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The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics

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Abstract

The concept of suspension of sovereignty is not new in the legal and political discourses in international relations. It has been employed mainly to describe dramatic and extreme situations in which a clear rupture is observed between the legal proposition of internal sovereignty and the social and political realities on the ground. A prominent example has been the case of foreign occupation. The recent UN Security Council Resolutions on Kosovo and East Timor rekindled interest in the concept of suspended sovereignty and raised new perspectives about its function and role in international politics because it is the product of legitimate international processes representing a further evolution of models of international political authority. Thus, the possible future crystallization of such a concept in international law should be seen and explored more as an opportunity to increase the transparency and accountability of international transitional administrations and less as a chance to reintroduce hierarchical relations in international politics.

Terms such as 'suspended animation',¹ 'sovereignty in abeyance',² 'suspended statehood'³ and 'suspended sovereignty'⁴ have been employed in the legal and political discourses on sovereignty in several cases in the modern history of international relations. These terms have been used to describe different situations in which the internal aspect of sovereignty was perceived to be an empty legal

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¹ Batty, 'Can an Anarchy be a State?', 28 *American Journal of International Law* (1934) 454.

² Judge Arnold McNair, *Advisory Opinion on the International Status of South West Africa*, ICJ Reports (1950) 150.

³ Yusuf, 'Reflections on the Fragility of State Institutions in Africa', 2 *African Yearbook of International Law* (1995) 3.

⁴ Schachter, 'Sovereignty — Then and Now', in R.St.J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1993) 685–688.

proposition not matching social realities. The corresponding claim has mainly been that in such situations sovereignty is no longer an applicable legal concept. Such cases include foreign occupation, the Mandate and UN Trusteeship systems, and cases in which states or territories were placed under interim international administrations either as the result of international agreements or due to UN Security Council resolutions adopted under Chapter VII of the UN Charter. The term ‘suspended sovereignty’ is preferred here because it describes more accurately the legal meaning and purpose for which such terms are normally employed.

1 Suspended Sovereignty and Foreign Occupation

Most commonly, the concept of suspended sovereignty is associated with cases of foreign occupation. Under modern international law, foreign invasion does not lead to the extinction of a state. However, a state under occupation is unable to exercise governmental authority in its territory. States have historically had little difficulty in recognizing that the exercise of sovereign rights may be temporarily suspended due to war or foreign occupation, as the experience of the Second World War most prominently demonstrates.⁵ The implicit assumption behind this attitude has been that, with peace, sovereignty will be restored through a final settlement. Ian Brownlie encapsulates the position of international law by stating that ‘[while] illegal usurpation of power as a result of foreign invasion will not cause the demise of a State . . . it will compromise its enjoyment of the incidents of statehood within a part or the whole of its own territory’.⁶

Therefore, the position in international law in the case of foreign invasion is that, while the legal personality of the state under occupation is not annulled, its sovereign rights are suspended. In this sense, the legal continuity of statehood is qualified. This means that the illegal usurper of power during the period of occupation effectively replaces the legal sovereign in international legal relations, at least with respect to the legal obligations of sovereignty such as state responsibility or other contractual obligations it may assume in connection with its activities as the *de facto* sovereign.⁷

It appears that the legal rubric of suspended sovereignty here serves the purpose of reconciling law with reality in anticipation of a final settlement. In that sense, it mainly serves as a legal rationalization of a political reality that has produced an abnormal legal situation. The concept of suspended sovereignty also implies here the effort of the international legal system to ensure both the rule of law and the stability of international legal relations in the case of suspension of internal sovereignty due to illegal foreign occupation.

⁵ *Ibid.*, at 685.

⁶ Brownlie, ‘General Course on Public International Law’, 255 *Collected Courses of the Hague Academy of International Law* (1995) 53.

⁷ Ian Brownlie, *Principles of Public International Law* (4th ed., 1990) 84.

2 Suspended Sovereignty and the Mandates and UN Trusteeship Systems

Another case in which the concept of suspended sovereignty has been invoked is the Mandate and UN Trusteeship systems. In 1950, when the International Court of Justice responded to the request for an advisory opinion on the legal status of the territory of South West Africa (Namibia), Judge MacNair stated in his separate opinion that:

the doctrine of sovereignty has no application to this new system. Sovereignty over a Mandated Territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent State . . . sovereignty will revive and rest in the new State. What matters . . . is not where sovereignty lies, but what are the rights and duties of the Mandatory in regard to the area of territory being administered by it.⁸

The term 'sovereignty in abeyance' here was employed to describe the innovative nature of the Mandate and UN Trusteeship systems as international institutions establishing new patterns of legal relations between the local population and the government which represent them internationally. In that sense, it served as the legal rationalization of the political realities that were created by the establishment of the Mandate and UN Trusteeship systems. However, there is also another similarity with the case of illegal foreign occupation: the concept of suspended sovereignty also operated here as a temporary arrangement with an expectation of a final settlement, which would most likely in this case be independence.

In the case of the Mandate and UN Trusteeship systems, Judge MacNair also argued that the systems could be compared to the English common law trust, in which power can be conferred on a trustee for the benefit of a third party, with supervisory authority vested in a court.⁹ In fact, the major characteristic of these new arrangements was that the mandatory was obliged to administer the territory for the benefit of the people and its acts were subject to international supervision. Such arrangements gained most of their legitimacy from their perceived sound teleological morality.

It is no coincidence that recent suggestions for the resurrection of the UN Trusteeship system in order to address protracted domestic conflicts and collapsed states are based on identical legal reasoning and on similar plausible moral arguments. For instance, Gerald Helman and Steven Ratner suggested that:

the conceptual basis for the effort should lie in the idea of conservatorship. In domestic systems when the polity confronts persons who are utterly incapable of functioning on their own, the law often provides some regime whereby the community itself manages the affairs of the victim. Forms of guardianship or trusteeship are a common response to broken families, serious mental or physical illness, or economic destitution . . . It is time that the United Nations consider such a response to the plight of failed states . . . Failed states are self-governing only in the narrowest sense. Though not under the control of a colonial power, they hardly govern

⁸ McNair, *supra* note 2, at 150.

⁹ *Ibid.*, at 151–152.

themselves. It seems appropriate to modernize and reorient UN programs to cover the 'newly non-self-governing territories'.¹⁰

The implications of such propositions for the international political and legal order are obviously far-reaching. The implicit assumption of such propositions is that certain states and peoples should somehow no longer be viewed as political entities entitled to the rights that derive from sovereignty. Thus, some states will become more sovereign than others, both in political and in legal terms. In order to identify the resonance of such propositions, we should further examine the legal basis of the concept of sovereignty in abeyance in the case of the Mandate and UN Trusteeship systems.

The idea of suspended sovereignty in the case of the Mandate system served as the legal rationalization of political realities. The Mandate system did not emerge as the result of the legal appreciation of the capacity of the local population for self-rule but rested on the power of disposition of the leading victor states of the First World War over the colonial territories of the defeated states.¹¹ In that sense, the application of the concept of suspended sovereignty here merely reflected the translation of political realities into legal forms.

The legal basis for placing territories under UN Trusteeship was fairly similar. The only difference was that, at the end of the Second World War, the major powers were no longer just the British and French colonial empires (which wanted to defend the *status quo* and maintain control over their territories) but also states such as the US and, particularly Russia and China, which, largely for their own interests, promoted the ideas of self-determination and independence for the dependent territories around the world.¹² This is reflected in the formulation of Article 77 of the UN Charter:

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:
 - a. territories now held under mandate;
 - b. territories which may be detached from enemy states as a result of the Second World War; and
 - c. territories voluntarily placed under the system by states responsible for their administration.

In practice, since no colonial power used the option under the third category to place voluntarily any of its colonial territories under the UN Trusteeship system, the legal basis of the concept of suspended sovereignty in the case of the UN Trusteeship was identical to that of the Mandate system. It was the legal rationalization of the political realities of the combined outcome of the First and Second World Wars as illustrated by the first two categories and, specifically, of the right of disposition that the victorious powers acquired over the dependent territories of the defeated states. Thus, the idea of suspended sovereignty in the case of the Mandate and UN

¹⁰ Helman and Ratner, 'Saving Failed States', *Foreign Policy* (Winter 1992–1993) No. 89, 3, at 12 and 17.

¹¹ Brownlie, *supra* note 7, at 172.

¹² Ermacora, 'Trusteeship System/Trusteeship Council', in R. Wolfrum (ed.), *United Nations: Law, Policies, and Practice*, vol. II (1995) 1259–1261.

Trusteeship systems was a term of art serving as the legal rationalization of the political realities produced by the First and Second World Wars.

The proposed application of the concept of 'newly non-self-governing territories' in the case of state collapse or failed states today follows a fairly similar legal reasoning. The decision to place a state under UN Trusteeship is explicitly reserved to the political considerations of the UN Security Council.¹³ Thus, the proposed legal basis for determining when a state may become a 'newly non-self-governing territory' eligible to be placed under UN Trusteeship can only be an emerging right of disposition that the UN Security Council has somehow acquired in the post-Cold War period. International law is then simply required, in an *ex post facto* assessment, to rationalize the political realities created by the UN Security Council's actions by declaring that the sovereignty of states placed under UN Trusteeship is suspended.

The UN Charter explicitly forbids the application of the Trusteeship system to UN member states. Article 78 of the Charter states that: 'the trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.' Thus, unless the Charter is amended, placing collapsed states under the UN Trusteeship system would clearly be at variance with international law. In that sense, the legitimacy of invoking today the proposition of suspended sovereignty, as the rationalization of a political decision that is interpreted to have somehow placed a collapsed state under UN Trusteeship, would also be questionable as it would be based on an illegal act. Another thesis is to expel a state from the UN and then proceed to place it under UN Trusteeship, as the prohibition of placing states under UN Trusteeship is applicable only to the member states of the UN.¹⁴ However, such an interpretation of Article 78 seems abusive and contradicts the purposes of the UN, let alone the very purpose of placing a state under UN Trusteeship.

However, propositions which favour the revival of the UN Trusteeship system tend to dismiss the arrangements of the UN Charter as obsolete. The thesis of the proponents of the application of some form of Trusteeship derives its plausibility from the moral imperatives with which a specific Western imagery of the Mandate and UN Trusteeship systems is widely associated ('sacred trust'). In 1960, Kenneth Robinson stated that 'the problems of trusteeship were the problems of power, of the responsibilities of the strong towards the weak'.¹⁵ In 1993, Paul Johnson stated that 'the civilized world has a mission to go to these desperate places and govern'.¹⁶ In 1994, William Pfaff reiterated the same imagery of the moral responsibility of the West towards the parts of the world deemed collapsed or collapsing by proposing that

¹³ Helman and Ratner, *supra* note 10, at 18–19.

¹⁴ Gordon, 'Some Legal Problems with Trusteeship', 28 *Cornell International Law Journal* (1995) 345.

¹⁵ Kenneth Robinson, *The Dilemmas of Trusteeship: Aspects of British Colonial Policy Between the Wars* (1965) 92.

¹⁶ Johnson, 'Colonialism's Back — And Not a Moment Too Soon', *New York Times*, 18 April 1993, F22.

Europe, due to its historical links with Africa, is more suitable to re-establish a trusteeship system over the collapsing parts of the continent.¹⁷

No proposal, however, in the post-Cold War period has suggested the translation of such moral responsibility into a legal obligation. For almost all the proponents of reviving the UN Trusteeship system, placing states under trusteeship and the criteria, processes and procedures of deciding which states are to be placed under trusteeship and what are the legal responsibilities of the international administrators are left entirely to the political expediency of the member states of the UN Security Council, to be decided on an *ad hoc* basis. In that sense, no questions about normative conceptions and procedural safeguards regarding the revival of the UN Trusteeship system have been raised. It seems that here the UN is mainly conceived as an alternative forum in which states can continue their traditional power games rather than as the place where authoritative concepts and procedures will be agreed with the aim to translate such moral responsibility into normative rules of the international system.

There have though also been proposals to re-examine this question from a fresh perspective. Peter Lyon states that:

it has to be admitted that a mandatory system, so reminiscent of colonialism in the days of the overseas ascendancies of the West Europeans, will almost certainly not prove generally acceptable nowadays and therefore practicable. Thus the best that might be practicable is a second best: trusteeship by the UN itself . . . It could be that the label trusteeship is so indelibly connected in people's minds with a particular UN system specified in Chapters 12 and 13 of the Charter that it would be politically and psychologically unwise to saddle what would, in practice, be a freshly thought out system with the old name. Perhaps guardianship (in itself a new use for an old idea) would be appropriate. Names apart, the best spirit of trusteeship needs revising and revitalizing, and there is much relevant work to do.¹⁸

The post-Cold War experiences with international agreements and UN Security Council resolutions authorizing far-reaching and innovative arrangements of international administration over sovereign territories have further rekindled interest in the debate about reviving the Mandate and UN Trusteeship systems or other forms of international protectorates.

¹⁷ 'Europeans could form a cooperative Trust Authority with Africans to restore order, a regime of political and social rights, and rebuild health and education institutions, develop national economic infrastructures and install competent administrations. This would be a 50-year project, possibly even a century-long one. But it could mean salvation for Africa and a deeply constructive accomplishment for Europeans. That it would eventually end would have to be understood from the start. The Europeans would be saying to the Africans: we began this modernization journey with you — now we are rejoining you to complete the journey.' Pfaff, 'Africa Needs Europe to Get Involved Again, in a Different Spirit', *International Herald Tribune*, 15 August 1994, 6.

¹⁸ Lyon, 'The Rise and Fall and Possible Revival of International Trusteeship', 31 *Journal of Commonwealth and Comparative Politics* (1993) 105 and 108.

3 Suspended Sovereignty and International Agreements Placing States Under Some Degree of International Administration

A third case in which the concept of suspended sovereignty has historically been invoked is the case of legal arrangements that originate from international agreements formulated or approved by the local parties to a domestic conflict that confer on international organizations far-reaching authority over the management of the domestic affairs of a state. United Nations organs had been prepared to assume administrative functions inside a state since the early days of the organization, for instance in relation to the City of Trieste (1947), the City of Jerusalem (1950) and West Irian (1962). However, the unprecedented scale of transfer of domestic power to international organizations that was produced by the post-Cold War Paris Agreements on Cambodia (1991) and the Dayton Peace Accords on Bosnia-Herzegovina (1995) have given a new perspective to the idea of suspended sovereignty.

The question of what impact placing states under some form of international administration would have on the sovereignty of states was originally raised in legal debates with regard to Cambodia. The Paris Agreements were based on the decision of the main political parties of Cambodia to establish the Supreme National Council (SNC) as the 'unique legitimate body and source of authority in which, throughout the transitional period, the sovereignty, independence and unity of Cambodia are enshrined'.¹⁹ However, the Agreements also established the UN Transitional Authority in Cambodia (UNTAC) and provided that UNTAC would exercise governmental power and civil administration in crucial fields of governance such as foreign affairs, national defence, finance, public security and information as well as exclusive control over the election process.²⁰ Steven Ratner raised the question of whether 'because of the SNC's delegation of authority to UNTAC, Cambodia lost those attributes of statehood and is no longer fully "sovereign"'.²¹ He argued that 'the SNC's formation requires some new thinking about sovereignty of states and recognition of governments, especially if it is considered as a possible precedent for other internal conflicts'.²²

However, no specific answer is given to this enquiry. Steven Ratner limited his analysis mainly to the presentation of the widely shared proposition that these arrangements were the temporary delegation of rights deriving from sovereignty by the SNC to UNTAC. He then simply dismissed such a perspective as 'formalistic', 'strained' and 'irrelevant' as it was 'based on an anachronistic conception of sovereignty'.²³ He concluded by stating that: 'if sovereignty rests with a state's people and embraces human rights norms, a string of repressive governments have already undermined the sovereignty of the Cambodian people. The peace accords, by

¹⁹ Ratner, 'The Cambodia Settlements Agreements', 87 *American Journal of International Law* (1993) 10.

²⁰ *Ibid.*, at 12–25.

²¹ *Ibid.*, at 23.

²² *Ibid.*, at 40.

²³ *Ibid.*, at 24.

entrusting to UNTAC tasks that foster conditions for Cambodians to exercise their popular will, reverse this trend and start to resurrect Cambodia's sovereignty.'²⁴

It is clear that his proposition is not that the Paris Agreements had somehow affected Cambodia's sovereignty, but that Cambodia had ceased to be a sovereign state long before the peace agreements and the establishment of the SNC and UNTAC and for reasons not related to these events. In fact, as he further states, 'the SNC is *sui generis* as a matter of international law . . . [T]he recognition of the SNC was clearly constitutive. It maintains its unique position only by virtue of [UN Security Council] Resolution 668.'²⁵ In that sense, the Paris Agreements can be rationalized as acting upon the political fact that Cambodia's sovereignty had vanished prior to the agreements. Thus, the Paris Agreements derive their power exclusively from the UN Security Council resolutions on Cambodia and not from the local people.

Such a proposition brings us back to the question of the Mandate and UN Trusteeship systems. Political realities are decorated with legal forms without precise meaning since no criteria for declaring Cambodia's sovereignty to be in abeyance are given other than an ambiguous *post facto* rationalization of the peace agreements. According to this interpretation of the peace agreements, Cambodia's sovereignty is retroactively declared extinct due to the oppressive rule of the previous Cambodian governments. The proposition, however, that Cambodia's sovereignty had disappeared because of the conduct of the previous oppressive regimes finds no support in international law.²⁶ While a more detailed analysis of such a proposition is beyond the scope of this paper, it suffices to state here that, should such propositions be applied consistently, the results would be embarrassing for many states around the world that are ruled by one or other form of dictatorial regime. In any case, such a proposition finds no support in state practice either.

The question, however, that the proposed concept of suspended sovereignty in these cases raises is whether such a concept could be defined as the rationalization of political realities such as the legal arrangements produced by international agreements. One approach would be that the function of the concept of suspended sovereignty here is almost identical with the case of the Mandate and UN Trusteeship systems. The political realities established by the Paris Agreements are thus rationalized in legal theory by the rubric of suspended sovereignty. Sovereignty is no longer a legal concept applicable to the state in question and the legal exercise here is simply to determine the role and principles of the UN administration's engagement in the country. However, such an approach stands against both the spirit and the letter of the Paris Agreements and the relevant UN Security Council resolutions, which explicitly stated that Cambodia's sovereignty and independence is embodied in the SNC.²⁷ Moreover, the UN administration does not assume full administrative

²⁴ *Ibid.*, at 24–25.

²⁵ *Ibid.*, at 10–11.

²⁶ Schachter, *supra* note 4, at 685–686.

²⁷ See also Mayall, 'Introduction', in James Mayall (ed.), *The New Interventionism, 1991–1994: United Nations Experience in Cambodia, Former Yugoslavia and Somalia* (1996) 12.

authority and responsibility over Cambodia but only over certain functions of the state.

Another approach would be that the magnitude of the transfer of authority per se results in the emergence of the concept of 'suspension of sovereignty'. Oscar Schachter stated that:

the idea that sovereignty may be suspended is not new to international law . . . [Following the Paris Agreements, Cambodia,] as a member of the United Nations, was still a sovereign state. But the far-reaching transfer of authority to a United Nations body, acting under the authority of the Security Council, left little more than a fig-leaf of sovereignty . . . The scope and depth of UNTAC's authority is virtually tantamount to that of a government.²⁸

The legal arrangements of the Paris Agreements are viewed here as the result of 'delegation of sovereignty' and as 'a necessary step to restore popular sovereignty through free elections and genuine observance of human rights'.²⁹

However, the two propositions are not construed as incompatible with each other. Indeed, the two explanations can be complementary. It can be argued that, in general, in cases in which agreements that pave the way for a peace settlement are formulated or even simply endorsed by the local parties to the conflict, the rights of the international community to interfere in the domestic affairs of a state derive mainly, if not solely, from the agreements themselves, and, thereby, they are predicated on local consent and the respect of the principle of sovereign equality of states. UN peacekeeping missions have traditionally operated upon these very same premises.³⁰ In that sense, the intrusive role of the international community in the post-Cold War settlement of numerous domestic conflicts such as those in Bosnia-Herzegovina, Mozambique, El Salvador and Angola can be explained by the same legal reasoning. Moreover, in none of these cases has the international administration assumed the full administrative responsibility of the territories concerned.

It can also be argued that, since the legal concept of sovereignty was never an absolute concept, and states have always perceived sovereignty to be subject to international law, international agreements transferring power to some form of international administration should not be construed as emerging international instruments that inform claims of suspension of sovereignty, but rather as the ordinary functioning of international law setting norms that introduce limitations on the exercise of sovereign rights, as do most international agreements.

In fact, the legal concept of sovereignty in international law was never an absolute concept. States have always been considered to be subject to international law.³¹ From Grotius to the present day both naturalists and positivists have invariably accepted that the limits imposed upon states by international law are not inconsistent with sovereignty.³² They are rather the collective expression of sovereign will. It is widely

²⁸ Schachter, *supra* note 4, at 685–686.

²⁹ *Ibid.*, at 686.

³⁰ Abi-Saab, 'United Nations Peacekeeping Old and New: An Overview of Issues', in Daniel Warner (ed.), *New Dimensions of Peacekeeping* (1994) 3–4.

³¹ Schachter, *supra* note 4, at 675–679.

³² *Ibid.*, at 675.

accepted today that sovereignty is a relative concept and that its legal boundaries are determined by international law. The development of international law, particularly impressive after the Second World War, and specifically the density of international treaty law today alone accounts for the intention of states to assume far-reaching international legal obligations, which effectively limit the exercise of rights deriving from sovereignty. In that sense, the legal concept of sovereignty is not a static concept. It depends on the development of the international legal order. It is ironic, however, that the most ardent critics of the legal concept of sovereignty today rarely advocate in favour of further development and consolidation of the international legal order. This is because sovereignty often is not perceived as a legal characteristic of the international system but as a legal constraint to power-oriented approaches of settling international disputes and advancing perceived state interests. For instance, the stance of the US on the treaty for the establishment of the International Criminal Court is fairly indicative that often the polemics on sovereignty are about the role of power and not the role of law in international relations.³³

While the legal arrangements provided by international agreements transferring power from local authorities to international ones may provide sufficient legal guidance to states and international actors about their rights and obligations in the conduct of their affairs, the question remains whether there is a threshold beyond which such a transfer of authority results in the suspension of sovereignty effectively altering the relations between the international administration and the peoples in the territory concerned. A further question here remains whether legal arrangements such as the Paris Agreements themselves created a situation that went beyond the ordinary cases of partial delegation of sovereignty, thereby giving rise to the emergence of an autonomous legal concept of suspended sovereignty. In other words, it is the magnitude of power that UNTAC assumed in Cambodia that may have given rise to a legal concept of suspended sovereignty.

Such a proposition, while it is also based on a rationalization of political realities, operates differently from the case of the Mandate and UN Trusteeship systems. Delegation of sovereignty is predicated on local consent but it results in such an extensive transfer of power to an international administration that it virtually renders sovereignty non-applicable in this case during the transitional period that an international authority administers the state. The critical difference between this and the previous propositions is that here the legal basis of the concept of suspended sovereignty is different, as local consent is an indispensable pre-condition for the function of the concept of suspended sovereignty. In other words, suspended sovereignty here signifies an 'extraordinary delegation of sovereign rights'. The most recent experiences though in Kosovo and East Timor have taken the debate over the concept of suspended sovereignty a step further from the 'extraordinary delegation of sovereign rights' and to the possible emergence of an autonomous legal norm of suspension of sovereignty.

³³ 'America and International Law', *Economist*, 5 December 1998, 14.

4 Suspended Sovereignty and UN Security Council Resolutions Placing Territories Under Full International Administrative Authority

United Nations Security Council Resolution 1244 of 10 June 1999, while reaffirming the commitment of all UN member states to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia (FRY), envisaged the withdrawal from Kosovo of all the military and police forces of the FRY together with a synchronized deployment of an international civil and security presence under United Nations auspices, respectively the United Nations Interim Administration Mission in Kosovo (UNMIK) and the NATO-led KFOR.³⁴ Resolution 1244 also envisaged the appointment of a Special Representative of the UN Secretary-General (SRSG) to administer Kosovo and to coordinate closely with KFOR to ensure that both UNMIK and KFOR worked towards the same goals and in a mutually supportive manner.³⁵ The role of the international administration was to replace the FRY authorities in the territory of Kosovo and assume full interim administrative responsibility.

Regulation 1999/1 of 25 July 1999 (also known as 'the Mother of all Regulations') stipulated that 'all legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the SRSG'.³⁶ The powers of the international administration and the SRSG emanating from Resolution 1244 and Regulation 1999/1 were enormous, virtually suspending FRY's sovereignty over Kosovo. In practice, UNMIK and KFOR assumed full responsibility for the administration of Kosovo and totally excluded FRY authorities from any administrative role in the territory.³⁷

In August 1999, in accordance with Resolution 1244, the FRY established in Pristina the Committee for Cooperation with the United Nations as the only presence of FRY authorities in Kosovo. Its mandate was limited merely to liaising with the international presence, while in reality it swiftly ended up resembling a diplomatic mission inside its own state.³⁸ Moreover, UNMIK from the very beginning considered issues related to pre-existing FRY laws and institutions in Kosovo as well as questions on the relations between the international administration and the FRY, and between

³⁴ Security Council Resolution 1244 of 10 June 1999, paras 3 and 5.

³⁵ *Ibid.*, at para. 6.

³⁶ UNMIK Regulation No. 1999/1 of 25 July 1999, 'On the Authority of the Interim Administration in Kosovo', Section 1, Article 1.

³⁷ Yanniss, 'Kosovo Under International Administration', 43 *Survival* (2001) No. 2, 32–34.

³⁸ Security Council Resolution 1244, Annex 2, para. 6, envisaged that 'after withdrawal, an agreed number of Yugoslav and Serbian personnel will be permitted to return to perform the following functions: Liaison with the international civil mission and the international security presence; Marking/clearing minefields; Maintaining a presence at Serb patrimonial sites; Maintaining a presence at key border crossings.' In reality, so far only the first task has been fulfilled with the establishment of the FRY Committee for Cooperation. Security considerations have throughout the first phase of the international administration ruled out the possibility of any return of FRY military or civilian personnel to perform the other functions envisaged in Annex 2, para. 6 of Resolution 1244. The FRY Committee for Cooperation was established to operate under the FRY Ministry of Foreign Affairs and between August 1999 and December 2000 was led by Ambassador Vukisevic, a FRY diplomat and former ambassador to Albania.

the international administration and the outside world, as basically policy matters and not legal ones. FRY sovereignty over Kosovo ended up signifying only that UNMIK could not unilaterally change the status of the territory and its internationally recognized borders. Regarding the latter, Resolution 1244 reserved for UNMIK only the role of facilitator in the process of determining Kosovo's future status. The fact that Resolution 1244 and Regulation 1999/1 envisaged that the international administration assumes plenary authority over Kosovo and the subsequent practice of UNMIK in administering the territory of Kosovo opened up a totally new perspective in the debate over the concept of suspended sovereignty.

A few months later, in East Timor, UN Security Council Resolution 1272 of 25 October 1999 envisaged equally far-reaching powers for the United Nations Transitional Administration in East Timor (UNTAET). In Resolution 1272, the UN Security Council '[d]ecides to establish, in accordance with the report of the Secretary-General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice'. Furthermore, Resolution 1272, while reaffirming respect for the sovereignty and territorial integrity of Indonesia, acknowledged the relevant agreements between Indonesia, Portugal and the United Nations on the question of East Timor, and 'welcomed the successful conduct of the popular consultation of the East Timorese people of 30 August 1999 ... through which the East Timorese people expressed their clear wish to begin a process of transition under the authority of the United Nations towards independence'.

It would seem that in the case of East Timor even the fig-leaf of sovereignty was removed. The UN was virtually the sole authority in the territory of East Timor and with a clear road map regarding the final status of the territory. Jarat Chopra stated that 'the organizational and juridical status of the UN in East Timor is comparable with that of a pre-constitutional monarch in a sovereign kingdom ... [I]t is the first time sovereignty has passed to the UN independently of any competing authority.'³⁹ However, suspension of sovereignty does not imply that the UN has assumed the sovereignty of East Timor. Suspension of sovereignty signifies rather that sovereignty is not an applicable concept any more and what matters is what are the rights and obligations of the UN transitional authority regarding the administration of the territory. When this abnormal situation ends sovereignty will revive under an independent East Timor. Sovereignty today, after all, in order to be compatible with the principle of self-determination of peoples, implies that governance is exercised on behalf of the local peoples. However, the UN does not rule East Timor or Kosovo today on behalf of the local population but for the local population and on behalf of the peoples of the world in accordance with the UN Charter. Thus, the UN has not become the sovereign. Rather, sovereignty is suspended, and the question is what are the rights and obligations of the UN.

An additional critical difference with recent past experiences such as those in

³⁹ Chopra, 'The UN's Kingdom of East Timor', 42 *Survival* (2000) No. 3, 27–39.

Cambodia and Bosnia-Herzegovina is that in neither case of Kosovo or East Timor can it seriously be argued that the transfer of authority essentially constitutes delegation of sovereign rights. In neither case is there any comprehensive international agreement defining the role of the envisaged transitional international administration. The real source of authority lies almost exclusively with UN Security Council Resolution 1244 in Kosovo and Resolution 1272 in East Timor. The reference in Resolution 1244 to the ambiguous (from a legitimacy point of view, as it occurred amidst ongoing military coercive actions against the FRY) acceptance by the FRY of the general principles of an agreement presented in Belgrade on 2 June 1999, and a similar reference in Resolution 1272 to the expressed intention of the Indonesian authorities to cooperate with both the international military and civil presences in East Timor, are rather feeble attempts to produce a fig-leaf of local consent.

As in almost all previous cases examined in this paper, the concept of suspension of sovereignty also operates here as a legal rationalization of a political reality that has produced a temporary abnormal legal situation in anticipation of a final settlement. The fact that in neither of the relevant UN Security Council resolutions on Kosovo or East Timor is there any reference to the exact legal status of the international transitional authorities is indicative of the pains of the international community to reconcile the realities on the ground with accepted legal notions and principles that guide international relations today. Yet, to reconcile law with reality in the cases of Kosovo and East Timor, the need to invoke more clearly the concept of suspended sovereignty would perhaps have been more judicious. More specifically, greater clarity would probably have contributed to increased efficiency in fulfilling their mandates. The lack of clarity over the question of sovereignty and the relations between UNMIK and FRY, for example, threatened the efforts of UNMIK to implement Resolution 1244 with virtual paralysis for several months. Greater clarity would also contribute to greater transparency and accountability of the international administrations in both Kosovo and East Timor. This is a problem that often haunts the relations of the local population with their respective international authorities and their international personnel.

The question that raises such a prospect is whether the UN Security Council is entitled in the exercise of its peace enforcement powers under Chapter VII of the UN Charter to declare the sovereignty of states over the entire or part of their territories to be in abeyance. In other words, can legitimate forms of coercive action themselves result in the suspension of all the rights that derive from independence or external sovereignty and that, therefore, sovereignty is no longer an applicable concept with respect to cases such as Kosovo and East Timor? While the relevant UN Security Council resolutions did not themselves openly pronounce on the subject, the mandate entrusted to the UN operations in Kosovo and East Timor can be construed as sufficient bases for considering the sovereignty in these territories suspended.

The Security Council is entrusted by the UN Charter to take all necessary measures to maintain or restore peace. Such a proposition is, in principle, an open-ended

mandate.⁴⁰ It can be argued that the Security Council can declare the sovereignty of a state to be suspended if and as long as such decision serves the purposes of maintaining international peace and security. An objection to such a wide interpretation of the peace enforcement powers of the UN comes from Article 24(2) of the UN Charter, which stipulates that: ‘In discharging these duties [on the maintenance of international peace and security] the Security Council shall act in accordance with the Purposes and Principles of the United Nations.’ The limitations imposed by the Charter in Article 24(2) do not, however, appear to prohibit a decision to suspend the sovereignty of a state. Rather, the limitations of the Charter inform important legal aspects of decisions such as the purposes, principles and procedures that guide action in such a far-reaching task as that of placing a state or part of its territory under full international administration by a decision of the UN Security Council under Chapter VII.

The most critical question therefore remains whether the UN Security Council resolutions on Kosovo and East Timor indicated clearly that the intention of the international community was to place these territories under a full UN administration signifying that sovereignty was suspended. Since the answer is positive, then, as in the cases of the Mandate and UN Trusteeship systems, the concept of sovereignty is no longer applicable here at all, and suspended sovereignty signifies that, when there is a final settlement, sovereignty will revive and rest again with the local peoples in whatever form is envisaged for the final status of these territories. While the case of East Timor is clearer, it remains to be seen whether sovereignty in Kosovo would be revived as part of the FRY or in an independent Kosovo. Accordingly, the question today should no longer be where sovereignty lies, but what are the legal requirements and constraints that inform the actions of the international administrations.

There are, however, objections to such an approach. The existing political processes that are behind decisions to suspend the sovereignty of a state provide no guarantee that placing a state under international administration will not be perverted from an exercise of international assistance to an extended arm of the foreign policy of individual states with the aim of promoting their perceived interests.⁴¹ Such a concern becomes more apparent when we consider the virtual absence of independent review mechanisms concerning the legality of UN Security Council decisions and the highly privileged role of the five major powers in the decision-making process of the UN

⁴⁰ On the relations between the peace enforcement powers of the UN Security Council and international law, see, in particular, Caron, ‘The Legitimacy of the Collective Authority of the Security Council’, 87 *American Journal International Law* (1993) 552–588; Schachter, ‘United Nations Law’, 88 *American Journal International Law* (1994) 1–23; Alvarez, ‘The Once and Future Security Council’, 18 *Washington Quarterly* (1995) No. 2, 3–26; and Higgins, ‘The United Nations Role in Maintaining International Peace: The Lessons of the First Fifty Years’, 16 *New York Law School Journal of International and Comparative Law* (1996) 135–148.

⁴¹ Abi-Saab, ‘A “New World Order”? Some Preliminary Reflections’, 7 *Haague Yearbook of International Law* (1994) 88–91.

Security Council.⁴² In that sense, those sceptical of the emergence of a concept of suspended sovereignty feel that this could be the precursor of an emerging institutionalization of legal inequality and the resurfacing of new formal hierarchical divisions among states based on power relations.

Others are also sceptical about the legal purposes of formulating a normative concept of suspended sovereignty that entirely dispenses with the requirement of local consent in the development of transitional international authorities. A major objection to such a concept of suspended sovereignty comes from approaches that perceive consent not as a formalistic legal requirement, which automatically bends to fit the use of the extraordinary powers of Chapter VII, but as an essential attribute of the function of the concepts of sovereignty and self-determination of peoples guiding any action in contemporary international relations.⁴³ This position is also supported by views that perceive local consent as indispensable elements of any international action that aims to re-establish political stability in a state or a territory. Kimberly Stanton stated that: 'Sovereignty, in the most basic sense of ultimate authority over a specified territory, remains integral to the construction of the very political arrangements that are desired.'⁴⁴

Oscar Schachter encapsulated the dilemmas posed by such extreme situations, stating that: 'The international community and the major powers are not prepared to impose order by brute force or to treat people as "wards" incapable of self-rule. At the same time, they cannot ignore the desperate conditions and their impact on other countries.'⁴⁵ While this dilemma will most likely remain a central consideration of our incorrigibly or admirably pluralistic world, the concept of suspended sovereignty implying that sovereignty is not applicable when a territory is placed under a full international administration pending a final settlement could still in extreme circumstances provide a satisfactory solution to address the underlying problems of such extreme situations. In fact, a more persuasive approach could be the following: use of force by the international community, placing territories under full international administration, and the resulting suspension of sovereignty, may be legitimate if decided under Chapter VII of the UN Charter and, perhaps, advisable, in order to protect life that is in imminent danger and contain conflicts with immediate security risks, but ultimately it cannot substitute the political and, arguably, legal necessity for developing local political consensus on peace and reconstruction and a

⁴² Bedjaoui, *The New World Order and the Security Council: Testing the Legality of its Acts* (1994); and Alvarez, 'Judging the Security Council', 90 *American Journal International Law* (1996) 1–39. See also the *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. UK; Libya v. USA)*, ICJ Reports (1998) 9.

⁴³ Schachter, *supra* note 4, at 688.

⁴⁴ Stanton, 'Pitfalls of Intervention: Sovereignty as a Foundation for Human Rights', 26 *Harvard International Review* (1993) 15. See also Eisemann, 'La faisabilité des actions pour la restauration de l'Etat', in Yves Daudet (ed.), *Les Nations Unies et la Restauration de l'Etat* (1995); and Kingsbury, 'Sovereignty and Inequality', 9 *European Journal of International Law* (1998) 618, at 620–625.

⁴⁵ Schachter, 'The Decline of the Nation-State and its Implications for International Law', 36 *Columbia Journal of Transnational Law* (1997) 19.

clearer doctrine of transparency and accountability of the responsible transitional international administrations.

A major lesson of the Kosovo and East Timor operations so far and, for some, a widely accepted doctrine today in complex peacekeeping operations is the requirement for an international transitional authority to develop a model of good governance ensuring the accountability of the international administration to the local population through the democratic representation and participation of the local peoples in the work of the international administration.⁴⁶ In that sense, the consideration that suspension of sovereignty implies that the international administration can dispense entirely with local consent may be an inadequate legalistic perception of the significant political realities with which the concept of sovereignty is associated.

In conclusion, while the cases of Kosovo and East Timor may account for the emergence of a legal concept of suspended sovereignty in international law, signifying that in such cases sovereignty is no longer an applicable concept and what matters is what are the legal responsibilities of the international transitional authority of the territory, the possible future crystallization of such a concept should be explored more as an opportunity to increase the transparency and accountability of international political authorities and less as a chance to reintroduce hierarchical relations in international politics. In that sense, the debate about the concept of suspension of sovereignty in such cases should also be approached as a further step in the evolution of legitimate international political authorities in international relations, particularly in their policing and peace-building function, and it should not be dismissed as a mere reflection of traditional power politics, even though, admittedly, power politics remain an inherently central part of our incurably state-centred and conflict-ravaged world.

⁴⁶ Alexandros Yanniss, *Kosovo Under International Administration: An Unfinished Conflict* (2001) 43; see also Williams, 'Ending Anarchy: International Rule and Reconstruction after Conflict' (introductory paper presented at 21st Century Trust, Cambridge, 5–13 October 2000).