
From Benchmarking to Final Status? Kosovo and The Problem of an International Administration's Open-Ended Mandate

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Abstract

This contribution examines certain inherent shortcomings of an 'open-ended' institution-building operation for which the future status of the entity in statu nascendi remains undecided. It first addresses the policy of conditionality through which Kosovo's international administration attempts to measure the performance of local institutions against imported 'standards'. The external representation function of an international administration acting on behalf of a non-state territorial entity, as an agent of necessity, is then analysed, considering recent and little-known developments and suggesting that UNMIK's practice supports the argument that 'internationalized' territories possess limited legal personality. Turning 'inward' to a sphere of domestic governance, the contribution highlights some of the problems encountered with regard to the privatization of public assets in Kosovo. Here, it argues that UNMIK is awkwardly caught between the pursuit of both the interests of the territory under its administration and the collective interest of the organized international community – two sets of interests which can collide head-on. The article concludes by suggesting that an international territorial agent should not, as a rule, attempt to mediate a solution, but endeavour to represent the territory in good faith.

'You gave us freedom, but not a future'.¹

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¹ Kosovo Albanian student, quoted in *The Situation in Kosovo. Report to the Secretary General of the United Nations. Summary and Recommendations*, undertaken by the Head of the DPKO Political Assessment Mission on Kosovo, Amb. Kai Eide, henceforth referred to as the 'Eide Report' (S/2004/932, Annex I, Brussels, 15 July 2004), at 4.

1 Introduction

Following NATO's 77-day military campaign against the Federal Republic of Yugoslavia in June 1999, the UN Security Council adopted Resolution 1244,² which enshrined a minimalist consensus regarding the position of a non-state territorial entity in international law. One of the tasks of the international territorial administration was, as one author described it, to struggle to preserve the peace while 'trying to balance between the Scylla of Kosovo's independence and the Charybdis of Yugoslavia's sovereignty'.³ While the sovereignty and territorial integrity of the FRY were reaffirmed, the strong aspirations towards independence voiced by the majority of the population were temporarily kept in check and mollified by UNMIK. The resolution vested the right to exercise effective control within the territory in a UN subsidiary organ – the United Nations Interim Administration Mission in Kosovo (UNMIK) – thus reducing FRY's sovereign rights to a *nudum jus*.⁴ For want of more original options of supranationally integrated sovereignty for non-state entities, such as a long-term EU trusteeship, the UN strove to defer the definitive investiture of a sovereign. It sought to freeze the dispute by trying to divert attention away from the status issue, effectively leaving the territory in limbo between statehood and disempowered neo-trusteeship.

2 The Governance Challenge Wrapped in a Sovereignty Enigma

Rather than promoting particular statehood and self-determination claims – as Resolution 1272 (1999) did with regard to the future political status of East Timor – Resolution 1244 and its implementing mission have been concerned with the creation of organized political institutions. Together with the body of law subsequently promulgated by UNMIK, Resolution 1244 laid the groundwork for an outcome that has not yet been agreed upon. The resolution stopped short of making the more enduring promise at the core of the UN trusteeship system: that sovereignty, suspended as it was under fiduciary administration, would eventually be reconstructed along the lines of, and vested in, an actor newly established by the UN Charter, 'the peoples'.

² S/RES/1244 (1999), of 10 June 1999 vested UNMIK with 'all legislative authority' over the territory and people of Kosovo. Cf. UNMIK/REG/1999/1, *On the Authority of the Interim Administration* (25 July 1999). Para 1.1 effectively self-institutionalizes all public powers that would normally be attributed to a state government. UNMIK remains composed of a structure of 'pillars', each reporting to the SRSG. Divided into four major components, the structure reflects the heavy dependence of the operation on the efforts and resources of various states and international organizations. While two pillars remained with the UN (civil administration and police/justice), the other pillars were distributed to the OSCE (institution building) and the EU (economic reconstruction). For a concise study of the constitutional history of Kosovo and the recent attempts to build political institutions cf. Stahn, 'Constitution without a State? Kosovo under the UN Constitutional Framework for Self-Government', 14 *LJIL* (2001) 531.

³ Yannis, 'The UN as Government in Kosovo', 10 *Global Governance* (2004) 67, at 68.

⁴ See Knoll, 'UN *Imperium*: Horizontal and Vertical Transfer of Effective Control and the Concept of Residual Sovereignty in "Internationalised" Territories', 7 *Austrian Rev Int'l and European L* (2002) 3.

More than six years of institution-building *in vacuo* have borne ambiguous consequences. On the one hand, the international community's unwillingness to synthesize the dialectics of sovereignty and self-determination has not kept it from actively interfering with the exercise of sovereignty by suspending the administrative control of Serbia and Montenegro (SCG). On the other hand, continued recalcitrance in addressing the final status of a UN-administered territorial unit has undoubtedly depreciated the UN's political capital. Echoing a widespread sentiment among the population, the former Kosovo Prime Minister Rexhepi made the criticism that 'being ruled 5,000 miles away in New York is simply not working', adding that 'with no road maps, or political deadlines, or sense of resolving their unclear international status as a non-state entity, Kosovars are fast losing hope'.⁵

To dismiss such propositions as mere political posturing would be perilous. The spectre of West New Guinea – an institution-building exercise conducted by the UN and designed to produce self-government that was aborted with the territory's effective reintegration into Indonesia in 1963⁶ – continues to haunt Kosovar actors operating in a political entity caught in the grey area between international personality and a legal *nihil*. What makes the situation in an 'open-ended' institution-building context so fluid is that the international agents of 'neo-trusteeship' lack a meaningful and coherent theory of how to build viable state institutions. They are unable to give credible assurances that a transfer of full effective control to local actors will *ever* take place. This severely circumscribes their capacity to exercise public power. As we shall see, this situation is worsened by the fact that a matrix of norms, rules and legal practices through which an international mission could navigate the treacherous waters of an 'open-ended' administration mandate such as the one governing Kosovo, does not exist.

A Of Roadmaps and Roadblocks

In what will be remembered as his legacy to the UN-administered territory of Kosovo, the former Special Representative of the UN Secretary-General (SRSG), Michael Steiner, based the determination of Kosovo's future status in international law on the idea that certain standards need to be achieved. In order to couch the transfer of competencies from the UNMIK to the nascent Provisional Institutions of Self-Government (PISG) in a wider framework of responsible government, the SRSG, in 2001, instituted a policy of 'benchmarking' through which indicators were to be developed in eight areas of governance.⁷ As put forth by the SRSG, the rationale behind this approach was that Kosovo can only advance towards a fair and just society once certain minimum preconditions are met. Steiner argued that these standards mirrored those

⁵ Smith, 'Angry Kosovars Call on "Colonial" UN Occupying Force to Leave', *Observer*, 19 Oct. 2003.

⁶ For a critical account of the UN, especially its failure to resist Indonesian political calculus, see Van der Veur, 'The United Nations in West Irian', 18 *International Organization* (1964) 53, at 53 ff.

⁷ These areas are: functioning democratic institutions, rule of law, freedom of movement, returns and reintegration, economy, property rights, dialogue with Belgrade, and the Kosovo Protection Corps.

required for Kosovo's potential integration into European structures: 'It must be a democratic, safe and respectable Kosovo on the way to Europe.'⁸

The roadmap drawn up for Kosovo indicated mile markers, but no directions. The policy of 'standards before status' was framed in the context of an idea that has garnered increased academic following under the terms of 'earned sovereignty'.⁹ Its operational elements seek to formulate indicators of good governance through which progress of a *polis* is measured; local institutions are then to be shepherded from one mile marker to the next, from the intermediate phase to the discussion of final status.¹⁰ The benefits of this conditionality policy accrued in the provision of opportunities for the parties to agree on basic requirements that the nascent entity must meet during an intermediate phase in order to qualify for such discussion.

As a policy instrument, 'benchmarking' hardly represents a novel tool for aiding the determination of a territory's status. Attempts at the 'standardization' of the local environment had formed an elaborate practice within the trusteeship system under which the UN collected full information on whether the administering authority had implemented obligations assumed under the Trusteeship Agreement. Covering issues such as political and economic development, public finance and taxation, human rights and fundamental freedoms, public health and educational advancement, the Trusteeship Council's 'Questionnaire' provided a matrix against which progress of the 'native population' was to be measured.¹¹ In its modern embodiment, conditionalities requiring states to undertake specific economic and political reforms in exchange for economic aid have been adopted as key policy tools by the World Bank, the International Monetary Fund (IMF) and the European Union.¹² Similarly,

⁸ *Address to the UN Security Council by Michael Steiner* (UNMIK Press Release, 30 July 2002). Since the EU-Western Balkan Summit of 2003 in Thessaloniki, appeals to the territory's European destiny have been regularly employed as part of the IC's rhetoric machinery in order to exhort civic virtues in the absence of a nation state. Cf., e.g., the invocation of 'standards' as the 'admission tickets' for Europe in the Commission's Communication 'A European Future for Kosovo', 20 Apr. 2005, and UNMIK SRSG Jessen-Petersen's speech to the OSCE Permanent Council, Vienna, 10 Feb. 2005.

⁹ Generally, see Williams *et al.*, 'Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty', 31 *Denver J for Int'l L and Politics* (2004) 349; Heymann, 'Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust', 19 *American University ILR* (2003) 153; and Williams and Pecci, 'Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination', 40 *Stanford JIL* (2004) 347.

¹⁰ The idea was initially spurred on in the context of the two proposals of the 'Goldstone Commission', available at www.kosovocommission.org.

¹¹ The UN machinery employed in the process of decolonization emulated a process through which the European centre made the provision of international legal rights and capacities contingent on the fulfilment of certain 'standards of civilization'. The 19th century hence saw a reinforcement of the boundaries between 'civilized', 'semi-', and 'uncivilized' countries which qualified only for partial membership in the international society. Cf. G. W. Gong, *The Standard of 'Civilization' in International Society* (1984), at 5–6.

¹² For a review of the EU-managed SAP towards the Western Balkan countries see Pippan, 'The Rocky Road to Europe: The EU's Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality', 9 *European Foreign Affairs R* (2004) 219. For an in-depth comparison of the SSAs (specifically those concluded with fYRoM and Croatia) with the Europe Agreements cf. Phinnemore, 'Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?', 8 *European Foreign Affairs R* (2003) 77. The passive approach taken by the Proposal for a Council Regulation Establishing

UNMIK's development of 'standards' clearly emulates the Brussels Declaration of the Peace Implementation Council (PIC) of 2000, in which specific benchmarks were established to measure the performance of Bosnian institutions.¹³

B The 'Earned Sovereignty' Approach

UNMIK has presented regular baseline reports to the UN Security Council (SC) on the implementation of 'benchmarks' since summer 2002. Until 2003, however, the process remained a purely UNMIK exercise, lacking in local ownership and serving more as an internal managerial tool than a policy adopted by the local provisional institutions. Since early 2003, the benchmarking process has been reinforced by the Tracking Mechanism for Kosovo, through which the European Commission tracks the development of, and provides sector-specific recommendations for, different policy areas. Under the Tracking Mechanism, Kosovo is obliged to gradually bring its legislation and institutions into line with the EU *acquis*, and receives access to the EU market in return.¹⁴ A turning-point came in November 2003, when the US announced a new initiative on behalf of the Contact Group nations, promising a review of Kosovo's status in mid-2005 if a set of specified standards on governance and treatment of ethnic minorities was achieved by that date. The SC-endorsed 'Standards for Kosovo' plan, flowing from the Contact Group initiative, established five joint UNMIK-PISG working groups to plan and coordinate the fulfilment of the standards to be evaluated by UNMIK in quarterly reports to the SC via the Secretary-General.

Conditioning final status talks on the fulfilment of a bundle of 'standards' provoked criticism not only from local political leaders but also from international commentators, who argued that the task of institution-building is made more complex when it plays out in an environment of suspended sovereignty.¹⁵ Strikingly, the policy does not link a particular future territorial status to the fulfilment of such conditions. Rather, it makes the fulfilment of standards a condition for *commencing discussions* on that status. More worryingly, Kosovo's political institutions are asked to meet standards that are not under *their* control, but under that of UNMIK and of Serbia. The dismantling of parallel structures that continue to be financed by Belgrade¹⁶ does not

an Instrument for Pre-Accession Assistance (presented by the Commission, COM(2004)627 final, Brussels, 29 Sept. 2004) is powerfully criticized by the European Stability Initiative in *Breaking Out of the Balkan Ghetto: Why IPA Should Be Changed* (Berlin, 1 June 2005).

¹³ Cf. *Declaration of the Peace Implementation Council* as well as its Annex, Brussels, 24 May 2000, and European Stability Initiative, *Turning Point: The Brussels PIC Declaration and State-Building Agenda for Bosnia and Herzegovina*, 7 June 2000.

¹⁴ The Tracking Mechanism is a technical working group co-chaired by the European Commission, UNMIK, and the PISG. See A. Wittkowski, *Next Step for Kosovo's Medium-Term Economic Development* (UNMIK Pillar IV, 31 January 2003), at 3.

¹⁵ On a strategy of 'standards with status' see J. Bugajski *et al.*, *Achieving a Final Status Settlement for Kosovo* (2003), at 6 ff.

¹⁶ Serbian state organs continue to claim that Resolution 1244 enshrines their right to carry out certain state functions in what they still view as a Serbian province. Based on this claim, they have – in violation of 1244 – maintained parallel structures of government in the Kosovo Serb majority municipalities and

fall to the responsibility of local Kosovo actors, but to Serbia.¹⁷ A lack of ‘progress in resolving practical issues of mutual concern’ in the dialogue with Belgrade¹⁸ should not be held against the PISG. Similarly, as discussed below, the privatization and liquidation of socially-owned enterprises remains a ‘reserved competence’ of UNMIK, without any meaningful participation of Kosovo institutions.¹⁹ The same reasoning applies to the reform of the justice system, which is under the authority of UNMIK’s Justice and Police component pillar.²⁰

The concrete experience of institution-building in Kosovo, discussed in the next section, suggests that an approach based on the fulfilment of what were once named ‘standards of civilization’ might bear the seed of its own undoing. Policies of conditionality, devised to make the spectre of nominal sovereignty, or independent statehood, disappear from the daily political business, have so far not amounted to the long-term consolidation of gains from ‘humanitarian intervention’ that lay in the socio-economic stabilization and improvement of domestic governance capacity of Kosovo. In what can be seen as a severe backlash to a conditionality policy directed at an internationalized territory, the *Eide Report*,²¹ submitted to the UN Secretary-General in summer 2004, recommended the immediate replacement of the ‘standard before status’ strategy for Kosovo with a more ‘dynamic’ approach. In June 2005, this changed approach led to the appointment of a Special Envoy (Ambassador Eide, author of the initial assessment) who was charged with conducting a comprehensive review of the standards and with an assessment of the conditions for the ‘possible next steps in the process’.²²

3 UNMIK as Territorial Agent

Moving beyond the ‘standards before status’ policy still being pursued in Kosovo, this section analyses the sphere of external representation of a non-self governing territorial entity. Here, an international administration pursues the interests of the people under its mandate which hold an inchoate title to determine their own political status. Section 3 will then examine UNMIK’s performance of the ‘international public interest’ which it pursues as a subsidiary organ of the UN. The example of the privatization of public assets by UNMIK illustrates the difficulties of balancing these competing interests.

enclaves, particularly in the field of health care, education, and justice. For UNMIK’s (unimplemented) strategy to combat these parallel structures see M. Steiner, *A Choice for Mitrovica. The Seven Point Plan* (1 October 2002).

¹⁷ But cf. Standard I.17 of the Kosovo Standards Implementation Plan, KSIP, 31 Mar. 2004, at 21.

¹⁸ Standard VII.3 of the KSIP, at 109.

¹⁹ But see Standard V.5 of the KSIP, at 81.

²⁰ As correctly noted by Zaum, ‘Letter to the Editor’, *Financial Times*, 24 Mar. 2004.

²¹ *Supra* note 1.

²² Report of the Secretary-General on the UN Interim Administration Mission in Kosovo (23 May 2005), UN Doc. S/2005/335, at para. 22.

A An International Administration's Machinery of External Representation

International representation, according to general principles, encompasses a situation in which (i) an entity acts on behalf of another on the international level and in which (ii) specific provisions are laid down by international law for the conduct of the former.²³ This entails a split between the immediately acting international person and the entity to which the legal effects of these acts are imputed.²⁴ When acting within its power, the agent assumes no personal responsibility toward either the 'principal' or third parties;²⁵ the represented entity itself becomes the party which is directly liable and which is the direct claimant *vis-à-vis* a third party.²⁶

As a starting-point for the discussion of Kosovo under international administration, the case of the Timor Gap Treaty is of considerable interest.²⁷ In 2000, after the Security Council had assumed temporary *imperium* over the territory, its subsidiary organ – the UN Transitional Administration in East Timor (UNTAET) – was charged with renegotiating the treaty *on behalf of* the East Timorese people.²⁸ The administration of an internationalized territory required the establishment of external relations with other subjects of international law. This necessity has been recognized by the UN Secretary-General, who referred specifically to the Mission's capacity to 'conclude such international agreements with states and international organisations as may be necessary for the carrying out of the functions of UNTAET in East Timor'.²⁹ While the

²³ Under pain of acting *ultra vires*, an agent representing a non-state territorial entity cannot perform functions or exercise powers other than those provided in the constituent document, nor convert functional means into purposes. For *ultra vires* acts of international organizations see, in general, E. Lauterpacht, 'The Legal Effect of Illegal Acts of International Organisations', in *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (1965), at 88 ff.

²⁴ Sereni, 'Agency in International Law', 34 *AJIL* (1940) 638, at 638.

²⁵ Agency is understood here as the relationship between the territorial agent and an entity that is under its temporary protection. This usage may differ from the regular application of the concept since agency is normally established between an agent and a 'principal'. In an asymmetric relationship such as that between a mandant and a mandatory, the use of the term 'principal' would be entirely misleading since it suggests that the mandant has the capacity to appoint the agent (and revoke the agency), which is not the case in an international fiduciary bond. It is in that sense that we can speak of 'compulsory agency *ex lege*' and insinuate that agency is vested in the agent by international law and assumed on grounds of necessity.

²⁶ R. Geiger, *Die Völkerrechtliche Beschränkung der Vertragsschlussfähigkeit von Staaten* (1979), at 67–68.

²⁷ Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation, 11 Dec. 1989, 29 *ILM* (1990) 475. On this subject, see generally Ong, 'The Legal Status of the 1989 Australia-Indonesia Timor Gap Treaty Following the End of Indonesian Rule in East Timor', 31 *NYIL* (2000) 67. The Treaty had earlier formed the substance of the 1995 *East Timor case* (*Portugal v Australia*).

²⁸ Memoranda of Understanding (MOU) between the Government of Australia and the UNTAET, the first adopted on 10 Feb. 2000, the second on 5 July 2001. Cf. the Report of the Secretary-General on the UNTAET (26 July 2000), UN Doc. S/2000/738, para. 23 as well as the brief account of the negotiations by Albright, 'The United Nations Transitional Authority in East Timor (UNTAET)', 97 *ASIL Proceedings* (2003) 210, at 211.

²⁹ Report of the Secretary-General on the Situation in East Timor (4 Oct. 1999), UN Doc. S/1999/1024, at para. 35. For references to UNTAET-Indonesia agreements concerning trade, the establishment of a border regime, and cooperation in legal and human rights matters cf. UNSG Report of 26 July 2000, *supra* note 28, at paras. 8–11.

agreement itself was not regarded as binding upon the future sovereign state of East Timor without the formal consent of its new government,³⁰ the interesting aspect here remains that UNTAET clearly asserted its power to act as the territorial government – as the agent *ex lege* through which a non-state territorial entity acted. UNTAET has made further use of its treaty-making power by concluding grant agreements with the Trust Fund for East Timor. In this specific case, as Chopra reports, the World Bank demanded that the agreement be accorded the status of an international treaty between the International Development Association and the SRSG, signing as ‘head of state, not merely as representative of the UN’.³¹

To an equal extent, UNMIK authorized itself to exercise external affairs powers by providing, in the Constitutional Framework, that the SRSG remains exclusively responsible for ‘concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244(1999)’.³² UNMIK thus follows established rules of agency in international law, namely, that the acts performed by the agent within the limits of its internationally conferred authority bind the entity *as though* they had been performed by the latter. The realities of external representation in an internationalized territory are, however, slightly more complex than one would be led to believe. On the one hand, memoranda of understanding and other non-binding instruments falling within the purview of the local institutions’ ‘transferred’ competencies are regularly signed by local officials only, usually with the necessary references to UNSC Resolution 1244(1999).³³ On the other hand, external agreements in the ‘reserved areas’ entered into by the international administration are of a different nature. As acts of agency performed by the international territorial administration, they are *not* attributable to the UN, whose subsidiary organ has signed up to them, but bind the local institutions and will continue to bind them for as long as the UN assumes the competence of sector-based rule-making in specific policy areas (i.e., as long the local legislature has not acquired the competence to negotiate divergent agreements).

Indeed, the UN has followed a practice of signing international treaties with states and international organizations *on behalf* of the local institutions, whose representatives

³⁰ Cf. Ong, ‘The Legal Status of the Timor Gap Treaty Post-UN East Timor Referendum: Is State Succession to Joint Development Mandated by International Law?’ [2000] *Proceedings of the Australian and New Zealand SIL* 143, at 152 ff.

³¹ J. Chopra, ‘The UN’s Kingdom of East Timor’, 42(3) *Survival* (2000) 27, at 30. The *IDA-UNTAET Trust Fund for East Timor Grant Agreement* of 21 Feb. 2000 is available at www.asil.org.

³² Chap. 8, para. 8(m) of UNMIK/REG/2001/9 *On a Constitutional Framework for Self-Government in Kosovo* (15 May 2001). The MoU *On the Regional Energy Market in South East Europe and its Integration into the EC Internal Energy Market* (Athens, 8 Dec. 2003, Doc. No. 15548/03/bis), signed by the UNMIK D/SRSG (‘EU’ Pillar IV), is an example of such exclusive representation, by the international agent, of a non-state territorial entity in international affairs. The Energy Community Treaty was eventually initialled in Mar. 2005 by representatives of the European Commission, Southeast European countries, and UNMIK after SCG and Bulgaria withdrew their objections.

³³ Cf., e.g., Memorandum d’Intesa between the Prime Minister of Kosovo and the Sindaco of Verona (24 Feb. 2004). For the power-sharing agreement between UNMIK and PISG cf. Chaps. V and VIII of the Constitutional Framework.

initial the text of the agreement. To the outside world, the duty to perform an internationally-binding agreement concluded by the international agent and a third party – such as the Free Trade Agreements signed to date³⁴ – will henceforth fall upon the actor who is constitutionally competent to do so according to the internal power-sharing agreement (Constitutional Framework). This practice is intended to encourage a continued commitment to treaties concluded between a third actor and the international agent once the latter has transferred sector-based competencies to the locally constituted institutions.³⁵

B UNMIK's Performance of Agency

Two examples from UNMIK's performance of external relations support the argument that the SRSG and his subordinate machinery are conceived not only as a UN subsidiary organ but also as agent of the territory concerned.³⁶

1 Novel Human Rights Commitments

Firstly, in the field of human rights law, the SRSG for Kosovo has signed an agreement with the Council of Europe (CoE)³⁷ reincorporating the Framework Convention of National Minorities into Kosovo's applicable law.³⁸ The substance of the agreement,

³⁴ On 29 May 2003, UNMIK submitted a Statement of Intent to the Stability Pact, committing itself to the obligations set out in the MoU on Trade Liberalisation and Facilitation (Brussels, 27 June 2001). Pursuant to this, UNMIK has concluded a number of FTAs under the auspices of the respective Stability Pact Working Group. See, e.g., the Free Trade Agreement between UNMIK on behalf of the PISG in Kosovo and the Council of Ministers of the Republic of Albania (7 July 2003), which seeks to link the territory into the network of FTAs in South Eastern Europe. The agreement was signed by the SRSG for Kosovo and the Albanian Minister of Economy and initialled by the Kosovo Minister for Trade and Industry. Follow-up measures included the UNMIK-Albania Agreements on the Reciprocal Promotion and Protection of Investments (19 Feb. 2004) and on the Avoidance of Double Taxation (28 Sept. 2004). See also the Agreement on the Field of Plant Protection and the Public Veterinary Services Agreement, concluded between UNMIK and the Government of Albania (by the D/SRSG for Civil Administration and the Albanian Minister for Agriculture and Food, Prishtina, 21 Nov. 2003). For an early agreement concluded by UNMIK on behalf of the territory cf. Cooperation Agreement on Cross-Border Economic Issues with FYRoM of 7 Mar. 2000 (UN Doc. S/2000/538, 6 June 2000). This MoU complemented the FTA between FRY and Macedonia concluded in 1996, which came into operation on 1 Jan. 1999 (which UNMIK deems applicable in Kosovo). An Interim Free Trade Agreement between UNMIK and the Macedonian government was reportedly concluded at the end of June 2005.

³⁵ The issue of agency *ex lege* to act on behalf of a non-state territorial entity must, in the case of Kosovo, be separated from the wider question whether international treaties that have been or are being concluded by FRY/Serbia and Montenegro (SCG) require implementation by UNMIK. This analysis is beyond the scope of this article.

³⁶ In a similar vein, see Ruffert, 'The Administration of Kosovo and East Timor', 50 *ICLQ* (2001) 613, at 626.

³⁷ Agreement between UNMIK and the CoE on Technical Arrangements Related to the Framework Convention for the Protection of National Minorities, signed on 23 Aug. 2004. The CoE Council of Ministers authorized the CoE Secretary General to conclude such agreement at its 890th Meeting (30 June 2004).

³⁸ Art. 3.2(h) of the Constitutional Framework had already incorporated the Framework Convention into Kosovo's municipal legal system. As Kosovo is not a party to the ECHR or its additional protocols, its constitutional 'incorporation' did not remedy the curious situation under which the inhabitants of Kosovo remain effectively deprived of their access to international human rights mechanisms that have recently been accorded to the inhabitants of SCG. Cf. Ombudsperson Institution, *Fourth Annual Report (2003–2004)* (2004), at 30.

signed by the SRSG under the powers vested in him falls within the ‘reserved powers’ of the international administration; no PISG representation was deemed necessary for its conclusion. While the preamble of the agreement explicitly states that the agreement ‘does not make UNMIK a Party to the Framework Convention’, UNMIK affirms ‘on behalf of itself and the PISG that their respective responsibilities will be exercised in compliance with the principles contained in the Framework Convention’.³⁹

In what may represent the very first measure ever to tie an international territorial administration into a multilateral accountability framework, UNMIK committed itself to submit full information to the CoE Committee of Ministers on the legislative and other measures taken to give effect to the Framework principles.⁴⁰ This lends concrete expression to some of the content of the Constitutional Framework’s enumeration of human rights instruments, which are supposed to be applicable in the territory of Kosovo.⁴¹

2 *Financial Agreements*

Consider the second example of the performance of external relations functions by the UNMIK SRSG, in which his office served as legal conduit to channel financial assistance from international institutions to local beneficiaries. The narrative proceeds in three stages. First, the World Bank provided initial grant support to Kosovo through its post-conflict fund and net income. In reaching its decision to endorse the first Transition Support Strategy via the establishment of a trust fund for Kosovo, the Bank’s Board of Directors concluded that such an engagement was in the interest of the Bank’s member states.⁴² With the introduction of expanded post-conflict grants

³⁹ Art. 1 of the CoE Agreement, *supra* note 37. Curiously, UNMIK thereby committed itself to fulfilling some of the legal obligations which SCG has undertaken by acceding to the CoE. In the course of its accession, SCG has not formulated any reservations concerning the territorial application of the CoE instruments. In accordance with the 1969 Vienna Convention on the Law of Treaties (ratified by SFRY on 27 Aug. 1970), the CoE accession treaty is in principle binding upon SCG ‘in respect of its entire territory’ (Art. 29). There is thus a presumption in favour of the application of the CoE treaty to the entire SCG territory, including Kosovo (Cf. *Note on the Applicability of Application of Europe Conventions in Kosovo and in BiH*, prepared by DG I, DG II, and DGAP for the Meeting with the Head of the OSCE Mission in Kosovo, Prishtina, 13 June 2002), at 1.

⁴⁰ Art. 2(2) of the CoE Agreement, *supra* note 37. The reporting schedule (which remains in force for the duration of UNMIK’s mandate) provides that UNMIK submit reports on a ‘periodic basis’ and whenever the Committee of Ministers so requests (Art. 2(3)). UNMIK shall participate, in an observer capacity, in the CoM meetings in which information on compliance with the Framework Convention are considered (Art. 2(5)). A different monitoring measure is anticipated in the Agreement between UNMIK and the CoE on Technical Arrangements Related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (23 Aug. 2004). Under this agreement, the relevant CoE Committee will obtain direct access to places where persons are deprived of their liberty by UNMIK (Art. 1(2)).

⁴¹ UNMIK has regrettably outsourced reporting obligations to its OSCE institution-building pillar, which has always struggled to maintain a precarious balance between its existence as an integral part of an international administration and the maintenance of an independent human rights portfolio that includes the monitoring of UNMIK’s human rights performance. While ‘taking the lead’ in reporting on compliance within the Framework Convention, the OSCE Mission’s Department for Democratisation incidentally also prepared a ‘shadow report’ on the same topic: interview with OSCE Mission Democratisation Officer, Prishtina, 26 Jan. 2005.

⁴² At that time, in 2000, the FRY – subsequently SCG – had not yet succeeded to the membership of the SFRY in the World Bank. Kosovo was thus not a territory of a ‘member country’. See World Bank SEE Country Unit, *Kosovo, FRY Transitional Support Strategy 2004* (18 Mar. 2004), at 13.

mechanisms in the second stage, the International Development Association (IDA) provided grants to UNMIK, serving as the recipient 'for the benefit of Kosovo',⁴³ 'a subsidiary organ of a principal organ . . . of the UN, which is a public international organisation'.⁴⁴ The background to this intricate lending mechanism of course lay in the ambiguity surrounding the 'trustee's' powers in relation to public assets – a direct consequence of the uncertainty of the territory's future international status. This has discouraged and continues to discourage private investment and hinders lending from international financial institutions. As the Bank admitted in 2004, '[g]iven the uncertainties . . . , a series of relatively short Transition Support Strategies has guided Bank engagement'. While financial support has been fairly substantial, constraints on lending mean that the Bank has not assumed the share of the burden it might have in other situations.⁴⁵

The lack of a comprehensive economic development strategy and vision for the territory has, in this second phase, been aggravated by the absence of procedures to be followed prior to the conclusion of an international financial agreement by the SRSG.⁴⁶ The related indeterminacy of Kosovo's equitable share of the former FRY's sovereign debt has equally prevented the international financial institutions (IFI) lending for capital projects.⁴⁷ In the third stage beginning in March 2004, access to international finance was included as one of the sub-standards within the Kosovo Standards Implementation Plan's economic sphere.⁴⁸ Numerous challenges have, however, hampered progress on the issue, among them (i) the lack of counter-guarantees; (ii) questions surrounding the level of involvement of the PISG in negotiating and implementing international financial agreements; and (iii) the legal succession of obligations under international financial agreements. As regards the last issue, the uncertainty over the future status of the territory raised worrying questions concerning

⁴³ As in the case of East Timor where UNTAET was designated as the recipient of the IDA Trust Fund for East Timor, WB assistance to Kosovo took the form of IDA grants to UNMIK since 'under the current circumstances, the use of regular resources – either in the form of direct lending to Kosovo or through the FRY – is not feasible': World Bank SEE Country Unit, *Kosovo, FRY Transitional Support Strategy 2002* (Report No. 24275-KOS, 2 July 2002), at 8.

⁴⁴ *Ibid.*, at 9. Those grants were only held permissible under Article V(2)(c) of the IDA's Articles of Agreement, which allow for the provision of the financing of an international organization. An IDA report noted that 'in the post-conflict context, grants could be made available, in special cases, to territories within member countries that are under UN-administration on an interim basis': IDA, *Report of the Executive Directors of IDA to the Board of Governors. Additions to IDA Resources: 13th Replenishment*. (IDA/SecM2002-0488, 25 July 2002), at 28, para. 85.

⁴⁵ Cf. World Bank 2004, *supra* note 42, at 11. The IMF took a more explicit line: '[r]esolution of Kosovo's final status would provide the right enabling environment to the extent that political uncertainty may hinder investment and economic activity more generally': IMF, *Kosovo – Gearing Policies Toward Growth and Development* (18 Nov. 2004).

⁴⁶ Insurance of risk management therefore took the form of bilateral agreements in which UNMIK offered certain fiscal advantages to investors whose interests were guaranteed. See, e.g., the US-UNMIK Agreement for Investment Support for Projects in Kosovo (Washington, DC, 17 May 2002, and Prishtina, 30 May 2002).

⁴⁷ S. Skogstad *et al.*, *Evaluation of the USAID/Kosovo Economic Reconstruction Project* (Nov. 2003), at 51.

⁴⁸ Standard V.1 (action point 4) of the KSIP, *supra* note 17, at 78.

the capacity of a UN organ to enter into long-term financial agreements on behalf of local beneficiaries, i.e., beyond the expiry of UNMIK's mandate.

Having been asked to provide loans for the reconstruction of infrastructure, the European Investment Bank (EIB) has insisted on obtaining counter-guarantees that the post-determination sovereign be bound to perform obligations contracted by UNMIK. In a letter to the UNSG, both the President of the European Commission and the President of the EIB requested 'confirmation from the UN that . . . (a) obligations contracted by UNMIK will be binding on any authority that will administer Kosovo after the replacement or termination of UNMIK's mandate; and (b) this authority will unconditionally accept those obligations as continuing obligations of Kosovo . . .'.⁴⁹ The EIB's demands are remarkable, as they reveal the intricacies underlying a territorial entity's access to IFIs without a status perspective. While discussions on the appropriate legal mechanism through which local institutions succeed to the liability provisions agreed upon with IFIs are ongoing, it has become clear that granting investment funds for the benefit of projects in Kosovo *depended* on the acceptance by the PISG of responsibility for the repayment of loans duly accepted by UNMIK acting on behalf of the former.⁵⁰ It has therefore become routine to insert a 'roll-over' clause in an agreement between UNMIK and international financial institutions. By initialising the agreement, the PISG acknowledge that obligations contracted by UNMIK are undertaken for and on behalf of the PISG, which normally excludes liability of the United Nations and UNMIK.⁵¹

The legal basis for such 'roll over' had only been created in 2004, five years after the beginning of the institution-building and reconstruction effort.⁵² The law on International Financial Agreements now provides that a negotiating delegation shall include three UNMIK representatives and three appointees of the government. It foresees a four-pronged procedure through which such agreements create obligations for

⁴⁹ Letter from Philippe Maystadt and Romano Prodi to UNSG Kofi Annan, D (2004) 340 (Brussels, 20 Oct. 2004, italics supplied).

⁵⁰ Cf. the preamble to the Framework Agreement between UNMIK, Acting for and on behalf of the Provisional Institutions of Self-Government in Kosovo and EIB, Governing the Bank's Activities in Kosovo (Prishtina, 3 May 2005).

⁵¹ *Ibid.*, Art. 15. The roll-over clause provides that 'neither the United Nations nor UNMIK shall bear any responsibility for the performance of such obligations or any liability with regard to the performance or non-performance of such obligations by the PISG or any successor to the PISG'. The agreement and the performance of obligations thereunder 'are neither guaranteed nor otherwise secured by UNMIK or the UN'.

⁵² Art. 5 of UNMIK/REG/2004/30 *On the Promulgation of the Law on International Financial Agreements* (of 9 Aug. 2004) provides that '[a]ll obligations occurred . . . shall be binding upon the PISG. Upon completion of the mandate of UNMIK . . . information on all outstanding obligations under such agreements to be resolved in line with general principles of International Law, shall be duly brought to the attention of the Security Council'. The principles referred to by the law are not entirely clear; one may speculate that with regard to obligations incurred by the former administering power they would probably be in stark conflict with the post-colonial rule of 'clean slate' codified in Art. 16 of the 1978 Vienna Convention on Succession of States in Respect of Treaties (UN Doc. CONF.80/31), reproduced at 17 ILM (1978) 1488.

Kosovo.⁵³ Liability for financial obligations incurred *before* 1999 is seen to be borne by Serbia and Montenegro (SCG).⁵⁴ It can be surmised that an across-the-board resolution of the debts incurred *after* 1999 and those undertaken under UNMIK Regulation 2004/30 will be part of the final status settlement to which SCG will be a party.⁵⁵

C *Towards a Limited Legal Personality of Internationalized Territories?*

The previous section highlighted new developments in the performance of external representation of a non-state territorial entity by an international agent. Upon further consideration, it is extraordinary that certain problems encountered in new frameworks of international tutelage precisely mirror those bearing similar circumstances under the League of Nations Mandate system. There, the 'defective' legal title to territory also presented an obstacle to capital investment and was thought to 'deter a mandatory from guaranteeing loans or making advances for the development of its mandated territory, unless it could have some tangible security'.⁵⁶ In a similar fashion, insistence on obtaining counter-guarantees represents the continuation of a practice established under the UN Trusteeship system. When a dependency was a party to loans contracted by international agreement, IBRD regulations required that a separate guarantee agreement be concluded between the Bank and the metropolitan power internationally responsible for the territory. As Zemanek noted, the dependency thereby 'became, within the scope of the provisions of the agreement, a person of international law, directly responsible for the performance of the agreement'.⁵⁷

Is this conclusion equally applicable to non-state territorial entities under the direct administration of the United Nations? When deliberating the position of entities other than states or international organizations in international law, it seems fitting to

⁵³ Art. 3(2)–(5) of UNMIK/REG/2004/30, *supra* note 52, stipulates that international financial agreements have to be (1) submitted to the government by the Minister for Finance and Economy, (2) approved in writing by the government, (3) endorsed by the Assembly, and (4) signed by the SRSG for UNMIK. The law provides the legal basis for the future cooperation between UNMIK and the EBRD, according to the MoU signed on 4 March 2005. At the margins, it should be noted that similar arrangements were envisaged for the internationalization of both Trieste and Jerusalem after WWII. Art. 24(2) of the Permanent Statute of the Free Territory (Annex VI of the Treaty of Peace with Italy, Paris, 10 Feb. 1947; 49 UNTS 126, 187) designated the Governor and a representative of the Government as competent jointly to sign treaties and agreements, exequaturs and consular commissions (which would also have been subject to ratification by the Legislative Assembly). As with Trieste, the Governor of Jerusalem would have had the power to sign treaties and international undertakings which would have had to be submitted for ratification to the Legislative Council (Art. 37(5) and (6), Statute for the City of Jerusalem, UN TCOR, 6th session, 4 Apr. 1950, UN Doc. T/592).

⁵⁴ Conversation with EC RELEX official, 22 Oct. 2004.

⁵⁵ For an overview of international legal sources for resolving (likely) disputes over intergovernmental claims see Perritt, 'Resolving Claims When Countries Disintegrate: The Challenge of Kosovo', 80 *Chicago-Kent LR* (2005) 119.

⁵⁶ This opinion was voiced in the third session of the Permanent Mandates Commission (July–Aug. 1923), quoted by Evans, 'The General Principles Governing the Termination of a Mandate', 26 *AJIL* (1932) 735, at 736.

⁵⁷ Zemanek, 'State Succession After Decolonization', 116 *RCADI* (1965–III) 187, at 259.

‘unbundle’ the concept of legal personality and further develop it as a spectrum recognizing a range of varying statuses and severable entitlements, always contingent upon the degree to which a territorial agent has been mandated to perform them. This does not amount, as Allott proposes, to abandoning the conceptual category of ‘subjects of international law’ altogether,⁵⁸ but to rendering it more accessible and inclusive for new participants in international legal relations. Following the precedent of international organizations,⁵⁹ personality shall be defined *in relation to the respective functions* the subject in question fulfils regarding needs shared by international society.⁶⁰ The *capacité juridique* of the entity, as manifested through an international agent, is thus delineated by a principle of functional limitation.⁶¹ Its legal personality may accordingly increase or decrease in accordance with the expansion or compression of functional areas where the international agent performs acts of representation.⁶²

The gradual assumption of obligations by Kosovo’s local institutions, encouraged by the international administration, indeed suggests that such a territorial entity gradually acquires a limited subjectivity in order to comply with the evolving requirements of international life. The initial latent subjectivity of the territory – addressed by norms of international law circumscribing its content⁶³ – is activated *qua* ‘performance’ by UNMIK projecting both its duties and rights to the international plane. As a direct consequence of this complex interaction of the relevant normative behaviour performed through a relationship of agency, Kosovo temporarily manifests its spatio-temporal specificity by entering into relationships with other international legal persons.

These propositions lead to a more differentiated understanding of the importance of the temporary convergence between the international legal system and ‘the people’ who have become addressees of certain international entitlements. This functionalist interpretation uses international legal personality as an intermediary, rather than a barrier, allowing the international legal structure to reach ‘all the way down to the

⁵⁸ P. Allott, *Eunomia: New Order for a New World* (1990), at 372.

⁵⁹ For the concept of *abgestufte Völkerrechtsfähigkeit* in the case of international organizations cf. Faßbender, ‘Die Völkerrechtssubjektivität internationaler Organisationen’, 37 *ÖzöRV* (1986) 17, at 26.

⁶⁰ Cf. Advisory Opinion on *Reparation for Injuries Suffered, ICJ Reports* (1949) 174, at 174: ‘[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the need of the community’.

⁶¹ Cf. also Rama-Montaldo, ‘International Legal Personality and Implied Powers of International Organizations’, 44 *BYIL* (1970) 111, at 141.

⁶² Similarly, certain colonies and mandated areas that enjoyed limited capacity at one point have subsequently acquired the unlimited international legal personality which flows from statehood. See Mosler, ‘Völkerrechtsfähigkeit’, in H.-J. Schlochauer (ed.), *Wörterbuch des Völkerrechts* (1962), iii, at 675–676.

⁶³ The machinery devised by S/RES/1244 provides for a progressive conferral of broad governmental responsibilities ‘under which the population can enjoy substantial autonomy’ within the FRY and in which the establishment of self-governing institution should ensure the conditions for a peaceful life. As Tomuschat points out, the notion of ‘self-government’ has taken on a *legal meaning* which denotes a collective entitlement to a higher level of self-responsibility in the exercise of public affairs, inside a larger political system: Tomuschat, ‘Yugoslavia’s Damaged Sovereignty over the Province of Kosovo’, in G. Kreijen *et al.* (eds.), *State, Sovereignty, and International Governance* (2002), at 323, 328.

individual inside the collective'.⁶⁴ As a corollary, Kosovo can accede to the international legal order without mediation by a constraining sovereign. On the international plane, states henceforth conceded to collaborate reciprocally with Kosovo through the medium of the international fiduciary, whose acts are attributed to the entity.⁶⁵

By 'internationalizing' the territory, the Security Council endowed a non-state territorial entity with an agent which is, at the same time, an *organ* of the organized international community – a subsidiary organ of the UN Secretary-General that fulfils functions ancillary to those of the mother organization.⁶⁶ For the purposes of the following analysis, it is pivotal to remember that a relationship of international agency is fundamentally different from the relationship between a state or an international organization and its respective organs: the latter is *not* of fiduciary nature. A subsidiary organ (such as a UN mission under the leadership of an SRSG) is regularly delegated with the execution of certain tasks, on behalf of the organization to which it remains directly responsible. The following section seeks to draw the contrast with the previous analysis where representation of 'domestic' interest took the form of territorial agency.

4 UNMIK as Administrator of an International Trust

Turning 'inwards', the sphere of domestic administration proves to be an ample field for studying the inherently contradictory sets of interests that a territorial agent/international organ is mandated to pursue.

A Privatization Stalled

UNMIK is mandated, on the one hand, to restructure Kosovo's public economy. On the other, it is prevented from infringing upon the territorial integrity of the FRY/Serbia and Montenegro (SCG). The lack of a 'road-map' for the territory has undoubtedly caused these two mandates to directly collide in the sphere of privatization, given that the UN's legal advisers have effectively interpreted Resolution 1244 as prohibiting UNMIK from making any lasting changes to the ownership status of socially-owned enterprises (SOEs) which may prejudice the rights of former owners or claimants.⁶⁷ The issues at stake emerged as the international community began to engage in state-building without the perspective of statehood. They highlight the gap between an international dual mandate, through which UNMIK pursues the territory's economic

⁶⁴ J. E. Nijman, *The Concept of International Legal Personality. An Inquiry Into the History and Theory of International Law* (2004), at 120.

⁶⁵ Since agency may possess the element of trust and confidence of a fiduciary relationship, the present analysis classifies agents and trustees together as fiduciaries. The two concepts are, however, distinct. In legal literature, this distinction is sometimes expressed by noting that all trustees are agents but not all agents are trustees: a trustee is an agent and something more. See G. T. Bogert, *Trusts* (6th edn., 1987), at 36.

⁶⁶ Cf. Mosler, 'Subjects of International Law', in 4 *EPIL* (2000) 710 (ed. by Rudolf Bernhardt), at 715.

⁶⁷ Cf. World Bank 2002, *supra* note 43, at 5. For a study on the nature of the Yugoslav brand of self-management socialism and an examination of the different strategies employed by UNMIK between 2000 and 2002 to fulfil its mandate as trustee of social property see European Stability Initiative, *The Ottoman Dilemma. Power and Property Relations under the United Nations Mission in Kosovo* (Prishtina, 8 Aug. 2002).

interest while desperately trying to balance it against the wider international public interest that includes SCG's reversionary sovereign title to the territory.

This has caused the European Union Pillar of UNMIK to fall behind the ambitious performance benchmarks established by the World Bank.⁶⁸ Not surprisingly, an IMF forecast published in 2002 concluded that 'Kosovo's long-term economic prospects are clouded by considerable uncertainty... domestic and especially foreign private investors are unlikely to undertake major projects... as long as uncertainty about the province's future status persists.'⁶⁹ The most negative impact of stagnation in the field of privatization was felt by buyers of the tendered enterprises: the transfer of the SOEs was considerably delayed, buyers had to start repaying of the loans they engaged for the purchase, and the enterprises' economic activity ceased while buyers were prevented from managing them.⁷⁰

The issues underlying Kosovo's privatization disaster strike at the heart of the international community's inability to effectively delineate the legitimate scope of an international administration and the extent to which it should exercise political authority. The capacity to transfer property rights and allocate land and assets had been resolved with the creation of the Kosovo Trust Agency (KTA), vested with the right to initiate privatization through spin-offs,⁷¹ and the adoption of a law that allows for long-term leases of socially-owned land and determines the recipients of the privatization process.⁷² However, the underlying key problem that caused the privatization process to stagnate has yet to be addressed. It relates to the ways by which the UN attempted to limit UNMIK's risk of liability for claims by owners and creditors. It did so by establishing the KTA as an 'independent body' with 'full juridical personality and in particular the capacity... to sue and be sued *in its own name*'.⁷³

⁶⁸ World Bank 2002, *supra* note 43, Annex VI.

⁶⁹ D. G. Demekas *et al.*, *Kosovo: Institutions and Policies for Economic Growth* (2002), at 14. Cf. also the *Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo* (26 Jan. 2004), UN Doc. S/2004/71, para. 35.

⁷⁰ Institute for Development Research (Riinvest)/UNDP, *Early Warning System Project, Kosovo Report No. 6 (January – April 2004)*, at 17.

⁷¹ See UNMIK/REG/2002/12 *On the Establishment of the Kosovo Trust Agency* (13 June 2002). S.8 stipulates the powers of the KTA to establish subsidiary corporations of SOEs. The spin-off model involves the setting up of a subsidiary company using SOE assets, and the subsequent selling off of the shares of these subsidiaries. The new company would thus find new investors while the old company would be liquidated. The proceeds are to be deposited into trust accounts to satisfy liabilities remaining with the SOEs, including ownership claims. Cf. Institute for Development Research (Riinvest), *Socially Owned Enterprises and Their Privatization* (Research Report, 20 June 2002), at 24 ff. and Demekas *et al.*, *supra* note 69, at 19. The passing of the KTA Regulation was preceded by a stand-off between SRSG Steiner and the UN's legal advisers in New York who consistently argued that the permanent change – understood as *transformation* – of property rights – would exceed UNMIK's mandate and scope of authority laid down in UNMIK/REG/1999/1, *supra* note 2, whose s.6 authorizes UNMIK to 'administer... immovable property' of the FRY/Serbia which is in the territory of Kosovo. Interview with UNMIK Legal Officer, Office of the Legal Adviser, Prishtina, 3 Feb. 2005.

⁷² UNMIK/REG/2003/13 *On the Transformation of the Right of Use to Socially-Owned Immovable Property* (9 May 2003).

⁷³ UNMIK/REG/2002/12, *supra* note 71, Section 1 (emphasis added). The subsequent UNMIK/REG/2002/13 *On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related*

B To Be or Not To Be Immune?

The underlying controversy was triggered by different conceptions of UNMIK's fiduciary obligations. UNHQ in New York favoured a restrictive view, prioritizing the international administration's responsibilities towards the SOE owners (hence initially rejecting the privatization of their assets). According to this view, the privatization of public assets could represent a case of *détournement de pouvoir*, in that UNMIK took administrative action which, though not excluded in its mandate laid down in Resolution 1244, may be inconsistent with, or outside the scope of, the objectives of the organization.⁷⁴ UNMIK's European Union component, on the other hand, conceived its trustee obligations as primarily directed toward the territory's economic recovery and the creation of a functioning property system.⁷⁵ In the eyes of the EU Pillar, this includes the competence to restructure economic institutions through rearranging property interests.

Due to the legal distance that had been created between UNMIK and the KTA, international officials – particularly those serving on the KTA's management board – have raised concerns as to their personal liability in future litigation regarding their involvement in the privatization process.⁷⁶ As attempts to distance UNMIK and the SRSG's deputies from possible liability claims reverberated through communications

Matters (13 June 2002) offers a legal remedy for potential owners and creditors to receive compensation for the loss of property. The passing of this Regulation was seen as a *sine qua non* to protect the UN against damaging liability claims in courts outside Kosovo.

⁷⁴ The view that UNMIK's mandate does not extend to the compulsory transfer of property interests (as necessarily occurs when assets are leased to investors for 99 years through the privatization process) is mainly based on the limitations imposed by the international law of occupation. Cf. the interesting discussion by Irmscher, who claims that the law of occupation applies to UNMIK, although second in rank after the authorizations contained in Resolution 1244: 'The Legal Framework for the Activities of the United Nations Interim Administration in Kosovo: The Charter, Human Rights, and the Law of Occupation', 44 *German YIL* (2001) 353, at 383–395. Disappointingly though, he does not commit himself on the issue of whether Art. 55 of the 1907 Hague Regulations ('... it must safeguard the capital of these properties...') is actually applicable to UNMIK (which would certainly prevent the privatization of socially owned property). For two reasons, the answer to this question must be in the negative. First, it is doubtful whether the legal reasoning underpinning the minimum standards incorporated in the Regulations is generally applicable to a UN organ temporarily administering territory. These protective functions are presumably built into its fiduciary mandate. In short, Kosovo is certainly not a territory 'placed under the authority of a *hostile army*' (Art. 42). In the case in question, an international territorial administration has been specifically charged with the reconstruction of key economic infrastructure (S/RES/1244, para. 11(g)). Secondly, drawing a general analogy with belligerent occupation fails to appreciate the particular situation of an open-ended mandate in which the pre-existing sovereign (and arguably the holder of titular sovereignty *qua nudum jus*) may return intact, should the status of the territory be determined in this direction. It is suggested to agree with Perritt, who convincingly argues that 'the Security Council has, since the issuance of Resolution 1244, exercised continuous oversight over the U.N.'s administration of Kosovo, receiving notice of UNMIK regulations and also receiving regular reports... some of which have expressly referred to privatization of socially owned assets as a priority... Failure by the [SC] to take action to limit the exercise of this authority by UNMIK evidences concurrence...': 'Resolving Claims', *supra* note 55, at 172.

⁷⁵ Cf. D. Eyre and A. Wittkowski, *The Political Economy of Consolidating Kosovo: Property Rights, Political Conflict and Stability* (2002), at 9–11.

⁷⁶ Skogstad *et al.*, *supra* note 47, at 54.

between UNHQ, UNMIK and its component Pillar responsible for economic reconstruction, the latter tried to obtain immunity for KTA personnel from the UN. The UN, however, maintained that EU-seconded KTA directors and international members of the KTA board who are not UN staff members did not enjoy the privileges accorded to the UN under the 1946 *Convention on the Privileges and Immunities of the United Nations* (CPIUN).⁷⁷ As a consequence, those international board members are exposed to the risk of being personally sued before courts outside the territory and being held liable for actions undertaken in the course of their official functions.⁷⁸

In what can be termed as the Battle of the Legal Advisers, UNMIK's Pillar IV insisted that the two key international staff vested with executive authority – the Deputy of the Deputy SRSG for Economic Reconstruction and KTA's Managing Director – would indeed be covered by the aforementioned UN convention which grants immunities to the category of 'experts on missions' performing functions on behalf of the UN (and who are not UN officials)⁷⁹ – an argument that was firmly grounded in the ICJ's interpretation of the convention.⁸⁰ This legal opinion has also been supported by two ancillary arguments relating to the international administration's plural identity. Firstly, the international civil presence, headed by the SRSG, remains responsible in the final instance for supporting the reconstruction of key economic infrastructure.⁸¹ Secondly, the KTA, including its Board, was established by the SRSG by virtue of an UNMIK Regulation in the pursuit of key UNMIK responsibility. Consequently, any action undertaken by international KTA staff with executive authority (which is *intra vires* with regard to UNMIK regulations and subsequent legislation promulgated by the SRSG) represents an action performed on behalf of the UN and hence attributable to it. This organic link is also supported by the fact that the key KTA managers are appointed by the SRSG as members of the KTA Board and also by the continuing authority of the SRSG who may repeal or modify all Board decisions.⁸² In the latest

⁷⁷ A/RES/22A(1), UN Doc A/43. Ann. I, 13 Feb. 1946, 1 UNTS 15 (corrigendum in 90 UNTS 327). See UN Code Cable 3154 (13 Nov. 2003).

⁷⁸ The case of *Wood Industries LLC v United Nations, UNMIK, and the Kosovo Trust Agency* (2003) (Supreme Court of the State of New York, Index No. 03/602741) appears to demonstrate that the risk of being sued is considerable (Wood Industries withdrew the complaint and re-filed the case in the Special Chamber of the Kosovo Supreme Court where it is now pending the decision to dismiss. The case is also discussed by Perritt, 'Providing Judicial Review for Decisions by Political Trustees', 15 *Duke JCIL* (2004) 1, at 16–17). Due to the financial risks involved, professional indemnity insurances for KTA Board members are not available on the private insurance market: interview with Pillar IV Legal Counsel, 1 Feb. 2005.

⁷⁹ Art. VI, s.22, CPIUN, *supra* note 77.

⁸⁰ As pointed out in the *Mazilu* opinion, this category encompasses a wide variety of persons to whom the UN 'has had occasion to entrust missions' (i.e., assignments), as long as they are neither representatives to, nor officials of, the organization: *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the UN*, Advisory Opinion, ICJ Reports (1989) 20). For a discussion of the term 'official' used both in the Charter and in the CPIUN see Szasz and Ingadottir, 'The UN and the ICC: The Immunity of the UN and Its Officials', 14 *IJIL* (2001) 867, at 869–873.

⁸¹ S/RES/1244 (1999), para. 11(g). Although the EU provides financial and technical assistance within the UNMIK structure, such assisting operations are undertaken under the overall responsibility of the UN.

⁸² UNMIK/REG/2002/12, *supra* note 71, sections 12.3 and 24.3(a) respectively.

stage of the legal controversy, UNMIK's Legal Adviser recommended that the UN not grant 'experts on mission' status to non-UN officials, thereby following a restrictive interpretation that effectively excludes those officials from immunity.⁸³

As a result of this standoff, the KTA Board was not officially convened in the period between March 2004 to May 2005. The privatization process was suspended.⁸⁴ At best, this tale points to the detrimental impact of an open-ended status situation and the constraints on the use of privatization to promote economic recovery. At worst, the narrative provides an embarrassing example of an international organization's disastrous hesitations embodied in its failure to first assert, and then exercise, legal authority over an area as a 'surrogate state' due to the ambiguity surrounding the scope of its rights and responsibilities. Creating acceptable conditions for private investment has become an essential part of state-building; UNMIK activities in this sphere may have been more successful had it been more willing to consider the link between economic progress and political stability and face up to its function as *government*.⁸⁵ UNMIK should have anticipated the trials and tribulations emerging from the contested conceptions of a trustee's functions and could have been counselled to request an early advisory opinion from the ICJ on this particular legal question arising within the scope of its activities.⁸⁶

Regardless of the interpretation adopted, as international Board members remain unwilling to actively participate in the relevant decision-making process, an international administration's 'indecisionism' had spawned a dysfunctional regulatory body that remains unable to implement its mandate. This, in turn, has not only compromised the legitimacy of the process but has also proven harmful to Kosovo's socio-political stability. It has undermined the UN mission's basic goal of creating a viable economy under the rule of law. In fact, control over some of Kosovo's

⁸³ Cf. Note to the SRSG (30 Mar. 2004), on file with the author.

⁸⁴ The KTA completed three rounds of privatization before the process was suspended in Oct. 2003. See UNMIK Pillar IV, 'Statement to clarify the current situation regarding the privatisation process' (7 Oct. 2003). An amended KTA Regulation, promulgated on 22 Apr. 2005, now allows for a change of ownership for public purposes ('eminent domain') even if the SOE status of an enterprise is not yet fully determined. Accordingly, the KTA Board can now make final ownership determinations after the sale of assets. Whether this will lead to the re-constitution of the KTA board prior to the resolution of the immunity issue remains to be seen.

⁸⁵ Cf. Perrit, 'Stabilizing Kosovo: "Enterprise Formation and Financial Markets"', 2(2) *Journal of Global Financial Markets* (2001) 28, at 33–34 (arguing that in analogy to the trustee-occupant concept, UNMIK has the power to transfer trust property, even when a transfer cuts off reversionary interests, as long as it exercises this power in line with the terms of the trust). For a similar conclusion regarding UNTAET see Morrow and White, 'The United Nations in Transitional East Timor: International Standards and the Reality of Governance', 22 *Australian YIL* (2002) 1, at 43.

⁸⁶ Art. 96(2) of the UN Charter provides that '[o]ther organs of the United Nations and specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the court on legal questions arising within the scope of their activities'. The GA has previously authorized some UN organs to request opinions at any time, without requiring special authorization for each individual case (cf. Arsanjani, 'Claims Against International Organizations: *Quis custodiet ipsos custodes*', 7 *Yale J of World Public Order* (1980–1981) 131, at 172, with reference). See also K. Wellens, *Remedies against International Organizations* (2002), at 232.

most valuable public assets continues to be decided outside a legal framework, in various local disputes.

5 UNMIK's Problematic Participation in Status Negotiations

Having examined a governance sphere that plagued UNMIK in its first six years of existence, the article's final section now draws attention to the key actor in an internationalized territory and directs us to disaggregating the intersecting influences that converge around this 'bicephalous' body in its agency and organic functions. It faces simultaneously 'outward' to the international community as a territorial agent, and 'inward' to a domestic audience as an international organ to perform the fiduciary bond. In *its quality as situated territorial agent* an international mission is constrained by the operation of a fiduciary bond between it and the governees. In its corollary *identity as subsidiary organ* of the United Nations its mission is constrained in its 'domestic' strategic choices by international law and the politics of its mother organization. Both aspects are important to capture the nature of an international administration, and both impose constraints. Yet their simultaneous performance manoeuvres the territorial agent *qua* international organ into an untenable situation should it choose to participate in final status negotiations.

A Options for the Security Council

As the decision concerning the status of the entity over which the UN has temporarily assumed effective control has been deliberately left open, it will fall to the Security Council to determine this at a future point in time in the form of a resolution amending 1244. This, in itself, can be considered as a revolutionary moment in the Council's practice for the closest it has previously come to imposing territorial boundaries on a state was arguably its decision to demarcate the Iraq-Kuwait boundary under its Resolution 687 (1991).⁸⁷ In directing permanent change to the status and the political structure of territory still remaining within a state, the SC has two options, the first of which can be discarded at the outset.

The SC could opt to further expand its powers in a post-conflict administration context and 'vertically impose' a permanent change in Kosovo's political status without the consent of the current holder of a *nudum jus* (SCG) to exercise sovereignty to the extent that it deems such determination necessary to the maintenance of international peace and security. Such a decision has no precedent in public international law. It would essentially imply that the international legal order draws the contours of state frontiers and grants title over territory to an entity that it simultaneously recognizes as a distinct unit. Unilateral determination of a territory's status

⁸⁷ SCOR, 45th Sess., 3 Apr. 1991, UN Doc. S/INF/47 (1991), paras. 2–4, reprinted in 30 ILM (1991) 847. Here, the Council merely undertook to give precision to the boundary mentioned in 'Agreed Minutes' concluded between the two states in 1963 (485 UNTS (1964) 321).

against the explicit wishes of the sovereign title holder may lie beyond the competences of the SC.⁸⁸

The second option is more likely to materialize. The SC could endorse a horizontal agreement between the concerned parties, in a resolution based on Chapter VII. Negotiations will no doubt take the form of a general plurilateral (or limited multilateral) treaty. Such 'Kosovo Accords', concluded under the auspices of the Contact Group would effectively end the status of 'international trust' and resolve the sovereignty puzzle. Parties to the determination of the future permanent political boundaries of the territory of Kosovo include, on the one hand, Serbia (and Montenegro) – the holder of a reversionary title to the exercise of sovereign powers – and on the other hand, Kosovo's local institutions. The latter will, in some form or other, be supported by an UNMIK delegation (which remains authorized to represent the territory in its foreign affairs). Even to the casual observer of international relations, it is obvious that the double functions of an international territorial administration could collide at that point.

B *Walking the Tightrope: UNMIK's Dual Functions*

Resolution 1244 tasks UNMIK with facilitating 'a political process designed to determine Kosovo's future status',⁸⁹ envisioning that at some point of the institution-building sequence, the UN's subsidiary organ will be called upon to participate in finding solutions to the permanent status of the territory it administers. The idea that UNMIK has to facilitate such dialogue is entrenched in the dominant culture of the UN Department of Peacekeeping Operations (DPKO), which holds that peacekeeping missions must be neutral in relation to the local contending parties.⁹⁰ This understanding is deeply rooted in the UN's mediation experience stemming from situations in which it was invited to do so by the warring parties. A governance mission in which complete agency is assumed on behalf of a non-self-governing territorial unit, is, however, fundamentally different from a situation in which the UN merely prods the parties to

⁸⁸ Chap. VII of the UN Charter arguably does not vest the UNSC with the power to prescribe changes in the international territorial order. This view is shared by Stahn, *supra* note 2, at 541 as well as by Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter', 26 *NYIL* (1995) 33, at 86. Michael Matheson, on the other hand, believes that the SC has the competence to direct changes in political boundaries 'if it should consider this necessary to restore and maintain international peace and security and if such measures are exercised in good faith observance of the Charter principles': 'United Nations Governance of Post-conflict Societies', 95 *AJIL* (2001) 76, at 85. Although referring to a territorial unit that was earmarked for self-determination, Judge Fitzmaurice's separate opinion is relevant to the case of Kosovo: '[e]ven when acting under Chapter VII of the Charter, the Security Council has no power to abrogate or alter territorial rights . . . The Security Council might, after making the necessary determinations under Article 39 . . . order the occupation of a country or piece of a territory to restore peace and security, but it could not thereby, or as part of that operation, abrogate or alter territorial rights': *Legal Consequences, ICJ Reports* (1971) 16, at 294.

⁸⁹ S/RES/1244 (1999), para. 11(e), with reference to the Rambouillet accords (S/1999/648).

⁹⁰ Impartiality and neutrality were laid down as principles of UN peacekeeping by Secretary-General Hammarskjöld in his 1956 report to the General Assembly on the first major UN peacekeeping operation, UNEF. Cf. Report of the Secretary General, *Study of the UNEF Experience* (9 Oct. 1958), UN Doc. A/3943, at para. 12.

fulfil their promises.⁹¹ Yet not only was UNMIK set up by procedures that developed as part of standard UN peacekeeping; the mission continues to operate within the chain of command of the DPKO. In keeping with this tradition, UNMIK has already attempted to convene a forum in which it assumed the role of a ‘mediator’, with a view to facilitating a political process that would yield such a horizontal status agreement. The first round of technical negotiations between Kosovo and Serbian delegations held in October 2003 in Vienna, however, collapsed spectacularly.

An international agent representing an emerging entity of international law is, in this analysis, precisely the wrong policy institution to bridge the gap between claims to self-determination on the one hand and to the reclamation of sovereign *dominium* on the other. *In concreto*, a UN administrative mission is ill-suited to host, and even less suited to conduct, negotiations on the mandated territory’s readiness to join the international community of states. Even to the novice, these two functions appear incompatible. Firstly, they involve the representation of territorial interests according to the fiduciary bond and their projection to the international arena. UNMIK’s second function in this context involves its participation, as subsidiary organ of the UN Secretary-General, in a horizontal agreement that provides the basis for a SC resolution determining the future political status of the territory. Regardless of its substance, it appears deeply questionable whether the SC, as the final authority to authorize permanent changes to the political boundaries of a sovereign member state, can endorse a status treaty in whose negotiation it participated through a subsidiary organ of one of the UN’s principal organs.

6 Conclusion

The decision to ‘suspend’ a territorial dispute reflects one of the chief dilemmas of a post-colonial international law which upholds two sets of contradictory concepts: rights associated with territorial possession claimed by and on behalf of a sovereign on the one hand; and claims *to* sovereignty framed by and on behalf of a ‘people’, on the other. June 1999 was merely the most recent instance in which the institution of an international trust served to temporarily suspend state sovereignty while shying away from identifying a unit of self-determination which would, in time, be entitled to formulate and exercise its claim to the disputed territory.

The ‘standards before status’ approach, so closely fashioned after policies of conditionality and the idea of ‘earned sovereignty’, operates in almost naïve denial of the continued relevance of self-reliant statehood. Serbia’s assertion of sovereign rights over the territory thus hovers perpetually in the background of Kosovo politics, menacingly to some, beguiling to others. The history of institution building over the past six years suggests that exhorting civil virtues of minority protection and good governance is, in the absence of real incentives, an inadequate means of engendering normative change in a post-conflict setting. It has reinforced a climate of heightened insecurity in which the

⁹¹ The conceptual underpinning of disinterested neutrality that characterized the ‘new peacekeeping’ was criticized in the Brahimi Report (*Report of the Panel on UN Peace Operations* (21 Aug. 2000), UN Doc. A/55/305, S2000/809, at para. 50).

conflict remains frozen rather than resolved. Under the stewardship of the former SRSG Holkeri, Kosovo spiralled into a wave of violence which, by 2004, exposed UNMIK's veritable governance crisis. The eclectic mix of models devised to respond to this crisis included a proposal that the transfer of competencies to local institutions be accompanied by a more 'neo-colonialist' posture: 'The new SRSG should be prepared to introduce a robust policy of interventions and sanctions in cases of inappropriate performance [of local actors].'⁹² This ambiguous recommendation serves to underscore a highly significant point: an 'open-ended' setting in which the future status of an entity will be negotiated on the basis of the performance of local agents increases the hurdles on the path to maintaining a coherent political structure that enables the international agent to renounce its 'proconsular role' and exit. This call has apparently been heeded by the successor SRSG, Jessen-Petersen, who declared upon his arrival in Prishtina: 'I think there is a limit to how long you can keep a place in limbo.'⁹³

As Robert Axelrod has observed, for cooperation to prove stable, the future must have a sufficiently large shadow that is cast in a stable set of relationships and expectations.⁹⁴ The *Eide Report* addressed those systemic constraints that arise from the absence of a 'shadow'. With undisguised impatience it concluded that

[u]nfulfilled aspirations and ambitions cannot be handled by policies without a clear political perspective . . . [W]ell functioning institutions depend on a strong sense of local ownership. Such ownership cannot be achieved if the owners do not know what they own and what they are intended to govern . . . The 'standards before status' policy is untenable in its present form. It must be replaced by a broader policy where standards implementation takes Kosovo in an orderly way from the present through future status discussions and into a wider regional and European integration process. In the current situation . . . we can no longer avoid the bigger picture and defer the most difficult issues to an indefinite future.⁹⁵

The privatization tale illustrated that in circumstances where final 'ownership' over both economic resources and the political process is deferred, an international territorial agent may be torn asunder by two contradicting sets of interests it purports to pursue: the economic interest of the territorial entity on the one hand, and the international legal interest in the maintenance of SCG's 'territorial integrity' (which includes the protection of its reversionary title to exercise state functions, should a determination of Kosovo's final status be made in this direction), on the other. Trusteeship of publicly-owned assets proved to be a double-edged sword which divided an international administration to an extent that it abandoned its responsibility to wield authority for the greater good of Kosovo's economy and society. The pursuit of objectives that are perceived to be in possible contradiction with each other yields negative externalities. One of the objectives of the article has been to demonstrate that an ambiguous mandate can render an international administration an inherently unstable, if not destabilizing, policy institution. What we may term the tragedy of its

⁹² *Eide Report*, *supra* note 1, at 5.

⁹³ UNMIK Press Conference, Prishtina, 7 Aug. 2004.

⁹⁴ R. Axelrod, *The Evolution of Cooperation* (1984), at 174.

⁹⁵ *Eide Report*, *supra* note 1, at 13 and 16.

‘civilizing mission’ in ambiguous, open-ended circumstances, an international agent has, six years into an institution-building mandate, shown itself incapable of administering an important part of the public economy.

In endeavouring to facilitate negotiations over the territory’s final status, UNMIK may even deviate from the fiduciary duties it has assumed as territorial agent, as is the case with the privatization of public assets. Such duties include the *bona fide* representation of the territory held in trust *vis-à-vis* the outside world as well as the compelling and overriding obligation to give primary consideration to the interests of the territory and its people.⁹⁶ For these reasons, UNMIK cannot allow itself to be cornered into a checkmate position, where its roles of territorial agent and international organ are mutually compromised. As the International Crisis Group recently argued, the UN Secretary-General should, in consultation with the Contact Group, appoint a Special Envoy to conduct exploratory discussions on Kosovo’s final status to ‘move the issue into high gear’.⁹⁷ The article concurs that the appointment of a mediator other than UNMIK would help avoid a conflict of interest. Alternatively, it is conceivable for a UN SRSG to assume the role of an ‘honest broker’ in status discussions while UNMIK’s jurisdiction is transferred to the EU, which would administer the international trust (EUMIK) through the grant of a ‘special membership’ to Kosovo.

The legacy of the UN Council for Namibia bolsters the argument that the same agency cannot simultaneously conduct *bona fide* negotiations with concerned parties, and perform the ‘ward’s’ interests.⁹⁸ In this case, the UN Council’s functions as administrative organ of the territory were separated from that of the SRSG, whose role was framed independently to facilitate diplomatic negotiations. The events of spring 2005, in which UNMIK’s capacities were pointlessly stretched as it tried to facilitate meetings between Kosovo’s President and Prime Minister and their counterparts on the SCG and Serbian side, demonstrate that UNMIK’s administrative and representative activities should, once and for all, be detached from wider questions concerning the territory’s future status. A sounder approach could involve the Security Council’s utilization of its Provisional Rules of Procedure allowing for the appointment of ‘a commission or committee or a rapporteur for a specified question’.⁹⁹ The determination of territorial status, conducted in the context of a structured forum independent from a territorial administration, should witness UNMIK solely representing the territory’s interests, in good faith and in close collaboration with local institutions.

⁹⁶ Integrating the principle of good faith into the law of the Charter, Art. 2(2) provides that ‘all Member . . . shall fulfil in good faith the obligations assumed by them in accordance with the present Charter’. These obligations were arguably breached in the case of Nauru’s administration under the Mandate system. See C. Weeramantry, *Nauru: Environmental Damage under International Trusteeship* (1992), at 307 ff. Although the obligation refers to members in the first place, it extends to UN organs as well. For a discussion cf. D. Schweigman, *The Authority of the Security Council under Chapter VII of the UN Charter* (2001), at 173–178.

⁹⁷ ICG, *Kosovo: Towards Final Status* (Europe Report 161, 24 Jan. 2005), at 23.

⁹⁸ Cf. S/RES/319 (1972), para. 5, in accordance with which the SRSG was appointed and the Report of the SG on the implementation of S/RES/319 (1972), UN Doc. S/10832, Annex II.

⁹⁹ Provisional Rules of Procedure of the Security Council, Rule 28, UN Doc. S/96/Rev.7 (1983). The basis for this rule is found in Art. 29 of the Charter.