Pictet, suggested, the efforts to converge these two bodies of law would compromise the effectiveness of

[231] *Reparation for Injuries Suffered in the Service of the United Nations*, (n 4) 185.

IHL and carry the risk of politicizing it and undermining the neutral work of the ICRC as a monitoring body. An approach focusing on the complementarity between human rights law and IHL, allowing one to fill the gaps of the other while accepting that they remain as distinct bodies of law, would provide a more nuanced approach in regulating how their relationship works in practice.

With respect to the relationship between human rights law and the law of occupation within a post-conflict administration context, a coherent relationship based on complementarity between two bodies law, especially for the purposes of maintaining the order and the safety, and regulating the every day life of the population is feasible. Even when the law of occupation is applied to UN post-conflict administrations by analogy, they can benefit from the complementarity between human rights law and the law of occupation especially with respect to the social, economic and cultural rights, e.g. right to food, health and property. The challenge that should the occupying power introduce a higher standards of human rights law especially with respect to social and economic rights than that was previously available, the termination of occupation would potentially lead to regressive measures in the protection of those rights if the sovereign government is unable to sustain the same level of human rights, would not be valid for the post-conflict administrations since one of their purposes is to build capacity and to create institutions on the administered territories that would be able to sustain high standards of human rights even after the termination of post-conflict administrations.

# CHAPTER 5

# ATTRIBUTION OF CONDUCT TO UN POST-CONFLICT ADMINISTRATIONS

## 1. Introduction

While ascertaining the international obligations of UN post-conflict administrations is the initial step in creation of a legal framework and strengthening their accountability, the assumption of legal responsibility by the Organization when these obligations are breached is equally important. The attribution of a wrongful conduct to an international organization is a prerequisite for the establishment of responsibility. Article 4 of the ILC Draft Articles on the Responsibility of International Organizations (ILC Draft Articles) sets the legal framework where it states:[1]

> There is an international wrongful act of an international organization when conduct consisting of an action or omission:
> (a) is attributable to that organization under international law; and
> (b) constitutes a breach of an international obligation of that organization.

Since the inception of its peacekeeping practice, the UN addressed the issues of responsibility in an *ad hoc* manner, without necessarily providing a legal basis as to the source of its responsibility for the conduct of peacekeeping forces.[2] One of the

[1] ILC, 'Report of the International Law Commission on the Work of its 63rd Session' (26 April-3 June and 4 July-12 August 2011) UN Doc A/66/10 and Add.1 (ILC report 63rd Session).

[2] K M Larsen, 'Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control Test' (2008) 19 EJIL 509, 513.

very first examples would be the settlement of a category of claims between the UN and the Congolese civilians where the UN assumed responsibility for the wrongful conduct of the United Nations Operation in the Congo (ONUC, 1960-1964), in line with Article 10 (b) of the Status Agreement[3] between the UN and the Congo.

Even before the establishment of the ONUC, during the UN operations in Korea in 1950, a practice making the UN the proper recipient of the complaints was forming. When US aircraft as part of UN forces in Korea violated the Soviet frontier, the US Government unequivocally stated that 'as evidence of its good faith the United States Government is prepared to supply funds for payment of any damage determined by a United Nations Commission or other appropriate procedure to have been inflicted upon Soviet property.'[4] Similarly, Regulations for the United Nations Emergency Force in Egypt (UNEF I (1956-1967) authorized the UN Secretary-General to make provisions for the settlement of claims arising with respect to the Force.[5]

The Contribution Agreement Between the United Nations and [Participating State] Contributing Resources to [the United Nations Peace-Keeping Operations][6] (the Contribution Agreement) of 1996, serving as model for status agreements between the UN and the host/third States, could be considered to codify the UN responsibility for

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[3]Agreement Between the United Nations and the Republic of the Congo Relating to the Legal Status, Facilities, Privileges and Immunities of the United Nations Organization in the Congo (signed 27 November 1961) 414 UNTS 229; D W Bowett, *United Nations Forces* (Stevens & Sons1964) 242-243.

[4] Note Dated 19 October 1950 from the Representative of the United States of America Addressed to the Secretary-General (19 October 1950) UN Doc S/1856.

[5] Regulations for the United Nations Emergency Force (UNEF I) (20 February 1957) UN Doc ST/SGB/UNEF/1 [15]; see also Exchange of Letters Constituting an Agreement Between the United Nations and the Government of Egypt concerning the Status of the United Nations Emergency Force in Egypt (signed 8 February 1957) 260 UNTS 61.

[6] Annex to UN Doc A/50/995 (9 July 1996).

claims by third parties during peacekeeping operations, albeit without clarifying the legal basis of this responsibility. The Contribution Agreement points out under Article 9 that:

> 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 Agreement.

Nevertheless, in the same year that the Contribution Agreement was drafted the Secretary-General provided insight to a possible legal basis, through making an analogy to responsibility of States:

> The international responsibility of the United Nations for the activities of United Nations forces is an attribute of its international legal personality and its capacity to bear international rights and obligations. It is also a reflection of the principle of State responsibility- widely accepted to be applicable to international organizations- that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization), entails the international responsibility of the State (or of the Organization) and its liability in compensation.[7]

More recently, in response to the question posed by the ILC 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,'[8] the UN Legal Counsel reiterated that the wrongful conduct attributable to a UN peacekeeping force in breach of an international obligation entails the responsibility of the UN.[9] Therefore, one can

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[7] Report of the Secretary-General, 'Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations' (20 September 1996) UN Doc A/51/389 [6].

[8] ILC, Report of the International Law Commission on the Work of its 55th Session (5 May- 6 June and 7 July-8 August 2003) Supp No 10 (A/58/10) Chapter III Section A (2003) [27]; ILC, Second Report on the Responsibility of International Organizations by Mr Giorgio Gaja, Special Rapporteur, 55th Session UN Doc A/CN.4/541 (2004) (Second Report).

[9] ILC, 'Report of the International Law Commission on the Work of its 56th Session' (3 May-4 June and 5 July-6 August 2004) UN Doc A/CN.4/545 18.

safely conclude that international responsibility of the UN forms the legal basis of the acceptance of the claims addressed towards the Organization.

However, the complex command and control structures of UN forces create confusion in attribution of conduct. As highlighted by the UN Legal Counsel:

> The principle of attribution of the conduct of a peacekeeping force to the United Nations is premised on the *assumption* [emphasis added] that the operation in question is conducted under United Nations command and control, and thus has the legal status of a United Nations subsidiary organ. In authorized Chapter VII operations conducted under national command and control, the conduct of the operation is imputable to the State or States conducting the operation. In joint operations, namely, those conducted by a United Nations peacekeeping operation and operation conducted under national or regional command and control, international responsibility lies where *effective* command and control is vested and practically exercised.[10]

This section aims to test the above assumption within the context of UN post-conflict administrations, which contribute to the complexity of UN command and control structures in their own right as *sui generis* bodies with both civilian and military components. In exploring the extent to which responsibility of the UN could be engaged for the acts of UN post-conflict administrations, this section further examines whether the criteria set for attribution of conduct under the ILC Draft Articles apply equally under human rights law.

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[10] ibid.

## 2. Defining the United Nations Command

As subsidiary organs of the UN,[11] UN post-conflict administrations would in principle be under UN command and control, and their conduct would be attributed to the UN. However, command and control structures of post-conflict administrations are not clear-cut, as they are complex entities with civilian components, (which consist of United Nations officials and of other persons assigned by the Secretary-General to assist the Special Representative or made available by participating States to serve as a part of a post-conflict administration), and military components, (which consist of military and civilian personnel made available by participating States to serve as a part of a post-conflict administration).[12] Some post-conflict administrations such as the UN Mission in Kosovo (UNMIK) could have more complicated structures; UNMIK was composed of a civilian presence with four components/pillars, i.e. interim civil administration (the United Nations), humanitarian affairs (the Office of the United Nations High Commissioner for Refugees (UNHCR), institutional building (the Organization for Security and Cooperation in Europe (OSCE) and reconstruction (the European Union).[13] The military presence in Kosovo, Kosovo Force (KFOR) was

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[11] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, ECtHR, Grand Chamber Admissibility Decision, 71412/01, 78166/01 (02 May 2007) [118]; see also for instance Agreement Between the United Nations and the Supreme National Council of Cambodia on the Status of the United Nations Transitional Authority in Cambodia (signed & entered into force on 7 May 1992) 1673 UNTS 363 [14] (Cambodia Agreement).

[12] See for instance, Cambodia Agreement (n 11) art 1 [ii] and [iii]; UNSC Res 1037 (15 January 1996), establishing United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES), UN Doc S/RES/1037 [1]; A post-conflict administration could further include a police component in many cases, which consists of police personnel made available to the United Nations forces and operations by participating States at the request of Secretary-General, see for instance Agreement Between the United Nations and the Government of Croatia regarding the Status of the United Nations Forces and Operations in Croatia (signed on 15 May 1995) UNJY 1995 42 [ii-iv] (Croatia Agreement).

[13] See Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244 (12 June 1999) UN Doc S/1999/672 [5].

not a component of UNMIK, it was established as 'an equal preserve but with a separate mandate and control structure' led by North Atlantic Treaty Alliance (NATO).[14] As indicated by the UN Legal Counsel in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, the civilian and military presence were required to operate in a mutually supportive manner towards the same goals, but there was 'no formal or hierarchical relationship' between them, nor 'was the military in any way accountable to the civil presence.[15]' The UN Transitional Administration in East Timor (UNTAET) was initially based on a similar model where the civilian presence and military presence, i.e. International Force for East Timor (INTERFET), were independent from each other. However, a few months after the establishment of the administration, INTERFET was replaced by the military component of UNTAET.[16]

Nevertheless, the UN command over the military components is distinct in the sense that each national contingent forming a part of a military component remains under the command of a national contingent commander but is placed under the operational control of the United Nations Force Commander or head of military component.[17] As pointed out by the Secretary-General, UN operational control involves 'the full authority to issue operational directives within the limits of (1) a specific mandate of

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[14] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (n 11) [118].

[15] ibid; Report of the Secretary-General (n 13) [7].

[16] See UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272 [9]; Report of the Secretary-General on the United Nations Transitional Administration in East-Timor (26 January 2000) UN Doc S/2000/53 [25-26].

[17] See DPKO 'United Nations Peacekeeping Operations, Principles and Guidelines' (2008) available at <http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf> 68, accessed 10 January 2012 (Capstone Doctrine).

the Security Council; (2) an agreed period of time […]; and (3) a specific geographical range (the mission area as a whole).'[18] The UN operational control necessitates that:

> […] once assigned under United Nations operational control, contingent commanders and their personnel report to the Force Commander and they should not act on national direction, particularly if those actions might adversely affect implementation of the mission mandate and run contrary to United Nations policies applicable to the mission.[19]

An additional limitation to UN control is that the contributing state retains control over its national contingents over disciplinary and criminal matters.[20] It has been asserted by the ILC Special Rapporteur on the international responsibility of international organizations that the retention of disciplinary powers and criminal jurisdiction of the contributing States over national contingents, and military components for that matter, might have consequences with respect to attribution of conduct; if the retention of certain powers turns their situation into one in which they still act to a certain extent as an organ of the contributing State, that situation should be dealt under Article 7,[21] which holds that:

> 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.

[18] Report of the Secretary-General, 'Comprehensive Review of the Whole Question of Peace-keeping Operations in All Their Aspects, Command and Control of United Nations Peace-keeping Operations' (21 November 1994) UN Doc A/49/681 [6].

[19] The Capstone Doctrine (n 17).

[20] UN Doc A/49/681 (n 18); see also for instance Cambodia Agreement (n 11) [44(b)].

[21] ILC report 63rd Session (n 1) 87.

However, the control of the contributing state solely over disciplinary and criminal matters would not trigger Article 7 unless it effects operational control of the UN.[22] As stated above by the UN Legal Counsel, effective command and control criterion under Article 7 is utilised in joint operations to ascertain who has the responsibility. For peacekeeping operations, the main principle is that as subsidiary organs their conduct is attributable to the UN as long as the UN has the operational control over the forces, which seems to have a lower threshold for attribution than effective control over specific conduct under Article 7 of ILC Draft Articles.[23] Since the establishment of the UN, the control of the international organization over national contingents was restricted to what could be called strategic direction or operational control.[24]

[22] Second Report (n 8) [40]; the retention of control over disciplinary and criminal matters over the British contingent, as part of UNFICYP, by UK seems to be a decisive element that led the House of Lords to rule in the *Attorney General v Nissan* case that the UK government had to pay compensation for the temporary occupation of a hotel by its contingent (UK House of Lords' Decision in *Attorney General v Nissan* [1970] AC 179 (Right of UK National to Compensation for Property Seized by UK Forces in Cyprus; Relationship of UK Forces to Cyprus Government and to United Nations); however Hirsch disagrees with the outcome of *Attorney General v Nissan* and argues that 'the British contingent was […] a secondary organ of the UN. This fact, combined with the operational control exercised by the Organization […] justif[ies] the imposition of responsibility on the UN, and not on the contributing state (M Hirsch, *The Responsibility of International Organizations Toward Third Parties: Some Basic Principles* (Martinus Nijhoff 1995) 76).

[23] The control threshold over a conduct that triggers attribution had been a subject matter before the ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, Judgment, ICJ Reports 1986 14, albeit in a different context, on whether the actions of persons not having the status of organs or agents of the respondent State, or another State could be attributed to the respondent state. The ICJ seemed to give consideration to whether the US directed or enforced the perpetration of the acts, the violations of human rights law or IHL by Nicaragua contras, as a factor that would prove the US effective control over the contras [115]. While ICJ reiterated this view in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v Serbia & Montenegro)*, Judgment, ICJ Reports 2007,43, it appeared to suggest that effective control is not the same as giving directions or enforcement of an act: 'The Court is […] of the view that the particular characteristics of genocide do not justify the Court in departing from the criterion elaborated in [Nicaragua Case] […] Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control'[401].

[24] See Letter from the Chairman of the Military Staff Committee to the Secretary-General dated 30 April 1947 and Enclosed Report on General Principles Governing the Organization of the Chapter XI Armed Forces made Available to the Security Council by member Nations of the United Nations UN Doc S/336. A Military Staff Committee that would assume strategic direction of the armed forces was planned but was never established (ibid, art 38).

The Special Rapporteur has suggested, referring to the UN practice, that ' [w] hat has been held with regard to joint operations, such as those involving UNOSOM II and the Quick Reaction Force in Somalia, should also apply to peacekeeping operations, insofar as it is possible to distinguish in their regard areas of effective control respectively pertaining to the United Nations and the Contributing State.'[25] To exemplify that the decisive question in relation to attribution of a conduct of an organ should be who has effective control over the conduct in question, he cited from the Report of the Commission of Inquiry established pursuant to Security Council Resolution 885 (1993) to investigate armed attacks on UNOSOM II personnel, and he further added that under the circumstances described in the Report it would be difficult to attribute the conduct of UNOSOM II to the UN:

> The Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted seeking orders from their home authorities before executing orders of the Forces Command.
>
> Many major operations undertaken under the United Nations flag and in the context of UNOSOM's mandate were totally outside the command and control of the United Nations, even though the repercussions impacted crucially on the mission of UNOSOM and the safety of its personnel.[26]

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[25] ILC report 63rd Session (n 1) 89-90; In addressing the question of the ILC Commission concerning the extent to which the conduct of peacekeeping forces was attributable to the contributing state and the extent to which it was attributable to the UN, many states considered that in principle acts of peacekeeping forces were attributable to the UN (See for instance statements by Denmark also on behalf of Finland, Norway and Sweden (UN Doc A/C.6/58/SR.14), [27]), Greece, Israel, Spain, Italy, (UN Doc A/C.6/58/SR.15, [13], [21], [41], [43]), the complexity of the situation was acknowledged by the states and the importance of the examination of the UN practice and arrangements between the contributing States and the UN, was emphasized by some (Canada, UK, US, Portugal, UN Doc A/C.6/58/SR.15, [3], [9], [16], [27]). It was only Russian Federation that expressly agreed with the Special Rapporteur's suggestion that the principle of effective control should cover UN peacekeeping forces as well; still it acknowledged the necessity of a more thorough study on the subject (UN Doc A/C.6/58/SR.15, [31]).

[26] UN Doc S/1994/653 (1 June 1994) [243-244].

However, there is no indication in the paragraphs above that what is meant by effective control of several national contingents is a degree of control more than what UN operational control entails. The Commission of Inquiry emphasized that the national contingents received orders from national authorities rather than the UN; if they had obeyed the UN's strategic direction they would be under the effective operational control of the UN in the sense of UN peacekeeping practice.

Nevertheless, the retention of UN operational control over peacekeeping forces should be tested in each case to decide on attribution of specific conduct to the international organization since it is a matter of fact that the commanders of national contingents would always be in regular contact with their governments not only to discuss matters as to discipline or criminal jurisdiction but to inform them about actions of the military contingent; such contacts should not result in contravention of UN orders.[27] Hamspon and Kihara-Hunt point to this danger when they note that 'it is absolutely clear that in practice the majority of contingents reserve their right to consult their own capital.'[28] Similarly, Brown states:

> [d]ifferent contingent commanders will have different agendas, usually directed from home, and may find themselves serving two masters: the Force Commander and, through the "rear link," their home governments. In several instances this has contributed to a breakdown of cohesiveness in UN peacekeeping forces, especially in Cambodia and Somalia.[29]

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[27] T Dannenbaum, 'Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving As United Nations Peacekeepers (2010) 51 Harvard International Law Journal 113, 148; M Coubrey & N D White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996) 149.

[28] F Hampson & A Kihara-Hunt, 'The Accountability of Personnel Associated with Peacekeeping Operations' in C Aoi, C de Coning & R Thakur (eds), *Unintended Consequences of Peacekeeping Operations* (United Nations University 2007) 199.

[29] D Brown, 'The Role of Regional Organizations in Stopping Civil Wars' (1997) 41 Air Force Law Review 235, 281.

The fact that UN operational control over a peacekeeping force should be tested in each case and that if UN orders are contravened the presumption that the conduct of a peacekeeping force is only attributable to the UN could be rebutted, has been acknowledged by the Dutch District Court in *H.N v the State of the Netherlands*, a case concerning the Srebrenica Massacre in July 1995.[30] The Dutch District court held that the acts and omissions of the Dutch battalion ('Dutchbat') of the UN Protection Force (UNPROFOR) should be attributed as a matter of principle to the UN since the operational command control over troops, not necessitating a control over the personnel matters of the troops or over the material logistics, was transferred to the UN in view of the Chapter VII powers of the UN Security Council.[31] The Court further added that this principle should be tested by facts; for the purposes of the case before it the Netherlands did not cut across the UN command structure, and the factual basis for attribution of Dutchbat actions to the UN was fully in place.[32]

While the Special Rapporteur's suggestion that 'effective control' test under Article 7, rather than Article 6, should also cover the UN peacekeeping forces has its merits, from the UN perspective, retaining the operational control over peacekeeping forces, making the Organization the addressee of claims by third parties affected by the conduct of these forces, is a necessity not only for the sake of efficiency but also for

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[30] *H.N. v. the State of the Netherlands,* District Court in the Hague (Civil Law Section), Judgment, 265615/ HA ZA 06-1671 (10 September 2008) (*H.N. v. the State of the Netherlands*). The official judgment is in Dutch, references are made to the non-binding English translation at < http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BF0181> accessed 10 April 2012.

[31] ibid [4.9], [4.11].

[32] ibid [4.14.1] & [4.14.5.].

the sake of neutrality and legitimacy. This position is best explained by following words of the Secretary-General, which were said in 1994 but are equally valid today:

> If it is to be effective a United Nations operation must function as one integrated unit reflecting the will of the international community as a whole […] Experience has clearly demonstrated that when command in the field is divided and military units receive guidance from national as well as United Nations Headquarters the difficulties inherent in an international operation are maximized and the risk of casualties rises. Maintaining the integrated, strictly international character of an operation remains the best safeguard against such a development. Clearly, then, it is impermissible for contingent commanders to be instructed by national authorities to depart from United Nations policies, or to refuse to carry out orders. Not only do such practices jeopardize the effectiveness of a mission and the safety and security of its personnel, they undermine the very legitimacy of the institution of United Nations peacekeeping.[33]

### 2.1 Conduct of Organs or Agents of the UN

Article 6 of the ILC Draft Articles regulates attribution of conduct of organs or agents of international organizations:[34]

> The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.
>
> The rules of the organization shall apply in the determination of the functions of its organs and agents.

[33] Report of the Secretary-General, 'Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects, Command and Control of United Nations Peace-keeping Operations' (n 18) [7].

[34] ILC report 63rd Session (n 1).

The requirement under the first paragraph of Article 6 that the organ or agent acts 'in the performance of functions of that organ or agent' emphasizes that conduct is attributable to the international organization when the organ or agent exercises functions that have been given by the said organization; acts in a private capacity are excluded.[35]

Despite the complexities in UN command structures, the UN practice as discussed above reveals that it is Article 6 rather than Article 7, that is more relevant for the attribution of conduct to the UN of organs and agents at the service of UN post-conflict administrations.

For the purposes of attribution of conduct there seems to be no distinction between agents or organs under Article 6.[36] While the designation of its organs by an international organization is a more straightforward process, the category of agents seems more elusive. The ICJ, when considering the status of persons acting for the United Nations in *Reparation for Injuries Suffered in the Service of the United Nations* gave relevance to the fact that an agent is conferred functions by an organ of the UN rather than being a holder of an official status and stated that:

> The Court, understands the word 'agent' in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the Organization with carrying out, or helping to carry out, one of its functions-in short, *any person through whom it acts* (emphasis added).[37]

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[35]ibid 86.

[36] ibid.

[37] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, 177.

In the latter *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, in determining whether Article VI, Section 22 ('experts on missions' for the UN) of the General Convention was applicable to the status of Special Rapporteurs of United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Court reiterated its position that agent of an international organization could be but not necessarily has to be the official of that organization, what matters is that the Organization acts through that person.[38] UN post-conflict administrations employ a variety of military, police or civilian officials, who could also include Officials of the UN Secretariat assigned to a civil component and United Nations volunteers who are assimilated to officials for the UN for the purposes of a particular operation.[39] However, the Organization also benefits from the work of locally recruited personnel or experts on missions[40] who could be classified as agents from whose actions and omissions the Organization would be responsible.

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[38] *Applicability of Article VI, Section 22, Of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, ICJ Reports 1989, 177, [47-48].

[39] See for instance, Exchange of Letters Constituting an Agreement Between the United Nations and the Government of Cyprus concerning the Status of the United Nations Peace-Keeping Force in Cyprus (31 March 1964) UNJY 1964 40, [24] and Croatia Agreement (n 12) [25] and Cambodia Agreement (n 11) [23].

[40] Experts on mission could be military observers, police personnel or civilian personnel other than United Nations Officials whose names would be declared by the Special Representative (see for instance, Cambodia Agreement (n 11) [24]).

## 3. To what Extent ILC rules on Attribution of Conduct Are Applicable Under Human Rights Law?

Prima facie, the question above may seem superfluous. When wrongful conduct of an international organization constitutes a breach of an international obligation, that international obligation could include an obligation under human rights law, among many other international obligations. However, the controversial decision of the ECtHR in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*,[41] as the first case before any international court which concerned the accountability of UN post-conflict administrations, prompts the discussion of the question above since it provides its own assessment of attribution of conduct to the UN under human rights law to establish its responsibility within the human rights protection system of the ECHR.

### 3.1 'Ultimate Authority and Control' under *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*

*Behrami and Behrami v. France* concerned an incident in the municipality of Mitrovica in March 2000. The applicant Agim Behrami's sons were among the children who were playing with a number of undetonated cluster bomb units (CBUs), which had been dropped during the NATO bombardment in 1999. When one of the bombs got detonated Gadaf Behrami was killed, Bekir Behrami was severely injured, and now is permanently blind. The application of Agim Behrami and Bekir Behrami to the ECtHR was founded on Article 2 of the ECHR, as it was submitted that the

[41] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (n 11).

incident took place because of the failure of French KFOR contingent to mark and/or defuse the un-detonated CBUs, which those troops knew to be present there.[42] *Saramati v. France, Germany and Norway* concerned the arrest and prolonged detention of Mr Saramati by KFOR; he was initially arrested on April 2001 on suspicion of attempted murder and illegal possession of a weapon. He was released in June but was arrested again in July by order of the Commander of KFOR (COMKFOR) and his detention was repeatedly prolonged by the decision of COMKFOR.[43] On January 2002, Mr Saramati was convicted of attempted murder but the Supreme Court of Kosovo quashed his conviction and ordered his re-trial and release from detention. Mr Saramati based his application on Article 5 and 6(1) of the ECHR as he claimed that his detention by KFOR was extra-judicial and he had no access to Court. The application was brought against France and Norway, as commanders of KFOR who issued detentions were Norwegian and French respectively.[44]

The ECtHR's starting point in addressing the admissibility of these joined case was the determination that during the dates that the events in the cases take place Kosovo was 'under the effective control of the international presences [KFOR and UNMIK] which exercised the public powers normally exercised by the Government of the FRY.'[45] Therefore, the Court considered that the central question raised by the present case was whether the Court was competent *ratione personae* to examine the states'

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[42] ibid [5], [61].

[43] ibid [8-17].

[44] ibid [62-65].

[45] ibid [70].

contribution to the civil and security presences which exercised control of Kosovo, rather than the question whether the respondent states exercised extra-territorial jurisdiction in Kosovo.[46] Following this reasoning, the Court initially had to decide whether the conduct in question (failure de-mine in Behrami and detention in Saramati) were attributed to the UN in order to move on to examine whether it was *competent ratione* personae to review any such conduct consisting of actions or omissions found to be attributable to the UN.[47] Having regard to the Military and Technical Agreement signed between KFOR, the FRY and the Republic of Serbia on June 1999, paragraph 9 as well as paragraph 4 of Annex 2 of the UN Security Council Resolution 1244 together with the COMKFOR Detention Directive 42, the Court found it evident that KFOR's mandate included issuing detention orders.[48] As for de-mining, the Court noted that Article 9 (e) of the UN Security Council Resolution 1244 supplemented by Article 11 (k) of the same resolution provided that KFOR retains responsibility for de-mining until UNMIK took over the task. De-mining had already been taken over by the UN Mine Action Coordination Centre (UNMACC), which was under the direction of the Deputy Secretary General, at the very latest by October 1999, therefore prior to the detonation date in the case, as indicated by the UN Mine Action Service (UNMAS); the primary UN body charged with monitoring de-mining developments in general. Accordingly, the mandate to supervise de-mining belonged to UNMIK.[49] These facts support the Court's least controversial finding that UNMIK was a subsidiary organ of the UN created under Chapter VII of the UN Charter and

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[46] ibid [71].

[47] ibid [121].

[48] ibid [124].

[49] ibid [52-60] and [125-127].

therefore the impugned inaction to de-mine in the *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* was in principle attributable to the UN.[50]

As regards detention by KFOR, the Court did not give due consideration to UNMIK's contention that KFOR was not a subsidiary organ of the UN, and had a separate mandate and control structure led by NATO.[51] After dealing with the theory of delegation of Chapter VII powers by the UN Security Council in detail, the Court stated that the key question was whether the UN Security Council 'retained ultimate authority and control [over KFOR] so that operational command only was delegated.'[52] The 'ultimate authority and control test' introduced by the Court is foreign to the UN practice, as has been explored above, which accepts responsibility if it has operational control over an operation. However, the Court decided that in lawfully delegating its security powers by the UN Security Council Resolution 1244, the Security Council retained the ultimate authority and control over KFOR, so that the impugned action of prolonged detention was in principle attributable to the UN. The Court's reasoning was as follows:

> In the first place, […], Chapter VII allowed the UNSC to delegate to "Member States and relevant international organizations." Secondly, the relevant power was a delegable power. Thirdly, that delegation was neither presumed nor implicit but rather prior and explicit in the Resolution itself. Fourthly, the Resolution put sufficiently defined limits on the delegation by fixing the mandate with adequate precision as it set out the objectives to be attained, the roles and responsibilities

[50] ibid [143].

[51] ibid [118].

[52] ibid [128-133].

> accorded as well as the means to be employed […]. Fifthly, the leadership of the military presence was required by the Resolution to report to the UNSC so as to allow the UNSC to exercise its overall authority and control (consistently, the UNSC was to remain actively seized of the matter, Article 21 of the Resolution). The requirement that the SG present the KFOR report to the UNSC was an added safeguard since the SG is considered to represent the general interests of the UN.[53]

The Court further noted that this delegation model demonstrates that direct operational command of the UN Security Council was not a requirement under Chapter VII; the effective command of the relevant operations was retained by NATO. As long as KFOR exercised lawfully delegated powers and UN Security Council retained the ultimate authority and control, the impugned action was attributable to the UN.[54] While the Court does not provide an explicit legal basis for its 'ultimate authority and control' test, it is influenced by and has the theoretical backing of the approach in legal literature on the legality of Security Council delegations under Chapter VII.[55]

Although the Court includes Article 7 of the ILC Draft Articles and part of commentary to this Article among the relevant law and practice for the purpose of this

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[53]ibid [134].

[54] ibid [136-141].

[55] See Larsen (n 2), 521; See ibid [130-132] for the sources cited by the Court; for instance D Sarooshi in *The United Nations and the Development of Collective Security* (OUP 1999) states that 'the question of who exercises operational command and control over the force is immaterial to the question of responsibility. The more important enquiry is who exercises overall authority and control over the forces (163). He further notes that 'the acts of forces authorized by the Council are attributable to the UN, since the forces are acting under UN authority to establish an objective stated by the Council' and there are only two exceptions to this general rule: 'the first is those cases where the Council was prevented from exercising overall authority and control over the force' or when 'states' forces have acted ultra vires when exercising their delegated Chapter VII powers' (165).

case,[56] it does not utilize the 'effective control' test under this Article which requires a factual evaluation on a case by case basis, to assess whether the UN had control over KFOR. If the Court applied this article, it would probably have reached a different outcome.

In conclusion, from attribution of both the failure de-mine in Behrami and detention in Saramati to the UN, it followed that the Court lacked competence *ratione personae* to examine further impugned actions; not only because the UN is not a Contracting Party to the ECHR but also because the Court considered itself incompetent to review the acts of the respondent states carried out on behalf of the UN under Chapter VII. [57]

In later cases, the Court reiterated its view concerning the attribution to the UN of conduct taken by national contingents. In *Kasumaj v Greece*, the applicant's two plots of land situated in Varosh in the municipality of Ferijah was occupied in June 1999 by Greek contingent of NATO and became the main national base for this contingent in Kosovo. Since then the applicant was denied access to and use of his land.[58] The applicant's main thrust of complaint was that the occupation of his property constituted a continuing violation of Article 1 of Protocol No 1 to ECHR. In the light of its reasoning in *Behrami and Saramati Case*, the Court declared in *Kasumaj v Greece* that KFOR actions were in principle attributable to the UN. [59] Likewise in *Gajic v Germany*, which concerned the usage of an apartment by German KFOR

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[56] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* (n 11), [30-32].
[57] ibid [144-152].

[58] *Kasumaj v Greece*, ECtHR, Admissibility Decision, 6974(05), (05 July 2007).

[59] ibid.

contingent in Kosovo between June1999-July 2004 without payment of any rent to the alleged owner, the Court further reiterated its position.[60]

**3.2 Cases before the European Court of Human Rights (ECtHR) Concerning 'Attribution of Conduct' to UN Post-conflict Administrations**

The facts in *Beric and Others v Bosnia and Herzegovina* were different; as the case did not concern the attribution of the acts of national contingents to the UN at all but was solely on the attribution to the UN of the act of the High Representative for Bosnia and Herzegovina as the head of the civilian administration in Bosnia and Herzegovina.[61] Between June-December 2004, the High Representative removed the applicants from all their public and political party positions and indefinitely barred them from holding any such positions and running for elections, as they were held 'derivatively culpable [of] contributing to the institutional failure to purge […] the political landscape of conditions conducive to the provision of material support and sustenance to individuals indicted under Article 9 (of the Statute of the International Criminal Tribunal for the Former Yugoslavia.'[62] Although the High Representative lifted the ban imposed on the applicants in November 2005, they were not automatically restored to their previous offices and were not entitled to any compensation.[63] The applicants raised complaints under Article 6, 11 and 13 of the

[60]*Gajic v Germany*, ECtHR, Admissibility Decision, 31446/02, (28 August 2007).

[61] *Beric and Others v Bosnia and Herzegovina*, ECtHR, Admissibility Decision, 36357/04, 36360/04, 38346/04, 41705/04, 45578/04, 45580/04, 91/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1177/05, 1180/05, 20793/05 and 25496/05, (16 October 2007).

[62]ibid [2].

[63]ibid [3].

ECHR.[64] While the Bosnian government maintained that the conduct of the High Representative was in essence attributable to the UN, the applicants, on the contrary, pleaded that the UN did not exercise 'effective control' over the conduct of the High Representative within the meaning of ILC Draft Articles.[65] The Court followed the same reasoning of delegation theory. However, this time the Court confusingly applied a change of words, replacing the 'ultimate authority and control test' with 'effective overall control test.' In essence, both tests were the same. According to the Court:

> Given that the UNSC had, as required, established a "threat to international peace and security" within the meaning of Article 39 of the UN Charter, it had the power to authorise an international civil administration in Bosnia and Herzegovina and to delegate the implementation of that measure to specific member States, provided that it retained effective overall control […] The key question, therefore, is whether the UNSC, in delegating its powers by UNSC Resolution 1031, retained effective overall control.[66]

The Court considered that the Security Council retained effective overall control for the same reasons it did in *Behrami and Behrami v France and Saramati v France, Germany and Norway*. Likewise, the delegation was prior to and explicit in the Security Council Resolution establishing the Office of the High Representative, which also put sufficiently defined limits on the delegation. Further, the High Representative was required by the Resolution to report to the UN Security Council so as to allow it to exercise its overall control and the requirement that the Secretary-General present

[64]ibid [20].

[65]ibid [23].

[66] ibid [27].

the High Representative's report to the UN Security Council was added as a safeguard.[67] The Court concluded that under these circumstances, the High Representative was exercising lawfully delegated powers under Chapter VII, so that the impugned action was in principle attributable to the UN within the meaning of attribution under the ILC Draft Articles. However, it is not clear how this could be the case, given that effective control test under the ILC Draft Articles is a factual test requiring control over a specific conduct, while the ultimate authority or control test, or effective overall control test based on delegation theory hardly implies an effective control over a specific conduct.

Interestingly, for the purposes of *Beric and Others v Bosnia and Herzegovina,* the Court could have used the argument that the civilian administration in Bosnia and Herzegovina was a subsidiary organ of the UN and as such its conduct was attributable to the UN. However, the Court preferred to rely on a wrong interpretation of the ILC Draft Articles instead. Therefore, it is not surprising that jurisprudence of the ECtHR on attribution of conduct of peace operations to the UN has been indirectly criticized by the Special Rapporteur who held that 'when applying the criterion of effective control "operational" control would seem more significant than "ultimate" control, since the latter hardly implies a role in the act in question.'[68] He further commented that 'various authors pointed out that the European Court did not apply the criterion of effective control in the way that had been envisaged by the Commission.'[69]

[67] ibid [28].

[68]ILC report 63rd Session (n 1) 91.

[69] ibid fn 115.

In *Kalinic and Bilbija v Bosnia and Herzegovina*, concerning the removal of the applicant Mr. Kalinic from his position as speaker of the Parliament of the Republika Srpska and as president of a political party, and removal of the applicant Mr Bilbija from his position in the Intelligence and Security Agency of Bosnia and Herzegovina by the High Representative in June and December 2004 respectively, and prohibition of the both applicants from holding such positions and from running for elections until further notice, the Court decided that the same reasoning in *Beric and Others v Bosnia and Herzegovina* extended to attribute the conduct of the High Representative to the UN and that Bosnia and Herzegovina could not be held responsible for such removals.[70] However, in *Sejdic and Finci v Bosnia and Herzegovina* the ECtHR held that the constitutional prohibition preventing the applicants to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina on the ground of their Roma and Jewish origin amount to discrimination (violation of Article 14) and a breach of Article 3 of Protocol No I to ECHR, attributable to Bosnia and Herzegovina and engaging the *ratione personae* competence of the Court.[71] The Court noted that the Dayton Peace Agreement outlining the mandate of the High Representative included the Constitution of Bosnia and Herzegovina (Annex 4), which itself was an international treaty. However, the Court further added that the High Representative did not have the power to amend the Constitution, and this power was vested in the Parliamentary Assembly of Bosnia and Herzegovina, which was clearly a domestic body. In those circumstances, the Court concluded that 'leaving aside the question

[70] *Kalinic and Bilbija v Bosnia and Herzegovina,* ECtHR, Admissibility Decision, 45541/04 and 16587/07, (13 May 2008).

[71] *Sejdic and Finci v Bosnia and Herzegovina*, ECtHR, Judgment (Grand Chamber), 27996/06 and 34836/06, (22 December 2009).

whether the respondent State could be held responsible for putting in place the contested constitutional provisions […] it could nevertheless be held responsible for maintaining them.'[72] While this decision adds nothing new to discussion of the attribution of the conduct of High Representative to the UN, it shows that in the face of overt discrimination the Court finds another way even through its own jurisprudence.[73]

### 3.3 The *Al-Jedda Case*

The decision of the House of Lords in *Al-Jedda case* does not involve post-conflict administrations and attribution of their conduct to the UN, however the decision gives insight as to how effective control test under the ILC Draft Articles should be interpreted in a case concerning human rights.[74] Mr Al-Jedda, had been held in detention by British forces in Iraq since October 2004 on suspicion of involvement in terrorist activities, and had complained that his rights under Article 5 (1) of ECHR have been violated. The Secretary of State, prompted by the decision of the ECtHR in *Behrami and Behrami v France and Saramati v France, Germany and Norway*, raised a new argument, not discussed before the Divisional Court or the Court of Appeal, claiming that by virtue of relevant Security Council Resolutions (especially UNSCR 1511 (2003) and UNSCR 1546 (2004) the detention of the applicant was attributable to the UN and thus outside the scope of the ECHR.[75] On the issue of attribution of

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[72] ibid [30].

[73] G Verdirame, *The UN and Human Rights, Who Guards the Guardians* (CUP 2011) 254.

[74] *R (On the Application of Al-Jedda) (FC) v Secretary of State for Defence* [2007] UKHL 58.

[75] ibid [3].

conduct, Lord Bingham who seemed to have the leading opinion, based his discussion on the effective control test under the ILC Draft Articles as the governing principle and asked the right questions:

> Were the UK forces placed at the disposal of the UN? Did the UN exercise effective control over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the UN rather than the UK? Did the UN have effective command and control over the conduct of UK forces when they detained the appellant? Were UK forces part of a UN peacekeeping force in Iraq?[76]

Lord Bingham answered the questions above in the negative. Considering the fact that coalition forces were occupying powers and did not have a UN mandate, the Security Council was not delegating its powers but was authorizing the UK to carry out functions it could not perform itself,[77] he concluded that 'it cannot be realistically be said that US and UK forces were under the effective command and control of the UN, or that UK forces were under such command and control when they detained the appellant.'[78] Comparing the case before him with *Behrami and Behrami v France and Saramati v France, Germany and Norway* Lord Bingham points out that:

> The analogy with the situation in Kosovo breaks down […] at almost every point. The international security and civil presences in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK as a subsidiary organ of the UN. The multinational force in Iraq was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN. There was no delegation of UN power in Iraq. It is quite

[76] ibid [22].

[77] ibid [23]; see K Starmer, 'Responsibility for Troops Abroad' in P Shiner & A Williams (eds), *The Iraq War and International Law* (Hart 2008) 281-283, for the discussion that distinguishing 'delegation' from 'authorization' re-opens the question of the competence of the Security Council.

[78] *R (On the Application of Al-Jedda) (FC) v Secretary of State for Defence*, (n 74), [22] [23].

> true that duties to report were imposed in Iraq as in Kosovo. But the UN's proper concern for the protection of human rights and observance of humanitarian law called for no less, and it is one thing to receive reports, another to exercise effective command and control. It does not seem to me significant that in each case the UN reserved power to revoke its authority, since it could clearly do so whether or not it reserved power to do so.[79]

The majority of House of Lords agreed with Lord Bingham's conclusion, albeit with some nuances in reasoning while Lord Rodger dissented.[80] The conclusion of the House of Lords appears to be in line with the way in which the criterion of effective control was intended by the ILC.[81] However, to a certain extent it endorses the views expressed by the ECtHR through distinguishing the facts of the *Al-Jedda case* by stating that unlike UNMIK, the multinational force in Iraq was not established at the behest of the UN and there was no delegation of Security Council powers in Iraq. The decision does not explain why in application of the effective control test, it should be decisive whether the force was established at the behest of the UN or not.[82]

After the decision of the House of Lords, Mr. Al-Jedda applied to the ECtHR.[83] The ECtHR referred to the effective control criterion in attribution to an international organization, of the conduct of an organ of a state placed at the disposal of an international organization under ILC Draft Articles as the common ground between

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[79]ibid [24].

[80]ibid, see views expressed by Baroness Hale [124], Lord Caswell [131], Lord Brown [145-148]. Lord Rodger [55-113] argued that *Behrami and Saramati* precedent would apply in case of Al-Jedda.

[81]ILC report 63rd Session (n1) [12].

[82] See Larsen (n 2) 526.

[83] *Al-Jedda v the United Kingdom*, ECtHR, Judgment (Grand Chamber), 27021/08, (07 July 2011) (*Al-Jedda v the United Kingdom)*.

the parties before the House of Lords.[84] Referring extensively to the decision of the House of Lords and in agreement with the majority of the Lords, the Court decided for the same reasons that 'the United Nations' role as regards security in Iraq in 2004 was quite different from its role as regards security in Kosovo in 1999.'[85] Distinguishing *Behrami and Behrami v France and Saramati v France, Germany and Norway* from *Al-Jedda Case* and upholding its decision in the former, the Court stated that 'the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multi-National Force and that the applicant's detention was not, therefore, attributable to the United Nations.'[86]

Finally, mention must be made to *Nuhanovic v the State of Netherlands*[87] before the Dutch Court of Appeal that was decided only two days before ECtHR's Al-Jedda decision came out. This was an appeal from the decision of Dutch District Court in *H.N v the State of the Netherlands*. Unlike the District Court, which focused on the operational command and control of the UN over peacekeeping operations as pre-requisite for attribution of their conduct to the UN, the Court of Appeal based its ruling on a wider interpretation of effective control under the ILC Draft Articles and held that:

[84] ibid [84].

[85] ibid [83].
[86] ibid.

[87] *Nuhanovic v the State of the Netherlands*, Court of Appeal in the Hague (Civil Law Section), Judgment, 265618/HA ZA 06-1672, (5 July 2011) (*Nuhanovic v the State of the Netherlands*). The official judgment is in Dutch, references are made to the non-binding English translation at <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR5388> accessed 10 May 2011.

> The question whether the State had 'effective control' over the conduct of Dutchbat which Nuhanovic considers to be basis for his claim, must be answered in view of the circumstances of the case. This does not imply that significance should be given to the question whether that conduct constituted the execution of a specific instruction, issued by the UN or the State, but also to the question whether, if there was no such specific instruction, the UN or the State had the power to prevent the conduct concerned [88]

Therefore the Dutch Court of Appeal decided that the respondent state could have prevented the removal of three Bosnian men who took refuge in the Dutchbat compound near Srebrenica, therefore was responsible for its involvement in the events which led to the killing of these Bosnian men by the Serbian forces.[89]

Ultimately, there seems to be no convincing argument that justifies the deviation of a human rights body from the ILC principles on attribution of a wrongful conduct to an international organization to decide on a violation under human rights law. These principles have been the culmination of the most comprehensive and authoritative research based on cases, state practice and scholarly studies. There might be peculiarities of international organizations that could cause confusion in applying the ILC principles as observed in the discussion whether military contingents of the UN peacekeeping operations should be considered under Article 6 or Article 7. However a debate as such pertains to the extent of UN control or State control over a peacekeeping operation that should be decided on a case-by-case basis, rather than a debate on the applicability of the ILC principles to the Organization. On the other

[88] ibid [5.8-5.9]; see ILC report 63rd Session (n 1) 93 fn 129.

[89] The judgment of the Dutch Court of Appeal was upheld by the Supreme Court of the Netherlands in *the State of the Netherlands v Nuhanovic*, Judgment (First Chamber), 12/03324 LZ/TT, (6 September 2013).

hand, the 'ultimate authority and control test' of the ECtHR goes against both the UN practice, and the ILC principles on attribution of conduct, and finds justification only in the scholarly study of the delegation of Chapter VII powers by the Security Council theory. Sarooshi points out the danger with the delegation of Chapter VII powers as such: '[t]he interests of States that take up a delegation of powers directly […] may not converge with the most effective way to achieve the community defined values at best and worst may even conflict with the attainment of such an objective.'[90] Through transferring the delegation theory discourse to the field of human rights law, the ECtHR runs the risk of serving states' interests rather than human rights.

## 4. Conclusion

In July 1995, during the conflict in Bosnia and Herzegovina, the Bosnian Serb Army under the command of General Mladic attacked the Srebrenica enclave and the Dutch contingent of UNPROFOR, Dutchbat, located initially in Srebrenica, withdrew to a compound in Potocari, five kilometres away. Subsequently, more than 5000 Bosnian Muslims who fled from Srebrenica took refuge in the Dutchbat compound. Among the people who took refuge were the parents and the brother of Mr Nuhanovic who was working as an interpreter for the UN Military Observers. As the conflict in Srebrenica escalated, Dutchbat and the refugees needed to be evacuated. During the consultations between Dutchbat, the local civilian committee and Mladic, the Serbian commander stated that the Muslim civilian population was not their target, but rumours that Muslim males were executed by the Bosnian Serb Army had already reached Dutchbat. When the evacuations started, Mr Nuhanovic, who had a UN pass,

[90] Sarooshi (n 55) 285.

was allowed to stay in the compound but his parents and his brother were evacuated and later executed by the Bosnian Serb Army or related paramilitary groups.[91] The Dutch Court of Appeal, in deciding on Mr Nuhanovic's plea to hold the Dutch state liable for its role in failing to prevent the death of his family ruled that the Dutch state had effective control over Dutchbat since it had the power to prevent the alleged conduct. The Dutch Court of Appeal stated that if the Dutch government had ordered Dutchbat to allow Mr Nuhanovic's family to stay in the compound, that instruction would have been obeyed.[92] The Court of Appeal further suggested that such an instruction would not have contravened UN operational command, as the alleged conduct was contrary to the instruction given by the Deputy Commander of UNPROFOR to protect the refugees as much as possible.[93] While the Court of Appeal's wide interpretation of the effective control criterion seems unprecedented, its approach is in line with the contention of the Special Rapporteur that the UN should not be responsible alone for everything that happens on the ground. The application of effective control criterion in peacekeeping operations would take some of the responsibility from UN's shoulders and would open space for dual or even multiple attribution. The ILC Commentary does not exclude the attribution of the same conduct simultaneously to a State and to an international organization.[94] It is understandable that, for the sake of efficiency, neutrality and legitimacy, so as not to jeopardize the willingness of states to contribute troops to UN operations, the UN insists on retaining the operational control. However, as stated by the Special

[91] *Nuhanovic v the State of the Netherlands* (n 87) [2.14-2.29].

[92] ibid [5.18].

[93] ibid.

[94] ILC Report 63rd Session (n 1) 90.

Rapporteur, applying the effective control criterion would base attribution of conduct on a factual basis.[95] More importantly, it would make dual attribution and consequently allocation of responsibility between UN and troop contributing States possible, and further would trigger the accountability of troops abroad under international human rights mechanisms.

However, 'the ultimate authority and control test' of the ECtHR that extends the UN responsibility to a degree unintended by the Organization itself, is a setback in the both in the effective control test and dual or multiple attribution. The decision had been severely criticized by many scholars,[96] but the ECtHR does not appear ready review its position. The attribution of the conduct of military contingents that could be part of a peacekeeping or peace-enforcement operation or military component of a post-conflict administration, continues to dominate the jurisprudential debate on human rights accountability in UN operations. As observed in *Beric and Others v Bosnia and Herzegovina*, *Kalinic and Bilbija v Bosnia and Herzegovina, Kasumaj v Greece*, or *Gajic v Germany*, the civilian components of post-conflict administrations with their extensive and intrusive legislative and administrative powers over the administered territories are potential human rights violators. As it stands, generally and at least from the perspective of the European human rights protection system, individuals whose rights are violated due to UN operations are at the mercy of the presence and effectiveness of accountability mechanisms established by the UN itself.

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[95] ibid 81.

[96] See for instance, Starmer (n 77 ) 270-276; Larsen (n 2) 521-524; F Messineo, 'The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights' (2009) 56 Netherlands International Law Review 35, 40-43; C Leck, 'International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct' (2009) 10 Melbourne Journal of International Law 346, 362-364; A Orakhelashvili, 'R (on the Application of Al-Jedda) (FC) v Secretary of State for Defence [2007] UKHL 58' (2008) 102 AJIL 337, 341.

# CHAPTER 6

# THE IMMUNITIES OF UN POST-CONFLICT ADMINISTRATIONS

## 1. Introduction

An important obstacle to the legal responsibility of the UN is considered to be the immunities that the Organization enjoys before national courts.[1] Since the UN primarily treats the post-conflict administrations it establishes as extended forms of peacekeeping and, as its subsidiary organs,[2] they enjoy the same type and degree of immunity as the Organization. However, when the UN exercises administrative powers over a territory or takes over the entire governance of a territory, the appropriateness of the immunities enjoyed by these administrations is open to question.[3]

This chapter first deals with the sources and nature of the immunity of the UN, in order to understand where the immunity of UN post-conflict administrations is derived from, then it moves on to examine the practice of UN post-conflict administrations with respect to immunities. Finally, it addresses the question whether

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[1] See G Verdirame, *The UN and Human Rights, Who Guards the Guardians* (CUP 2011), 351; A Reinisch, 'Securing the Accountability of International Organizations' (2001) 7 Global Governance 131, 133.

[2] ILC, 56th Session, Responsibility of International Organizations, Comments and Observations Received from International Organizations, UN Doc A/CN.4/545 (25 June 2004) 17.

[3] See for instance C Stahn, *The Law and Practice of International Territorial Administration, Versailles to Iraq and Beyond* (CUP 2008), 587-589; F Rawski, 'To Waive or Not To Waive: Immunity and Accountability in UN Peacekeeping Operations' (2002) 18 Conn. J. Int'L 103, 124-125; G Verdirame, 'UN Accountability for Human Rights Violations in Post-conflict Situations' in N D White & D Klaasen (eds), *The UN, Human Rights and Post-conflict Situations* (Manchester University Press 2005), 94.

the UN has an obligation to provide alternative means of dispute settlement when it escapes the jurisdiction of national courts.

The principal focus of attention is the immunity of the UN as an international organization rather than the immunities enjoyed by its officials or agents.

## 2. The Sources and Nature of the Immunity of the UN

### 2.1 The Sources

The immunities of international organizations are generally incorporated in the international treaties establishing them.[4] In cases where an explicit provision on immunities had not been included in the constituent treaty of an organization or where the immunities are to be elaborated, a subsequent treaty regulating an entire system of privileges and immunities can be negotiated between the organization and the member states.[5] As the immunities of international organizations are mainly regulated by constitutive treaties, it is difficult to prove the existence of a customary rule of immunity that applies to every organization.[6] However, the international organizations established after the formation of the UN adopted rules on immunities

[4] See for instance, Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 1609 UNTS 119, Article 133; Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 154, Article VIII; Articles of Agreement of the International Monetary Fund (adopted 22 July 1944, entered into force 27 December 1945) 2 UNTS 39, Article IX (3).

[5] E De Brabandere, 'Immunity of International Organizations in Post-conflict International Administrations' (2010) 7 International Organizations Law Review 79, 98; An often given example is the Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff (adopted 20 September 1951, entered into force 18 May 1954) 200 UNTS 3.

[6] De Brabandere (n 5).

similar to that of the Organization.[7] Article 105 of the UN Charter forms the basis of the Organization's immunities. Accordingly:

> 1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes
>
> 2. Representatives of the Members of the United Nations and Officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization

The immunities of the UN were further elaborated by the General Convention on the Privileges and Immunities of the United Nations (the General Convention).[8] Under Article II (2) of the General Convention:

> The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in particular case it has expressly waived its immunity[9]

While Article 105 of the UN Charter limits the immunities of the UN to those that are 'necessary for the independent exercise of their functions,' the above Article of the

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[7] See for instance, Charter of the Organization of American States (n 4) in comparison to Article 105 of the UN Charter; the Agreement Establishing the World Trade Organization (n 4), art VIII (4).

[8] Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15; while the immunity of the UN under the General Convention is absolute, its officials (Art V (18) and experts on mission (Art VI (22) enjoy functional immunity, in addition to the immunities specified under Art V (18) the Secretary-General and assistant Secretaries-Generals are also afforded diplomatic immunities; While military personnel are not covered by the General Convention, they are usually granted immunities under the Status of Forces (SOFA) or Status of Mission (SOMA) Agreements or Military Technical Agreements (MTA).

[9] See also, Convention on the Privileges and Immunities of the Specialized Agencies (adopted 21 November 1947, entered into force 2 December 1948) 33 UNTS 261 art III (4).

General Convention seems to expand the immunities to an absolute.[10] However, as Singer points out:

> It seems unlikely that the General Convention enlarges the privileges and immunities embodied in the UN Charter. The General Convention was opened for accession early 1946 when the Charter still represented the views of the United Nations membership. Rather, the General Convention must represent the view of the member states at that time that the proper functioning of the UN demanded absolute jurisdictional immunity.[11]

Indeed, when Article 105 of the UN Charter was drafted, the Rapporteur of Committee IV/2 of the United Nations Conference on International Organizations had commented that 'if there is one certain principle it is that no Member State may hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens, financial or other.'[12]

**2.2. The Nature**

The debate on the nature of the immunities enjoyed by international organizations in general and the UN in particular, is characterized by the emphasis, in the legal literature, on the functional immunity of international organizations versus absolute immunity claims by international organizations. The functional immunity doctrine suggests that international organizations are entitled to such immunities, which enable them to exercise their functions, in the fulfilment of their purposes, in member (or

[10] F Rawski (n 3), 111; G Verdirame (n 1), 351.

[11] M Singer, 'Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns' (1995-1996) 36 Va. J. Int'L 53, 84.

[12] *Powell against the Secretary-General of the United Nations*, Administrative Tribunal of the United Nations, Case No 234, Judgment No 237 (20 October 1978) 64.

host) states' territory without undue interference by the states.[13] A narrow interpretation of functional immunity would suggest that an international organization could be sued before national courts for disputes arising out of acts of the organization that are not included in its functions. Despite promotion of a narrow interpretation of immunities based on functions of the Organizations by some scholars,[14] the UN practice has been consistent since the adoption of the General Convention; embracing an absolute immunity of the Organization from the jurisdiction of national courts.[15] Various rationales can be put forward in support of absolute immunity of the UN. Firstly, one can base its approach on the functionality argument itself: to allow the Organization to carry out its functions properly and without any interference would only be possible if it enjoys absolute immunity from the jurisdiction of national courts,[16] which could be biased and could allow unjustified claims.[17] Granting the UN absolute immunity would further ensure the 'uniform application' of its decisions across various national legal systems.[18] From another

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[13] C F Amerasinghe, *Principles of Institutional Law of International Organizations* (CUP 2005), 316; M Singer (n 11), 56; H G Schermers & N M Blokker, *International Institutional Law: Unity Within Diversity* (Martinus Nijhoff, 2011), 258, [324].

[14] See for instance K Wellens, 'Fragmentation of International Law and Establishing Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap' (2003-2004) 25 Michigan Journal of International Law 1159, 1175-1177; E Gaillard & I Pingel-Lenuzza, 'International Organizations and Immunity from Jurisdiction: To Restrict or To Bypass' (2002) 51 International and Comparative Law Quarterly 1, 4-7; M Parish, 'An Essay on the Accountability of International Organizations' (2010) 7 International Organizations Law Review 277, 278.

[15] See for instance, the Amicus Curiae of the UN, for the case of *Marvin R Broadbent et al v OAS*, US Court of Appeals for the Circuit of the District of Columbia, 628 F. 2d. 27, 35 (1980), summarized in UNJY (1980) 230, where it is pointed out that: 'the immunities of States are those attributable to sovereigns and thus reflect those that States reserve to themselves, whether absolute or relative; those of international organizations are functional and thus reflect their needs, which require complete protection from national jurisdiction.'

[16] ibid, see De Brabandere (n 5) 87-88.

[17] Stahn (n 3) 582.

[18] ibid; P Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff 1994) 103.

perspective, allowing national courts to decide on the scope of the functional immunity of international organizations would mean that they could decide on what constitutes functions of an international organization. The purposes of international organizations that define their functions are based on their constituent instruments. This has been highlighted by the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations*, where the Court stated that the rights and duties of an international organization must depend on its purposes and functions as specified or implied in its constituent documents and developed in the practice of the Organization.[19] Accordingly, the appropriate organs of an international organization would be competent to categorize what constitutes the functions of the organization.[20] An inquiry by the national courts to define the scope of the purposes and the functions of an international organization would carry the risk of 'rapidly fragment[ing] into disputative and indeterminate political discourse, and consequently fail[ing] to generate useful standards for determining jurisdictional immunity.'[21]

[19] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949,174,180; see, on the other hand, F Seyersted, 'Objective Personality of Intergovernmental Organizations, Do Their Capacities Really Depend Upon The Conventions Establishing Them?' (1964) 34 Nordic Journal of International Law 3, 28; *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Reports 1962, 157, 168.

[20] See *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, 62, 87 [60]; M Gerster, 'Article 105' in B Simma (ed), *The Charter of the United Nations, A Commentary* (OUP 2002) 1320, Section 23.

[21] Singer (n 11) 102.

### 2.2.1 Is there an Analogy Between Immunity of States and Immunity of International Organizations?

While the number of organizations has increased and the scope of their activities has broadened over time, claims for absolute immunity still persist.[22] In a well-known legal action brought against Food and Agriculture Organization of the United Nations (FAO) before the Italian Supreme Court of Cassation by the landlords of certain premises that the Organization had rented, the FAO claimed, albeit indirectly, absolute immunity from jurisdiction of the Italian courts by arguing that there exists, in every instance 'a nexus between any of its activities and the aims of the Organization.'[23] However, the Court examined whether the activities pursued by the Organization, namely, the rental of the premises in this context, were directly related to the institutional aims of the FAO.[24] In this respect, the Court rejected the FAO's argument that there is a nexus between any of its activities and the aims of the Organization. It concluded that this could lead to the acceptance of an 'unrestricted concept of immunity' which would be inconsistent with international conventions that provide for the FAO's immunity.[25] However, a closer took to the Conventions that provide for the FAO's immunity, namely Article VIII, Section 16 of the Headquarters Agreement between FAO and Italy (the Headquarters Agreement) which states that 'FAO […] shall enjoy immunity from every legal process except in so far as in any

[22] Singer (n 11) 56; De Brabandere (n 5) 80.

[23] *Food and Agriculture Organization of the United Nations v INPDAI,* The Supreme Court of Cassation, Judgment No. 5399, (18 October 1982), summarized in UNJY 1982, 236.

[24] ibid.

[25] ibid.

particular case FAO shall have expressly waived its immunity'[26] and Article III (4) of the Convention on the Privileges and Immunities of the Specialized Agencies identical to Article II (2) of the General Convention, reveal that they actually assert absolute immunity. Although the Court placed emphasis on the functional immunity doctrine, it also underlined the question of jurisdiction in the dichotomy of sovereign acts and private law transactions, concluding that the private nature of the rent contract left no doubt as to the jurisdiction of Italian courts in this case.[27] The characterization of an 'analogy' between the immunities of international organizations and the immunities of sovereign states, relying on the *acta jure imperii/gestionis* distinction, is sometimes invoked by national courts albeit 'unconvincingly'.[28]

In an earlier case, in 1969, brought by an Italian citizen against FAO before the Rome Court of First Instance,[29] the Court elaborated on this distinction. The plaintiff, who had been employed by FAO for a period of years as a messenger or lift operator under short term contracts had complained that he had been refused permanent employment which would have entitled him to medical coverage benefits and participation in the United Nations Joint Staff Pension Fund.[30] The Court pointed out that just as states are considered immune from the jurisdiction of other states with respect to public

[26] Agreement Regarding the Headquarters of the Food and Agriculture Organization of the United Nations (31 October 1950) reprinted in Legislative Texts and Treaty Provisions Concerning the Legal Status, Privileges and Immunities of International Organizations, Vol. II (United Nations Publication, Sales No. 61.V.3) 187.

[27] *Food and Agriculture Organization of the United Nations v INPDAI*, (n 23).

[28] A Reinisch & G Kodek, '*Immunity of International Organizations and Alternative Remedies Against the United Nations,* Seminar on State Immunity, Vienna University (2006) available at <http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/neumann.pdf> accessed 10 February 2012, 4.

[29] *Giovanni Porru v Food and Agriculture Organization of the United Nations*, Rome Court of First Instance (Labour Section), Judgment of 25 June 1969, summarized in UNJY 1969, 238-239.

[30] ibid 238.

activities, the international organizations enjoy immunity with respect to activities by which they seek to fulfil specific purposes (*iure imperii*), but not with respect to the private activities (*uti privatus*).[31] However, in conclusion the Court based its decision in the specific case not on this distinction, but on a functional analysis whereby it stated that the employment relationship between the plaintiff and FAO was part of how the Organization arranges its internal structure and, therefore, belonged to the category of acts performed in the exercise of its functions, enjoying immunity from jurisdiction.[32]

Unlike the immunities of international organizations, the immunities of states are primarily based on the principle of sovereign equality.[33] Therefore, until early 20th century states enjoyed absolute immunity from jurisdiction of foreign national courts. With the advent of twentieth century and the rise in international trade and commercial activities between states, a distinction between the sovereign or governmental acts (*acta jure imperii*) and non-sovereign or private acts (*acta jure gestionis)* gradually developed to the effect that private acts such as commercial activities of states would not benefit from immunities.[34] Although there are a few advocates of the state-international organizations analogy,[35] there are also strong

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[31] ibid 239.

[32] ibid.

[33] I Brownlie, *Principles of Public International Law* (OUP 2003) 321.

[34] W T Fox, 'Competence of Courts in Regard to "Non-sovereign" Acts of Foreign States' (1941) 35 AJIL 632, 636; See J Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' (1983) 54 BYIL 75, for the difficulty in distinguishing *acta jure imperi* and *acta jure gestionis*.

[35] E Gaillard & I Pingel-Lenuzza (n 15), 4-5.

objections.[36] Higgins convincingly argues that the sovereign acts and private acts distinction does not apply to international organizations, since an international organization cannot act in 'sovereign authority.' To suggest otherwise, she argues, would be incorrectly to assimilate states to international organizations whose basis of claim to immunity is different.[37] Indeed, states and international organizations are not 'comparable' legal personalities[38] in that respect; international organizations do not have a territory or population and they carry out their activities relying on the services of nationals of states. The UN Secretariat further rejects any analogy:

> [t]he immunity accorded international organizations under this system of law [public international law] is an absolute immunity and must be distinguished from sovereign immunity which in some contemporary manifestations, at least is more restrictive.[39]

Whether the *acta jure imperii/gestionis* distinction restricts the immunities of international organizations has also came before the US courts. There are historical reasons for this, since the International Organizations Immunities Act (IOIA) enacted by the US government back in 1945 provides that international organizations designated by the President should receive the 'same immunity from suit and every

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[36] Robert Jennings states in his foreword to P Bekker's book on *The Legal Position of Intergovernmental Organizations* (n 18) that the argument with respect to international organizations 'which makes recourse even by analogy to the legal position of sovereigns [is] wholly unnecessary and illogical'; Singer argues that the jurisdictional immunity of international organizations presents problems that are similar in some respects to those of the immunities of states, when the range of their activities expanded during the 20th century. Therefore, he points out that '[a]lthough the doctrine of restrictive state immunity cannot be applied en bloc to international organizations, appropriate comparisons or analogies can be drawn' (Singer (n 11) 56-57); De Brabandere (n 5) 82-84.

[37] R Higgins, *Problems and Process, International Law and How We Use it* (Oxford: Clarendon Press 1994), 93.

[38] De Brabandere (n 5) 83.

[39] UN Secretariat, Memorandum to the Legal Advisor United Nations Relief and Works Agency for Palestine Refugees in the Near East, UNJY 1984, 188 [32].

form of judicial process as is enjoyed by foreign governments.'[40] The US Foreign Sovereign Immunities Act of 1976 (FSIA)[41] introduced restrictions to the immunities of foreign governments in certain circumstances. This led to the view that the same restrictions also extended to immunities of international organizations since the IOIA applies to international organizations as well.[42] The applicant relied on this argument in *Atkinson v. The Inter-American Development Bank et al* before the United States Court of Appeals for the District of Columbia Circuit, when she sought a declaratory judgment that her former husband's employer, the Inter-American Development Bank, was not immune from garnishment proceedings so that she could enforce two state court judgments against him by garnishing his wages.[43] The Court concluded that even if the IOIA's reference to the law of immunity of foreign sovereigns is an evolving one that incorporates the commercial activities exception to immunity, the appellant's garnishment proceeding would not come within that exception since it does not rest on a commercial activity of the Bank; therefore the Bank is immune from jurisdiction.[44]

However, reference should be made to a recent case before the US courts against the UN concerning sex discrimination. The applicants in the case of *Cynthia Brzak, Nasr Ishak v United Nations* worked for the United Nations High Commissioner for Refugees (UNHCR) and sued the UN and the individual defendants in the District

[40] 22 U.S.C. § 288 a (b).

[41] 28 U.S.C. § 1602-11.

[42] See *Atkinson v Inter-American Dev. Bank* 156 F. 3d 1335, 1340-42 (DC.Cir. 1998).

[43] ibid.

[44] ibid.

Court for the Southern District of New York, alleging sex discrimination under several statutory and state common law rule.[45] The district Court dismissed the claims for lack of subject-matter jurisdiction on the grounds that the UN and the individual defendants enjoy absolute and functional immunity respectively. Before the US Court of Appeals for the Second Circuit,[46] the appellants relied on the same argument that international organizations designated by the President no longer have absolute immunity under IOIA, since FSIA restricts their immunities. Nevertheless, the Court, while affirming that the UN is immune from jurisdiction, highlighted the special position of the UN in comparison to other international organizations where it stated:

> […] whatever immunities are possessed by other international organizations, the CPIUN [Convention on the Privileges and the Immunities of the United Nations] unequivocally grants the United Nations absolute immunity without exception.[47]

The UN responded to attempts to restrict its immunity before the US Courts, by a statement of the United Nations Office of Legal Affairs:

> Attempts have been made to apply the restrictive theory to international organizations, including the United Nations, based on a similar distinction between non-commercial and commercial activities […] As far as we are aware, no attempt to apply the restrictive theory to the United Nations has been successful. In this respect, we would note that the United States Government, in briefs submitted to the [US] courts in cases involving the United Nations, has supported the United Nations position that the restrictive theory of state immunity does not apply to the United Nations, *inter alia*, because the United Nations derives its immunity from international obligations based on treaties to which the United States is a party, i.e. the Charter of the United Nations and the Convention on the Privileges and

45 *Brzak v United Nations*, 551 F. Supp. 2d 313, 318 (S.D.N.Y. 2008).

46 *Cynthia Brzak, Nasr Ishak v United Nations*, 597 F. 3d 107, 110 (2d Cir. 2010).

47 ibid.

Immunities of the United Nations, which do not recognize any difference between non-commercial and commercial. As we understand, the United States Government has recognized the application of the restrictive immunity theory to other international organizations with which it does not have agreements similar to those it has with the UN[48]

**3. Assessment of the Immunity of the UN**

Consistently, the UN does not participate in the national court proceedings that question its immunity; the Organization takes the view that:

> Since international organizations are recognized entities in international law, courts are required to recognize their immunities. It is not necessary for international organizations to claim the immunities to which they are entitled since such immunity exists as a matter of law and is a fact of which judicial notice must be taken. In practice, a suggestion of immunity is normally made to a court on behalf of an international organization by the competent executive authorities of the States concerned. It goes without saying that in such cases the international organization is not submitting to the jurisdiction of the Court[49]

Shortly after the decision against FAO on the rent contract dispute became available, the Italian government, as the government of the host state, extended its services to defend the Organization's immunity before the Italian Courts and initiated preparations to pass a legislation in the Italian Parliament regarding the 'immunity from measures of execution of foreign States and international organizations.' However, FAO considered that 'these developments did not resolve the fundamental

[48] Note prepared by the General Legal Division of the Office of Legal Affairs, on Participation of Organizations of the United Nations System in Competitive Bidding Exercises Conducted by Governments, UNJY 1999, 422 [19].

[49] UN Secretariat, Memorandum (n 39), UNJY 1984, 189; see The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency Concerning Their Status, Privileges and Immunities, UN Doc A/CN.4/L. 118 and Add. 1 and 2, 223-224 [72]; see O Spijkers, 'The Immunity of the United Nations in Relation to the Genocide in Srebrenica in the Eyes of a Dutch District Court' (2009) 13 Journal of International Peacekeeping 197, 200.

problem of ensuring that the Organization enjoyed full immunity from legal process.'[50]

The UN system has been cautious about protecting its immunities even in instances where the Organization could be a potential applicant before national courts, such as in potential claims for seeking recovery from staff members who have committed gross negligence and/or fraud. The UN Secretariat summarizes the legal position of the Organization in these words:

> […] referring cases before national courts, would have serious ramifications for the privileges and immunities of the United Nations. By initiating such proceedings before the national courts, the Organization could allow its internal regulations and rules and policies to be examined by the courts which might question whether the rights of the person from whom recovery has been sought have been observed. Further the Courts might apply standards to the Organization that are germane to that judicial system.[51]

Reinisch, who undertook a comprehensive review of the decisions of the national courts points out that 'the overwhelming majority of the cases involving the UN resulted in the acceptance of immunity.'[52] As observed, national courts either directly uphold the absolute immunity of the Organization under the applicable treaties, or they unconvincingly mention the commercial, non-commercial divide but rightly refrain from directly relying on it. Further the functional immunity of international

[50] FAO Council, 87th Session (June 1985), UNJY 1985, 81-82.

[51] UN Secretariat, Memorandum to the Director, Management of Policy Office, Department of Management, UNJY 1999, 403 [20].

[52] A Reinisch, *Challenging Acts of International Organizations Before National Courts* (OUP 2010), 79.

organizations doctrine has not been very helpful either, since courts are more inclined to give UN a special position as opposed to other international organizations, by agreeing to the absolute immunity regime under the General Convention. It is further debatable if the national courts are appropriate venues to discuss the scope of the functions of the UN, not only because such discussion could make a court consider national interests as opposed to the independence of the UN, but also because it is doubtful if such exercise would result in consistent jurisprudence across national courts.

Finally, even alleged serious violations of human rights law and IHL have been unsuccessful in restricting the immunity of the UN. In a high-profile case brought in the Netherlands by the Association of Citizens Mothers of Srebrenica, who were representing the surviving relatives of the boys and men who were killed in the 1995 Srebrenica genocide, the applicants claimed UN was responsible for failure to prevent genocide.[53] The District Court remarked that no rights could be derived from any other international law standards, such as the Convention on the Prevention and Punishment of the Crime of Genocide or Article 6 (right to access to a court of law) of the ECHR that make an exception to the immunity of the UN even in the violations of *jus cogens* norms.[54] The Appeal Court and the Supreme Court in the Hague upheld

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[53] *The Association of Citizens Mothers of Srebrenica v the State of the Netherlands and the United Nations*, 295247/HA ZA 07-2973 (10 July 2008), the official judgment is in Dutch, references are made to the non-binding English translation at <http://www.asser.nl/upload/documents/20120420T023627-Decision%20District%20Court%20The%20Hague%2010%20July%202008%20(English).pdf> accessed 20 April 2012.

[54]ibid [5.16-5.22]; see also *Manderlier v United Nations and Belgian State*, Brussels Court of First Instance, Judgment, (11 May 1966), summarized in UNJY 1966, 283, where the Court upheld the immunity of the UN, despite the applicant's claim that his right to a hearing by a tribunal under Article 10 of the Universal Declaration of Human Rights was violated if he is unable to sue the UN before domestic courts, in the absence of a competent international tribunal.

the decision of the District Court.[55] As the latest attempt, the Association of Citizens Mothers of Srebrenica brought their case before the ECtHR, which agreed with the Dutch Courts on absolute immunity of the UN in *Stichting Mothers of Srebrenica and Others v the Netherlands*.[56] The ECtHR has been heavily influenced by the recent ruling of the ICJ in *Jurisdictional Immunities of the State (Germany v Italy: Greece Invervening)* whereby the ICJ held that 'under customary international law as it presently stands, a state is not deprived of immunity by the reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict' and that the State immunity is not effected even under violation of a *jus cogens* rule.[57] As a result, the ECtHR has decided that 'the grant of immunity to the United Nations served a legitimate purpose and was not disproportionate.'[58]

## 4. Waivers of Immunity

The General Convention seeks to balance absolute immunity in some ways. Under Article V, Section 18, officials of the UN enjoy functional immunity. Article VIII, Section 29 obliges the UN 'to make provisions for appropriate modes of settlement of

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[55] *The Association of Citizens Mothers of Srebrenica v the State of the Netherlands and the United Nations*, 200.022.151/01 (30 March 2010); *Stichting Mothers of Srebrenica v the State of the Netherlands and the United Nations*, 10/04437 (13 April 2012).

[56] *Stichting Mothers of Srebrenica and Others v the Netherlands*, ECtHR, Decision, 65542/12 (11 June 2013).

[57] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment of 3 February 2012, [91], [158]. The ICJ held that no conflict exists between rules of *jus cogens* and customary rules of state immunity as they address different matters and rules of immunity are procedural in character. The Court further added that rules of *jus cogens* do not confer courts a jurisdiction that they would not otherwise possess (ibid [93-97]).

[58] *Stichting Mothers of Srebrenica and Others v the Netherlands* (n 56) [169].

disputes arising out of contracts or other disputes of a private law character to which the UN is a party, and disputes involving any official of the UN who by reason of his official position enjoys immunity, if immunity has not been waived by Secretary General.' Last but not least, the General Convention contains provisions on waivers of immunity.

According to Article V, Section 20, the Secretary General 'shall have the right and duty to waive the immunity of an official 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 UN.' The General Convention sets out 'clear criteria' only for the waiver of immunity of UN officials but not for the immunity of the UN.[59] Under Article II, Section 2 all waivers should be express. National courts have been prudent when they had to decide whether a waiver of immunity by the UN existed and have scrutinized whether the Secretary General has made an express waiver in each case.[60]

In the recent case of *Cynthia Brzak, Nasr Ishak v United Nations*, the US Court of Appeals for the Second Circuit pointed out that in order for a waiver of immunity by the UN to be accepted it should be expressly stated; to argue otherwise would be reading 'the word "expressly" out of the (CPIUN) [the General Convention].'[61]

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[59] Verdirame (n 1), 356; Rawski (n 3), 111.

[60] A Reinisch, *Challenging Acts of International Organizations Before National Courts* (n 52) 96.

[61] *Cynthia Brzak, Nasr Ishak v United Nations*, (n 46); see *Mendaro v World Bank* , 717 F2d 610 (DC Cir 1983).

The UN practice suggests that the right and the duty to waive immunities is employed occasionally, and in the majority of the cases it is employed to waive the immunity of UN officials not the Organization itself.[62] While there has been no comprehensive statement by the UN on when a duty to waive immunity exists, the practice of the Organization reveals that especially with respect to accusations of serious crimes and gross misconduct and child abuse, internal investigations would be conducted which may result in the waiver of immunity.[63]

The Secretary-General seems to have the exclusive authority in deciding whether to waive immunity or not, and his decision cannot be appealed. The only option of review is, if a request as such is made to the ICJ, by a competent organ or a specialized agency of the UN under Section 30 of the General Convention. The Secretary-General's authority in this respect has not been before the ICJ to date. So far, two cases that arose out of a dispute under the General Convention has been referred to the Court; both referrals have been made by the Economic and Social Council and both concerned the immunities of experts on mission.[64] In *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the UN*

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[62] Verdirame (n 1), 357-358; for the few occasions of waivers of immunity of the UN see A J Miller, 'The Privileges and Immunities of the United Nations' (2009) 6 International Organizations Law Review 7, 88 et seq.

[63] See Report of the Special Committee on Peacekeeping Operations on Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, UN Doc A/54/839, (20 March 2000) [66]; Report of the Secretary-General on Children and Armed Conflict (7 September 2001) UN Doc A/56/342-S/2001/852 [36].

[64] *Applicability of Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, ICJ Reports 1989, 177; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the UN Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, 62.

*Commission on Human Rights*, the ICJ indirectly confirmed the decision of the Secretary-General on immunity waivers as final in almost all cases.[65]

## 5. Issues Specific to the Immunity of UN Post-conflict Administrations

When the UN takes over the entire governance of a territory, 'acting as a surrogate state,' the appropriateness of the immunity of the Organization is open to serious question.[66] Even when the Organization partially administers a territory, the degree of intrusiveness in the internal matters of the administered territory would raise concerns with respect to the compatibility of the immunity of the UN with its governance tasks. The rationale for immunity, i.e. protection against the unilateral interference of the host state so that the Organization can fulfil its functions independently is less convincing under these circumstances. The Ombudsperson in Kosovo best summarizes the situation, as 'there is no need for a government to be protected against itself.'[67] However, not everyone shares the same viewpoint. According to Brabendere, 'the functional underpinning of institutional immunity is perhaps even more crucial' in the administration of territories, 'in order to guarantee the independent accomplishment of such intrusive and comprehensive mandates.'[68]

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[65] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the UN Commission on Human Rights* (n 64) [60].

[66] See 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); Stahn (n 3), 581; Rawski (n 3), 103-104.

[67] Ombudsperson Institution in Kosovo, Special Report No 1 (n 66) [23].

[68] De Brabandere (n 5), 81.

In the practice of the UN, no explicit exception or adjustments have been made to the immunity system when the Organization exercises governance tasks. An often-discussed example has been the sweeping immunity regime that has applied to the UN Mission in Kosovo (UNMIK) and the Kosovo Force (KFOR) under UNMIK Regulation No 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000). Accordingly, KFOR and UNMIK and their property, funds, and assets are immune from any legal process;[69] thus transposing the absolute immunity regime under Article II (2) of the General Convention to KFOR and UNMIK.[70] This far-reaching immunity was severely criticized, as no matter what the character and consequences of the acts undertaken by UNMIK, they were removed from the jurisdiction of national courts, making it very difficult 'if not impossible for individuals to defend their rights against governmental authorities.'[71] Further, UNMIK personnel, including locally recruited personnel, were immune from legal process in respect of all acts performed by them in their official capacity (Section 3.3). The former Assistant Secretary-General for Peacekeeping Operations justified the adoption of UNMIK Regulation 2000/47 'with one major concern in mind, which is to protect the personnel of these various organizations [UN, OSCE, EU] as needed in local courts.'[72]

The UN Transitional Administration in East Timor (UNTAET) refrained from adopting a regulation along the same lines as UNMIK Regulation No 2000/47. Still,

[69] Sections 2 & 3.

[70] Stahn (n 3) 584.

[71] OSCE Mission in Kosovo, Review 1: The Criminal Justice System in Kosovo (February-July 2000), (10 August 2000) 19; See also, Ombudsperson Institution in Kosovo, Special Report No 1 (n 66).

[72] UNSC Official Records, 4190th Meeting (24 August 2000) UN Doc S/PV, 19.

the Special Representative of the Secretary-General in East Timor indicated that the General Convention applied fully to UNTAET staff.[73] With respect to immunity of the UNTAET, specific regulations adopted by the administration suggested that some executive decisions of the Special Representative could be challenged before the competent judicial authorities in East Timor.[74] However, as Stahn points out, 'the absence of clear provisions created considerable confusion and ambiguity' about UNTAET's immunity before East Timorese courts.[75]

Immunities are often incorporated into Status of Mission Agreements between the UN and the states concerned. In the case of the United Nations Transitional Authority in Cambodia (UNTAC), an agreement incorporating the privileges and immunities under the General Convention was signed between the UN and Cambodia.[76] On other occasions, states have included provisions on immunities in agreements on transfer of administration of a territory to the UN. Such was the case in the administration of West New Guinea (West Irian) by the United Nations Temporary Executive Authority (UNTEA), where the General Convention applied.[77] In some instances, the existing SOFAS were modified to include the immunities of the UN administration; an example is the extension of Article II of the General Convention to United Nations

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[73] Rawski (n 3) 118.

[74] See for instance, UNTAET Regulation No 2000/17 on the Prohibition of Logging Operations and the Export of Wood from East Timor (10 May 2000) UNTAET/REG/2000/17 sections 6.4 & 6.5 and UNTAET Regulation No 2000/19 on Protected Places (30 June 2000) UNTAET/REG/2000/19 sections 8.4 & 8.5.

[75] Stahn (n 3) 586.

[76] Agreement Between the Supreme National Council of Cambodia and the United Nations on the Status of the United Nations Transitional Authority in Cambodia (signed and entered into force on 7 May 1992) 1673 UNTS 363, art III (3), art IV (14), arts VI (22) & VI (24).

[77] Agreement Between the Republic of Indonesia and the Kingdom of Netherlands Concerning West New Guinea (West Irian) (signed 15 August 1962, entered into force 21 September 1962) 6311 UNTS 274, art XXVI.

Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) under the existing SOFA between the UN and Croatia.[78]

An examination of pleas for waivers of immunity of post-conflict administrations suggests that that UN is likely to waive the immunity of its officials when they are involved with serious crimes; but that the institutional immunities remain intact.[79] In Kosovo, due an international arrest warrant seeking the arrest of a UNMIK official to be prosecuted under Rwandan law for genocide, the Secretary General waived the official's immunity so that he could be detained and subject to legal proceedings with a view to his possible extradition to Rwanda to stand trial.[80] Further, UNMIK undertook to request an automatic waiver of immunity from the Secretary-General whenever an UNMIK staff member is suspected of 'engaging or facilitating in trafficking in women or children, or suspected of using the services of a woman that they knew was trafficked.'[81] In East Timor, when an UNTAET official was involved in a car accident that resulted in the death of an East Timorese citizen, the Special Representative insisted with the Secretary-General that the official's 'immunity be

[78] UNSC Res 1037 (15 January 1996) UN Doc S/RES/1037, [13]; see also, Exchange of letters Constituting an Agreement Between the United Nations and the Government of Croatia, Supplementing the Agreement Regarding the United Nations Forces and Operations in the Republic of Croatia, Zagreb 26 January and 2 February 1996, UNJY 1996, 14-15; Agreement Between the United Nations and the Government of Croatia Regarding the Status of the United Nations Forces and Operations in Croatia (signed and entered into force 15 May 1995), UNJY 1995, 42 et seq, arts 3 & 4 and 15.

[79] Rawski suggests that '[…] both UNMIK and UNTAET have invoked or threatened to invoke immunity where there was a question of whether the rights of Timorese or Kosovar citizens have systematically been violated as a consequence of the implementation of mission policy' (Rawski (n 3) 119)

[80] *Mbarushimana against the Secretary-General of the United Nations*, Administrative Tribunal of the United Nations, Case No 1287, Judgment No 1192 (30 September 2004) 4.

[81] UNMIK, Combating Human Trafficking in Kosovo Strategy & Commitment (May 2004) 18, available at <http://www.unmikonline.org/misc/UNMIK_Whit_paper_on_trafficking.pdf> accessed 1 July 2012; see also Report of the Secretary- General on Special Measures for Protection From Sexual Exploitation and Sexual Abuse (17 February 2012) UN Doc A/66/699, [36].

lifted and that he be brought to a Judge in Dili, to show that no one should be above the law.'[82]

The immunity of post-conflict administrations has been widely criticized, especially in the context of land dispossessions and executive and/or excessive periods of pre-trial detention. The Ombudsperson in Kosovo received complaints, mainly against KFOR but also against UNMIK for occupation and damage to private property with the lack of administrative or judicial remedies to challenge occupations and to claim compensation for financial and material losses.[83] The Ombudsperson observed that property dispossession violate the right to property under Article 1 of Protocol 1 to ECHR, the right to respect for the home under Article 8, and the right of access to a court guaranteed under Article 6.[84] Land and property disputes have been an integral part of the conflict in East Timor. Under UNTAET Regulation No 1, UNTAET had the sole authority to administer immovable and movable property.[85] UNTAET proposed to establish a land claims commission where land and property disputes would be referred to; however, such a commission was never established.[86] The administration tried to regulate private and public land without significant

[82] UNTAET Press Briefing Note, 'SRSG Briefs National Council' (13 December 2000); However, Rawski notes that shortly after the Secretary General announced that the official's immunity would be waived, he was released and allowed to return to Finland, his state of nationality (Rawski (n 3) 120).

[83] Ombudsperson Institution in Kosovo, Special Report No 1 (n 66).

[84] ibid.

[85] UNTAET Regulation No 1999/1 on the Authority of Transitional Administration in East Timor (27 November 1999) UNTAET/REG/1999/1, section 7.1.

[86] D Fitzpatrick, 'Mediating Land Conflict in East Timor' in *Making Land Work* (published by the Australian Agency for International Development (AusAID) 2008), 180.

consultation with East Timorese citizens and without an effective system to resolve disputes.[87]

With respect to executive and lengthy pre-trial detentions, the Ombudsperson and NGOs have been highly critical of UNMIK. Those detained in Kosovo under executive orders of the Special Representative complained to the Ombudsperson about the lack of a lawful basis for their detention, the failure of any governmental authority to inform them fully of the grounds of their detention, and the lack of any mechanism through which they could challenge their detention and request compensation for unlawful detention.[88]

Extending the rationale for grants of immunity to international organizations does not seem to apply convincingly to the circumstances prevailing in the administration of territories, where the post-conflict administration acts like a state. The Ombudsperson in Kosovo voiced the concerns common in legal literature and to NGOs when he stated that:

> […] no democratic state operating under the rule of law accords itself total immunity from any administrative, civil or criminal responsibility. Such blanket lack of accountability paves the way for the impunity of the state. […] the fundamental precept of the rule of law is that the executive and legislative authorities are bound by the law and are not above it.

Nevertheless, states have not articulated any strong objections against the immunities of international administrations to date. Some authors even assert that state practice

[87] Rawski (n 3) 121.

[88] Ombudsperson Institution in Kosovo, Special Report No 3 on the Conformity of Deprivations of Liberty under 'Executive Orders' with Recognized International Standards (29 June 2001), [2].

towards the acceptance of UN immunity has led to the formation of a customary law in this area.[89] Clearly, the UN does not show any sign of 'softening' its practice with respect to immunities. In practice, the mandates of post-conflict administrations can be broad, complex and intrusive, in many instances covering the entire reconstruction and capacity building of state institutions and requiring no undue interference from host states. Yet, the tension between immunities and protection of human rights seems to be a recurrent challenge for any UN post-conflict administration. This challenge has also been acknowledged by the ICJ in the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunals* within the context of disputes between the UN and its staff:

> 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.[90]

### 6. Is there an 'Obligation' to Provide for Alternative Means of Dispute Settlement for the UN?

Section 29 of the General Convention tries to moderate the impact of immunities before national courts, with provisions for alternative means to settle disputes (a) 'arising out of contracts or other disputes of a private law character, to which the

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[89] See for instance, Amerasinghe (n 13) 345; Singer (n 11) 98; De Brabandere (n 5), 107; J Werzer, 'The UN Human Rights Obligations and Immunity: An Oxymoron Casting a Shadow on the Transitional Administration in Kosovo and East Timor,' (2008) 77 Nordic Journal of International law 105, 122; contra H Fox, *Law of State Immunity* (OUP 2008) 726; P Sands & P Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell 2009) 489.

[90] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunals*, Advisory Opinion, ICJ Reports 1954, 47, 57.

United Nations is a party and (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.' The UN Legal Counsel in the Oral Proceedings of the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the UN Commission on Human Rights* confirmed that Section 29 requires the UN to make provision for appropriate modes of settlement of private disputes, with the intention 'to provide a complete remedy system to private parties who allege to have been harmed by actions of the United Nations or by its agents acting within the scope of their mandate.'[91] Section 29 does not elaborate on the types of dispute settlement procedures employed by the UN. The practice of the Organization reveals that an arbitration clause pursuant to the UNCITRAL [United Nations Commission on International Trade Law] Arbitration Rules is inserted into all commercial agreements that are entered into.[92] Further, the UN Legal Counsel in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the UN Commission on Human Rights* pointed out that it is 'neither feasible, practical' nor 'economical' to establish standing claims bodies to deal with private law disputes since these disputes could arise in any of the UN member states and out of various factual situations.[93]

Section 29 does not clarify the relationship between immunities and provisions for alternative means of dispute settlement, i.e. whether the grant of immunity is

[91] Verbatim Record of the Public Sitting held on 10 December 1998, in the case concerning the *Difference Relating to Immunity from Legal Process of A Special Rapporteur of the Commission on Human Rights*: H Corell, Legal Counsel of the UN Oral Statement, UN Doc CR 1998/17, 9 [6].

[92] ibid

[93] ibid 10 [12].

conditional upon the availability of alternative means of dispute settlement.[94] The ICJ does not accept a conditional relation between the two, as the Court points out in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the UN Commission on Human Rights* 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 by its agents acting in their official capacity.'[95] More recently, in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* the ICJ explicitly stated that such a rule does not exist: 'the Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State immunity dependent upon the existence of effective alternative of securing redress.'[96]

The European Court of Human Rights (ECtHR) tried to ascertain the link between the immunity of international organizations and the availability of alternative means of dispute settlement in a number of cases on the right to access to a court.[97] The Court's starting point in the famous case of *Waite and Kennedy v Germany*, on whether granting the European Space Agency (ESA) immunity from German jurisdiction was permissible under the ECHR, was that 'the attribution of privileges and immunities to international organizations is an essential means of ensuring the proper functioning of such organizations free from unilateral interference by individual governments' and

[94] Concurring, De Brabandere (n 5) 10-11.

[95] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the UN Commission on Human Rights* (n 64) [66].

[96] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 57) [101].

[97] European Convention for the Protection of Human Rights and Fundamental Freedoms, (signed 4 November 1950, entered into force 3 March 1953) 213 UNTS 221, art 6.

this 'long standing practice' enabling the good working of the international organizations is therefore 'legitimate.'[98] The Court then moved on to assess the proportionality of the exception to the right of access to a court through the availability of reasonable alternative means of legal process as 'material factor' in this assessment, but it refrained from conditioning the grant of immunity on the availability of alternative means.[99] Taking into account that there were available alternative means of legal process, the Court decided that the limitation on the right to access to German Courts neither impaired the essence of this right nor was disproportionate.[100] In the case of *Beer and Regan v Germany*[101] decided on the same day, the Court's reasoning was similar. After the ruling of the ICJ in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening),* the ECtHR expressly and more confidently stated that the recognition of immunity does not *ipso facto* constitute a violation of the rights of access to a court even, in the absence of an alternative remedy.[102]

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[98] *Waite and Kennedy v Germany*, ECtHR, Judgment (Grand Chamber), 26083/94, (18 February 1999) [63].

[99] Within context of *Waite and Kennedy v Germany* case the alternative means were the ESA Appeals Board, which was independent of ESA and had jurisdiction to hear disputes between the Agency and its staff [69], and the possibility of recourse to local courts against the firms that have employed temporary workers and hired them to ESA (ibid [70]); See E Gaillard & I Pingel-Lenuzza (n 14), 7, for the criticism that it is doubtful whether the Court made an adequate assessment of the effectiveness of the alternative means.

[100] *Waite and Kennedy v Germany* (n 98) [73].

[101] *Beer and Regan v Germany*, ECtHR, Judgment (Grand Chamber), 28934/95, (18 February 1999) [58]; See also, *Al-Adsani v the United Kingdom*, ECtHR, Judgment (Grand Chamber), 35763/97, (21 November 2001) [53-56]; *Mc Elhinney v Ireland*, ECtHR, Judgment (Grand Chamber), 31253/96, (21 November 2001) [38-40]; *Fogarty v the United Kingdom*, ECtHR, Judgment (Grand Chamber), 37112/97, (21 November 2001) [38-39].

[102] *Stichting Mothers of Srebrenica and Others v the Netherlands* (n 56) [164].

## 7. Conclusion

The Dutch Court of Appeal in the case of *Mothers of Srebrenica v the State of the Netherlands and the United Nations* offers substantial insight into why the UN is unlikely to give up its absolute immunity before national courts. Accordingly, the Dutch Court highlights the special position that the Organization has amongst other international organizations, since it has the exclusive responsibility and far- reaching powers to maintain international peace and security.[103] These extensive powers might cause the UN more often than not to get involved with conflict situations where the interests of several parties are at stake. Therefore, the Court concludes:

> [t]here is a real risk that if the UN did not enjoy, or only partially enjoyed immunity from prosecution, the UN would be exposed to claims by parties to the conflict and summoned before national courts of law of the country in which the conflict takes place. In view of the sensitivity of the conflicts in which the UN may be involved this might include situations in which the UN is summoned for the sole reason of obstructing any actions undertaken by the Security Council, or even preventing it altogether. It is not inconceivable either, that the UN is summoned in countries where the judiciary is not up to the requirements set by the ECHR. The immunity from prosecution granted to the UN therefore is closely connected to the public interest pertaining in the world. For this reason it is very important that the UN has the broadest immunity allowing for as little discussion as possible.[104]

There is a certain degree of truth in the above statement. More importantly, the fact that in the practice of the UN, the Organization's immunity is absolute makes it more realistic and efficient to put the emphasis on the availability of alternative means of dispute settlement, rather than on removal of immunities to enhance the

[103] *The Association of Citizens Mothers of Srebrenica v the State of the Netherlands and the United Nations*, (n 55) [5.7].

[104] ibid.

accountability of the Organization. The availability of alternative means of dispute settlement is all the more important within the specific context of post-conflict administrations, where the UN acts as the surrogate government, since recourse to independent bodies established by the UN could be the only way for individuals to seek compensation and redress against the Organization.

Although there is a clear tendency to link immunities to the availability of alternative means of dispute settlement, neither UN practice nor international jurisprudence regrettably supplies enough evidence on creation of a relationship of conditionality between the two. Nevertheless, it can convincingly be argued that the UN imposes on itself a duty to provide alternative means of dispute settlement at least under Section 29 of the General Convention.

However, for UN post-conflict administrations, a corollary obligation to provide for alternative means of dispute settlement should follow from the purposes of the realization of ‘promotion of rule of law’ and ‘protection of human rights’ pertaining to the specific mandates of the UN post-conflict administrations.

# CHAPTER 7

# MECHANISMS TO ENGAGE THE ACCOUNTABILITY OF UN POST-CONFLICT ADMINISTRATIONS

## 1. Introduction

UN post-conflict administrations, like any other peacekeeping operation, are primarily subject to a political, intra-institutional control manifesting itself mainly through periodic reports submitted by the administrations to the relevant UN organ, i.e. the Security Council in most cases.[1] A narrowly defined legal accountability of peacekeeping operations towards individuals has further been engaged through UN Claims Commissions, an internal mechanism to address demands of individuals affected by the actions of peacekeeping operations. Still, the exercise of often-extensive administrative powers, that reached the extent of a 'surrogate state' in East Timor and Kosovo, and lengthy authority over the local population of the post-conflict territories put the UN under intense pressure to create external and independent accountability mechanisms to review the acts of the territorial administrations. This pressure was most severe for the fully-fledged UN administration in Kosovo, which governed Kosovo for many years with no definite exit-strategy. Generally, attempts of domestic courts to put UN acts under scrutiny were frustrated by the broad immunities the Organization enjoys, and by the supremacy of Regulations issued by the post-conflict administrations over any other

[1] UNSC Res 1037 (15 January 1996) UN Doc S/RES/1037 [4]; UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244 [20]; UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272 [18].

applicable laws.[2] The UN post-conflict administrations, aware of the insufficiency of the claims commissions to address the increasing pleas for accountability, sought to establish mainly non-judicial accountability mechanisms in the administered territories.

Through evaluating the practice of these mechanisms in place, this Chapter explores the extent to which accountability of the UN towards the local population of the administered territories is effectively engaged.

## 2. Internal Accountability Mechanisms within UN Peacekeeping Context

### 2.1 UN Claims Commissions

Traditionally, UN Claims Commissions have been created within the context of peacekeeping operations as a consequence of the UN's official recognition that violations of the Organization's international obligations by its organs or agents in the performance of their duties entail its international responsibility and liability in compensation.[3] In conformity with section 29 of the General Convention on the Privileges and Immunities of the United Nations[4] on settlement of private law

[2] UNMIK Regulation No 1999/1 On the Authority of the Interim Administration in Kosovo (25 July 1999) UNMIK/REG/1999/1; UNMIK Regulation No 1999/24 On the Law Applicable in Kosovo (12 December 1999) UNMIK/REG/1999/24; UNTAET Regulation No 1999/1 On the Authority of the Transitional Administration in East Timor (27 November 1999) UNTAET/REG/1999/1.

[3] Report of the Secretary-General, 'Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations' (20 September 1996) UN Doc A/51/389 [7]; ILC, 'Report of the International Law Commission on the Work of its 56$^{th}$ Session' (3 May-4 June and 5 July-6 August 2004) UN Doc A/CN.4/545, 18.

[4] Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15.

disputes to which the UN is a party, paragraph 51 of the Model Status of Forces Agreement for Peacekeeping Operations[5] (the Model SOFA) provides that

> […] any dispute or claim of a private law character to which the United Nations peace-keeping operation or any member thereof is a party and over which the courts of the [host country/territory] do not have jurisdiction […] shall be settled by a standing claims commission to be established for that purpose. One member of the commission shall be appointed by the Secretary-General of the United Nations, one member by the Government and a chairman jointly by the Secretary-General and the Government […] All decisions shall require the approval of any two members. The awards of the commission shall be final and binding, unless the Secretary-General of the United Nations and the Government permit an appeal […].

Although the procedure provided for under paragraph 51 of the Model SOFA was reproduced in some agreements on status of peacekeeping operations including status of UN post-conflict administrations,[6] the UN has not established any standing claims commissions to date. Instead, third-party claims for personal injury or death and/or property loss or damage that are attributable to acts performed in connection with official duties by civilian or military members of the mission have been handled by internal and ad-hoc UN local claims review commissions/boards established in the missions.[7] UNMIK Regulation No 2000/47 on the Status, Privileges and Immunities

[5] Report of the Secretary-General, 'Comprehensive Review of the Whole Question of Peace-keeping Operations in All Their Aspects, Model Status of Forces Agreement for Peace-keeping Operations' (9 October 1990) UN Doc A/45/594.

[6] See Agreement Between the Supreme National Council of Cambodia and the United Nations on the Status of the United Nations Transitional Authority in Cambodia (signed & entered into force on 7 May 1992) 1673 UNTS 363 art 47; Agreement Between the United Nations and the Government of Croatia Regarding the Status of the United Nations Forces and Operations in Croatia (signed & entered into force 15 May 1995) UNJY 1995, 42 et seq. art 50 and Exchange of Letters Constituting an Agreement Between the United Nations and the Government of Croatia, supplementing the Agreement Regarding the United Nations Forces and Operations in the Republic of Croatia (signed & entered into force on 2 February 1996) UNJY 1996, 14-15.

[7] Report of the Secretary-General, 'Review of the Efficiency of the Administrative and Financial Functioning of the United Nations, Procedures in Place for Implementation of Article VII, Section 29,

of KFOR and UNMIK and Their Personnel in Kosovo reflects the UN practice in that respect where it states:

> Third party claims for property loss or damage and personal injury, illness or death arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not arise from "operational necessity" of either international presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for.[8]

Although the establishment of claims commissions provides the individuals in the administered territories with an opportunity to recover compensation for loss caused by the acts of the UN or its members, they have significant shortcomings.

### 2.1.1 'Operational Necessity' as Exemption from Liability

First, the principle of 'operational necessity' is a ground for exemption from liability in the practice of the claims commissions, although this principle has not been initially incorporated in the Model SOFA.[9] In the words of the Secretary-General, the responsibility of UN operations is subject to the exception of operational necessity, that is, 'where damage results from necessary actions taken by a peacekeeping force

of the Convention on the Privileges and Immunities of the United Nations' (24 April 1995) UN Doc A/C.5/49/65 [17]. According to the Secretary-General, even if the standing claims commissions were established, resort to them would be 'problematic in the context of Chapter VII operations where no "host Government" would be available to participate (ibid); UN Doc A/51/389 (n 3) [22].

[8] UNMIK/REG/2000/47 (18 August 2000) [7].

[9] See UN Doc A/51/389 (n 3) [15].

in the course of carrying out is operations in the pursuance of its mandates.'[10] This principle is obviously derived from 'military necessity' under IHL.[11] The Secretary-General lists four cumulative conditions to decide on the existence of the operational necessity exception in a given situation: there must be a good-faith conviction on the part of the force commander that an operational necessity exists; the operational need that prompted the action must be strictly necessary; leaving little or no time for the commander to pursue another, less destructive option; the act must be executed in pursuance of an operational plan; and finally the damage caused should be proportional to what is strictly necessary to achieve the operational goal.[12] Considering these conditions, operational necessity as an exemption from liability should apply more to the initial phases of administration of a territory and to the acts of military contingents, to the extent that the territory is in a state of armed conflict, rather than the acts of civilian components of territorial administrations.

Although the principle of operational necessity is conceptually similar to military necessity, it seems to imply a less strict standard for exemption from liability than the latter.[13] While military necessity does not justify in all cases 'absolute release' from

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[10] ibid [13].

[11] ibid [fn 5]: '[The concept of "operational necessity"] is distinguishable from the concept of "military necessity," which is limited to combat operations and is governed by the laws of war. Both concepts are, however, conceptually similar in that they serve as an exemption from liability, or a legitimization of an act that would otherwise be considered unlawful'; D Shraga, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law for Operations-Related Damage' (2000) 94 AJIL 406, 410; A Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006), 116.

[12] UN Doc A/51/389 (n 3) [14].

[13] See 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 (26 April 2001) [41-42] (Special Report No 1); C Stahn, *The Law and Practice of International Territorial Administration, Versailles to Iraq and Beyond* (CUP 2000), 628-629.

liability,[14] the invocation of operational necessity seems to preclude any possible compensation for the harm caused by UN forces.[15] According to the UN Secretary-General, the scope of UN liability for damage resulting from operational necessity is unclear.[16]

### 2.1.2 Procedural Problems

Article 6(1) of the European Convention on Human Rights (ECHR) provides that:

> In the determination of his civil rights and obligations […], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgments shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society.

The claims commissions fulfil none of the criteria under Article 6 (1). First, the discretion of the UN in the establishment and the composition of internal claims commissions[17] is incompatible with the right to an independent and impartial tribunal established by law. The Secretary-General points to this problem where he states: '[…] the mechanism established internally by the United Nations leaves the investigation, processing and final adjudication of the claims entirely in the hands of the Organization.'[18] Further, claims commissions are supposed to be set up at the time the mission is established, in practice they are set up when the need arises.[19] This

[14] H McCoubrey, 'The Nature of the Modern Doctrine of Military Necessity' (1991) 30 Mil L War Rev 215, 238; M Grenspan, *The Modern Law of Land Warfare* (University of California Press 1959), 314; Stahn (n 13) 629.

[15] See Special Report No 1 (n 13) [42].

[16] UN Doc A/51/389 (n 3) [29].

[17] See UNMIK/REG/2000/47 (n8) [7].

[18] UN Doc A/51/389 (n 3) [20]; Special Report No 1 (n 13) [75].

[19] UN Doc A/51/389 (n 3) [25].

arrangement adds to the power imbalance between the parties since it creates the risk that individuals could initially have no forum in which to bring their claims.[20]

Another equally important concern is that the right to a fair hearing is not observed. As the Venice Commission bluntly stated with regard to the UN administration in Kosovo, UNMIK provides no opportunity for individuals to be heard or represented by legal counsel and the only possible appeal from a decision of the claims commission is to send a memorandum to the UNMIK Director of Administration.[21] More specifically, as noted by the Kosovo Ombudsperson, the claimants do not have the right to have their views heard on two decisive threshold requirements before the claims commissions; first, in establishing whether the acts in question are attributable to KFOR or UNMIK, and second, on whether operational necessity could serve as an exemption from liability.[22]

Article 6 (1) stipulates that judgments should be made public and trials should be open to public unless it is in the interest of morals, public order or national security not to do so. However, the UN claims commissions carry out their work behind closed doors. As the Kosovo Ombudsperson stated in 2002, but as equally valid in 2013: '[…] virtually no information is publicly available about the existence, mechanisms or procedures of these commissions or claims offices.' To date, no information has been publicised about the number of claims settled or compensation

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[20] T Dannenbaum, 'Translating the Standard of Effective Control into A System of Effective Accountability' (2010) 51 Harvard International Law Journal 113, 127.

[21] European Commission for Democracy Through Law (Venice Commission), 'Opinion on Human Rights in Kosovo, Possible Establishment of Review Mechanisms' (2004) CDL-AD(2004)033 [61] (Opinion on Human Rights in Kosovo).

[22] Special Report No 1 (n 13) [40].

or damages awarded by them.'[23] Similarly, the Venice Commission rightly pointed out that: 'it remains impossible to obtain information from UNMIK about the status of pending claims or any statistical information about the number or type of claims resolved.'[24]

Over the years the number and complexity of the claims against the UN have increased, and the claims commissions have, according to the Secretary-General experienced 'growing backlogs and longer delays in the settlement of claims.'[25] In addition, the Secretary-General adds that during the period prior to the closure of an operation, new claimants who seek to obtain compensation before the UN departs from the territory submit substantial number of new claims, significant numbers of which remain unresolved following the termination of the UN operation.[26] The longer the delays get, the more individuals are deprived of effective remedies, the relationship between the Organization and the host states gets more strained, and the Organization becomes exposed to harsher criticism.[27]

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[23] Ombudsperson Institution in Kosovo, 'Second Annual Report 2001-2002' (10 July 2002) 3 (Second Annual Report).

[24] Opinion on Human Rights in Kosovo (n 21) [61].

[25] UN Doc A/51/389 (n 3) [26].

[26] ibid [28].

[27] ibid [26].

### 2.1.3 Compensation only for Claims of Private Law Character

UN Claims commissions only deal with claims (that could be characterized as claims) of a private law character. They mostly relate to 'non-consensual use and occupancy of premises, personal injury and property loss or damage arising from the ordinary operation of the force, and such injury and damage as result of combat operations.'[28]

The UN only accepts a limited tortious liability. In view of the substantial increase in the number and amount of third-party claims against the UN arising from peacekeeping operations, the General Assembly requested the Secretary-General to develop measures for limiting the liability of the UN.[29] Having considered the report of the Secretary-General on third-party liability[30] and the related report of the Advisory Committee on Administrative and Budgetary Questions,[31] the General Assembly adopted a Resolution on temporal and financial limitations for third-party liability of the Organization.[32] Accordingly, in respect of third-party claims against the Organization, compensable types of injury or loss are limited to 'economic loss' and no compensation is paid for non-economic loss, such as pain and suffering or

[28] ibid [3].

[29] UNGA Res 51/13 (4 November 1996); Shraga states that calls from the General Assembly for limiting the liability of the UN came at a time 'when the United Nations was overstretched and underfunded, its financial and human sources scarce' (Shraga (n 11) 410).

[30] Report of the Secretary-General, 'Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations' (21 May 1997) UN Doc A/51/903.

[31] Report of the Advisory Committee on Administrative and Budgetary Questions, 'Third-party Claims, Reform of the Procedures for Determining Reimbursement to Member States for Contingent-owned Equipment, Death and Disability Benefits' (1 October 1997) UN Doc A/52/410.

[32] UNGA Res 52/247 (17 July 1998).

moral anguish, as well as punitive or moral damages.[33] Further, the Organization does not pay compensation in regard to such claims submitted after six months from the time the damage, injury or loss was sustained or from the time it was discovered by the claimant, and in any event after one year from the termination of the mandate of the peacekeeping operation unless there are exceptional circumstances for a claim made at a later date to be accepted.[34] For claims arising from peacekeeping operations with short duration the six-month temporal limitation could be reasonable,[35] however for claims arising from acts of post-conflict administrations, a longer period within which submissions of claims might be fair and necessary.

### 2.2 Lump-sum (*en masse*) Agreements

A lump-sum agreement is a mode of settlement by which the Organization negotiates a settlement directly with the Government (normally of the host State) acting on behalf of its nationals.[36] The Government exercises its right to diplomatic protection of its nationals through submitting their claims to the UN and negotiating on their behalf a lump-sum amount in the settlement of claims. Once a lump-sum amount is agreed, the Government distributes it to its nationals as it sees fit.[37] A leading example of a lump-sum agreement was the settlement of a large number of claims against the UN for damage to persons or property arising from the UN operation in

[33] ibid [9(a)]-[9(e)]. The amount of compensation shall not exceed a maximum of 50,000 dollars unless there are exceptional circumstances.

[34] ibid [8].

[35] Shraga (n 11) 411.

[36] UN Doc A/51/389 (n 3) [34].

[37] ibid.

the Congo (ONUC) in the 1960s, through negotiations conducted by the Governments of Belgium, Greece, Italy, Luxembourg and Switzerland on behalf of their nationals.[38] While this mode of settlement could offer the Organization especially the advantages of 'efficiency and expediency of settlement,'[39] it is dependent upon the existence of a functioning government in the UN area of operation and the government's willingness to espouse the claims of its nationals.[40]

As the claims commissions and lump-sum agreements only deal with claims of private law character and compensate only economic loss, they could not be the sole mechanism to engage the accountability of the UN. Within context of post-conflict administrations additional accountability mechanisms were needed and created.

## 3. Non-Judicial Mechanisms Established by the UN Post-conflict Administrations

### 3.1 The Ombudsperson Institution[41]

The ombudsperson is traditionally a domestic mechanism that monitors the conduct of the executive authority to ensure that its actions are legal and fair.[42] The first

[38] ibid [36].

[39] ibid [34], [35].

[40] ibid [37]; see M Gibney, K Tomasevksi & J Vedsted-Hansen, 'Transnational State Responsibility for Violations of Human Rights' (1999) 12 Harvard Human Rights Journal 267, 280 for the view that Somalia in the 1990s could not fulfil its 'responsibility […] to seek redress for the harms suffered by its own citizens […] [m]ost likely as a result of the lack of an organized government in Mogadishu.'

[41] The terms 'ombudsperson' and 'ombudsman' are used interchangeably in the legal literature. For the purpose of this research the term 'ombudsperson' is preferred unless the term 'ombudsman' is included in the official title of an institution.

[42] See L C Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 Harvard Human Rights Journal 2, 8; see generally L C Reif (ed), *The International Ombudsman Anthology: Selected Writings From the International Ombudsman Institute* (Kluwer Law International 1999).

ombudsperson was established in Sweden in 1809.[43] In the early to mid-twentieth century the institution spread through Scandinavia, however it was not until the 1960s that the institution became popular among the world especially in Central and Eastern European, Commonwealth and Latin American countries.[44]

Generally, the ombudsman is a single person but the institution can consist of a number of persons; it has the power to launch investigations on receipt of a complaint or by its own motion into claims of maladministration and can make recommendations to address a violation of law or administrative principles.[45] In its reports, the Ombudsman can only make recommendations; its decisions are not legally binding.

Initially, the Ombudspersons had a general mandate of monitoring the observance of law by the executive. However, in the past decades the institution came to be recognized as a specific mechanism for the protection of human rights.[46] This development was also supported by international organizations. Vienna Declaration and Programme of Action adopted at World Conference on Human Rights (Vienna, 14-25 June 1993)[47] affirmed the importance of developing effective institutions for the promotion and protection of human rights. The Committee of the Ministers of the

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[43] See W Gellhorn, 'The Swedish Justiteomdusman' (1965) 75 Yale LJ 1.

[44] See for a survey Reif, 'Building Democratic Institutions' (n 42) 7-10 and Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff 2005) 294-299.

[45] Reif, 'Building Democratic Institutions' (n 42) 9; Zwanenburg, *Accountability of Peace Support Operations* (n 44) 296.

[46] See Zwanenburg (n 44) 296.

[47] UN Doc A/Conf. 157/24 (Part I), Chapter 3 (13 October 1993).

Council of Europe has further recommended that member states should establish effective national human rights institutions, in particular the ombudsperson.[48]

### 3.1.2 The 'International' Ombudsperson

Gradually, the ombudsperson institution gained recognition as an accountability mechanism controlling the actions of international organizations as well.[49] In the early 1990s, especially due to growing concerns about possible human rights violations by the UN forces, calls for an ombudsperson office began to rise within the UN itself. The Lessons Learned Unit of the Department of Peacekeeping Operations (DPKO) in its Report that reflected on UN's successes and failures in Somalia stated that:

> For the United Nations to successfully promote respect for human rights and good governance in collapsed states, as well as gain some measure of credibility, it must demonstrate a commitment to the principles of accountability and transparency in its own work. In UNOSOM, no independent oversight existed which could serve as an ombudsman to consider grievances registered by the local population against the United Nations. Without such a mechanism, the United Nations was perceived by many in Somalia to be "above the law," which undercut its efforts to promote human rights.[50]

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[48] See Recommendation No R (85) 13 of the Committee of Ministers to member states on the institution of the Ombudsman, 23 September 1985 and Recommendation No R (97) 14 of the Committee of Ministers to member states on the establishment of independent and national institutions for the promotion and protection of human rights, 30 September 1997.

[49] Stahn (n 13) 621; for instance, prominent examples were the World Bank Inspection Panel (established by International Bank for Reconstruction and Development Resolution No IBRD 93-10 and International Development Association Resolution No IDA 93-6 on 22 September 1993) where the parties whose rights or interests have been or are likely to be directly affected by an action or omission of the World Bank could apply, and the European Ombudsman (established by the Treaty on European Union (Treaty of Maastricht) [1993] OJ C 191/1) who investigates complains about maladministration in the institutions and bodies of the European Union.

[50] DPKO, The Comprehensive Report on Lessons Learned from United Nations Operation in Somalia (UNOSOM), April 1992-March 1995 <http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/UNOSOM.pdf> accessed 1 February 2013.

Similarly, the Secretary-General has consistently recommended that a public ombudsman should be established with all peacekeeping operations that would deal with individual complaints about the acts of UN peacekeepers that violate international humanitarian law and human rights law.[51]

While proposals for establishing ombudspersons in each UN peacekeeping operation have not been accepted to date, the institution is gaining recognition as a possible human rights accountability mechanism for UN administrations. Since these administrations have human rights mandates and exercise administrative authority analogous to national governments, an international ombudsperson could act like a national ombudsperson to monitor observance of human rights law by those who exercise executive authority in the territories in question. As Stahn points out, ombudsperson institutions 'enjoy particular prominence in the transitional administrations field because they provide an individualised and flexible form for human rights complaints and independent scrutiny, which identifies flaws in international governance, without combining them with directly legally binding sanctions for the respective administration.'[52]

An initial example has been the Ombudsman for Bosnia and Herzegovina established by Annex 6 of the General Framework Agreement for Peace in Bosnia and

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[51] Report of the Secretary-General, 'Protection of Civilians in Armed Conflict' (8 September 1999) UN Doc S/1999/957 [31]; Report of the Secretary-General, 'Implementation of the Recommendations of the Special Committee on Peacekeeping Operations' (26 January 2004) UN Doc A/58/694 [72].

[52] Stahn (n 13) 621-622.

Herzegovina (Dayton Peace Agreement).[53] Under Annex 6 of the Dayton Peace Agreement a Commission on Human Rights was established, which consisted of two structures: the Office of the Ombudsman and the Human Rights Chamber.[54] The Ombudsperson in Bosnia and Herzegovina was vested with extensive investigative powers over alleged violations of human rights, as provided for in the international agreements listed in the Dayton Peace Agreement.[55] The ombudsperson would give particular priority to 'severe or systematic violations' and cases of alleged discrimination.[56] The Dayton Peace Agreement provided mechanisms to ensure that the Ombudsperson's conclusions or recommendations were followed.[57] The Ombudsperson could initiate proceedings before the Human Rights Chamber if its recommendations are ignored.[58] However, the Ombudsperson's monitoring powers were limited to human rights violations by the 'parties' (the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srspska) to the Dayton Peace Agreement, excluding any control over the acts of the Office of the High Representative.

The jurisdiction of the Ombudsperson in Kosovo was ground breaking compared to that of the Ombudsman in Bosnia and Herzegovina, in that the former had 'jurisdiction to receive and investigate complaints from any person or entity in

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[53] General Framework Agreement for Peace in Bosnia and Herzegovina (14 December1995) 35 ILM 89 annex 6, art IV (Dayton Peace Agreement).

[54] ibid art II.

[55] ibid art II [2].

[56] ibid art V [3].

[57] ibid art V [4].

[58] ibid art V [7].

Kosovo concerning human rights violations and actions constituting an abuse of authority by *the interim civil administration* [UNMIK] or *any emerging central or local institution.*[59] The ombudsperson's monitoring powers over UNMIK were overshadowed by the fact that the ombudsperson would be appointed and removed from office by the Special Representative of the Secretary-General.[60] Although the appointment and removal by the Special Representative does not seem to jeopardize the independence and neutrality of the ombudsperson in effect, it still led to the unpleasant conclusion that the 'executive' appointed the person who would monitor its actions, an approach unfamiliar to selection of national ombudspersons.[61]

The ombudsperson in Kosovo has dealt with a large spectrum of human rights issues and alleged violations of human rights by UNMIK. Most cases concerned property issues (governmental takings of or damage to property, problems with gaining access to property etc.), employment issues (recruitment practices, unjust dismissals, etc.), or impunity issues (failures to investigate crimes etc.).[62] Further, the ombudsperson has investigated unlawful deprivations of liberty (Article 5 of the ECHR) imposed under a series of Executive Orders of the Special Representative, and lengthy detentions,[63]

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[59] UNMIK Regulation No 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo (30 June 2000) UNMIK/REG/2000/38, section 3.1 (emphasis added).

[60] ibid sections 6.2 & 8.2.

[61] See Zwanenburg (n 44) 307).

[62] See for instance, Second Annual Report (n 23) 5, Annex 1; Ombudsperson Institution in Kosovo, 'Third Annual Report 2002-2003' (10 July 2003) 8 (Third Annual Report); Ombudsperson Institution in Kosovo, 'Fourth Annual Report 2003-2004' (12 July 2004) 31, Annex 1 (Fourth Annual Report).

[63] See, *Avdi Behluli v the United Nations Mission in Kosovo (UNMIK*), Ombudsperson Institution in Kosovo, 256/01, (12 September 2001*); Cele Gashi v the United Nations Mission in Kosovo (UNMIK)*, Ombudsperson Institution in Kosovo, 257/01, (12 September 2001); *Jusuf Veliu v the United Nations Mission in Kosovo (UNMIK)*, Ombudsperson Institution in Kosovo, 258/01, (12 September 2001); Ex officio Registration No 02/01 Concerning the Deprivation of Liberty of A.P.L, Ombudsperson Institution in Kosovo, (18 October 2001).

alleged violations of right to free elections under Article 3 of the Protocol No 1 to ECHR based on removal of individuals from electoral lists,[64] claims of ill-treatment by UNMIK Police in violation of Article 3 of the ECHR,[65] and so on.

The Ombudsperson has interpreted its mandate to investigate actions constituting an abuse of authority broadly[66] and has been highly critical of UNMIK especially with respect to three main issues: that the people of Kosovo were deprived of their basic rights and freedoms, lack of response by the Secretary General to its recommendations, and lack of cooperation by the UNMIK authorities. According to the Ombudsperson, UNMIK, which was established as a "surrogate state," paid no attention to the principle of separation of government powers or the rule of law, therefore the people of Kosovo were deprived of protection of their human rights and freedoms by the institution that was supposed to protect them.[67] As the Ombudsperson noted, the future of Kosovo 'looks bleak […] as Kosovo must prepare itself to be a 'human rights black hole,' in Europe and in the world.'[68] In Special Reports, the Ombudsperson raised concerns, among others, on the incompatibility with recognized international standards of the scope of the grant of immunity to

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[64]Ex officio Registration No 19/01 Regarding the Removal of Emrush Xhemajli, Gafurr Elshani and Sabit Gashi from the List of Candidates for the November 2001 Elections, Ombudsperson Institution in Kosovo, (29 October 2001).

[65] See for instance, *Hamdi Rashica v the United Nations Mission in Kosovo (UNMIK)*, Ombudsperson Institution in Kosovo, 52/01, (31 October 2001); *Shefqet Maliqi v the United Nations Mission in Kosovo (UNMIK)*, Ombudsperson Institution in Kosovo, 361/01, (13 March 2002); *Afrim Selaci v the United Nations Mission in Kosovo (UNMIK)*, Ombudsperson Institution in Kosovo, 84/00, (17 April 2003).

[66] Zwanenburg (n 44) 307.

[67] Second Annual Report (n 23) 1; Third Annual Report (n 62) 3.

[68] Second Annual Report (n 23) 5.

UNMIK and KFOR in their institutional capacities,[69] on the inadequate entrenchment of international human rights standards in the legal system of Kosovo,[70] and the absence of judicial control over deprivations of liberty imposed under Executive Orders issued by the Special Representative, and non-existence of an enforceable right to compensation for individuals whose rights have been violated in connection with detentions under these Orders.[71] While the Ombudsperson acknowledged that in time the human rights situation in Kosovo has improved to a degree in certain sectors, it consistently reiterated that the general level of human rights protection was still below minimum international standards several years after the establishment of UNMIK.[72]

Another major concern has been the inadequate response or total lack of reaction by the Special Representative to the recommendations of the Ombudsperson, in violation of section 4.11 of UNMIK Regulation No 2000/38 establishing the Ombudsperson Institution.[73] As the Ombudsperson has rightly held:

> As long as UNMIK does not respond to the issues raised by the Ombudsperson and fails to effectively ensure that the local institutions under its supervision react in an

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[69] Special Report No 1 (n 13).

[70] Ombudsperson Institution in Kosovo, Special Report No 2 on Certain Aspects of UNMIK Regulation No 2000/59 Amending UNMIK Regulation No 1999/24 on the Law Applicable in Kosovo (27 October 2000) (30 May 2001).

[71] Ombudsperson Institution in Kosovo, Special Report No 3 on the Conformity of Deprivations of Liberty Under 'Executive Orders' with Recognised International Standards (29 June 2001); Ombudsperson Institution in Kosovo, Special Report No 4 on Certain Aspects of UNMIK Regulation No 2001/18 on the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders (12 September 2001).

[72] Ombudsperson Institution in Kosovo, 'Fifth Annual Report 2004-2005' (11 July 2005) 3 (Fifth Annual Report).

[73] UNMIK/REG/2000/38 (n 59), section 4.11.

> adequate manner to steps taken by the Ombudsperson, the effectiveness of the Ombudsperson as a human rights mechanism will, to a considerable extent, be limited. […] Whether or not his recommendations to the SRSG [Special Representative to the Secretary General] are followed or taken into consideration is very much up to the discretion of the respective SRSG. Once a report has been delivered, there is no forum for any further legal debate-if the SRSG decides, for certain reasons, not to follow the Ombudsperson's recommendations, both sides retain their opposing positions and no solution is reached.[74]

As solution to this particular problem, the Ombudsperson has demanded that the laws regulating its jurisdiction and competences should be drafted in stronger terms; giving the institution the opportunity to oblige the administrative authorities to respond to its recommendations within a specified time and ask for justifications in instances of delayed responses, and allowing the ombudsperson to initiate or take part in court or legal proceedings even as a third party.[75]

Finally, the lack of adequate cooperation between the Ombudsperson and UNMIK authorities led to the tension in the relationship between the two institutions.[76] When the Special Representative introduced a strange policy in early 2003 that no UNMIK staff member would sign a receipt or provide any proof that UNMIK had received any correspondence from anyone, including the Ombudsperson, the administration was harshly criticized by the Ombudsperson for being non-democratic and non-

[74] Fourth Annual Report (n 62) 17.

[75] Fifth Annual Report (n 72) 23;See also Parliamentary Assembly of Council of Europe, 'Resolution 1417 on Protection of Human Rights in Kosovo' (2005) art 5 [iv] [a] (Resolution 1417).

[76] Under UNMIK/REG/2000/38 (n 59) section 4.7, the Ombudsperson shall have access to and may examine files and documents of UNMIK and may require any person to cooperate with him/her providing relevant information, documents and files. The Special Representative may however refuse to release a file or document on condition that he explains the reasons in writing.

transparent.[77] This policy was subsequently changed at least with respect to correspondence from the Ombudsperson.[78] The lack of cooperation between the Ombudsperson and the UNMIK police was particularly severe. The UNMIK police have persistently refused access to certain files on several cases resulting in blocking investigation for those cases.[79] In *Afrim Selaci v the United Nations,* the Ombudsperson noted with concern that over two years and on eight separate occasions he had contacted UNMIK Police asking for information about the case but received no response, even when the information requested revealed that there was no improper conduct by the UNMIK police.[80]

With the gradual transfer of administrative powers to Provisional Institutions of Self-government in Kosovo (PISG), the Special Representative modified the Ombudsperson's mandate[81] as the start of a process creating a local Ombudsperson in Kosovo. The new mandate removed the Ombudsperson's monitoring power over UNMIK's actions and instead gave it the power to monitor the PISG's actions. UNMIK Regulation No 2006/6 provided that the Ombudsperson may enter into a bilateral agreement with the Special Representative for cases dealing with UNMIK.[82] This wording resembles section 3.4 of UNMIK Regulation 2000/38 that regulated the relationship between the Ombudsperson Institution and KFOR over which the

[77] Third Annual Report (n 62), 7-8; see Resolution 1417 (n 75) 5 [iv] [b].

[78] Third Annual Report (n 62) 7-8.

[79] Fourth Annual Report (n 62) 16.

[80] *Afrim Selaci v the United Nations Mission in Kosovo (UNMIK)* (n 65) [16].

[81] UNMIK Regulation No 2006/6 on the Establishment of Ombudsperson Institution in Kosovo (16 February 2006) UNMIK/REG/2006/6.

[82] ibid section 3.4.

jurisdiction of the Ombudsperson was never extended.[83] The Ombudsperson has raised serious concerns about how UNMIK Regulation No 2006/6 could potentially weaken the human rights protection in Kosovo, given the large number of cases pending against it.[84] While acknowledging the gradual transition of authority in Kosovo, the Ombudsperson had to remind UNMIK authorities that as long as UNSC Resolution 1244 establishing UNMIK is in place, UNMIK's responsibility to ensure respect for human rights in the Kosovo territory remains intact, as an aspect of its mandate that it often disregards.[85]

In East Timor, an Ombudsperson Institution became operational in 2001, albeit without an UNTAET Regulation establishing the Institution's powers and role.[86] Therefore, the legal framework within which the Institution operated is hard to assess. As suggested by an UNTAET Daily Briefing, similar to the Ombudsperson Institution in Kosovo, the Ombudsperson in East Timor was 'tasked with protection of rights […] of all persons living in East Timor against governmental abuses, injustices and denial of rights' and as such complaints could be made against UNTAET and other governmental institutions.[87] The relatively low number of cases before the East Timor Ombudsperson, as compared to high number of cases before its Kosovar counterpart,

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[83] R Everly, 'Reviewing Governmental Acts of the United Nations in Kosovo' (2007) 8 German Law Journal 21, 33-34.

[84] Ombudsperson Institution in Kosovo, Press Release 'Serious Concerns Raised about UNMIK Regulation on Ombudsperson Institution' 22 February 2006; Fifth Annual Report (n 72) 60.

[85] Fifth Annual Report (n 72) 25.

[86] S Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (OUP 2005), 149; Report of the Amnesty International, 'East Timor: Justice Past, Present and Future' (26 July 2001) ASA 57/001/2001, 29.

[87] UNTAET Daily Briefing, 'Twenty Cases Examined by Ombudsperson' (1 June 2001).

especially due to the lack of clarity in public on the Ombudsperson's authority and powers contributed to the characterization of the institution as generally ineffective.[88]

### 3.2. The Human Rights Advisory Panel

The European Commission for Democracy Through Law (Venice Commission) in 2004, addressing the lack of adequate human rights protection in Kosovo, with a view to establishing mechanisms allowing for remedies for alleged violations of human rights, suggested the establishment of a Human Rights Court in Kosovo.[89] This suggestion was further reiterated by the Parliamentary Assembly of Council of Europe in its Resolution 1417 (2005) on the Protection of Human Rights in Kosovo.[90] Under intense external pressures, UNMIK carried out discussions with the Council of Europe, in collaboration with the Venice Commission.[91] Eventually, UNMIK half-heartedly agreed to suggestions of the Venice Commission but opted for a Human Rights Advisory Panel, instead of a Human Rights Court, that could only issue non-binding recommendations relating to complaints of human rights violations by UNMIK. The international administration justifies this decision as follows:

> The creation of a judicial body that would issue binding decisions on UNMIK would be problematic from the perspective of the privileges and immunities of UNMIK and its personnel, their possible exposure to liability and the importance of not

[88] Chesterman (n 86) 150.

[89] 'Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms (n 21) [104]

[90] Resolution 1417 (n 75) art 4.

[91] Report Submitted by the United Nations Interim Administration in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since 1999, (13 March 2006) UN Doc CCPR/C/UNK/1 [132].

compromising the discretion of the institutions of the United Nations to interpret the mandate of UNMIK under UNSCR 1244.[92]

The Venice Commission envisioned a human rights court in Kosovo that would work alongside the Ombudsperson who would be able to lodge applications before the court as well.[93] However, significantly the establishment of the Human Rights Advisory Panel in Kosovo was accompanied by the abolition of powers of the Ombudsperson over UNMIK, therefore they never worked together.

The Human Rights Advisory Panel was established in March 2006 as a provisional body during the term of the mandate of UNMIK to examine alleged violations of human rights by the administration.[94] From the start, the Panel was subject to criticism on several grounds.[95] Firstly, by 2006, UNMIK had been in control of Kosovo for seven years and further, by the time the Panel became operational in November 2007,[96] it was shortly before the general withdrawal of UNMIK from the exercise of executive functions.[97] The temporal jurisdiction of the Panel, which is limited to alleged violations of human rights that occurred after 23 April 2005 or which occurred before this date where the facts gave rise to a continuing violation of

[92] ibid.

[93] Opinion on Human Rights in Kosovo (n 21) [105].

[94] UNMIK Regulation No 2006/12 on the establishment of Human Rights Advisory Panel (23 March 2006) UNMIK/REG/2006/12; See generally for the drafting process of the UNMIK Regulation No 2006/12, B Knoll & R J Hull, 'Too little, too late: The Human Rights Advisory Panel in Kosovo' (2007) European Human Rights Law Review 534, 540-543.

[95] See generally C Chinkin 'Kosovo Human Rights Advisory Panel,' International Law Meeting Summary at Chatham House (26 January 2012) available at < http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/260112summary.pdf> accessed 1 February 2013.

[96] The Human Rights Advisory Panel, 'Annual Report 2008' [2].

[97] Statement by the President of the Security Council, (26 November 2008) UN Doc S/PRST/2008/44; The Human Rights Advisory Panel, 'Annual Report 2009' [61].

human rights,[98] was also disappointing, not only because it excluded most of the period that UNMIK has spent as the sole administrator in Kosovo but also because it excluded a major outbreak of violence in Kosovo on March 2004 resulting in deaths, injuries and displacement of people, as the most serious setback since 1999 in the promotion of human rights in the territory.[99] Another significant concern was that the Special Representative of the Secretary-General would appoint the members of the Advisory Panel and he would have the exclusive authority and discretion to decide whether to implement the recommendations and findings of the Panel.[100] This led to the criticism by the Human Rights Committee that the Panel 'lacks the necessary independence and authority.'[101]

As the first human rights complaint mechanism of its kind monitoring the practice of a UN post-conflict administration, the Human Rights Advisory Panel was confronted with certain challenges. These included ascertaining the scope of acts or omissions attributable to UNMIK, assessing if all other remedies had been exhausted by the claimants, identifying whether a violation of human rights is still continuing as an aspect of the Panel's temporal jurisdiction,[102] and elaborating its rules of procedures to deal with cases.[103]

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[98] UNMIK/REG/2006/12 (n 94) Section 2.

[99] Chinkin (n 95); see on the March 2004 violence, Human Rights Watch Report, 'Failure to Protect: Anti-minority Violence in Kosovo, March 2004' (26 July 2004) available at <http://www.hrw.org/reports/2004/07/25/failure-protect > accessed 1 February 2013.

[100]UNMIK/REG/2006/12 (n 94) sections 5.1 & 17.3.

[101] Human Rights Committee, Concluding Observations on Kosovo (Serbia) (14 August 2006) UN Doc CCPR/C/UNK/CO/1 [10].

[102] Annual Report 2008 (n 96) [1].

[103] UNMIK/REG/2006/12 (n 94) section 18.1; the Rules of Procedure of the Human Rights Advisory Panel were based on the Rules of Procedure of the European Court of Human Rights (ECtHR) (Annual Report 2009 (n 97) 2.

Complaints before the Human Rights Advisory Panel included a wide range of alleged human rights violations such as the right to life, the prohibition of ill-treatment, the right to a fair trial, the right to respect for private and family life, the right to an effective remedy and the right to property.[104] In 2008, the first year the Panel became operational, the number of complaints before it was less than 100.[105] In the first half of 2009, the number of cases before the Panel started rapidly growing, rising to more than 400.[106] By 2010, the total number of complaints was more than 500.[107] The caseload has become a significant challenge, as the Panel has a small secretariat, and inadequate numbers of staff, including few lawyers.[108] As the number of complex and labour-intensive cases before the Panel has increased as well, delays in delivering decisions were inevitable.[109] A contributing factor has been the challenge for the Panel to identify a human rights complaint when it is not properly framed within the appropriate human rights terms.[110]

Following UNMIK's general withdrawal from the exercise of executive functions in Kosovo in November 2008 and considering that 'as the responsibilities of UNMIK

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[104] Annual Report 2008 (n 96) [3]; The Human Rights Advisory Panel, 'Annual Report 2012' [40]).

[105] Annual Report 2008 (n 96) [3].

[106] Annual Report 2009 (n 97) [63].

[107] The Human Rights Advisory Panel, 'Annual Report 2011' [30].

[108] ibid 2; The Human Rights Advisory Panel, 'Annual Report 2010' 2; Annual Report 2009 (n 97) 1; (Annual Report 2011 (n 107) 2).

[109] See Annual Report 2010 (n 108) 2; it was not until 2012 that the Panel was able to coalesce a small but professional team, with the help of external funding provided by the government of Sweden, that would speedily and satisfactorily deal with the remaining complaints (Annual Report 2012 (n 104) i).

[110] According to Annual Report 2009 (n 97) [66].

decreased, fewer complaints were likely to be declared admissible,' the Panel decided to discontinue engaging in any further large-scale public outreach.[111] And, with Administrative Direction No 2009/1 Implementing UNMIK Regulation No 2006/12, the Special Representative declared the cut-off date for submissions before the Panel as 31 March 2010.[112] Still, the shortage of personnel, the difficulty of some cases, together with other factors such as the fact that the Panel can only sit part-time in Pristina has led to an extension of this period.[113] Concerned about the backlog of cases, the Venice Commission stated in its follow-on Opinion in December 2010 on the Existing Mechanisms to Review the Compatibility with Human Rights Standards of Acts by UNMIK and EULEX in Kosovo that:

> There is indeed the risk that the Panel may cease to exist before it has had the possibility of dealing with all the currently pending cases. This, in the Commission's view, would represent a very serious shortcoming of the mechanism established, as it would mean that individual claims of human rights breaches remain without an effective remedy.[114]

Therefore the Venice Commission recommended that although UNMIK is reducing its executive authority in Kosovo, the Panel's mandate should be extended for such a sufficient period of time as necessary to allow it to decide on all pending cases.[115] Finally, a major difficulty for the Panel is to make recommendations to UNMIK in a

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[111] Annual Report 2009 (n97) [61]; Annual Report 2010 (n 108) [32].

[112] UNMIK Administrative Direction No 2009/1 implementing UNMIK Regulation No 2006/12 on the Establishment of the Human Rights Advisory Panel (17 October 2009) UNMIK/DIR/2009/1 section 5; see UNMIK/REG/2006/12 (n 94) section 19.

[113] Annual Report 2011 (n 107) 3; see Chinkin (n 95).

[114] CDL-AD(2010)051 [35].

[115] ibid [38].

situation where the UN administration no longer has a direct impact on decisions in Kosovo. As noted by the Panel:[116]

> UNMIK can longer amend legislation as necessary (or in any case, even if it amended the relevant legislation, it could no longer ensure enforcement) nor can it direct the authorities to remedy other deficiencies identified by the Panel. This situation required the Panel to be cognisant of such limitations while making recommendations that would have a beneficial impact on the human rights situation of the affected complainants.

In recognition that UNMIK could no longer itself carry out its recommendations, the Panel stared recommending lately in 2012 that UNMIK 'urge the Kosovo authorities to take all possible steps in order to assure that the complainants' cases will be decided without delay.'[117]

### 3.2.1 Changes Introduced by Administrative Direction No 2009/1 Implementing UNMIK Regulation No 2006/12

Towards the end of its first fully operational year, the tensions between the Panel and the UNMIK were visible. The Panel's Second Annual Report in 2009, was highly critical of the international administration, pointing out that 'UNMIK had not thoroughly considered all the consequences which might result from the

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[116] Annual Report 2010 (n 107) [117]; see Council of the European Union, 'Joint Action on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo' (4 February 2008) 2008/124/CFSP; see Kosovo Declaration of Independence (17 February 2008) available at < http://www.assembly-kosova.org/?cid=2,128,1635> accessed 12 February 2013.

[117] *Lajovic and others against UNMIK*, HRAP, Opinion, 009/08, (9 June 2012).

establishment of the Panel […] when formulating its concept, legal foundation and organizational undertaking, as laid down in UNMIK Regulation No 2006/12 […].'[118] The Panel was particularly concerned about different interpretations by the Panel and UNMIK about the nature, the role and procedures of the Panel, but also about UNMIK's insufficient assessment of the Panel's administrative needs.[119]

Administrative Direction No 2009/1,[120] which introduced changes that 'significantly limited the Panel's role' and how it functions was not welcomed by the Panel and put the tensions (between the Panel and UNMIK) into sharper focus.[121] Under section 29 of the UNMIK Regulation No 2006/12, the Special Representative of the Secretary-General may issue any administrative directions for the implementation of the said Regulation. According to the Panel however, although the declared aim of the Administrative Direction No 2009/1 was to interpret certain provisions of UNMIK Regulation No 2006/12, it in fact amended them in various aspects, such as by altering the admissibility criteria and procedure for the processing of complaints, the manner of conducting public hearings and the appointment procedure for members of the Panel.[122]

First, a procedural issue addressed by the Administrative Direction No 2009/1 was related to a common practice of the Panel under UNMIK Regulation No 2006/12 section 11.3, whereby it requests the Special Representative to respond on behalf of

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[118] Annual Report 2009 (n 97) foreword.

[119] ibid.

[120] UNMIK/DIR/2009/1 (n 112).

[121] Annual Report 2009 (n 97) foreword.

[122] ibid [35].

UNMIK to the Panel's finding that the complaint is admissible. Where the Panel considers that the admissibility of the complaint is indistinguishable from the merits, it would join the admissibility decision with merits.[123] Section 2.1 of the Administrative Direction No 2009/1 seems to address this practice where it provides that the Panel 'shall examine all issues of admissibility of the complaint before examining the merits.' Further, the same provision as supported by section 2.3 seems to suggest that issues of admissibility could be examined 'at any stage of proceedings.' In contrast, the Panel is of the opinion that allowing objections to the admissibility decisions at any stage of proceedings would cause considerable delays in deciding a case.[124]

More crucially, as far as the admissibility criteria are concerned, section 2.2 of the Administrative Direction No 2009/1 introduced a new provision, which regulated that any complaint that is or may become in the future the subject of the UN Third Party Claims Process should be deemed inadmissible by the Panel; since UN claims commissions are considered automatically to be available avenues pursuant to section 3.1 of UNMIK Regulation 2006/12, they should be exhausted before a complaint comes before the Panel. According to the Panel, the immediate effect of this provision could be that a number of complaints including some of the more high-profile cases would have to be declared inadmissible.[125] This prophecy was fulfilled at least with respect to two pending cases that received considerable public attention:[126] *Kadri*

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[123] ibid [36-37].

[124] ibid [38].

[125] ibid [40].

[126] Annual Report 2008 (n 96) [18].

*Balaj and Others against UNMIK*[127] and *N.M and Others against UNMIK.*[128] The former complaint concerned the allegedly disproportionate use of force by UNMIK police who discharged rubber bullets towards the crowd, during a protest demonstration in Pristina on February 2007, which killed two individuals and caused injuries in other complainants.[129] The latter complaint was in relation to alleged lead poisoning and violation of the right to health of 143 members of the Roma, Ashkali and Egyptian communities in Kosovo, who have been resident in five UNMIK administered camps for internally displaced persons in Northern Mitrovica, on account of the soil contamination in the camp sites due to the close proximity of the camps to a mining complex, and on account of poor living conditions in the camps in general.[130] Initially, the Panel declared *Kadri Balaj and Others against UNMIK* admissible and *N.M and Others against UNMIK* admissible in part.[131] However, with the promulgation of the Administrative Direction No 2009/1, the Panel felt obliged to declare both complaints inadmissible, as they were subject to the UN Third Party Claims Process.[132] With respect to the inadmissibility of both complaints, the Panel

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[127] *Kadri Balaj and Others against UNMIK*, HRAP, Admissibility Decision, 04/07, (6 June 2008), (*Kadri Balaj and Others against UNMIK*, Admissibility Decision (I)); *Kadri Balaj and Others against UNMIK*, HRAP, Admissibility Decision, 04/07, (31 March 2010), (*Kadri Balaj and Others against UNMIK,* Admissibility Decision (II)); *Kadri Balaj and Others against UNMIK*, HRAP, Decision to Reopen Proceedings 04/07, (11 May 2012) (*Kadri Balaj and Others against UNMIK*, HRAP, Decision to Reopen Proceedings).

[128] *N.M and Others against UNMIK*, HRAP, Admissibility Decision, 26/08, (5 June 2009), (*N.M and Others against UNMIK*, Admissibility Decision (I)); *N.M and Others against UNMIK*, HRAP, Admissibility Decision, 26/08, (31 March 2010), (*N.M and Others against UNMIK*, Admissibility Decision (II); *N.M and Others against UNMIK*, HRAP, Decision to Reopen Proceedings, 26/08, (10 June 2012) (*N.M and Others against UNMIK*, HRAP, Decision to Reopen Proceedings).

[129] *Kadri Balaj and Others against UNMIK*, Admissibility Decision (I) (n 127) [1-2].

[130] *N.M and Others against UNMIK*, HRAP, Admissibility Decision (I) (n 128) [2].

[131] *Kadri Balaj and Others against UNMIK*, Admissibility Decision (I) (n 127); *N.M and Others against UNMIK*, Admissibility Decision (I) (n 128).

[132] *Kadri Balaj and Others against UNMIK,* Admissibility Decision (II) (n 127) [6]; *N.M and Others against UNMIK*, Admissibility Decision (II) (n 128) [25].

stated, with regret, that the Special Representative had the discretion to determine the regulatory scheme of the complaint system before the Panel, and even if the competence of the Special Representative to alter some of the basic principles contained in UNMIK Regulation No 2006/12 by implementing an administrative direction can be questioned, the Panel 'has no jurisdiction to examine the compatibility of the legal basis of its functioning with human rights standards.'[133] The complainants in *N.M and Others against UNMIK* sought to challenge the UN Third Party Claims Process as an avenue that should be exhausted, and argued that their claim has been pending before the UN Claims Process since February 2006 with no conclusion. They further contended that delays in processing the claim, coupled with the application of the Administrative Direction No 2009/1 to their pending case before the HRAP, was 'an act of bad faith on the part of UNMIK intended to frustrate any process and which essentially voids the complainants' claims' and denies their right to an effective remedy.[134] On the other hand, the complainants in *Kadri Balaj and Others against UNMIK* chose to file a new complaint directed against Administrative Direction No 2009/1 as a whole, on grounds that the Administrative Direction purports to have the effect of reopening the admissibility issue and preventing the Panel from considering the merits and therefore undermining the independence and impartiality of the Panel.[135] From the viewpoint of the Panel, a serious concern with regard to the introduction by section 2.2 of the Administrative Direction No 2009/1 of the UN Third Party Claims Process as an available avenue

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[133]*Kadri Balaj and Others against UNMIK* (ibid) [40-41]; *N.M and Others against UNMIK* (ibid) [30]; see also *Demirovic against UNMIK*, HRAP, Admissibility Decision, 57/08, (17 April 2009); *Jovanovic against UNMIK*, HRAP, Admissibility Decision, 52/08, (23 May 2009).

[134]*N.M and Others against UNMIK* (ibid) [27-28].

[135]*Kadri Balaj and Others against UNMIK*, Admissibility Decision (II) (n 127) [38]; see *Kadri Balaj and Others against UNMIK (Balaj II),* HRAP, Admissibility Decision, 320/09, (12 February 2010).

that *must* be exhausted is that the provision 'has the effect of obliging the Panel to consider the UN Third Party Claims Process as an accessible and sufficient avenue.'[136] Normally, in line with the jurisprudence of the ECtHR, the HRAP should have had the jurisdiction to decide whether the UN Third Party Claims Process, like any other avenue that should be exhausted before a complaint comes before the Panel, 'was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the (complainants') complaints and offered reasonable prospects of success.'[137] Section 2.2 of the Administrative Direction No 2009/1 removed this jurisdiction from the Panel.

However, even when the Panel finds a case inadmissible due to non-exhaustion of UN claims process, it does not entirely close its doors to the complainants since the requirement of exhaustion of available avenues, according to the Panel, pose only temporary restrictions on admissibility and the complainants may resubmit their complaints through filing a new complaint, once the claims process has been concluded.[138] However, as noted by the Panel, the complainants may miss the cut-off date of submissions before the Panel when they wait for the UN claims process to

[136] *N.M and Others against UNMIK*, Admissibility Decision (II) (n 128) [36].

[137] ibid [35]; see *Akdivar and Others v Turkey*, ECtHR, Grand Chamber Judgment, 21893/93, (16 September 1996) [66-68].

[138] *N.M and Others against UNMIK*, Admissibility Decision (II) (n 128) [45-46]; *Kadri Balaj and Others against UNMIK,* Admissibility Decision (II) (n 127) [55-56]. The Panel came to this conclusion through referring to proceedings before various international tribunals whereby the applicants may seek to reopen proceedings under certain special circumstances and through the application of Rule 49 of the Panel's Rule of Procedure, which provides that questions not governed by these Rules shall be settled by the Panel (*N.M and Others against UNMIK* (ibid) [48-51], *Kadri Balaj and Others against UNMIK* (ibid) [58-61]).

conclude.[139] Therefore, some special arrangements are necessary to enable the complainants to proceed with their cases before the Panel once the UN claims process is completed if they wish to do so.[140] Unfortunately, no arrangements have been made in that respect to date. However, the Panel accepted that a request for reopening the proceedings in *N.M and Others against UNMIK* could be made even when the complainants apply after the cut-off date for submissions. The panel ignored UNMIK's objections in that context and held that the cut-off date only applies to new complaints, since accepting otherwise would offend the basic notion of justice.[141]

The applicants of the both of the cases discussed above applied to the Panel to reopen the proceedings on account of completion of the UN Third Party Claims Process.[142] The Panel agreed that the UN Claims Process had come to an end and therefore proceeded to examine the merits.[143] The Panel has called this special procedure of re-opening procedures 'the Balaj exception' and has invoked it consistently to remedy the undesirable outcome of the strict application of the cut-off date for submissions under section 5 of UNMIK Direction No 2009/1.[144]

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[139] *N.M and Others against UNMIK* (ibid) [45]; *Kadri Balaj and Others against UNMIK* (ibid) [57].

[140] ibid.

[141] *N.M and Others against UNMIK*, HRAP, Decision to Reopen Proceedings (n 128).

[142] *Kadri Balaj and Others against UNMIK*, Decision to Reopen Proceedings (n 127); *N.M and Others against UNMIK*, HRAP, Decision to Reopen Proceedings (n 128).

[143] *Kadri Balaj and Others against UNMIK* (ibid) [45], [94]; *N.M and Others against UNMIK* (ibid) [35], [48].

[144] Human Rights Advisory Panel, 'Annual Report 2012' (n 104) [40]; see *NTP Bujari (AS PETROL) against UNMIK*, HRAP, Admissibility Decision, 311/09, (6 December 2012).

Finally, changes introduced by Administrative Direction No 2009/1 with respect to public hearings before the panel must be mentioned. Sections 1.1 & 1.3, regulating the public hearings before the Panel, stresses the non-adversarial character of not only the public hearings, but also the proceedings before the Panel as a whole. As the Panel rightly pointed out, it is hard to reconcile this non-adversarial approach 'with the spirit, if not the wording, of UNMIK Regulation No 2006/12,'[145] which establishes the Panel as a human rights accountability mechanism against allegations of human rights violations by UNMIK. Furthermore, by allowing the complainants only to summarize the alleged human rights violations (section 1.2), without giving the parties the opportunity to comment on each other's submissions or engaging in legal discussion, Administrative Direction No 2009/1 renders the public hearings meaningless.[146]

Last but not least, Administrative Direction No 2009/1 has amended the procedure for the appointment of Panel members. Initially, the Special Representative would appoint the members of the Panel upon proposal by the President of the ECtHR.[147] With the new procedure under section 3.1 of the Administrative Direction No 2009/1, upon request by Special Representative, the President of the ECtHR is expected to designate a sufficient number of suitable candidates among whom the Special Representative would appoint the members of the Panel; if no proposals or insufficient number of proposals are received by UNMIK within one calendar month, the Special Representative would make the appointment on his own, following

[145] Annual Report 2012 (n 104) [41].

[146] ibid.

[147] UNMIK/REG/2006/12 (n 94) Section 5.1.

consultation with relevant international bodies. While the new procedure gives the Special Representative a significant degree of discretion on the appointment of panel members, it is vague on the issues of what amounts to 'significant' number of candidates or which are the relevant international bodies. Although the Panel was worried that the changes introduced could have the effect of limiting the Panel's independence,[148] the replacement of a former Panel member with a current Panel member proceeded smoothly, to the satisfaction of the Panel.[149]

### 3.2.2 The Problem of Compensation for Non-Pecuniary Damage

In the case of *Kadri Balaj and Others against UNMIK*, the Panel assessed the effectiveness and adequacy of the UN Third Party Claims Process to redress the human rights violations concerned. The Panel noted that:

> […] the compensation paid to the complainants [as result of UN Third Party Claims Process] was not based on any acknowledgment of a violation of the victims' human rights. Rather, it constituted an ex gratia payment. Moreover, as was repeatedly explained to the complainants by the UNMIK negotiation team, the compensation is limited to economic loss, including in particular loss of earnings. No compensation has been paid for pain and suffering, moral anguish, punitive or moral damages or other types of loss which are not directly related to the injury.[150]

[148] See Annual Report 2009 (n 97) [42].

[149] ibid (i).

[150] *Kadri Balaj and Others against UNMIK*, Decision to Reopen Proceedings (n127) [71].

Therefore, the Panel concluded that complainants' 'victim' status under human rights law continues, as they have not been afforded redress for the breach of the human rights instruments referred to under UNMIK Regulation No 2006/12.[151] Further, the Panel disagreed with UNMIK, which considered that the claimants signed a waiver of all claims of every kind, including their rights before the Panel, as part of third party claims process. According to the Panel, the fact that complainants signed a release, which states 'I understand that this offer is in full and final settlement of all claims of every nature and kind whatsoever resulting from the above (death or injuries)' does not prevent them from bringing their complaints before the Panel, as the rights engaged by Article 2 & 3 of the ECHR are not capable of being waived under any circumstances.[152]

Compensation for non-pecuniary damage is a fundamental issue of contention between the Panel and UNMIK. In response to the Panel's recommendations in that respect, the Special Representative had persistently used what the Panel calls 'boilerplate language,'

> In relation to the Panel's recommendation to award adequate compensation to the Complainants, the Panel is aware that current United Nations General Assembly instructions on compensations do not permit the United Nations Organization and its missions to pay compensation other than for material damage or physical harm. Consequently, UNMIK is not in a position to pay any compensation for human rights violations that may have occurred in these matters. UNMIK will continue to draw the attention of the United Nations General Assembly to the need for a review of the

[151] ibid [69]; ECHR art 34; see with respect to 'victim' requirement under ECHR, *Markin v Russia*, ECtHR, Grand Chamber (Judgment), 30078/06, (22 March 2012) [82].

[152] *Kadri Balaj and Others against UNMIK*, Decision to Reopen Proceedings (n 127) [74-83].

current compensation rules, which exclude payment of compensation for non-pecuniary damage.[153]

Another trend that demonstrates the UN's reluctance to compensate non-pecuniary damage has been UNMIK's regular objections to the admissibility of the complainants' right to be free from inhumane treatment, especially the right to be free from the mental pain and suffering caused by the disappearance of a relative (Article 3 of the ECHR) in the context of missing and/or murdered persons cases.[154] One positive development is that, since 2012, UNMIK no longer challenges the admissibility of Article 3 with respect to these cases.[155] Nevertheless, the Panel had received no information indicating that UNMIK had brought the necessity to review the UN's compensation rules to the Organization's attention with expected vigour.[156]

### 3.2. 3 Interim Assessment of the Human Rights Advisory Panel

The Human Rights Advisory Panel could make significant contributions to international jurisprudence on the accountability of UN post-conflict administrations and make human rights protection effective in the UN administered territories. The Panel has taken its task seriously, not only in providing recommendations to address specific human rights violations within context of UN administration in Kosovo but

[153] Annual Report 2012 (n 104) [90]; see also, 'SRSG's Comments on HRAP Opinion in the case of Nadica Kusic (case no 08/07)' reproduced in Parliamentary Assembly of the Council of Europe, 'Resolution 1739 on The Situation in Kosovo and the Role of the Council of Europe' (2010) [45].
[154] See for instance, *Durica against UNM*IK, HRAP, Admissibility Decision, 79/09, (12 August 2011) [16-21]; *Mladenovic against UNMIK*, HRAP, Admissibility Decision, 99/09, (11 August 2011) [19-23].

[155]Annual Report 2012 (n 104) [91].

[156] ibid (as at March 2013).

also, at least in one instance, in urging UNMIK to seek systemic responses to human rights problems in the administered territories in general.[157]

Nevertheless, the potential contribution of the Panel is weakened, not only because of the administrative and procedural challenges it faces, partly related to UNMIK policies, but more importantly due to the fact that UNMIK or UN post-conflict administrations for that matter, do not seem to be fully prepared to accept the implications of an independent human rights mechanism that will put their acts under scrutiny. The tension between the Panel and UNMIK, together in general but more specifically, with the lack of will within the UN system to afford appropriate compensation and other reparations to victims of human rights violations, makes one question the genuinity and seriousness of the UN in establishing a human rights accountability mechanism as such.

In every complaint in which the Panel finds a human rights violation, it recommends that UNMIK take 'immediate and effective measures' to implement its recommendations and also to inform the Panel and the complainants of further developments.[158] However, according to the Panel, UNMIK has continuously failed to respond to its recommendations.[159] If the findings and recommendations of the Panel are not followed by a public response by UNMIK, in the words of the Panel, the

[157] The Panel considers it appropriate that UNMIK 'takes appropriate steps before competent bodies of the United Nations, including the UN-Secretary General, towards the allocation of adequate human and financial resources to ensure that international human rights standards are upheld at all times by the United Nations, including when performing administrative and executive functions over a territory, and to make provision for effective and independent monitoring' (*S.C against UNMIK*, HRAP, Opinion, 02/09, (6 December 2012) 19); Annual Report 2012 (n 104) [86].

[158] Annual Report 2009 (n 97) [87].

[159] ibid [88].

whole process would not only be 'incomplete' but it would also become 'arcane and academic.'[160] On the other hand, any response from UNMIK ranging from formal apologies to forms of reparations including financial compensation would not only provide some transparency and accountability for UNMIK's actions, but would also set a standard for future UN missions.[161]

## 4. Judicial Review of Acts of UN Post-conflict Administrations

### 4.1 Judicial Review by Domestic Courts

Domestic control over the acts of the executive organs of the UN post-conflict administrations has been a rarity. Few regulations adopted by the administrations allowed the competent judicial organs to challenge their executive decisions,[162] although UNTAET did make some serious efforts in that respect.[163]

For the most part, domestic courts were not prepared to review the executive decisions of the post-conflict administrations on their own initiative, but there have been some exceptions. The Constitutional Court of Bosnia and Herzegovina promoted

[160] ibid [89].

[161] ibid.

[162] See for instance UNMIK Regulation No 2000/8 on the Provisional Registration of Businesses in Kosovo (29 February 2000) UNMIK/REG/2000/8, which allows a business that is denied a registration or whose registration is suspended or revoked by UNMIK's decision, to apply for review of that decision to a court of competent jurisdiction in Kosovo (section 4.4).

[163] Stahn (n 13) 606; see for instance, UNTAET Regulation No 2000/10 on Public Procurement for Civil Administration in East Timor (6 March 2000) UNTAET/REG/2000/10, section 42. UNTAET Regulation No 2000/17 On the Prohibition of Logging Operations and the Export of Wood from East Timor (10 May 2000) UNTAET/REG/2000/17, sections 6.4 & 6.5 and UNTAET Regulation No 2000/19 on Protected Places (30 June 2000) UNTAET/REG/2000/19, sections 8.4 & 8.5.

the idea of functional duality, suggesting that acts of the international authority that intervene in the legal system of Bosnia and Herzegovina would be a part the domestic law of the state, and therefore could be legally reviewed.[164] This suggestion was not followed up, or has not been yet developed into a systematic tool to review the decisions of the transitional administrator by the domestic courts in Bosnia and Herzegovina or courts of any post-conflict administration for that matter, and in any case did not resolve the possible frustration of any proceedings due to immunities that the international administrator or its acts would enjoy before domestic courts. Further, with respect to certain executive orders of his, the High Representative found it pertinent to state that their provisions were laid down by the High Representative pursuant to his 'international mandate' and, therefore, they were not justiciable by the Courts of Bosnia and Herzegovina.[165]

Not surprisingly, attempts at judicial review of the acts of the UN administration in Kosovo were few, as a result of the precedence of the regulations promulgated by the Special Representative over other applicable laws.[166] The UNMIK Regulations did not provide for judicial review of their content by the domestic courts, and the immunities enjoyed by the international administration have been an additional safeguard.[167] Still, there have been some interesting cases.[168] In a case concerning the

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[164] See Chapter IV, section 2.1 for the detailed discussion of functional duality; *Request for Evaluation of Constitutionality of the Law on State Border Service*, Constitutional Court of Bosnia and Herzegovina, U 9/00, (3 November 2000); *Request for the Evaluation of Constitutionality of the Law on Travel Documents of Bosnia and Herzegovina*, Constitutional Court of Bosnia and Herzegovina, 25/00, (23 March 2001).

[165] See, for instance OHR, Decisions Relating to Individuals Indicted for War Crimes in the Former Yugoslavia, Order of 9 February 2004 Blocking All Bank Accounts of, held by and/or in the name of Dragan Basevic.

[166] UNMIK/REG/1999/1 (n 2); UNMIK/REG/1999/24 (n 2).

[167] UNMIK/REG/2000/47 (n 8).

enforcement of a fine issued by the Temporary Media Commissioner (TMC) in Kosovo against the owners and representative of a local newspaper *Bota Sot*, the Pristina District Court refused to apply UNMIK Administrative Direction No 8/2003,[169] whereby it was stated that if a fine imposed by the TMC under Section 3.1 (c) of UNMIK Regulation No 2000/36 or under Section 2.1 (c) of UNMIK Regulation No 2000/37 has remained unpaid, the district court with jurisdiction over the place where the debtor resides has the authority to enforce the fine.[170] Further, the application to enforce to fine could be heard by a single international judge[171] who ruled in this particular case that the Administrative Direction No 8/2003 was unlawful on grounds of its incompatibility with the Kosovo Law on Regular Courts which should take precedence over an administrative direction of the Special Representative.[172] Eventually, the case was appealed to the Kosovo Supreme Court, where a panel headed by an international judge overruled the decision of the District Court and returned the case to the same court for reconsideration.[173] Subsequently, an order enforcing the fine imposed by the TMC was issued by the District Court.[174] The *Bota Sot* case before the District Court of *Pristina* also raises interesting questions as

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[168] See Everly (n 83) 23-28 for an overview of the cases.

[169] UNMIK Administrative Direction No 8/2003 implementing UNMIK Regulation No 2000/36 On the Licensing and Regulation of the Broadcast Media in Kosovo and UNMIK Regulation No 2000/37 on the Conduct of the Print in Media in Kosovo (8 April 2003) UNMIK/DIR/2003/8.

[170] ibid [1.3].

[171] ibid [1.5.].

[172] *Bota Sot* case, District Court of Pristina, E No 1/2004, (16 July 2004).

[173] *Bota Sot* case, Supreme Court of Kosovo, AC/37/2004, (20 August 2004).

[174] *Bota Sot* case, District Court of Pristina, E No 2/04, (14 January 2005).

to the extent to which the domestic courts of administered territories can be considered "domestic" when international judges necessarily assist them.[175]

Another case worth mentioning came before the Pristina Municipal Court in 2005 and concerned the Municipal Court's order to execute the contract signed between the Telecommunications Regulatory Authority in Kosovo (TRA) and the company Mobikos, which envisaged that Mobikos would be the second mobile phone operator in Kosovo. This contract was signed in contravention of Executive Decision No 2004/25[176] of the Special Representative, which cancelled the tender process for the second mobile phone operator carried out by the TRA, on the ground that the tender process was flawed. The UNMIK spokesperson reacted to the decision of the Municipal Court in a press briefing on 23 March 2005, where he stated that by virtue of the Executive Decision No 2004/25, the contract is null and void and therefore, the decision of the Municipal Court is without legal basis and unenforceable.[177] Further, UNMIK has consistently refused to enforce judgments by domestic courts that challenged the Regulations, Administrative Directions or Executive Decisions of the Special Representative. The case of *Elife Murseli v the United Nations Mission in Kosovo (UNMIK)*,[178] reported by the Ombudsperson, reveals the fractious relationship between domestic courts and UNMIK in that respect. The case concerned the non-

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[175] See for instance, UNMIK Regulation No 2000/6 on the Appointment and Removal from Office of International Judges and International Prosecutors (15 February 2000) UNMIK/REG/2000/6; UNMIK Regulation No 2000/34 amending UNMIK Regulation No 2000/6 on the Appointment and Removal from Office of International Judges and International Prosecutors (27 May 2000) UNMIK/REG/2000/34; UNMIK Regulation No 2000/64 on Assignment of International Judges/Prosecutors And/Or Change of Venue (15 December 2000) UNMIK/REG/2000/64.

[176] UNMIK/ED/2004/25 (20 October 2004).

[177] UNMIK Press Briefing (23 March 2005) available at <http://www.unmikonline.org/Pages/PRall.aspx> accessed 10 March 2013.

[178] *Elife Murseli v the United Nations Mission in Kosovo (UNMIK),*Ombudsperson Institution in Kosovo, 122/01, (10 December 2001).

execution of a decision of the Municipal Court in Kacanik on the fairness of an open competition held in 2000, to select the director of Preschool Education Center “Agimi” in Kacanik (PEC “Agimi”).[179] The applicant Elife Murseli had applied for the post with other three candidates and was notified by the Regional Directorate for Education in Gjilan (an UNMIK institution) that she had failed the open competition.[180] Her appeal to the Directorate on the ground that she had the highest number of points of the three candidates was further considered ill founded and rejected.[181] The applicant then took the case before the Kacanik Municipal Court, which accepted fully the applicant’s claim that the competition had been unlawful and unfair, and annulled the decision on the selection of the Director of PEC “Agimi.”[182] UNMIK refused to annul the decision, and not only invoked immunities of its personnel and the administration itself, but also contended that the selection process was carried out within applicable UNMIK Regulations and Administrative Directions, which were not open to judicial review.[183] Finally, the Ombudsperson qualified UNMIK’s refusal to execute the judgment of the Kacanik Municipal Court as a violation of Article 6 of the ECHR.[184]

In East Timor, a high profile case that challenged an executive decision of the Special Representative to the Secretary-General was that of Takeshi Kashiwagi, a Japanese national, living and working in East Timor as a free-lance journalist, who was

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[179] ibid [1].

[180] ibid [8-9].

[181] ibid [10-11].

[182] ibid [15].

[183] ibid [14] & [19].

[184] ibid [43-48].

imprisoned in the summer of 2000; he was charged with defamation, under the applicable Indonesian Code of Criminal procedure, and for threatening to kill Xanana Gusmão who was then the President of National Congress for Timorese Reconstruction (CNRT).[185] Although no evidence was produced to justify his detention before the District Court of Dili, Kashiwagi remained under detention for 18 days before he was unconditionally released. His release was partly due to intervention of the Special Representative in the case, by issuing an executive order decriminalizing the act of defamation.[186] Kashiwagi then brought a claim for compensation for his unlawful detention against the Investigating Judge, the Head Prosecutor of Dili District Court, the Deputy General Prosecutor for Ordinary Crimes, and the Minister of Justice in the Transitional Cabinet and finally the Special Representative. Although, the defendants argued that the claim should not be heard before a national court, as it challenged an executive order of the Special Representative, the District Court of Dili ruled that both Kashiwagi's detention and the Executive Order to rescind the act of defamation were unlawful; and the defendants should pay compensation. The District Court of Dili has not been clear in its reasoning on rescinding the Executive Order and eventually East Timorese Court of Appeal reversed the decision and dismissed the compensation claims, on grounds of lack of jurisdiction.

[185] See for a full account of this case, Report of Amnesty International, *East Timor: Justice Past, Present and Future* (n 86) 23 et seq; M A Fairlie, 'Affirming Brahimi: East Timor Makes the Case for a Model Criminal Code,' (2003) 18 American University International Law Review 1059, 1087 et eq.

[186] UNTAET Executive Order No 2000/2 on the Decriminalization of Defamation (7 September 2000) UNTAET/ORD/2000/2.

### 4.2 Judicial Review by Mechanisms established by UN Post-conflict Administrations

UN post-conflict administrations have established a few judicial mechanisms that were allowed to review certain acts of the administrators. Since they were established with the consent of the administrations, they proved to be more successful than domestic courts. However, their effects were limited since their mandate only covered some areas. For instance, UNMIK established a Pharmaceutics Appeals Board with the authority to hear and decide on appeals by an applicant against a refusal of the Kosovo Drug Regulatory Authority to issue a licence or a decision to suspend, revoke or terminate a licence for operation as a pharmaceutical wholesaler or retailer, importer or manufacturer of pharmaceutical products.[187]

Another example is the establishment of a Special Chamber of the Supreme Court of Kosovo to adjudicate claims relating to the decisions or actions of the Kosovo Trust Agency (KTA).[188] The Special Chamber had the mandate to hear claims with respect to the privatization process in Kosovo and used its authority to review the conformity of UNMIK Regulation No 2003/13 on the Transformation of the Right to Use Socially Owned Immovable Property[189] with international human rights standards in

[187] UNMIK Regulation No 2000/52 On the Import, Manufacture, Sale and Distribution of Pharmaceutical Products, including Narcotic Drugs and Psychotropic Substances (2 September 2000) UNMIK/REG/2000/52.

[188] UNMIK Regulation No 2002/13 On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Trust Agency Related Matters (13 June 2002) UNMIK/REG/2002/13; Kosovo Trust Agency was established by UNMIK Regulation No 2002/12 On the Establishment of the Kosovo Trust Agency (13 June 2002) UNMIK/REG/2002/12.

[189] UNMIK/REG/2003/13 (9 May 2003).

the context of a complaint against a decision of the KTA.[190] In this complaint, the applicants argued that they have not been included on a list of Termosistem company employees eligible for a share of proceeds from the company's privatization on ground of their Serbian ethnicity. Although UNMIK Regulation No 2003/13 required under Section 10(5) (b) that claims of discrimination should be supported by 'documentary evidence,' the Special Chamber refused to apply this provision as it was inconsistent with international human rights standards and allowed the applicants to prove their case with non-documentary evidence. This decision prompted the Special Representative to promulgate Anti Discrimination Law adopted by the Assembly of Kosovo (Law No 2004/3), which allowed the complainants to prove cases of discrimination by any means, rather than solely by documentary evidence.[191]

### 4.2.1 Kosovo Media Appeals Board

The Kosovo Media Appeals Board ("Board") has been the more well known of these few independent and external accountability mechanisms. The Board had the binding and enforceable power to uphold, modify or rescind the decisions of a UN post-conflict administration within the specific context of licensing and regulating the broadcast media in Kosovo pending the establishment of a regulatory regime for broadcasting.[192]

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[190] See *Termosistem Case*, Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Matters, SCEL 04-0001, (9 June 2004); see Everly (n 83) 26-27.

[191] UNMIK Regulation No 2004/32 On the Promulgation of the Anti-Discrimination Law Adopted by the Assembly of Kosovo (20 August 2004) UNMIK/REG/2004/32.

[192] UNMIK Regulation No 2000/36 On the Licensing and Regulation of the Broadcast Media in Kosovo (17 June 2000) UNMIK/REG/2000/36.

In 2000, an Office of Temporary Media Commissioner (TMC) was established in Kosovo, who would be responsible from implementing a temporary regulatory media regime to develop and promote an independent and professional media in Kosovo.[193] The TMC would be the sole authority to issue broadcast licenses and impose sanctions on broadcast licensees[194] who fail to adhere to the Print Media Code of Conduct under UNMIK Regulation No 2000/37.[195] Simultaneously, the Kosovo Media Appeals Board (the Board) was established, which had the authority to hear and decide on appeals by a person or entity against the decisions of the TMC on refusing to issue a broadcast licence, the conditions(s) attached to a broadcast licence, or sanctions imposed by the TMC.[196]

The Board was composed of two international members and one local member who were appointed by the Special Representative of the Secretary-General, and was authorized to uphold, modify, or rescind any condition or sanction imposed by the TMC.[197] A decision of the TMC would remain in effect until the Board issued its final decision, which was binding and enforceable.[198]

As it would be expected from any independent accountability institution, the Board was supposed to state the reasons for its decisions, and it was further expected to

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[193] ibid section 1.1.

[194] ibid sections 2.1 & 3.1.

[195] UNMIK Regulation No 2000/37 on the Conduct of the Print Media in Kosovo (17 June 2000) UNMIK/REG/2000/37.

[196] UNMIK/REG/2000/36 (n 192) sections 4.1 & 4.2.

[197] ibid sections 4.4 & 4.5.

[198] ibid section 4.7.

devise its own rules of procedure.[199] In formulating its rules of procedure, the Board took account of the internationally recognized human rights standards laid down in Article 14 of the ICCPR and in Article 6 of the ECHR, including the jurisprudence of the ECtHR to 'guarantee fair and impartial proceedings.'[200] Similarly, in regard to the law to be applied by the Board as the basis of its legal reasoning, the Board gave due respect to the provisions of the international human rights instruments set out in section 1.3 of UNMIK Regulation No 1994/24 together with the terms of the applicable regulations.[201]

The Board had the competence to review the legal basis of decisions taken by the TMC. In *Nexhmedin Spahiu and Radio Mitrovica v Temporary Media Commissioner*, an appeal on the fairness of procedure in evaluating broadcast licence applications and the question of bias, the Board elaborated on its competence as follows: 'The powers of public authorities are subordinated to the law. All administrative power within Kosovo is subject to legal limitations, and if its exercise exceeds those limitations, it may be invalidated by a reviewing authority.'[202] While this postulate was unfortunately not entirely valid with respect to control over all administrative decisions of UNMIK not only because of lack of competence but also due to immunities enjoyed by the Organization, the Board distinguished itself not only as an institution reviewing the decisions of the TMC, but also as an important instrument of

[199] ibid sections 4.5 & 4.6.

[200] ibid section 4.6; *Belul Beqaj and the Newspaper Dita, Appellant v Temporary Media Commissioner*, Kosovo Media Appeals Board, (13,14,16 September 2000) [15-16]; *Nexhmedin Spahiu and Radio Mitrovica v Temporary Media Commissioner*, Kosovo Media Appeals Board, (10 January 2001, 14 February 2001) [5].

[201] See UNMIK/REG/1999/1 (n 2); UNMIK/REG/1999/24 (n 2); *Nexhmedin Spahiu and Radio Mitrovica* (n 200) [6], [28]; *Belul Beqaj and the Newspaper Dita* (n 200) [18].

[202] *Nexhmedin Spahiu and Radio Mitrovica* (n 200) [32].

incidental control over UNMIK Regulations within its area of competence.[203] As stated by the Board in *Belul Beqaj and the Newspaper Dita*, where the Board found that the procedure leading to the imposition of sanctions against media under UNMIK Regulation No 2000/37 was not governed by the level of due process required by internationally recognized human rights standards,[204] it is 'not competent to review the legality or 'constitutionality' of Regulations promulgated by the Special Representative of the Secretary-General' in light of the legislative and executive authority vested in UNMIK and exercised by the Special Representative.[205] The Board reviewed, however, whether the procedural guarantees under UNMIK Regulation No 2000/37 on imposition of sanctions were in line with the requirements under Article 6 of the ECHR.[206] Further, the Board refused to review the legality of an Executive Decision of the Special Representative, under which the operations of the newspaper Dita were suspended for eight days in May 2000,[207] on grounds that it was not competent to review decisions taken before the creation of the Board, and that its competence did not extend to reviewing the legality of executive decisions of the Special Representative.[208] Nevertheless, the Board did not refrain from stating that 'the present proceedings are deeply coloured by earlier events, and that the Appellant continues to be sincerely concerned by the apparent lack of any forum in which to

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[203] See Stahn (n 13) 608.

[204] *Belul Beqaj and the Newspaper Dita* (n 200) [64-67].

[205] ibid [54] & [56]; see UNMIK/REG/1999/1 (n 2); UNMIK/REG/1999/24 (n 2).

[206] *Belul Beqaj and the Newspaper Dita* (n 200) [62-63].

[207] UNMIK/ED/2000/2 (30 May 2000); *Belul Beqaj and the Newspaper Dita* (n 200) [21].

[208] *Belul Beqaj and the Newspaper Dita* (n 200) [53-54].

pursue to challenge to the earlier closure'[209] pointing to the problem of non-reviewable executive decisions of the Special Representative.

The dichotomy between freedom of expression and imposition of sanctions by the TMC against owners, operators, publishers and editors who violate UNMIK Regulation No 2000/37, section 4.1 and publish the personal details of any person, including, name address or place of work, publication of which would pose a serious threat to the life, safety, or security of any such person was a recurring theme before the Board.[210] The appellant newspaper Dita, in *Belul Beqaj and the Newspaper Dita* appealed against the sanctioning decision of the TMC, which was put in place after the newspaper has published personal details and work places of twenty persons, including Orthodox priests, who allegedly participated in crimes against Albanians; after the publication of the article in Dita, two Orthodox priests were shot and hospitalized.[211] The appellant based its appeal on freedom of speech, democratic and civilized values.[212] The Board elaborated extensively on the jurisprudence of the ECtHR on freedom of expression,[213]and essentially acknowledged that exceptions to freedom of expression must be construed strictly but considered the relevant context of Kosovo in determining the balance between the public interest in preventing or

[209] ibid [55].

[210] See *Belul Beqaj and the Newspaper Dita* (n 200); *Sylejman Aliu and the Newspaper Bota Sot, Appellant v Temporary Media Commissioner*, Kosovo Media Appeals Board, (10 & 11 January 2001, 19 February 2001); *Epoka E Re vs Temporary Media Commissioner*, Kosovo Media Appeals Board, (16 August 2001).

[211] *Belul Beqaj and the Newspaper Dita* (n 200) [30-31] & [40].

[212] Ibid [41].

[213] ibid [68-75]; see also *Sylejman Aliu and the Newspaper Bota Sot, Appellant v Temporary Media Commissioner* (n 210), [70-73].

allowing the disclosure of an information.[214] Therefore, in view of the continuing level of violence and tension as result of the recent war, the Board considered that Dita 'has shown little understanding of the possibly tragic consequences' of the article it published, and it would be reasonable to infer that some of the individuals mentioned in the article, as well as others who could be mistaken for those photographed and described, therefore would be put in danger.[215]

Nevertheless, the Board declared the sanctioning decision of the TMC null and void on procedural grounds, stating that sections 2.1 & 2.3 of the UNMIK Regulation No 2000/37 did not sufficiently explain the procedure to be followed by the TMC in determining a violation and imposing a sanction, allowing the TMC to effectively act like both prosecutor and judge, and therefore contrary to the due process required by international standards.[216]

The decision of the Board on the procedural deficiency in imposing sanctions on media in *Belul Beqaj and the Newspaper Dita*, prompted the TMC to introduce a Media Hearing Board that would give a publisher the opportunity to contest the allegations of violations of UNMIK Regulation No 2000/ 37 before an independent and administrative panel that has the competence to determine whether a violation of the UNMIK Regulation No 2000/37 has occurred.[217] This has been a small but significant development, illustrating the role that the independent accountability

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[214] *Belul Beqaj and the Newspaper Dita* (n 200) [73-74].

[215] ibid [78-79].

[216] ibid [64-67].

[217] *Sylejman Aliu and the Newspaper Bota Sot, Appellant v Temporary Media Commissioner* (n 210) [21] & [69-70].

mechanisms could play to facilitate and enhance the accountability of post-conflict administrations.

## 5. Conclusion

In recent years, there have been positive developments with respect to accountability of UN post-conflict administrations. The establishment of accountability mechanisms 'new' and specific to the UN post-conflict practice has been a welcome step, but the effectiveness of these mechanisms largely depends on the extent to which the UN approaches them seriously and in good faith. The Organization needs to react positively to the findings/recommendations of these mechanisms and should facilitate rather than frustrate the processes before them. In the Kosovo context, the insufficient or mostly lack of response on behalf of the UN to the recommendations of the HRAP and the Ombudsperson has been a consistent problem.

An equally troubling concern has been the UN's attempts to frustrate the process before HRAP by 'forcing' individuals to resolve their demands mainly through internal UN Claims Commissions. Within the HRAP context, this seems to be a specific intention in the adoption of Administrative Direction No 2009/1. More critically, during negotiations by the claims commissions with the victims, the UN legal team has been imposing 'release forms' indicating that by accepting the pending offer of the Organization, the victim would release UNMIK from any liability, as the offer was 'in full and final settlement of all claims of every nature and kind whatsoever;[218] even though these offers are not based on any acknowledgment of a violation of the victims' human rights by the Organization, but rather constitute an *ex gratia* payment.[219] Such attempts to prevent the process before HRAP, an accountability mechanism that the UN itself established puts the Organization in a position of giving with one hand, while taking away with the other, which can only damage its credibility.

Nevertheless, the external mechanisms, whether advisory, quasi-judicial, or judicial established by the post-conflict administrations, in the administered territories are viable alternatives for the administration of justice for third parties whose rights are violated by the UN. This is due to several reasons. First, unlike UN Claims Commissions, they are independent of the UN. Their practice to date proves that they can manage to preserve their independence, even though they are established by the UN and their members are appointed by the Organization. Secondly, their function is crucial where domestic courts of the administered territories might be non-existent or unable to function properly as result of reasons associated with the conflict in the territory, or in any case because of the extensive immunities enjoyed by the UN, or because of the primacy of the regulations promulgated by the post-conflict administration over any other applicable laws. Further, they are alternatives to scrutiny by an international court which, at least for the moment, does not seem to be a possible option. For instance, both the Venice Commission and the Parliamentary Assembly of Council of Europe have suggested the establishment of a human rights court in Kosovo that would have judicial control over actions of UNMIK and

[218] *Kadri Balaj and Others against UNMIK*, HRAP, Decision to Reopen Proceedings (n 127), [23-29].

[219] ibid [71].

KFOR.[220] However, the UN rejected these suggestions on grounds of not compromising the discretion of the UN institutions to interpret the mandate of UNMIK under UNSC Res 1244.[221]

Similarly, the extension of jurisdiction of already existing international courts like the ECtHR to the actions of the post-conflict administrations is not on the UN's agenda. As can be inferred from the outcome of the *Behrami and Behrami v France and Saramati v France, Germany and Norway*, where the ECtHR decided that it lacked competence *rationae personae* to examine the impugned actions 'attributable' to the UN, [222] the Court has no will to act on alleged human rights violations on the UN administered territories. Further, without independent quasi-judicial or judicial mechanisms whatsoever, individuals are either left to the mercy of the UN Claims Commissions or, in other words, they are left without any mechanisms to vindicate their human rights claims. This is actually what has happened with respect to the claimants in *Behrami and Behrami v France and Saramati v France, Germany and Norway*. Following the inadmissibility decision of the ECtHR, one of the applicants, Mr Agim Behrami sought to take his complaint this time against UNMIK, before the HRAP.[223] The Panel was *forced* to declare the complaint inadmissible, as it fell outside the Panel's competence *ratione temporis*, as the facts occurred before 23 April 2005.[224] If there were no temporal jurisdiction limit before the Panel, it could have

[220] See Opinion on Human Rights in Kosovo (n 89); Resolution 1417 (n 75).

[221] See above (n 91).

[222] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway,* ECtHR, Grand Chamber Admissibility Decision, 71412/01, 78166/01 (02 May 2007).

[223] *Agim Behrami against UNMIK*, HRAP, Admissibility Decision, 24/08, (17 October 2008).

[224] ibid [14].

given the applicant the opportunity to vindicate his human rights claim. However, Mr Behrami was left without even the satisfaction of a determination that the death of one of his sons and the serious injury of the other amounted to a violation of their human rights.

Finally, the judicial mechanisms established with the consent of the post-conflict administrations such as the Special Chamber of the Kosovo Supreme Court of Kosovo and the Kosovo Media Appeals Board proved to be successful, not only in enhancing of accountability of the Organization towards individuals, but also in their incidental review of the actions of a post-conflict administration in their respective subject fields. A lesson learned for future would be to extend the mandates of subject-specific judicial mechanisms as such to cover diverse human rights issues. That is not to say that recommendations of the advisory mechanisms like ombudspersons or quasi-judicial mechanisms like human rights panels should be considered less effective than binding, enforceable decisions of judicial mechanisms. Ombudsperson institutions and human rights panels have the ability to investigate, report, and analyze human rights claims according to international case law and to suggest recommendations for changes in law and policy of post-conflict administrations, and the post-conflict administrations are expected to take these recommendations seriously. According to Reif, 'the effectiveness of a national human rights institution at any point in time depends, […] on legal, political, financial and social factors, many of which fall within the power of the executive and legislative branches of government.'[225] Thus, applying this perspective on the international plane, the action

[225] Reif (n 42) 68.

of a post-conflict administration bestowed with governmental powers would be crucial in determining the strength or weakness of any accountability institution.

# CHAPTER 8 CONCLUSION

## 1. Introduction

A prominent guidance document with respect to UN peacekeeping, the United Nations Peacekeeping Operations, Principles and Guidelines of 2008 (the Capstone doctrine), is based on the premise that the UN post-conflict administrations are part of multi-dimensional peacekeeping operations; it states that:

> Some multi-dimensional United Nations peacekeeping operations […] temporarily assume the legislative and administrative functions of the State, in order to support the transfer of authority from one sovereign entity to another, or until sovereignty questions are fully resolved […] or to help the State to establish administrative structures that may not have existed previously.[1]

The Capstone doctrine further lists the core functions of these operations, which are to facilitate the political process through the promotion of national dialogue and reconciliation, to protect civilians, to assist in the disarmament, demobilization and reintegration of combatants, to support the organization of elections, to protect and promote human rights, and to assist in restoring the rule of law.[2]

In distinguishing multi-dimensional peacekeeping operations from traditional United Nations Peacekeeping Operations, the Capstone doctrine points out that the transformation of the international environment after the Cold War gave rise to these

[1] DPKO, United Nations Peacekeeping Operations, Principles and Guidelines' (2008) (Capstone Doctrine) available at < http://pbpu.unlb.org/pbps/Library/Capstone_Doctrine_ENG.pdf> accessed 2 August 2013.

[2] ibid 6.

new generation operations, which are typically deployed in the dangerous aftermath of a violent internal conflict and may employ a mix of military, police and civilian capabilities to support the implementation of the core functions listed above.[3] While the UN has an evolutionary perspective on peacekeeping, the UN practice of exercising partial or full administrative prerogatives on territories shattered by conflict is not new. Back in the 1960s, the UN exercised partial administrative powers during the conflict in the Congo,[4] and established the United Nations Temporary Executive Authority (UNTEA) of 1962 in the territory of West New Guinea (West Irian),[5] which was noted by the Secretary-General as the first full UN temporary administration over a vest territory.[6] In 1966, the General Assembly terminated South Africa's mandate over Namibia and it was decided that the UN would assume direct responsibility of the territory until its independence.[7] However, it was indeed with the revival of the UN collective security system post Cold War that UN post-conflict practice gained momentum. The United Nations Transition Assistance Group (UNTAG) of 1989, described as a 'unique' operation by the Secretary-General at the time, consisted of a civilian component and a military component acting at the disposal of the Special Representative to the Secretary-General to work together within the overall mandate of ensuring the early independence of Namibia through

[3] ibid 22.

[4] UNSC Res 143 (14 July 1960) UN Doc S/4387; UNSC Res 161 (21 February 1961) UN Doc S/4741; UNSC Res 169 (24 November 1961) UN Doc S/5002.

[5] Agreement Between the Republic of Indonesia and The Kingdom of Netherlands Concerning West New Guinea (West Irian) (adopted 15 August 1962, entered into force 21 September 1962) 27 UNTS 6311 (the New York Agreement).

[6] UN General Assembly Official Records, 17th Session, 1127th Plenary Meeting (21 September 1962).

[7] UNGA Res 2145 (XXI) (27 October 1966); UNGA Res 2325 (XXII) (16 December 1967); UNGA Res 2248 (S-V) (19 May 1967).

free elections under the supervision and control of the United Nations.[8] The composition of UNTAG served as a model for the post-conflict administrations which followed the end of the Cold War, such as the United Nations Transitional Authority in Cambodia (UNTAC) in 1991,[9] and the United Nations Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium (UNTAES) of 1996.[10] It was with the fully-fledged UN Mission in Kosovo (UNMIK) and the United Nations Transitional Administration in East Timor (UNTAET) of 1999 that UN post-conflict practice reached its climax.[11] In both instances, a full range of governance and transformation activities in a territory was placed under the auspices of the UN.

According to the Capstone Doctrine:

> […] The fact that multi-dimensional United Nations peacekeeping operations enjoy a high degree of international legitimacy and represent the collective will of the international community gives them considerable leverage over the parties. This leverage can be used to build and sustain a political consensus around the peace process, promote good governance and maintain pressure on the parties to implement key institutional reforms.[12]

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[8] Report of the Secretary-General submitted pursuant to paragraph 2 of Security Council Resolution 431 (1978) Concerning the Situation in Namibia (29 August 1978) UN Doc S/12827 [8]; UNSC Res 385 (30 January 1976) UN Doc S/RES/385; UNSC Res 435 (29 September 1978) UN Doc S/RES/435.

[9]Agreement on a Comprehensive Political Settlement the Cambodia Conflict (signed 23 October 1991) 28613 UNTS 27.

[10] Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium (signed 12 November 1995) UN Doc A/50/757- S/1995/951.

[11] UNSC Res 1244 (10 June 1999) UN Doc S/RES/1244; UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272 [1].

[12] Capstone Doctrine (n 1) 24.

While the perception of the UN as the international organization representing 'the collective will of the international community' enabled it to implement key institutional reforms in the administered territories, it also stood out as one of the reasons that obscures the discussions on accountability of UN post-conflict administrations towards the populations of the administered territories.

The critical analysis of the UN post-conflict administrations undertaken in this research does not aim to undermine the post-conflict peacebuilding efforts of the UN. Nevertheless, the accountability deficit hampers these efforts. The UN post-conflict administrations exercise government powers and they have the power to shape the life and affect the future of the citizens or residents of these territories; this power therefore should entail accountability, the duty to account for its exercise.[13]

A major reason for the lack of effective accountability within the context of UN post-conflict administrations is the ambiguity of the law applicable to their actions, which would otherwise enable identification of the extent of the UN's international legal responsibility towards the populations of the administered territories. As stated by the ILA Committee, 'the issue of the identity of the set of international legal rules applicable to IOs is a necessary preliminary to any determination of responsibility problems.[14] Therefore, this research discussed the extent of application of the international humanitarian law and human rights law to UN post-conflict administrations as bodies of law that would help to create a legal framework to regulate actions of these administrations and therefore enhance accountability. The determination of the applicable law relates both to *ex ante* and ex *post facto*

[13] ILA, Report of the Seventy-first Conference (Berlin 2004) (the Final Report) 5.

[14] ibid 19.

accountability. Ascertaining that UN post-conflict administrations have parallel obligations under IHL and human rights law would create a strong presumption in favour of human rights protection before violations occur (*ex ante* accountability), and effective accountability mechanisms honouring these obligations should step in if and when they are breached (*ex post facto* accountability).

## 2. The Applicability of International Humanitarian Law and the Law of Occupation to UN Post-conflict Administrations

UN practice reveals that the Organization does not accept the unequivocal application of the Geneva Conventions and its Additional Protocols to its operations. The accession by the Organization to these conventions is not a viable option not only because the final clauses of the Geneva Conventions and Additional Protocols do not provide for the accession of the international organizations, but also because a possible accession would make the UN appear to be an adversary in an armed conflict, in contradiction with the neutrality that the Organization should possess as part of its responsibility for maintaining international peace and security as representing the collective will and interests of the member states.[15] However, under the Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operations (the Model Agreement), the UN undertakes to observe and respect the principles and spirit of the international conventions applicable to the conduct of military personnel.[16] The

[15] The UN Charter, art 1 (1).

[16] Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations (23 May 1991) UN Doc A/46/185 (the Model Agreement) art 28.

Secretary General's Bulletin on Observance by UN Forces of IHL (the Bulletin) of 1999 strengthened the commitment of the UN to the IHL through substituting the 'principles and spirit formula' with the more straightforward phrase: 'principles and rules.'[17] However, the Bulletin has a narrow scope, as it is only applicable to UN enforcement operations, 'when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement,' and to peacekeeping operations 'when the use of force is permitted in self defence.'[18] The Bulletin does not take into consideration the broad mandate, for example the mandate to 'use all necessary means' to secure their mission, of the contemporary multi-dimensional peacekeeping operations. Further, neither the Model Agreement nor the Bulletin clarifies how principles and rules of IHL are to be operationalized in UN practice. The Convention on the Safety of United Nations and Associated Personnel of 1995 (the Safety Convention),[19] adopted a few years after the Bulletin, addressed a critical gap in the law regulating consequences of attacks or threats against the UN personnel, but it is ambiguous on applicability of IHL to UN peacekeeping operations. The Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel of 2005 supplementing the Safety Convention[20] provides no further insight on the subject.

[17] Secretary General's Bulletin, 'Observance by United Nations Forces of International Humanitarian Law' (6 August 1999) UN Doc ST/SGB/1993/13, section 1.1 & 3.

[18] ibid section 1.1.1.

[19] Convention on the Safety of United Nations and Associated Personnel, UNGA Res 49/59 (17 February 1995), 2051 UNTS 363.

[20] UNGA Res 60/42 (6 January 2006).

In the absence of any treaty obligations, the principles and rules that apply to UN operations would be those IHL rules expressly accepted to be applicable by the Organization such as, according to Sections 5-9 of the Bulletin, some fundamental norms of IHL, and customary rules of IHL to the extent that these obligations could be discharged by the UN.[21] However, the argument that the Geneva Conventions and Additional Protocols contain many obligations that can only be discharged by states[22] is not effective for UN post-conflict administrations, since they would have legislative, administrative and judicial powers over the administered territories which would enable them to discharge the majority of IHL obligations.

Further, the Bulletin's narrow focus on the rules governing the hostilities might have the effect of discarding the detailed provisions of a subset of IHL that could be crucial for the UN post-conflict administrations, the law of occupation outright. The analogy between the administration of territories by international organizations and occupation by states has never been acknowledged in UN practice despite stark similarities between the two. Article 42 of the Hague Regulations links occupation to belligerency, but Common Article 2 of the Geneva Conventions gives occupation a wider meaning than it had under Article 42. While the first paragraph of the Common Article 2 encompasses occupations taking place during the hostilities, even if the state of war is not recognized, the second paragraph encompasses all cases of occupation, including those not preceded by armed hostilities, or where armed resistance was useless. Common Article 2 is not clear whether the phrase 'all cases of occupation'

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[21] *Interpretation of the Agreement of 25 March 1981 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73, 89-90.

[22] UN Secretariat, 'Question of the Possible Accession of Intergovernmental Organizations to the Geneva Conventions for the Protection of War Victims' (15 June 1972) UNJY 1972.

refers to occupation other than belligerent occupation, but it can certainly be contended that Common Article 2 covers other forms of non-belligerent occupations such as ‘peacetime’ or ‘consensual’ occupations.[23]

While the administration of territories by the UN closely resembles consensual occupations, the *de jure* application of the law of occupation to these administrations is problematic, given that the UN is unlikely to accept being labelled as an occupier, a term which has negative connotations and is generally linked to wars, oppression and colonial domination.[24] However, one should rather focus on *de facto* application of the law of occupation as a normative framework for post-conflict administrations, based on factual similarities between the UN post-conflict administrations and occupations. Like occupation, a post-conflict administration establishes a direct administration over the territory, where it exercises temporary control, while the complexity and the many gradations towards ending occupation are equally observed when UN post-conflict administrations come to an end. Effectively, like to occupations, the UN post-conflict administrations have to restore and ensure public order and safety (Article 43 of the Hague Regulations), make critical determinations as to the status of the local laws; and use similar justifications to change/repeal existing legislation or enact new laws. More importantly, the law of occupation guarantees basic humanitarian standards for the treatment of the populations of the

[23] D Shraga, ‘Military Occupation and UN Transitional Administrations-The Analogy and its Limitations’ in M G Kohen (ed), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (Brill 2007) 480; A Roberts, ‘What is a Military Occupation’ (1984) 55 BYIL 249, 274 et seq.

[24] M J Kelly, *Restoring and Maintaining Order in Complex Peace Operations, The Search for a Legal Framework* (Kluwer Law International 1999) 179.

administered territories[25] and constraints under Article 43 expecting the occupant to respect the laws in force in the country unless absolutely prevented would prevent liberal institutional changes in the administered territories without wide-scale participation of the populations of these territories.

### 3. Human Rights Law and UN Post-conflict Administrations

Different theories ('internal conception,' 'external conception, 'hybrid conception,' 'functional treaty succession') have been put forward as evidence of human rights obligations of the UN. Nevertheless, none of these theories is convincing enough alone. The most reliable argument is based on the fact that in the absence of any treaty obligations, the UN, as an international organization with objective personality,[26] is bound by human rights law to the extent that it has gained customary international law status. The application of human rights law as part of the normative framework in UN administered territories is crucial since the accountability mechanisms under IHL are not as developed as those under the human rights protection systems. Further, as revealed by the jurisprudence of the ICJ,[27] these two bodies of law can complement each other, allowing one to fill the gaps in the other so as to create a stronger system of human rights protection, thereby, strengthening accountability in the administered territories. There exists a misconception that human rights law always gives the

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[25] J Pictet (ed), The Geneva Conventions of 12 August 1949: Commentary (Geneva: ICRC 1952-1960) 60.

[26] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, 185.

[27] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136; *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgment, ICJ Reports 2005,168.

individual greater and more extensive protection than IHL, but with respect to certain rights and with its non-derogability, IHL might guarantee better protection.[28]

Human rights law and the law of occupation would interact especially with respect to the regulation every day life on the administered territories, in protecting people's right to an adequate standard of living, the right to food, the right to health and the right to property.[29] While the law of occupation provides the essential minimum protection for these rights, they can be complemented more extensively under human rights law. As the international administration of a territory becomes prolonged, the interaction between human rights law and IHL would be more significant. Especially with respect to social, economic and cultural rights which are programmatic and based on progressive realization,[30] IHL would be complemented by human rights law or vice versa to devise long term strategies, while the obligation under the law of occupation to respect local law unless absolutely prevented would constrain radical changes not based on democratic participation of the populations of administered territories. A normative system based on complementarity between IHL, the law of occupation and human rights law would enhance the human rights protection and, therefore, accountability as well.

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[28] See for instance Geneva Convention III art 13; Geneva Convention IV art 32; Protocol I art 11.

[29] I Scobbie, 'Principle of Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict' (2010) 14 Journal of Conflict & Security Law 449, 455-456; S Vité, 'The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food, Health and Property' (2008) 90 IRRC 629, 633.

[30] Committee on Economic, Social and Cultural Rights, General Comment No 3, The Nature of States Parties Obligations (Article 2, paragraph 1 of the Covenant) (14 December 1990) UN Doc E/1991/23 [9].

## 4. Attribution of Conduct to UN Post-conflict Administrations and Immunities

While ascertaining the international obligations of UN post-conflict administrations is the initial step in strengthening their accountability, the assumption of legal responsibility by the Organization when these obligations are breached is equally important. As subsidiary organs, UN post-conflict administrations would in principle be under UN command and control and their conduct in breach of international obligations would be attributed to the UN. However, command and control structures of post-conflict administrations are complicated, as they are complex entities with civilian and military components. The UN has operational control[31] over the military components consisting of national contingents, which remain under the command of national contingent commanders and under the disciplinary control of the respective troop contributing states.[32] However, UN practice reveals that as long as military components are under the strategic direction of the UN, they would be under the effective operational control of the Organization.[33] Therefore the retention of UN operational control should be tested in each case in order to decide on the attribution of specific conduct to the UN.

It is clear from UN practice that in authorized Chapter VII operations conducted under national command and control, the conduct is imputable to states carrying out the operation; in joint operations responsibility belongs to those who exercise

[31] The Capstone Doctrine (n 1) 68.

[32] Report of the Secretary-General, 'Comprehensive Review of the Whole Question of Peace-keeping Operations in All Their Aspects, Command and Control of United Nations Peace-keeping Operations' (21 November 1994) UN Doc A/49/681 [6].

[33] ibid.

effective command and control.[34] While the UN practice was ignored by the ECtHR and the Court devised an 'ultimate authority and control' test of its own in *Behrami and Behrami v. France and Saramati v. France, Germany and Norway,*[35] a crucial outcome of this decision from the accountability perspective was that even when wrongful conduct is rightly attributed to the UN (as UNMIK failed to de-mine the territory), the Court declared that it lacked competence *ratione personae,* not only because the UN is not a contracting party to the ECHR, but also because it considered itself incompetent to review the acts of the respondent states carried out on behalf of the UN under Chapter VII.[36] The outcome of this and other similar decisions of the ECtHR,[37] shows that after wrongful conduct is attributed to the UN, the individuals' only option is to seek redress in the accountability mechanisms established by the UN itself. Further, attempts by national courts to engage the UN's responsibility have been frustrated by the Organization's absolute immunity.[38] Various arguments have been put forward in support of preserving the Organization's absolute immunity. These include emphasis on the UN's role in representing the public interest; that immunity is essential to enable it to carry its actions properly and without undue interference by states; and that the Organization should be protected from the possible bias and inconsistent decisions by national courts, would damage the Organization's

[34] ILC, 'Report of the International Law Commission on the Work of its 56th Session' (3 May-4 June and 5 July-6 August 2004) UN Doc A/CN.4/545 18.

[35] *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* ECtHR, Grand Chamber Admissibility Decision, 71412/01, 78166/01 (02 May 2007)

[36] ibid [144-152].

[37] See for instance *Kasumaj v Greece*, ECtHR, Admissibility Decision, 6974(05), (05 July 2007); *Gajic v Germany*, ECtHR, Admissibility Decision, 31446/02, (28 August 2007).

[38] Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 art 2 (2).

credibility.[39] These are strong arguments and within the context of UN post-conflict administrations, one should add the fact that the national courts of the post-conflict administrations might not be functioning properly, or that there might be no functioning national courts at all to give effect to the UN's responsibility. While preserving the absolute immunities of post-conflict administrations could create the uneasy conclusion that a surrogate government would be protected against itself,[40] realistically, considering the fact that the UN practice does not show any sign of softening its immunity regime, the focus should be on the availability of alternative means of dispute settlement, rather than on removal of immunities. While the ICJ has expressly held recently in *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* that there is no basis in international law that makes the entitlement of a State immunity dependent upon the existence of effective alternative means of securing redress,[41] an obligation to provide alternative means could be derived from Section 29 of the General Convention, which requires the UN to make provision for appropriate modes of settlement of private disputes, with the intention 'to provide a complete remedy system to private parties who allege to have been harmed by actions of the United Nations or by its agents acting within the scope of their mandate.'[42]

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[39] See E De Brabandere, 'Immunity of International Organizations in Post-conflict International Administrations' (2010) 7 International Organizations Law Review 79; P Bekker, *The Legal Position of Intergovernmental Organizations: A Functional Necessity Analysis of Their Legal Status and Immunities* (Martinus Nijhoff 1994) 103.

[40] See 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) [23].

[41] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment of 3 February 2012 [101]

[42] Verbatim Record of the Public Sitting held on 10 December 1998, in the case concerning the *Difference Relating to Immunity from Legal Process of A Special Rapporteur of the Commission on Human Rights*: H Corell, Legal Counsel of the UN Oral Statement, UN Doc CR 1998/17, 9 [6].

**5. To What Extent Mechanisms to Engage the Accountability of the UN Post-conflict Administrations Are Effective?**

Generally, UN post-conflict administrations have sought to address the plea for accountability through UN Claims Commissions.[43] These Commissions, however, have significant shortcomings: the responsibility of peacekeeping operations is subject to the exception of operational necessity; they are internal mechanisms that fulfil none of the criteria of independence and access which are to be found, for example, in Article 6 of ECHR; and they are *ad hoc* commissions that are only set up when the UN decides that there is a need during an operation,[44] thus depriving individuals of the opportunity to bring their claims whenever they want to. More crucially, the Claims Commissions only compensate claims of a private law character, based on limited tortious liability; the Organization does not pay any compensation for non-economic loss, such as pain and suffering or moral anguish, or provide for punitive or moral damages.[45] Only compensating claims of a private law character has been an important issue of contention between the UN and the Human Rights Advisory Panel in Kosovo.[46] Although UNMIK undertook to draw the attention of the United Nations General Assembly to the need for a review of the current

[43] Report of the Secretary-General, 'Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations' (20 September 1996) UN Doc A/51/389 [7]; ILC, 'Report of the International Law Commission on the Work of its 56$^{th}$ Session' (3 May-4 June and 5 July-6 August 2004) UN Doc A/CN.4/545, 18.

[44] UN Doc A/51/389 (n 43) [25].

[45] UNGA Res 52/247 (on temporal and financial limitations for third-party liability of the Organization) (17 July 1998).

[46] *Kadri Balaj and Others against UNMIK*, HRAP, Decision to Reopen Proceedings 04/07, (11 May 2012) [71].

compensation rules,[47] there have been no developments in that respect.

In recent years with the establishment of accountability mechanisms 'new' and specific to the UN post-conflict practice, such as the Ombudsperson Institutions in Kosovo and East Timor, the Human Rights Advisory Panel in Kosovo and the Kosovo Media Appeals Board, there have been positive developments with respect to the accountability of UN post-conflict administrations. However, for these mechanisms to be effective the Organization needs to react positively to their findings and recommendations. With respect to UNMIK, the insufficient or mostly lack of response on behalf of the administration to the recommendations of the HRAP and the Ombudsperson has been a persistent problem. The presiding member of the HRAP, M Nowicki, points this out in the foreword of the recent annual report of the Panel where he states that:

> The Panel's recommendations, especially those referring to financial compensation, are being ignored while victims are left only with the satisfaction that the Panel has vindicated their claims. This is decidedly too little and is compounded by the fact that a Panel's opinion finding violations is not even followed by a letter of apology addressed to the victim from the SRSG on behalf of UNMIK.[48]

The quasi-judicial mechanisms in the post-conflict territories should have more deterrence power over post-conflict administrations. An ombudsperson model along the lines of the Ombudsman for Bosnia and Herzegovina,[49] which has mechanisms to ensure that its recommendations are followed but which also has monitoring powers

[47] 'SRSG's Comments on HRAP Opinion in the case of Nadica Kusic (case no 08/07)' reproduced in Parliamentary Assembly of the Council of Europe, 'Resolution 1739 on The Situation in Kosovo and the Role of the Council of Europe' (2010) [45].

[48] The Human Rights Advisory Panel, 'Annual Report 2012' (i).

[49] General Framework Agreement for Peace in Bosnia and Herzegovina (1996) 35 ILM 89 annex 6, art IV.

over the administrators would be more effective. If the ombudsperson decides that the post-conflict administration violated human rights, the administration should explain how it would comply with the decision of the ombudsperson in a specified period. In the event that the administration does not comply with its recommendations, the Ombudsperson should be able to initiate proceedings before other human rights protection mechanisms established in the administered territories.

Finally, the judicial mechanisms established by the post-conflict administrations themselves, such as the Special Chamber of the Kosovo Supreme Court of Kosovo and the Kosovo Media Appeals Board were successful both in enhancing of accountability of the Organization towards individuals and the incidental review of the actions of a post-conflict administration in their respective subject fields. The extension of the mandates of these subject-specific judicial mechanisms to cover diverse human rights issues on the administered territories would be a major step towards actualizing effective accountability.

## 6. Conclusion

It is doubtful whether UN will undertake major post-conflict administrations processes in the near future, like Kosovo or East Timor. However, multi-dimensional peacekeeping operations will undoubtedly continue to exercise at least partial administrative powers in territories under or prone to armed conflict. Even as these lines are being written, UN forces are exercising partial administrative powers in countries like Liberia[50] and Côte d'Ivoire[51] to support the implementation of the peace processes, assist national security reforms, train national institutions and work towards upholding the rule of law and protection and promotion of human rights.

Any military and civilian deployment into complex conflict situations that aims to protect and promote human rights and upholding the rule of law would benefit from a legal framework which encompasses not only the SOFAs, military technical agreements, and UN operational principles, guidelines or regulations to carry out a mission's mandate, but equally important, which unequivocally accepts the application of human rights law and its complementary application with IHL and the law of occupation to address the needs and concerns of the administered populations. This legal framework should be complemented by effective accountability mechanisms that will hold the post conflict administrations accountable for violations of international obligations.

Current mechanisms reveal that the UN does not have a systematic approach to accountability of post-conflict administrations and creates *ad hoc* mechanisms when the need arises. The establishment of the ombudsperson institutions in Bosnia-Herzegovina, Kosovo and East Timor was not based on clear, consistent principles. The creation of permanent accountability mechanisms, such as an ombudsperson or a human rights panel, does not seem likely, at least for the near future, given the fact

[50] UNSC Res 1509 (19 September 2003) UN Doc S/RES/1509; UNSC Res 2116 (18 September 2013) UN Doc S/RES 2013.

[51] UNSC Res 1528 (27 February 2004) UN Doc S/RES/1528; UNSC Res 2112 (30 July 2013) UN Doc S/RES/2112.

that the Organization did not even manage to create a permanent claims commission under the Model SOFA, due to underlying political or financial reasons.

However, the Organization could adopt a holistic approach towards accountability through possible monitoring and supervision by its permanent organs, such as the General Assembly where all member states are represented. Ombudsperson institutions, for instance, could report to the General Assembly or the Secretary-General rather than to the Special Representatives of the Secretary-General. In the legal literature, there have been suggestions to establish specialized transitional administration committees consisting of experts who could identify the shortcomings of post-conflict administrations in general in the light of international human rights standards and principles of good governance.[52] More crucially, in the post-conflict setting, a Committee of the UN Peacebuilding Commission could be influential in enhancing accountability. The Commission is a relatively new institution with a mandate to bring together all relevant actors, to marshal resources, and to advise on coordinated, coherent and integrated strategies for post-conflict peacebuilding and recovery.[53] While it is an intergovernmental organization that advises on reconstruction and institution-building efforts in countries in transition,[54] its mandate could extend to the monitoring and supervision of the acts of UN operations with

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[52] C Stahn, *The Law and Practice of International Territorial Administration, Versailles to Iraq and Beyond* (CUP 2000) 618-619; S Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (OUP 2005) 152, 240.

[53] For a survey on establishment of the Peacebuilding Commission see Report of the High-level Panel on Threats, Challenges and Change, ‘A More Secured World: Our Shared Responsibility’ (2 December 2004) UN Doc A/59/565 [261-269] that proposed the creation of a Peacebuilding Committee. The proposal was formally adopted by the Secretary General in his Report, ‘In Larger Freedom: Towards Development, Security and Human Rights for All’ (21 March 2005) UN Doc A/59/2005. The Peacebuilding Commission was established by enabling UN Resolutions; UNGA Res 60/180 (30 December 2005) and UNSC Res 1645 (20 December 2005) UN Doc S/RES/1645.

[54] The Peacebuilding Commission made crucial contributions to security sector reform, rule of law and national reconciliation in Liberia, see UNSC Res 2116 (n 50).

administrative prerogatives. The Commission could further assist in creating a framework of principles and rules that would apply in the international administration of territories, help to prevent potential IHL and human rights law violations, and thus create a principled way of assessing these violations when they occur.

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