

Contemporary Challenges for Post-conflict Governance and Civilian Crisis Management

- A Study of the Protection of Minority Groups and
the Re-building of the Judiciary in Post-conflict Societies



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Abbreviations

AJIL	American Journal of International Law
Art.	Article
CFSP	Common Foreign and Security Policy
CoE	Council of Europe
DPA	Dayton Peace Agreement
ECHR	European Court of Human Rights
EJIL	European Journal of International Law
EU	European Union
FRY	Federal Republic of Yugoslavia
G.A.	General Assembly
GFA	General Framework Agreement for Peace in Bosnia and Herzegovina
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for Former Yugoslavia
KFOR	Kosovo Force
LSMS	Legal System Monitoring Section (OSCE)
OSCE	Organisation for Security and Cooperation in Europe
S.C.	Security Council
SFRY	Socialist Federal Republic of Yugoslavia
SRSG	Special Representative of the Secretary-General
UN	United Nations

UNHCR

United Nations High Commissioner for Refugees

UNMIK

United Nations Interim Administration in Kosovo

UNTAET

United Nations Transitional Administration in East-Timor

1. Introduction

1.1 General Overview

There seems to be a close relationship between the protection of human rights and the rights of minorities, the rule of law and peace. This relationship is also contemplated in the UN Charter and in international human rights instruments. Avoiding war and the protection of human rights are both named as objectives of the UN in the opening lines of the Charter. The relationship between the protection of these rights and the importance of adherence to the principle of the rule of law for this protection is laid down in the preamble of the Universal Declaration of Human Rights, which affirms that: *"it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."*¹ The acknowledgement of the importance of the protection of minorities for peace is laid down in the preamble of the Council of Europe Framework Convention for National Minorities, in which it is stated that: *" the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace in this continent. "*²

Economic, political and social discrimination against minorities, often combined with the denial of dignity, identities and cultures of minorities, which leads to unrest, instability and armed conflicts, have as we have witnessed been a common phenomenon during the last 10 years. Even genocides have taken place during the last decade. The violation of the rights of minorities often leads to minorities rising in rebellion, and to violent consequences. Nowadays most armed conflicts take place within states and they are often caused by tensions arising from minority problems and nationalistic claims. In this kind of conflicts the aim might often be to displace or even to exterminate a particular section of the population, and they usually result in large-scale civilian deaths, massive human rights violations, damages to health care and education systems and huge numbers of refugees and displaced persons. Furthermore, if not directly targeted, minorities also tend to come under pressure and lose protection in situations where state structures have broken down in chaos and anarchy. Minorities are particularly vulnerable in this kind of situations, since the usual level of tolerance or supportive or protective measures are under strain, abandoned or sometimes even turned against particular groups. Moreover,

¹ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

² Council of Europe Framework Convention for the Protection of National Minorities ETS no. : 157

internal conflicts also tend to spill over international borders, as forced population movements create new minorities and tensions that might escalate into new conflicts. Bosnia-Herzegovina, Kosovo, Macedonia, Burundi, Rwanda and the Kurds and lots of other situations are examples of violent inter-ethnic conflicts.³ Much due to the evident link between international peace and security and minority rights, international and regional organisations do put more emphasis on minority issues today than after the second world war.

The problems of minorities are not over even if the actual armed conflict has come to an end. Several reports have shown that there are still huge problems facing minorities in post-conflict societies, including societies under an international administration. To find a solution to the protection of minorities is one of the most important tasks that the international community faces in post-conflict governance situations. Despite efforts on the international level, which have resulted in an interim international administration, minorities "on the ground" continue to be under pressure in these post-conflict societies. This becomes evident by studying the reports from international human rights monitors. According to the report on the Situation of human rights in the former Yugoslavia, by Mr. Jiri Dienstbier, Special Rapporteur of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, the lack of security and protection from attacks and intimidation, property issues, and being trapped inside protected enclaves, without freedom of movement or access to employment, education or other services still remain as huge problems for the minorities in Kosovo.⁴

In addition to the lack of security and protection against attacks, minorities also suffer from the lack of a functioning, fair judiciary and adherence to the principles of the rule of law. This aspect is clearly illustrated in the report on the Situation of human rights in the former Yugoslavia, by the Special Rapporteur, where it is stated that despite the general declination of crime in Kosovo, attacks on individuals belonging to minorities remain disproportionately high.⁵ Furthermore, the joint OSCE - UNHCR Report of the Situation of Ethnic Minorities in Kosovo (October 2000 through February

³ Alfredsson, 1999, s. 3., Thurer, 1999, pp. 52-53.

⁴ UN Doc. E/DN.4/2001/47 29 January 2001. Report on the Situation of human rights in the former Yugoslavia, by Mr. Jiri Dienstbier, Special Rapporteur of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, paragraphs 114-115.

⁵ Ibid.

2001), clearly indicates that the lack of adequate security remains the biggest problem for the minority communities, but it also stresses that lesser crimes committed against minority communities and harassment of these communities have become commonplace due to the general climate of impunity in the society.⁶ In addition, the Special Rapporteur also raised another minority issue in connection with the malfunctioning of the judicial system and the poor adherence to the principles of the rule of law in Kosovo. He asserts that bias on part of the judges and prosecutors in trials against members of minorities has been evident, and that this is one of the most problematic features in relation to the absence of a fair and functioning judicial system in Kosovo.⁷

These problems are serious obstacles for building a lasting peace in societies which have undergone ethnic conflicts, and they need immediate attention from the international actors involved. The question of which means and measures should and could be used remain however unsolved.

1.2. Post-conflict governance, the rule of law and minority protection

Enhancing respect for minority rights is a means for preventing further conflicts, also when building up post-conflict societies. In order to prevent future conflicts, and to create a stable organised society, the concerned state, and the international community must protect the rights of minorities, through constitutional and other legislative guarantees combined with sufficient remedies, constituent with international standards.

The United Nations, as the international organisation responsible for international peace and security, has taken a major role in international governance of post-conflict societies. Accordingly, the UN has played an important role also in post-conflict settlement of the ethnic conflicts on the Balkans, in Europe. Nevertheless, also other international and European organisations, especially the OSCE and the EU play an increasingly important role in post-conflict governance. The role of the EU, and its emerging civilian crisis management is especially interesting with regard to conflicts in Europe. The legal framework for the protection of minorities in the context of post-conflict societies has been based

⁶ OSCE - UNHCR Report of the Situation of Ethnic Minorities in Kosovo (October 2000 through February 2001), par. 1-3.

on either an international treaty regime like the General Framework Agreement for Peace in Bosnia and Herzegovina, or on United Nations Security Council resolutions, and on provisional constitutions and regulations adopted on the basis of these resolutions. This is the case with Kosovo and East-Timor for example. In Macedonia on the other hand the protection of minorities will be afforded through constitutional guarantees, which result from international mediation.

These legal frameworks usually contain several references to international minority rights standards, and human rights instruments, but the difficulty lies in implementing them. One of the main obstacles for ensuring respect for human rights and minority rights in post-conflict societies is often the absence of a local functioning and fair judiciary, which would adhere to the principles of the rule of law. The international community is often faced with an institutional and normative vacuum in war-torn post-conflict societies, and the question of applicable law becomes a pressing issue. In post-conflict societies local laws and legal systems, that is the ones preceding the conflict, are often not functioning, often due to intimidation by armed elements. Moreover, they are also often rejected or questioned by groups who consider themselves as victims of the conflict. These circumstances tend to lead to the flourishing of crime, and local political factions often exploit the vacuum, and the evidence of violations of international humanitarian law and human rights law runs the risk of being destroyed, while those responsible of these crimes remain free. In these circumstances the creation of a sense of law and order and the re-building of a basic judicial system becomes a pressing issue as the failure to address past and ongoing violations and crimes may well hamper the broader objectives of the operation.⁸

1.3. The aim and purpose of the study

The point of departure for this study is the assumption that minorities are particularly vulnerable in post-conflict societies, where the legal system has broken down and is open for abuse by hostile political factions, and consequently, that the establishment of law and order and a functioning legal system, which also protects minority groups, is of utmost importance. The aim with this study is therefore to examine and evaluate the protection of minority groups, and the re-building of an unbiased,

⁷ UN Doc. E/DN.4/2001/47 29 January 2001. Report on the Situation of human rights in the former Yugoslavia, by Mr. Jiri Dienstbier, Special Rapporteur of the Commission on Human Rights on the situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, paragraph. 119.

independent and multiethnic judiciary in post-conflict societies under international administration. By taking advantage of the experiences from Kosovo, the study also aims at elaborating on how measures taken by the international community to strengthen the rule of law should also aim at improving the situation of minorities in post-conflict societies. With regard to this latter aim the study also seeks to use the lessons learnt, as a basis for minority concerns and points of departure for creating a functioning, impartial and independent judiciary, that ought to be taken into account in future post-conflict management operations as well as civilian crisis management operations. In this respect the emerging EU civilian crisis management capacity is of most interest. Especially since the strengthening of the rule of law and civilian administration have been declared as priority areas.

These aims create a rather diverse set of questions, which will be dealt with within the two parts of the study. In the first part, the different concepts of post-conflict governance, and the legal regimes created in international post-conflict governance will be examined. The issues in this connection are: What is the legal basis for the international community represented through international organisations to administer a post-conflict society, to legislate and to perform other governmental functions? Of special interest is of course the legal framework, upon which the international community bases its competence to administer the judicial system and to perform judicial functions. Further on in the first part, the study will also analyse the creation of the civilian crisis management and conflict prevention capabilities of the European Union and their priorities. In this connection it is also of interest to address the question of compatibility, with regard to EU's crisis management functions and the UN Charter and its principles. The second part of the study is then concerned with an analysis of the protection of minority groups in post-conflict Kosovo under the United Nations Interim Administration and the re-building of the justice system, and the lessons to be learnt from these experiences. In this connection the following questions arise: What kind of obligations does international law and international human rights law put on an international transitional administrator or an international actor involved in a crisis management operation? What kind of protection for minority groups is the transitional administrator thus obliged to uphold under international law? What has been the situation of the minority groups in practice? What kinds of measures have been taken in order to protect minority groups and their rights? What are the lessons to be learned with regard to the protection of minority groups in post-conflict societies? With

⁸ Strohmeyer, p. 47, 2001.

regard to the re-building of the justice system, the aim is to focus on the issues, which have some bearing on the minority groups, or rather on the reconciliation and the prevention of future hostilities between the different communities in a post-conflict society. Thus, I will examine in detail the creation of an impartial, independent and multiethnic judiciary adherent to the principle of the rule of law in Kosovo, bearing in mind its impact on minority groups. The questions that arise in this context are: What are the criteria for an impartial tribunal? What measures have been taken by UNMIK and UNTAET in order to create an impartial judiciary? Have they been successful in this? Has the judiciary been able to fairly process past war crimes and ongoing ethnically motivated crimes? Has the body of law determined to be applicable been perceived of as neutral? Does the judiciary offer a real remedy in discrimination cases? What are the lessons to be learned with regard to the re-building of a justice system in post-conflict society, which has undergone an ethnic conflict?

Even if Kosovo is my main example in this connection I will also make comparisons to East-Timor and other cases, where it is called upon. The aim is thus to come up with a set of recommendations on measures that could be included in a “quick start justice package”, intended to serve as means for establishing law and order, the rule of law and respect for human rights, as soon as possible in post-conflict environments. My intention is not be exhaustive when it comes to the issue of a “quick start justice package”, but rather to make the point that minority concerns should be included in a ”quick-start justice package” and further on in building the permanent local judicial system, bearing in mind the need for reconciliation and the sensitivity of these issues.

1.4. Sources and materials

This study proceeds through an examination of the primary legal sources, which in this case are the relevant international treaties and agreements, including the UN Charter, human rights instruments like the International Covenant on Civil and Political Rights, the European Convention on Human Rights, the Statute of the International Criminal Court, and the General Framework Agreement for peace in Bosnia and Herzegovina. Furthermore, I will also use the Security Council resolutions, which set out the mandates for the international administrations in Kosovo and East-Timor, and the regulations taken by these international administrations.

As this study aims at analysing the on-going work of the EU concerning the civilian aspects of crisis management, I will also use EU documents, especially European Council presidency conclusions, which have advanced the emerging civilian crisis management capacities of the Union. For evaluating the situation of minorities in post-conflict societies, and the re-building of the judiciary, I intend to rely on reports produced by different international organisations, especially those of the UN and the OSCE, and to a limited extent also reports adopted by NGOs. Moreover, the study will also take into account the latest doctrine on the issues, especially with regard to more theoretical issues.

2. International governance of post-conflict societies and civilian crisis management under international law

2.1. In general

Post-conflict settlement and international governance of post-conflict societies are not mentioned in the UN Charter, but they undoubtedly play an important part in the overall purpose of the UN, namely to maintain international peace and security. In 1992 the UN Secretary-General introduced the concept of "*post-conflict peace-building*" in his report "*An Agenda for Peace*". On the basis of this the UN General Assembly noted in a resolution that post-conflict peace building should complement efforts at peacemaking and peacekeeping in order to consolidate peace and advance a sense of confidence and well being among peoples and states.⁹

The administration of a conflict-ridden territory by international organisations is a new development in public international law and in international relations in general. Starting from Bosnia-Herzegovina, and then in Kosovo and East-Timor, international organisations have been given more extensive powers to administer a post-conflict society, covering a broader range of activities than under previous peacekeeping operations.¹⁰

Since the latter half of the 1990s the Security Council has started to authorise more comprehensive mandates for peace and security operations. This resulted in a shift in the balance of tasks and personnel in peacekeeping operations, from overwhelmingly military to predominantly civilian. In some missions the UN has even assumed tasks, which have traditionally been understood as falling within the purview of governments. The first operations of this sort were the operations in Namibia and Cambodia, and later on the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES). Nevertheless, the administrations in Kosovo and East-Timor go far beyond any previous undertakings, since the UN in these operations is vested with complete legislative and executive authority over territories and peoples concerned. One could say that the UN stepped into a

⁹ UN Doc. GA/Res. A/RES/47/120. Adopted on 18th of December 1992.

¹⁰ Wilde, p. 1, 2000.

political and administrative vacuum, and that the role of the UN resembles that of a midwife to new states. The UN is thus functioning as a government and performing tasks that are usually vested in a government.¹¹ These administration arrangements thus vest in the UN the overall responsibility for the administration, the exercise of all legislative and executive authority, including the administration of justice. There is however one significant difference between the UN Interim administration in Kosovo, and the Transitional Administration in East-Timor. Kosovo is namely not in a state of transition, as pointed out by Chesterman. Kosovo remains still a part of the Federal Republic of Yugoslavia (FRY) despite the international interim administration.¹² Notwithstanding, this difference the term "transitional administrations" will be used in this study to describe both of these operations.

The United Nations is no longer the only international organisation involved in post-conflict settlement and transitional administration, although it is the leading one, and the organisation carrying the overall responsibility. Several authors have argued for strengthening the capacity of regional actors to manage conflicts in their own regions. Faced with the threat of wider regional instability, due to conflicts that tend to spill over, regional actors often have more at stake in such conflicts and are therefore more likely to commit both time and resources to resolve them.¹³ Post-conflict settlement and functions within international post-conflict administrations are also evolving into important functions of the European Union (EU) and the Organisation for Security and Cooperation in Europe (OSCE). This is clearly illustrated by the case of the United Nations Interim Administration Mission in Kosovo (UNMIK), where the mission was divided into four different components, each of them led by a different organisation, including both the EU and the OSCE.¹⁴

2.2. Post-conflict governance and civilian crisis management

In this connection it is also important to pay some attention to the terminology and the different concepts. The concept of post-conflict governance can as Korhonen and Gras puts it, be described as an umbrella concept for different forms of international administration, which occurred during history.¹⁵

¹¹ Griffin & Jones, pp. 76-77, 82, 2001.

¹² Chesterman, p. 3, 2001.

¹³ Adebajo & Lekha Sriram, p. 8, 2001.

¹⁴ UN Doc. S.C. Res. 1244 (1999).

¹⁵ Korhonen & Gras, p. 15, 2001.

Chesterman uses the concept of "*state-building*" when dealing with extended international involvement which goes beyond traditional peace-keeping and peace-building mandates, and which is directed at strengthening and developing governmental institutions by assuming some or all governmental functions for a transitional period.¹⁶ Such activities are essential for this study as well, but for the purposes of this study the concept of "*post-conflict governance*" will be preferred, in order to underline that the governance takes place in the aftermath of a conflict, and perhaps more importantly, that the final status of the governed territory is not necessarily a state of its own.

The UN Secretary-General Boutros-Ghali introduced the terms "*extended peace-keeping*" and "*peace-building*" in his report *An Agenda for Peace*, in 1992. These concepts differ from post-conflict governance in that they also include conflict prevention and other pre-conflict activities, and will thus not be used in this paper.

The European concept of "*civilian aspect of crisis management*" covers partly the same activities as post-conflict governance, but post-conflict governance is seen as a more established form of performing these tasks. Crisis management can be defined as an externally organised activity, which aims at alleviating, mending and preventing escalation of a temporary crisis situation. Civilian crisis management is normally perceived of as a swift and short term response to a conflict situation, and thus something of a more temporary nature. Nevertheless, the post-conflict civilian crisis management envisages peace-building, prevention of the recurrence of crisis and sustainable development strategies through economic and social policy, disarmament, promotion of human rights, humanitarian assistance, rehabilitation, reconstruction, and re-integration into international society and the global market.¹⁷ As the European Union seeks to strengthen the Common Foreign and Security Policy, it has also put emphasis on defining a civilian crisis management role for itself, which would demarcate its activities vis-à-vis NATO in crisis situations. In this respect, the Santa Maria da Feira European Council defined 1.) Policing; 2.) Strengthening the rule of law; 3.) Civilian administration; and 4.) Civilian protection as the priority target areas for EU's civilian crisis management.¹⁸ These activities point in the direction that EU's civilian crisis management capabilities are also geared towards functioning in more long term

¹⁶ Chesterman, p. 3, 2001.

¹⁷ Korhonen & Gras, p. 17, 2001.

¹⁸ The European Council Meeting, June 19-21st 2000 Feira. Presidency Conclusions. Taken from:

operations as well. Moreover, they also coincide as we can see to a great extent with the tasks performed by the international administrations in Kosovo and East-Timor and therefore the lessons learnt from these operations, especially when it comes to activities aiming at strengthening the rule of law, are also highly relevant for future crisis management operations.

This study will focus on the protection of minority groups in post-conflict societies, under international administration arrangements, but before going into minority protection arrangements, we need to discuss how the international administration arrangements have been legally constituted and the implications thereof. In accordance with the study of such administrations undertaken by Ralph Wilde, we thus discuss the arrangements in Bosnia-Herzegovina, Kosovo, East-Timor and Macedonia, since these operations represent different forms of international involvement, both when it comes to the legal basis, and to the tasks performed by the international actors.

2.3. International post-conflict governance: some case-studies

2.3.1. Bosnia-Herzegovina

The General Framework agreement for Peace in Bosnia and Herzegovina (GFA), also known as the Dayton Agreement (DPA) was initialled in Dayton on November 21 1995, and signed by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia, in Paris on December 14 of the same year.¹⁹ The DPA had essentially two objectives. The first one was to secure a halt to the hostilities between the Serb, Bosniak and Croat parties in the conflict in Bosnia-Herzegovina, and the second one was to create stability, restore human rights and to build a lasting peace in a war torn country.²⁰

The parties to the Dayton Peace Agreement were drawn from Bosnia, Croatia, the FRY, but the Dayton Agreement does not regulate the relationships between the parties. The DPA consists of the actual

<http://ue.eu.int/Newsroom/>.

¹⁹ The General Framework Agreement for Peace in Bosnia and Herzegovina. Initialled in Dayton on 21 November 1995 and signed in Paris on 14 December 1995, 35 ILM 75, 1996. Hereinafter this document will be referred to as the "GFA" or the "DPA" as it is also known as the Dayton Peace Agreement. Pajic, p. 1., 1997.

²⁰ Hanson, pp. 87-88, 2000.

peace agreement and 11 annexes, which set out how Bosnia and its two entities, the Federation and Rpblika Srpska will function internally and the powers of international organisations over this.²¹ Annexes 1-A and 1-B deal with the military aspects of the DPA, annex 2 with the Inter-Entity Boundary line and related issues, and annex 3 is an agreement on elections, whereas annex 4 contains the constitution. Furthermore, there are also annexes on human rights, refugees and displaced persons, and on the International Police Task Force.²² The international organisations are not formal participants to the DPA, except for in Annex 1-B, which is composed of smaller agreements between NATO and the parties. Despite not being parties to the DPA, international organisations are however given the final authority to interpret the provisions of annexes that set out their powers. Although, not being a party to the agreement, the Office of the High Representative (OHR), established by annex 10 on the civilian implementation of the DPA, has responsibility over the entire economic and political reconstruction of Bosnia-Herzegovina and thus the implementation of the civilian aspects of the DPA. Similarly, also annex 1-A invites the Security Council to establish the Implementation Force (IFOR), later the Stabilisation Force (SFOR), and grants SFOR the total military control over Bosnia-Herzegovina.²³

The legal authority of the arrangements in Bosnia-Herzegovina is thus to be found in an international treaty, brokered by the international community, through the Contact Group. In addition to being treaty law, the provisions of the DPA are also binding as a matter of Security Council law, as the Security Council, acting under chapter VII, in resolution 1031, beside authorising the establishment of SFOR, also supported the Dayton Agreement, and in particular the prerogatives of the OHR and the SFOR.²⁴

With regard to the judicial system, the DPA also included the new constitution (GFA annex IV) for Bosnia-Herzegovina. The DPA together with the Bosnian constitution, and the constitutions of the entities form one of the most complex human rights protection systems ever devised by law. The European Convention for the protection of human rights is accorded a special status, as it is made directly applicable. In addition, The GFA and the constitutions incorporate into domestic law a wide

²¹ Wilde, p. 1, 2000.

²² GFA Annexes 1-A, 1-B, 2, 3 and 4.

²³ Wilde, p. 1-2, 2000. GFA annexes 1-A, 1-B and 10.

²⁴ Wilde, p. 1, 2000. UN Doc. SC/Res. 1031 Addressing the Political Settlement in the Former Yugoslavia and the Transfer of Power from UNPROFOR to IFOR.

range of international human rights instruments, including human rights instruments, which are not formally binding in international law. In addition the GFA, and the Constitutions establish and give jurisdiction to several mechanisms for the implementation and monitoring of human rights.²⁵ The international community did not face a judicial vacuum, when drafting the GFA, and thus the Constitution in article 2 of annex II, states that all laws, regulations and judicial rules of procedure in effect when the constitution enters into force, would remain in force, insofar they are compatible with the Constitution.²⁶

2.3.2. The United Nations Interim Mission in Kosovo

By the conclusion of the NATO campaign during the spring of 1999, Kosovo was in a state of both economic and social chaos. The relations between the Kosovo Albanians and the Kosovo Serbs were extremely bad. Widespread reprisals, looting and seizures of homes and property were commonplace, and the situation grew even worse as there was no functioning law enforcement system to provide justice.²⁷ In these circumstances the international community had no other choice than to provide for a system of governance, at least for a transitional period. On June the 10th 1999 the Security Council thus adopted resolution 1244, under chapter VII. In this resolution the Security Council:

- *”Decided on the deployment of international civil and security presence, in Kosovo, under the UN auspices.*
- *Authorised the Secretary-General to establish ”an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions”*²⁸

²⁵ O’Flaherty & Gisvold, pp. 1-4, 1997. See also GFA annexes 4, 6 and 7.

²⁶ GFA annex II art. 2 in the Constitution.

²⁷ UN Doc. S/1999/779. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, paragraphs. 8-9, 11-15.

²⁸ UN Doc. S.C. Res. 1244, paragraphs. 7-10.

The Secretary-General then created the civil presence, UNMIK, and appointed a special representative to direct it. The mission was divided into four components, and each of them was led by a different international organisation.²⁹ The civilian administration component, which has the task of handling the public administration and civil affairs, police and judicial affairs, is led by the United Nations. The third pillar, the institution-building pillar, which assumed tasks of promoting democratisation and institution building, elections, and human rights, is led by the OSCE. The UN High Commissioner for Refugees was until the end of the emergency stage responsible for the third pillar, which was humanitarian assistance and mine action. A new pillar I, Police and Justice was established under the leadership of the UN in May 2001. The European Union is responsible for the fourth pillar, the so-called Reconstruction and Economic Development pillar, which include the reconstruction of the key infrastructures and other economic and social systems.³⁰

The carrying out of these tasks required that the UNMIK identified the applicable law in Kosovo, which would govern all these functions. Consequently, the Special representative promulgated a series of regulations on the matter. According to regulation 1999/1 all legislative and executive authority with respect to Kosovo, including the administration of the judiciary is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.³¹ Furthermore, the same regulation stated that the laws applicable in Kosovo prior to 24 March 1999, which are the laws imposed by the FRY prior to its withdrawal, shall continue to apply, insofar as they do not conflict with the mandate given to UNMIK by the Security Council or any regulations issued by UNMIK.³² This was changed later so that in addition to the laws promulgated by the UNMIK, the laws in force in Kosovo before the FRY stripped away the autonomy would be applicable.³³ Later on the Special Representative has repealed certain legislation, which he found discriminatory.³⁴ Moreover the UNMIK, through Special Representative, has continued to make law, where there has been gaps or insufficiencies, and he also has created new court structures, defined their jurisdiction, and provided for the appointment of prosecutors and

²⁹ UNMIK Regulation No. 1999/1 on the authority of the Interim Administration in Kosovo §1.

³⁰ UN Doc. S/1999/779. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, paras. 54- 109.

³¹ UNMIK Regulation No.1999/1, § 1.

³² Ibid. § 3.

³³ UNMIK Regulation No.1999/24 on the law applicable in Kosovo.

³⁴ UNMIK Regulation No. 1999/10 on the repeal of discriminatory legislation affecting housing and rights in property.

judges.³⁵ UNMIK has also continued with the law-making, since there has as we will see later, been a need for new codes of criminal law and procedure in order to fill the existing gaps and in order to ensure a fully functioning legal system, that would control inter-ethnic violence as well as ordinary crimes.³⁶

The future status of Kosovo still remains to be decided upon. The international community is currently trying to design legal mechanism through which Kosovo could become part of the FRY again.³⁷ According to resolution 1244 the aim of the international community shall be to promote "*the establishment, pending a final settlement, a substantial autonomy and self-government in Kosovo,*" and to facilitate a political process designed to determine Kosovo's future status."³⁸ This is foreseen in the Constitutional Framework for provisional self-government, adopted through UNMIK Regulation No. 9/2001, which created new local political structure, which gradually will take over, as the international involvement phases out.³⁹

2.3.3. United Nations Transitional Administration in East-Timor (UNTAET)

Within months after having taken on the responsibility of transitional governance of Kosovo, the UN faced a similar task in East-Timor. In response to the violence taking place after the announcement of the result in the popular consultation, the Security Council established an international force, the INTERFET, to restore order and to facilitate humanitarian assistance.⁴⁰ Despite INTERFET's success in restoring the order, the violence had already, in addition to the destroying of homes and buildings, waterworks and public services, caused the collapse of the civil administration and judicial system.⁴¹ As a result of this the UN Security Council, acting under chapter VII, established the United Nations Transitional Administration in East-Timor (UNTAET) in resolution 1272, which was given the overall

³⁵ UNMIK Regulation No. 1999/5 on the establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor, UNMIK Regulation No.1999/7 on Appointment and Removal from Office of Judges and Prosecutors, UNMIK Regulation 1999/18 on the Appointment and Removal from Office of Lay-Judges.

³⁶ Matheson, 2001, p. 81.

³⁷ Suksi, p. 10, 2001.

³⁸ UN Doc. S.C. Res. 1244, paras. 11(a), (e).

³⁹ UNMIK Regulation No. 9/2001 15 May 2001. On the Constitutional Framework for provisional self-government in Kosovo.

⁴⁰ UN Doc. S.C. Res. 1264. Adopted on September 15th 1999.

responsibility for the administration of East-Timor, and empowered to exercise all legislative and executive authority, including the administration of justice.⁴²

The UNTAET is like UNMIK, headed by a Special Representative of the Secretary-General, who as the transitional administrator is responsible for all aspects of the UN's work in East-Timor, and has the power to enact new laws and regulations and to amend, suspend or repeal existing ones.⁴³ In the first regulation, Regulation 1/1999 the Special Representative vested all legislative and executive authority, including the administration of the judiciary in the UNTAET. This authority was to be exercised by the Special Representative, in consultation with the representatives of the East Timorese people.⁴⁴ According to Linton, regulation 1999/1 together with Security Council resolution 1272 vests sovereign authority, including the right to legislate and to enter into international agreements, over a territory and its inhabitants in UNTAET. This is the first time a UN transitional administration exercises sovereign powers over a territory and its inhabitants. In the case of Kosovo for example, Kosovo remains a part of the FRY, although UNMIK acts as the transitional administration pending a political settlement. This sovereignty over East-Timor is limited by a duty to act in accordance with international standards and the law in force in East-Timor.⁴⁵

The rebuilding of the judiciary and the law enforcement system was declared by the UNTAET, as one of its immediate priorities.⁴⁶ In this respect, with regard to applicable law in East-Timor, regulation 1/1999 provided that: *"until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East-Timor, the laws in East-Timor prior to 25 October 1999 shall apply in East-Timor insofar as they do not conflict with resolution 1272 or UNTAET directives."*⁴⁷, which meant that Indonesian law continued to apply. International treaties do not have direct effect in East-Timor, but due to section 3.1 of the Regulation 1/1999, existing laws have to be read subject to international standards. Likewise existing laws also have to be read in the light of

⁴¹ UN Doc. S/2000/53 Report of the Secretary-General on the United Nations Transitional Administration in East-Timor, paras. 29-31.

⁴² UN Doc. S.C.Res. 1272. Adopted on October 25th 1999.

⁴³ UN Doc. S.C.Res. 1272, paras. 1-2, 6.

⁴⁴ UNTAET Regulation No. 1/1999.

⁴⁵ Linton, pp. 13-136, 2001.

⁴⁶ UN Doc. S/2000/53 Report of the Secretary-General on the United Nations Transitional Administration in East-Timor, paragraphs. 44 –53.

⁴⁷ UNTAET Regulation No. 1/1999.

UNTAET regulations and directives. Consequently, several of the Indonesian laws, especially security laws, have also been declared to be no longer applicable in East-Timor.⁴⁸

After 24 years of massive and brutal human rights violations and a culture of impunity it was extremely important for the UN and the UNTAET to deal with the issues of accountability and justice. In this respect UNTAET adopted regulation No. 2000/15 on the 6th of June, which established panels with exclusive jurisdiction over serious criminal offences. This important regulation establishes the legal framework for the investigation, prosecution and trial of the crimes of genocide, war crimes, crimes against humanity, murder, sexual offences and torture. These panels are only partly internationalised institutions as they are created at the District Court of Dili, apply international law and hybrid laws adopted by the UNTAET, and since they comprise of both international and East-Timorese judges.⁴⁹ Moreover, in order to create a functioning criminal legal system, UNTAET adopted regulation 2000/30, containing transitional rules of criminal procedure.⁵⁰

In his report on UNTAET, the Secretary-General asserted that the establishment of a credible system of justice, in which fundamental human rights are respected, is to be regarded as a benchmark for assessing the success of the UNTAET.⁵¹ According to Linton, it is clear from the report of the Security Council mission, that UNTAET, although having been able to create a system of justice from scratch, still has a long way to go with respect to managing that system in accordance with international standards.⁵² The biggest problems are that the current system cannot process all those already detained in due time, and that it seems that UNTAET has difficulties in bringing to justice those responsible for the massive human rights violations.⁵³

⁴⁸ Linton, pp. 136-137, 2001. See also UNTAET Regulation No. 1/1999. §3.

⁴⁹ UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. Linton, pp. 145-149, 2001.

⁵⁰ UNTAET Regulation No. 2000/30 on Transitional Rules of Criminal Procedure.

⁵¹ UN Doc. S/2000/53 Report of the Secretary-General on the United Nations Transitional Administration in East-Timor, Paragraph. 49.

⁵² Linton, pp.176-177, 2001.

⁵³ UN Doc. S/2000/1105 20 November 2000 Report of the Security Council Mission to East Timor and Indonesia.

2.3.4. The international community and the crisis in Macedonia

Macedonia has been on the brink of inter-ethnic war between ethnic Albanian armed groups and Macedonian government forces and paramilitary groups, since the beginning of the year. The international community could avoid the outbreak of a full-scale war between Macedonian government forces and ethnic Albanian armed groups, thanks to the mediation efforts. As a result of these efforts a Framework Agreement was negotiated over seven gruelling weeks and signed in Ohrid on the 13th of August 2001 by the representatives of Macedonia's two main ethnic Macedonian parties, and the two main ethnic Albanian parties.⁵⁴ The international negotiators, the EU, the U.S. and NATO created a two-track strategy for ending the hostilities and for commencing a reform process.⁵⁵ The Framework Agreement thus stipulated that: Ethnic Albanian armed groups would voluntarily surrender their weapons to NATO, and disband, while the Macedonian Parliament would adopt a series of constitutional reforms and two laws, that would give the ethnic Albanians more minority rights and local self-government. In addition the Albanian fighters who have been disarmed would be granted an amnesty.⁵⁶

The international community acted as a "midwife" for the Framework Agreement, but its tasks did not end there. Two sets of tasks for the international community flow from the Framework Agreement of the 13th of August. The civilian tasks related to assisting in the implementation of the reforms defined in the agreement are coordinated by the EU, whereas the security related tasks are being addressed by the NATO. With regard to the civilian tasks, an overall coordinating body, including representatives of NATO, OSCE, UNHCR, and the European Commission, and the U.S. has been formed. This body has in turn formed four working groups, one on returns, one on reconstruction, one on police/monitoring and one on legislation.⁵⁷ The security related tasks were entrusted in NATO, which was given a very

⁵⁴ Framework Agreement 13.08.2001. Taken from the Webb page of the United States Institute of Peace <http://www.usip.org/library/pa/macedonia/pa> (29.10.2001). See also "Macedonia: filling the security vacuum", International Crisis Group Balkans Briefing, 8 September 2001. This report can be found at: <http://www.intl-crisis-group.org/projects/balkans/macedonia/reports>.

⁵⁵ The senior EU representative, former French Minister of Defence Francois Leotard, and a special U.S. representative Ambassador James Pardew led the negotiations, whereas NATO was conducting parallel negotiations regarding the military aspects.

⁵⁶ Framework Agreement 13.08.2001. Macedonia: filling the security vacuum", International Crisis Group Balkans Briefing, 8 September 2001, p. 2.

⁵⁷ Ibid. p. 9, 2001.

narrow mandate, namely to collect the weapons that the ethnic Albanian armed groups had agreed to hand over. Thus, NATO deployed 4,500 soldiers to conduct the "Essential Harvest" operation. The operation was successful in completing its task of weapons collection, but the situation in Macedonia was such, that the departure of an international presence would have created a serious security vacuum.⁵⁸ Therefore, NATO on the request of the authorities of Macedonia launched "Operation Amber Fox", which has the mandate of contributing to the protection of international monitors who will oversee the implementation of the Framework Agreement.⁵⁹

The Framework Agreement is a political agreement signed by the Macedonian and ethnic Albanian political leaders in Macedonia. The role of the international community has not been just the one of the mediator and the broker of the agreement, but the international community has also assumed the tasks of monitoring the implementation, and the provision of an international security presence. This operation differs from previous ones in that the UN has not been involved. The Agreement has been brokered by the organisations and states mentioned above, and the military aspects have been carried out by NATO on the request of the Macedonian government, and not by NATO troops acting under a UN mandate. The UN Security Council has nevertheless, in resolution 1371, adopted under Chapter VII, given the Framework Agreement and the international civilian and military presence its support.⁶⁰

In the 1991 Constitution of Macedonia, the Albanians, Turks, Vlachs, Romas and other nationalities are mentioned alongside with the Macedonian people.⁶¹ According to the Framework Agreement of July 13th 2001, the Parliament has however to pass amendments to the constitution, and new laws that grant more political rights and local control to the Albanian community. Thus, the Framework Agreement includes provisions on non-discrimination and equitable representation, which entail recruitment of members of under-represented communities to the public administration and the judicial system and the police, and provisions that introduce a higher threshold for certain constitutional amendments and laws that would affect minority issues, such as the use of language and education.⁶² Furthermore, the

⁵⁸ Ibid. p. 10-15, 2001.

⁵⁹ NATO's Role in the former Yugoslav Republic of Macedonia. Operation Amber Fox, 23 September 2001. Taken from <http://www.nato.int/fyrom>.

⁶⁰ UN Doc. SC/Res. 1371(2001) Adopted by the Security Council at its 4381st meeting on 26 September 2001.

⁶¹ For an analysis of the situation of minorities in Macedonia before 2001 see Ortakovski, pp. 275-303, 2000.

⁶² The Macedonian Framework Agreement 13.08.2001. Section 4 Non-Discrimination and Equitable Representation and Section 5. Special Parliamentary Procedures.

Framework Agreement also includes sections on education and use of language, and expression of identity, which are copied from the relevant European Conventions, and which render any other language beside Macedonian, an official language in units of local self-government, in which at least 20% of the population speaks that language.⁶³

Whyte hails the minority protection regime, contained in the Framework Agreement, as it in contrast to many other instruments designed for the resolution of ethnic conflicts tends to emphasise the individual rights rather than collective rights. According to Whyte, this feature is important as it includes also those who do not wish to identify with the main factions. Whyte characterises it as being as close to the ideal of a civic democracy, as you can get in an ethnically divided society.⁶⁴

2.4. Conclusions regarding the legal basis for international post-conflict governance

International administration of a conflict-ridden territory raises several questions under international law. The first issue concerns the legal basis for establishing an international interim administration. First, we must therefore consider whether the international community, acting through an international organisation has adequate legal authority to set up an ad hoc governance over a territory. In the cases of Kosovo and East-Timor, the interim international administrations were established on the basis of UN Security Council Resolutions, adopted under chapter VII of the UN Charter. The Council had determined the existence of a threat to international peace and security, within the meaning of art. 39 of the UN Charter, and established the administrations as means to overcome the threat to the international peace and security.⁶⁵ Matheson asserts rightly, that not necessarily every breakdown of governmental functions can be characterised as a threat to the international peace and security, but that situations of internal conflicts, involving elements such as cross-border violence, substantial refugee flows and serious regional instability can lawfully form the basis for a determination by the Council under Chapter VII. Furthermore Matheson also arrives at the conclusion that the situations in both Kosovo and East-Timor clearly constituted situations calling for response under Chapter VII.⁶⁶ In the case of Bosnia-Herzegovina, the legal basis for the arrangement poses fewer questions than in Kosovo and

⁶³ Ibid. Section 6. Education and Use of Languages and Section 7. Expression of Identity.

⁶⁴ Whyte, p. 3, 2001.

⁶⁵ UN Doc. S.C. Res. 1244, UN Doc. S.C. Res. 1272.

East-Timor, as the administration is set out in a treaty, brokered by the international community and signed by the warring parties.

With the international administrations in both Kosovo and East-Timor the UN has been given the executive authority over entire peoples and territories, including all legislative and executive authority, including the administration of the judiciary.⁶⁷ The fact that these functions are vested in an international organisation naturally invokes questions concerning sovereignty and political legitimacy. In the DPA, a *sui generis* entity created by the DPA, the OHR is given the task of implementing the civilian aspects of the DPA. The increase of the powers of the OHR, which in turn disempowered the locals, and makes Bosnia just fall short of being a protectorate, has led to criticism.⁶⁸ In the case of Bosnia-Herzegovina, the powers of the OHR, have their legal basis in a treaty, but when it comes to Kosovo and East-Timor the second question involved is therefore more complicated, as we need to assess whether or not the UN Security Council, acting under Chapter VII, has an adequate legal authority under international law, for the governance functions it has assumed. The scope of the measures that the Security Council may take, when acting under Chapter VII, are very broad. Article 41 provides that the Council may take measures to give effect to its decisions under chapter VII, without limiting the range of measures that may be taken. Article 41 provides for a list of possible measures which neither includes nor excludes governance functions, but this list is clearly just exemplary and not exhaustive.⁶⁹ What most clearly speaks in favour of post-conflict governance being a possible measure within the meaning of art. 41 is the practise of the Security Council during the last decade. As examples of such arrangements and organs created by the Security Council, using its powers under Chapter VII and art. 41, the sequestration of government assets, and the creation of a body to distribute the proceeds to persons and entities with claims against that government in the form of the compensation for victims of Persian Gulf Conflict can be mentioned.⁷⁰ Another, even more important measure taken under art. 41, was the creation of the International Criminal Tribunal for Former Yugoslavia (ICTY), an international judicial body empowered to try and punish individuals.⁷¹ The creation of the tribunal by

⁶⁶ Matheson, p. 83, 2001.

⁶⁷ Griffin & Jones, p. 76, 2001. See also UN Doc. SC Res. 1244, UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo §1, UN Doc. S.C. Res. 1272.

⁶⁸ Hanson, pp.97-98, 2000.

⁶⁹ UN Charter art. 41.

⁷⁰ UN Doc. S.C. Res. 687.

⁷¹ UN Doc. S.C. Res. 827.

the Security Council was challenged, in the Tadic-case for example. Here the Appeals Chamber then held that the Security Council had a wide margin of discretion under art. 39 to choose the appropriate course of action, and that the establishment of a judicial organ is not excluded from the possible measures under articles 41 and 42. The establishment of the Tribunal is thus seen as an instrument for exercising the function of upholding international peace and security.⁷² Matheson therefore holds that there is no reason why the Security Council could not use its powers under chapter VII for restoring international peace and security, to establish a transitional administration, responsible for administrative and judicial structures, endowed with powers to promulgate laws and regulations.⁷³ Furthermore, he also asserts that the exercise of governance does not interfere with state sovereignty, since the non-interference principle expressed in art. 2(7) of the UN Charter, expressly excludes enforcement measures taken under chapter VII from this principle.⁷⁴ Matheson also discusses the limits of the Councils authority, but in this connection I find it unnecessary to go into that, especially since the measures are in force only for a transitional period.

We can conclude, that as for creating the administrations, the United Nations, and its Security Council has played a much more important and active role in Kosovo and East-Timor. With regard to Bosnia-Herzegovina, the role of the Security Council was limited to giving its blessing to the arrangements and establishing SFOR, whereas the Security Council gave the arrangement in Kosovo the legal basis, and also determined more of the arrangement itself. With regard to UNTAET, the Security Council played an even more important role, as it again provided the legal basis, but in addition to that also was the sole authority for all aspects of the arrangement, whereas also other organisations are involved in UNMIK.

The involvement in Macedonia is totally different and represents a third model, as there is no international administration present. The role of the international community has primarily been one of a mediator and a broker of the agreement, but in addition the international community has also assumed the tasks of monitoring the implementation, and the provision of an international security presence. This operation differs from previous ones in that the UN has not been involved. NATO has provided

⁷² Prosecutor v. Tadic, Appeal on Jurisdiction, No. IT-94-AR72, paras. 32-38.

⁷³ Matheson, p. 84, 2001.

⁷⁴ Ibid. p. 84, 2001.

the security presence on the request of the Macedonian government, and not NATO troops acting under a UN-mandate. The UN Security Council has nevertheless, in resolution 1371, adopted under Chapter VII, given the Framework Agreement and the international civilian and military presence its support.

Turning back to the legal questions discussed above we can conclude that the Security Council can set up transitional administrations, as means under its chapter VII powers. Wilde even asserts that having international administration arrangements authorised through the Security Council, is to be preferred to treaty based administrations, signed by the entity concerned, although this arrangement would include the consent of the concerned entity. Wilde asserts, that this consent is only meaningful in a narrow, formal sense, as international administration in a general sense always is imposed. Given this, it is better that international administrations are legally authorised with the power of unilateral imposition, which is the UN Security Council, the international organ endowed with the responsibility for international peace and security. Furthermore, Wilde also sees the flexible process of adopting Security Council resolutions as an advantage to the slow treaty making and revision process, as the changing nature of an international administration requires a regulatory regime that operates flexibly.⁷⁵

⁷⁵ Wilde, p. 4, 2000.

3. EU's Civilian Crisis Management and Conflict prevention capabilities

3.1 Introduction

This study aims at using the lessons learnt from the operations in Kosovo and East-Timor, in particular with regard to the emerging civilian crisis management capabilities of the European Union. Therefore, it is also necessary to take a closer look at the development of EU's civilian crisis management and conflict prevention capabilities and their priority areas. Furthermore, it is also necessary to examine the competence of EU's crisis management functions with regard to the UN Charter, and other international organisations, bearing in mind the discussion of the previous chapter.

3.2. Civilian aspects of EU's crisis management capabilities

3.2.1. Background

The Common Foreign and Security Policy (CFSP) of the European Union was established by the Treaty of Maastricht, which entered in to force in 1993, and the provision on the CFSP were also further developed in the Amsterdam Treaty, which entered in to force in 1999. It is however, the Treaty of Nice, which is not yet in force that will finally turn the EU into a security and defence organisation, as it gives the Union the competence to strengthen its contribution to the maintenance of international peace and security in accordance with UN Charter.⁷⁶

To date, articles 11-28 of the TEU relates to the CFSP, and prescribes the safeguarding of common values, fundamental interests, the independence and integrity of the Union in conformity with the United Nations Charter and to develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms, as the objectives for the CFSP. The Treaty also provides the Union with a common security policy that covers all matters relating to its security, including the

⁷⁶ For an overview of the development of the European Security and Defence Policy see Wessel: "The EU as a black widow: Devouring the WEU to give birth to a European Security and Defence Policy", in V.Kronenberger (ed.): "The EU and the International Legal Order: Discord or Harmony?", pp. 405-434, 2001, T.M.C. Asser Press, The Hague, The Netherlands.

gradual formulation of a common defence policy, the European Security and Defence policy (ESDP) as a part of the CFSP. The so-called Petersberg tasks, which were adopted by the WEU Ministerial Council in 1992, and which cover the whole range from conflict prevention to crisis management and include: humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peacemaking are also included in the TEU, giving the union competence to operate fully within these tasks.⁷⁷

The crisis management tasks of the EU were first placed at the core of the process of strengthening the European common security and defence policy, at the Cologne European Council meeting in June 1999.⁷⁸ The crisis management tasks were further developed at the Helsinki European Council in December 1999, where two presidency reports on developing the Union's military as well as civilian crisis management capacities were adopted. On the basis of the presidency report on non-military crisis management, the European Council decided to establish a non-military crisis management system to make the various civilian means more effective, in parallel with military ones.⁷⁹ The work on all aspects of civilian crisis management, as defined in the Helsinki European Council presidency conclusions and its annexes was taken further at the Santa Maria da Feira European Council. As a result of the work of the presidency a Committee for civilian aspects of crisis management was established through a Council decision taken in May 2000. This Committee will coordinate the civil crisis management of the EC, and its functions as a working group under the Council and reports to COREPER (Committee of Permanent Representatives).⁸⁰ Furthermore, also a coordinating mechanism, which had the task of establishing a database on civilian police capabilities, was set up at the Council secretariat. Moreover, a study to define the concrete targets in the area of civilian crisis management had been carried out. The most important development at Santa Maria da Feira was however that the European Council identified four priority areas for civilian aspects of crisis management. These were to be: 1) policing, 2) strengthening the rule of law, 3) strengthening civilian administration and 4) civilian protection.⁸¹ These priority areas were further elaborated on at the seminar "Strengthening the rule of

⁷⁷ TEU, art. 11,12 and 17.

⁷⁸ Presidency Conclusions Cologne European Council

⁷⁹ Presidency Conclusions Helsinki European Council - 10 and 11 December 1999. Taken from: http://europa.eu.int/comm/external_relations/news/12_99/doc_99_16.htm.

⁸⁰ Decision 2000/354/CFSP of the Council of 22 May 2000, OJ (2000) L 49/. See also Wessel, p. 425, 2001.

⁸¹ Presidency Conclusions Santa Maria da Feira European Council 19 and 20 June 2000. Taken from: <http://ue.eu.int/Newsroom/>

law in the context of crisis management – What are the specific targets of the European Union?” in October 2000, in which also representatives from the UN, the OSCE and the Council of Europe took part. The Nice European Council decided to establish 3 new working bodies: the Political and Security Committee, the EU Military Committee and the EU Military Staff on permanent basis. The Nice European Council did not further advance the civilian aspects, but gave an overview of the work of the committee on the civilian aspects of crisis management, and reaffirmed the need resolutely to continue the work.⁸² Likewise, the Gothenburg European Council stressed the commitment of the Union to develop and refine its capabilities, structures and procedures in order to improve the ability to undertake the full range of conflict prevention and crisis management tasks, involving both civilian and military means.⁸³ At the Laeken European Council, a declaration on the operational capability of the common European Security and Defence Policy was adopted. This Declaration stated that the Union, through the continuing development of the ESDP, the strengthening of its capabilities, both civil and military, and the creation of the appropriate structures, which have been developed since the European Councils in Cologne and Helsinki, now is ready to undertake some crisis management operations, and that the Union through swift arrangement with NATO will enhance its capabilities to carry out operations over the whole range of the Petersberg tasks.⁸⁴

3.2.2. The compatibility of EU’s crisis management functions with the UN Charter

Article 11 of the TEU prescribes that one of the objectives of the CFSP shall be: “- *to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including those on external borders;*”⁸⁵ Moreover, the so-called Petersberg tasks, which cover a range of activities from conflict prevention to conflict management and peace-making, which would fall under measures taken in order to uphold and strengthen international peace and security, are also included in the TEU under art. 17.⁸⁶ As the UN and its Security Council is the world organisation responsible for

⁸² Presidency Conclusions Nice European Council Meeting 7,8 and 9 December 2000. Taken from <http://ue.eu.int/Newsroom/>

⁸³ Presidency Conclusions Göteborg European Council 15 and 16 June 2001. Taken from: <http://ue.eu.int/Newsroom/>.

⁸⁴ Presidency Conclusions European Council Meeting in Laeken 14-15 December 2001. Taken from: <http://ue.eu.int/Newsroom/>.

⁸⁵ TEU art. 11.

⁸⁶ TEU art. 17.

maintaining world peace, the actions of regional in this sphere needs to be compatible with the principles of the UN Charter. With regard to such activities the UN Charter poses a strict prohibition on the use of force. The only exceptions to this prohibition are: the right to collective self-defence and actions by the Security Council under Chapter VII. In addition, the UN Charter also allows the Security Council to utilise regional arrangements for enforcement actions under its authority.⁸⁷ With regard to the civilian and military crisis management capabilities, the European Councils have consequently also expressly recognised the UN Security Council's primary responsibility for the maintenance of international peace and security, and continuously declared that the Union seeks to strengthen its capacity to contribute to the international peace and security in accordance with principles of the United Nations Charter.⁸⁸ The European Councils have thus emphasised the cooperation with the UN as the lead agency and the need for cooperation with the UN and other international organisations like the OSCE and the CoE.⁸⁹ Regarding the compatibility of EU's civilian crisis management with the UN Charter, Wessel asserts that the EU could with regard to the inclusion of the Petersberg tasks in the TEU, and the building up of military and civilian capacities for crisis management operations, perhaps be regarded as a regional organisation carrying out enforcement action under the authority of the Security Council, within the meaning of art. 53 in the UN Charter.⁹⁰

3.2.3. The priority areas of EU's civilian crisis management

Leaving the military aspects of EU's crisis management aside, and taking a closer look at the civilian aspects, we can note as was done already above that policing, strengthening the rule of law,

⁸⁷ Charter of the United Nations June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945. articles 2(4), 51 and 53.

⁸⁸ See for example Presidency Conclusions Cologne European Council 3 and 4 June 1999, Presidency Conclusions Helsinki European Council 10 and 11 December 1999, Presidency Conclusions Santa Maria da Feira European Council 19 and 20 June 2000. Presidency Conclusions Nice European Council Meeting 7,8 and 9 December 2000, and Presidency Conclusions Göteborg European Council 15 and 16 June 2001. All taken from: <http://ue.eu.int/Newsroom/>.

⁸⁹ Ibid.

⁹⁰ Wessel, p. 428-429, 2001. See also the UN Charter art. 53 (1), which reads as follows: "*The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.*"

strengthening the civilian administration and civilian protection were identified as the priority or target areas for EU's civilian crisis management at the Santa Maria da Feira European Council.

3.2.3.1. Policing

With regard to the first area, policing, the Council welcomed the specific targets regarding civilian police capabilities, which set out concrete targets that member states should achieve by cooperating voluntarily within the framework of article 12, fifth indent, of the TEU, by 2003. As a final objective in this respect, the member states should be able to provide 5000 police officers to international missions by 2003.⁹¹

3.2.3.2. Strengthening the rule of law

For this study the priority area, strengthening the rule of law is the most interesting one, and in this regard the Santa Maria da Feira European Council also stressed the need to accompany the work on policing with assistance for the establishment of judicial and penal systems. In this respect the Council suggested the following measures:

1. Member States could establish national arrangements for the selection of judges, prosecutors, penal experts and other relevant categories within the judicial and penal system, to be deployed at short notice to peace support operations. Moreover, the member states were also urged to consider ways to train them appropriately;
2. The EU could aim at promoting guidelines for the selection and training of international judges and penal experts in liaison with the United Nations and regional organisations (particularly the Council of Europe and the OSCE);

⁹¹ Presidency Conclusions Santa Maria da Feira European Council 19 and 20 June 2000. Taken from: <http://ue.eu.int/Newsroom/>.

3. The EU could consider ways of supporting the establishment/renovation of infrastructures of local courts and prisons as well as recruitment of local court personnel and prison officers in the context of peace support operations.⁹²

Myntti therefore concludes that the main emphasis for strengthening of the rule of law in EU's civilian crisis management context lies in the selection of judges, prosecutors, penal experts and other relevant categories within the judicial and penal system for deployment in crisis management operations, the training of these persons, and in the measures taken supporting the local administration of justice.⁹³ The priority areas, and especially the priority area strengthening of the rule of law, were further elaborated on at the seminar entitled "Strengthening the rule of law in the context of crisis management – What are the specific targets of the European Union?" arranged under the auspices of the Committee for Civilian Aspects of Crisis Management, held on the 25th of October 2000. With regard to priority area two, the strengthening of the rule of law, which is of most relevance for the present study several important approaches based on the Santa Maria da Feira European Council arose from the seminar. First of all, the difficulties arising in some crisis situations where the international community is facing an institutional as well as a normative vacuum, due to the collapse of the judicial system was recognised as imminent. In this regard, the need to adopt and rely on a legal framework – an international interim criminal code, based on international standards, which would be directly applicable on a provisional basis to international police and local actors within the legal system, was highlighted. Secondly, the need to develop a strong synergy between the actions undertaken to support the rule of law and those of police missions was stressed. The need to have a provisional criminal justice infrastructure available as soon as possible in order to avoid a legal and institutional vacuum was thus underlined. Thirdly, the seminar also recognised the need for continuity between short-term emergency solutions for establishing law and order and criminal justice and long-term initiatives in the restoring or rebuilding of the local judicial system. Moreover, the seminar also acknowledged that the restoration of the local judicial and penal system should take place through training of local personnel and through advising and providing expertise to the local authorities and governmental institutions on the drafting of laws and regulations in compliance with international human rights standards.

⁹² Presidency Conclusions Santa Maria da Feira European Council 19 and 20 June 2000. Taken from: <http://ue.eu.int/Newsroom/>

⁹³ Myntti, p. 27, 2001.

Furthermore, the seminar also emphasised that account should also be taken of social, ethnic, cultural and political complexities, when dealing with these issues.⁹⁴

The issue of strengthening the rule of law in a civilian crisis management context was also taken further during the Belgian Presidency. The presidency suggested through a presidency note issued on the 24th of July 2001 that a draft crisis criminal procedure code, supplemented by basic minimum of provisions of substantive criminal law, as well as draft code of fundamental rights with reference to police operations, based on relevant international standards should be drafted in cooperation with the UN, the OSCE and the CoE. This code should be within the meaning of the first approach of the seminar “Strengthening the rule of law in the context of crisis management – What are the specific targets of the European Union?” and it should be applicable in circumstances for a short period in crisis situations where it is impossible to determine the applicable law or to apply the law applicable prior to the conflict.⁹⁵ Thus, a working group with the task of continuing the discussions on an international interim criminal code was established.

3.2.3.3. Strengthening of civilian administration

With regard to the third priority area, the strengthening of civilian administration, which it is necessary to enhance when supporting societies in transition, the Council found that:

1. Member States could consider improving the selection, training and deployment of civil administration experts for duties in the re-establishment of collapsed administrative systems;
2. Member States could also consider taking on the training of local civil administration officials in societies in transition.⁹⁶

⁹⁴ Myntti, p. 28-29, 2001.

⁹⁵ Council of the European Union, Presidency Note, Brussels 24 July 2001 11224/01, p. 7.

⁹⁶ Presidency Conclusions Santa Maria da Feira European Council 19 and 20 June 2000. Taken from:

3.2.3.4. Civil protection

In addition to these three priority areas, civil protection was identified as a fourth priority area. According to the Council these tasks include search and rescue in disaster relief operations, even if it is necessary to draw a distinction between operations of civil protection within the framework of crisis management operations, and other types of disaster relief operations. Thus the Council held that, in crisis management operations within CFSP, it should also be possible to resort to EU Member States' tools and capabilities for civil protection. The Council asserted that the concrete targets in this area could be defined in terms of human and material resources that each Member State could make available, type of mandate and status of the operation for participating countries as well as promotion of compatibility of equipment between Member States.⁹⁷

Bearing in mind the earlier findings we can easily see that the priority areas are closely related to the tasks and responsibilities of both UNMIK in Kosovo and UNTAET in East-Timor, especially with regard to the efforts to rebuild a judicial system and to re-establish the rule of law, but also with regard to the lack of police and the hardships in rebuilding the civilian administration.

3.3. EU's conflict prevention capabilities

In a EU context conflict prevention is often mentioned together with crisis management. This might seem somewhat odd, as conflict prevention aims at preventing the occurrence of a conflict, whereas crisis management refers to a situation where a conflict has already broken out. These two means have however a complementing function within the ESDP.

The list of means at the disposal of the EU for conflict prevention is long: development cooperation and external assistance, trade policy instruments, humanitarian aid, social and environmental policies, diplomatic instruments and political dialogue. The new civilian crisis management mechanisms could also be used in a pre-crisis preventive role within the framework of EU's conflict prevention, to deal

<http://ue.eu.int/Newsroom/>.

⁹⁷ Presidency Conclusions Santa Maria da Feira European Council 19 and 20 June 2000. Taken from: <http://ue.eu.int/Newsroom/>.

with the earliest stages of an incipient conflict. The Commission underlines however that the deployment of civilian crisis management machinery for conflict prevention purposes, must not be a substitute for efforts aiming at strengthening the capacity of unstable countries or regions to deal peacefully with their own conflicts.⁹⁸ The European Council has also approved an EU Programme on Conflict Prevention, which stated that the EU will set clear political priorities for preventive actions, improve its early warning action and policy coherence, enhance its instruments for long- and short-term prevention, and build effective partnerships for prevention.⁹⁹ The European Council endorsed the EU Programme for the Prevention of Violent Conflicts at the Gothenburg Council, as this will improve the Unions capacity to undertake early warning, analysis and action. Moreover, the Council also held that conflict prevention is one of the most important objectives of the external relations of the Union, and that it should be integrated in all relevant aspects of external relations including, the ESDP, development cooperation and trade.¹⁰⁰

⁹⁸ Communication from the Commission on Conflict Prevention, Brussels, 11.04.2001 COM (2001) 211 final. Taken from: http://europa.eu.int/comm/external_relations/cfsp/news/com2001_211_en.pdf.

⁹⁹ 2356th Council meeting - GENERAL AFFAIRS - Luxembourg, 11-12 June 2001. Press release. Taken from: <http://ue.eu.int/Newsroom/>.

¹⁰⁰ Presidency Conclusions Göteborg European Council 15 and 16 June 2001. Taken from: <http://ue.eu.int/Newsroom/>.

4. The United Nations Interim Administration Mission in Kosovo and protection of minority groups in post-conflict Kosovo

4.1. International human rights law in the legal framework

4.1.1. Point of departure

The report of the Panel on UN Peace Operations, the so-called “Brahimi report” underlined the importance of the UN system adhering to and promoting respect for international human rights instruments in all aspects of its peace and security activities.¹⁰¹ The international presence in Kosovo, consisting of, UNMIK, which is the civilian presence and KFOR, which is the military presence, has its legal basis in Security Council resolution 1244 adopted under Chapter VII. These two entities are thus through their mandates authorised to exercise all public authority in Kosovo, even though Kosovo formally remains as a part of the Federal Republic of Yugoslavia. In filling this function UNMIK is also obliged to respect and uphold international human rights standards. Human rights law, including the protection of the rights of persons belonging to minorities, becomes according to Cerone binding in Kosovo through several modalities. First of all, human rights law and respect for international human rights standards is incorporated in the mandate for UNMIK. Secondly, the human rights obligations of the Federal Republic of Yugoslavia (FRY) remains in force, and can be argued to be binding upon the entity exercising the authority in Kosovo, due to the principles of state succession and the continuation of human rights obligations.¹⁰² Moreover, the regulations issued by UNMIK in accordance with its competence to enact legislation, has confirmed the obligation of the international authorities to act in accordance with international human rights standards, and affirmed rights for person belonging to minorities. In addition we can also note that domestic legislation, which protects minorities was made applicable through a UNMIK regulation.

¹⁰¹ UN Doc. A/55/305 S/2000/809 Report of the Panel on United Nations Peace Operations.

¹⁰² Cerone, p. 471-472, 2001.

4.1.2. Security Council resolution 1244

The protection of minority communities is not mentioned explicitly as a main responsibility of the international civil presence, in resolution 1244 upon which UNMIK and KFOR were established. Nevertheless, the protection of human rights is incorporated in the mandate of UNMIK, as paragraph 11 (j) of resolution 1244 prescribes that “*Protecting and promoting human rights*”, and “*assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo*”, shall be among the main responsibilities of the international civil presence.¹⁰³ Given the place of minority rights in international human rights law, and statements made by the UN Secretary-General in connection with the deployment, this mandate can also be taken to include minority rights.¹⁰⁴ With regard to KFOR, the situation is a bit different. According to resolution 1244 the most important task of KFOR is to “*Ensure public safety and order until the international civil presence can take responsibility for this task;*” and thus it has since its deployment had to pay special attention to the protection of minority communities, who are often the victims of crimes due to ethnic tensions and hatred. Moreover, KFOR is also charged with: “*establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered.*”¹⁰⁵ The protection of human rights or the rights of persons belonging to minorities is not mentioned expressly among the tasks and objectives of the NATO-led international security force in charge of the security component of the mission. Nor are there any expressed limits to the means that KFOR can use in fulfilling its responsibilities. Nevertheless, UNMIK promulgated regulation 2000/47, which prescribed that KFOR shall respect applicable law and regulations insofar as they do not conflict with the fulfilment of the mandate.¹⁰⁶ Moreover, Cerone concludes on this point that KFOR due to the fact it is deployed under UN auspices, also has to comply with human rights, as the promotion of human rights is among the objectives of the UN. Further, as

¹⁰³ UN Doc. S.C. Res. 1244 10 June 1999, Paragraphs. 11 (j) and (k).

¹⁰⁴ Even if there was no mention of minorities in the mandate, UNMIK was also expected to carry out assistance and protection to the vulnerable ethnic minority communities in performing its tasks. The protection and assistance to minorities was foreseen as a principal function for UNMIK in the humanitarian area in the report of the UN Secretary-General pursuant to paragraph 10 of Security Council resolution 1244, and the role of UNMIK in protecting minority groups was also emphasised by the acting Special Representative of the Secretary-General (SRSG), in a statement given on the 14th of July 1999. (See UN Doc. S/1999/672 Report of the Secretary-General pursuant to paragraph 10 of Security Council resolution 1244 (1999) 12 June 1999.)

¹⁰⁵ UN Doc. S.C. Res. 1244 10 June 1999, Paragraph 9. Taken from <http://www.un.org/Docs/scres/1999/99sc1244.html>.

¹⁰⁶ UNMIK Regulation No. 2000/47 On the status, privileges and immunities of KFOR and UNMIK and their personnel in

resolution 1244 obliges UNMIK and KFOR to support each other, it is evident that KFOR also has to support UNMIK's objective to promote human rights.¹⁰⁷ In addition, the various KFOR-contingents may also be bound through the human rights obligations of their sending states. International human rights instruments limit the scope of their application to persons subject to the jurisdiction of the state party to the convention, but the term "jurisdiction" has been interpreted broadly by international human rights institutions. With regard to the ICCPR for example, the Human Rights Committee has constantly held that the Covenant can have extraterritorial application, and demonstrated that the jurisdiction can extend beyond its territorial boundaries.¹⁰⁸ Of, scholars also Meron takes a similar stand, as he argues that a state's human rights obligations obtain where its agents exercise power and authority over persons outside national territory.¹⁰⁹ Drawing his conclusions from the standpoint of human rights institutions, Cerone also concludes that the human rights obligations of the sending state also apply with regard to KFOR contingents in the treatment of the population in Kosovo.¹¹⁰

4.1.3. The human rights obligations of the FRY

International human rights law, including minority rights can also be regarded to having been in force since the deployment of UNMIK and prior to that. The Socialist Federal Republic of Yugoslavia (SFRY), the predecessor to the FRY, was namely a party to major human rights treaties, the ICCPR among them, and these obligations also continued to apply to the FRY, as the law of state succession and continuation of human rights obligations provides for automatic succession when it comes to human rights obligations. With regard to the ICCPR, the Human Rights Committee has in this respect held in General Comment 26 that:

"The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in Government of the

Kosovo.

¹⁰⁷ Cerone, p. 473-474, 2001.

¹⁰⁸ Cerone, p. 475, 2001. See also UN Doc. CCPR/C/79Add50 (1995) The Human Rights Committee Concluding Observations on the United States of America.

¹⁰⁹ Meron, p. 81, 1995.

*State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant”*¹¹¹

With regard to UNMIK, Cerone thus asserts that the principle of automatic state succession might imply that also any public authority; in this case UNMIK and KFOR, acting in the place of the FRY Government would be bound by these obligations.¹¹² Thus, the ICCPR, which includes the most widely recognised legally binding article on minority rights, namely article 27 has technically speaking been in force in Kosovo, since the ratification of the ICCPR by the SFRFY.

4.1.4. Regulations adopted by UNMIK

As the Security Council vested authority over the territory and the people of Kosovo in the United Nations Interim Administration Mission in Kosovo (UNMIK), all legislative and executive powers, including the administration of the judiciary were thus vested in UNMIK. Thus, the first regulation on the authority of the UNMIK stipulated in section 3 of the regulation that: *“in exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, colour, language religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status.”*¹¹³ The international standards referred to, were however not set out until the promulgation of regulation No. 24, in which they were identified in detail, instrument by instrument. Among these instruments was also the ICCPR, and its binding provision on minorities.¹¹⁴ Article 27, which thus is to be regarded as being in force and putting obligations on part of the UNMIK and KFOR, reads as follows:

¹¹⁰ Cerone, p. 478, 2001.

¹¹¹ Human Rights Committee, General Comment 26 (61), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1631st meeting.

¹¹² Cerone, p. 474, 2001.

¹¹³ UNMIK Regulation No. 1999/1 on the authority of the interim administration in Kosovo 25 July 1999, sections 2 and 3. Taken from <http://www.un.org/peace/kosovo/pages/regulations/reg1.html>.

¹¹⁴ UNMIK Regulation No. 1999/24 On the law applicable in Kosovo, 12 December 1999. section 3.

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”¹¹⁵

The negative phrasing of this provision obliges states to refrain from interference and to practise tolerance. All forms of integration and assimilation pressure, and of course all measures directed against, and threatening the existence of minorities is also prohibited.¹¹⁶ Although most threats to minority rights stem from the state side, since the dominant group usually use the state power mechanisms to oppress minorities, experiences from states with many rivalling ethnic or religious groups show that the private side can also threaten minority rights. Therefore it is important whether article 27 has a horizontal effect. According to Nowak states are thus obliged to protect minority rights as well against threats stemming from the state side as well as against threats stemming from other groups of the population.¹¹⁷ Article 27 contains three separate rights, namely; the right to culture, the right to religion and the right to language. These three rights can all be referred to under the umbrella concept “right to identity”, which is used in the doctrine, since these rights protect the separate cultural, religious or linguistic identity of minorities.¹¹⁸ It is quite safe to conclude that article 27 does, under contemporary international law, require some positive action by the states, since the Human Rights Committee in its General Comment on article 27, states that positive measures are permitted in order to correct situations which prevent or impair minorities from the enjoyment of the rights guaranteed in art. 27.¹¹⁹ In the General Comment on article 27, the Human Rights Committee also acknowledges the collective aspect of article 27 as it states that, although the rights protected under art. 27 are individual rights, they depend on the ability of the minority group to maintain its culture, religion or language. States are obliged to protect this identity, even through positive measures.¹²⁰

¹¹⁵ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Hereinafter this instrument will be referred to as the ICCPR.

¹¹⁶ Nowak, 1993, p. 502.

¹¹⁷ Ibid. p. 502-503.

¹¹⁸ Spiliopoulou-Akermark, 1997, p. 46.

¹¹⁹ The rights of minorities (Art. 27):08/04/94. CCPR General Comment 23 (Fiftieth session).

¹²⁰ The rights of minorities (Art. 27):08/04/94. CCPR General Comment 23 (Fiftieth session).

With regard to the obligations arising under art. 27 and other human rights provisions, it is interesting to note, that UNMIK, despite being fully aware of the impossibility of giving full effect to art. 27 and other international standards in Kosovo, never issued a public emergency and derogated from the human rights obligations it had received and imposed upon itself. Nevertheless, even if a state of emergency had been proclaimed, General Comment No. 29 (72) adopted by the UN Human Rights Committee in July 2001 states that the international protection of the rights of persons belonging to minorities include elements that must be protected in all circumstances, including in circumstances that would allow states to derogate from some of their obligations under the ICCPR. The non-derogable nature of rights of persons belonging to minorities is according to the Human Rights Committee reflected in the prohibition against genocide, the prohibition of discrimination included in the derogation clause itself, and in the non-derogable nature of the right to freedom of thought conscience and religion. Moreover, also such deportation or forcible transfer of population which constitute a crime against humanity under the ICC-Statute, and of which minority groups are usually the victims, is also prohibited in all circumstances. The same goes also for any propaganda for war, or advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.¹²¹

Article 27 of the ICCPR would thus independently of the principle of automatic succession have become binding law upon the deployment of UNMIK through regulation No. 1/1999.¹²² Following, the protest by the Kosovo Albanians, the applicable law was changed through regulation No. 1999/24 to the “the law in force in Kosovo on the 22nd March 1989”, which is the law in force prior to the abolition of the autonomy, but this did not affect the list of international instruments.¹²³

As the applicable law in Kosovo was determined to be the laws in force on the 22nd of March 1989 as far as they do not stand in conflict with international human rights standards, one could also argue that it follows that minority communities in Kosovo would enjoy the protection they enjoyed under the SFRY Constitution of 1974, and rights afforded under the autonomy laws of Kosovo, insofar as they do

¹²¹ UN Doc. CCPR/C/21/Rev.1/Add.11, CCPR General comment 29, 31 August 2001.

¹²² UNMIK Regulation No. 1999/1 on the authority of the interim administration in Kosovo 25 July 1999, sections 2 and 3. Taken from <http://www.un.org/peace/kosovo/pages/regulations/reg1.html>.

¹²³ UNMIK Regulation No. 1999/24 On the law applicable in Kosovo, 12 December 1999. section 3.

not conflict with resolution 1244, international human rights standards, and regulations promulgated by the SRSG.¹²⁴

This was the legal framework by the time of the deployment of UNMIK, but since that the SRSG has promulgated regulations, which have impacted on the legal framework. Most notable is of course the adoption of the Constitutional Framework for provisional self-government, which makes the European Charter for Regional or Minority Languages and the Council of Europe's Framework Convention for the Protection of National Minorities directly applicable, and gives minority communities several rights in order to preserve, protect and express their ethnic, cultural, religious and linguistic identities. In addition it also provides for several strategies in order to ensure effective participation in the political structures within the framework of the provisional self-government.¹²⁵ The SRSG had also prior to the promulgation of the Constitutional Framework for provisional self-government, issued regulations, which had some bearing on the legal framework of minority protection. Most notable among these were Regulation No. 10, which repealed discriminatory legislation affecting housing and rights in property;¹²⁶ Regulation 1/2000 On the Kosovo Joint Interim Administrative Structure, guaranteeing all communities a fair representation in the provisional political structures;¹²⁷ Regulation 4/2000, which criminalized inciting to national, racial, religious or ethnic hatred, discord or intolerance;¹²⁸ and regulations 39/2000 and 45/2000 on the municipal elections and on self-government of municipalities, which also included strategies for securing representation of minority communities in the municipal decision-making structures.¹²⁹

¹²⁴ Under the Constitution, the members of nationalities enjoyed rights that were over and above the international standards regarding non-discrimination. The Constitution also guaranteed for example the members of nationalities the right to use their language, and to receive education on their mother tongue. Ortkovski asserts in this respect, that international standards concerning minority rights were respected in Yugoslavia until the end of the 80s, and that nationalities even enjoyed higher standards than those required by the international community. The Constitution of the Autonomous Province of Kosovo guaranteed the Albanian nationality freedom of thought, speech, assembly and association, as well as schools, a university, and media in their mother tongue, and the Albanian nationality also had equal representation in the political forums and parliaments from municipal to federal level. (Ortakovski, p. 231-232, 253, 2000.)

¹²⁵ UNMIK Regulation 2001/9 15 May 2001 Constitutional Framework for Provisional Self-Government.

¹²⁶ UNMIK Regulation No. 1999/10 On the repeal of discriminatory legislation affecting housing and rights in property, 13 October 1999.

¹²⁷ UNMIK Regulation No. 2000/1 On the Kosovo Joint Interim Administrative Structure, 14 January 2000.

¹²⁸ UNMIK Regulation No. 2000/4 On the prohibition of inciting to national, racial, religious or ethnic hatred, discord or intolerance, 1 February 2000.

¹²⁹ UNMIK Regulation No. 2000/39 On the municipal elections in Kosovo, 8 July 2000. UNMIK Regulation No. 45/2000 On self-government of municipalities in Kosovo, 11 August 2000.

Despite a relatively strong legal framework for minority protection in Kosovo under the UNMIK administration, the reality for minority communities remained difficult. In order to give a good overview of the factual situation of minorities and the improvements in their situations, the analysis below will be given in a chronological order. Kosovo is comprised of several communities. The Kosovo Albanians constitute the majority group and the Serb community, the Roma, Ashkali or Egyptian community, the Bosniak community, the Turkish community and the Gorani community are recognised as minority groups or communities in the Constitutional Framework. In addition, the Kosovo Albanians living in Serb dominated areas can be considered as a de facto minority community, facing the same problems as other minority communities. Due to the limited space the analysis will be limited to the an analysis of the following problems: 1) the lack of security and ethnically motivated violence; 2) the lack of freedom of movement coupled with problems in accessing basic public services, like health care and education; and 3) access to political structures. These issues are not only the ones of most relevance for the rest of this study, but also the most important problems facing the minority communities in Kosovo.

4.2. The situation of minority communities in practice

4.2.1. July 1999 – January 2000

4.2.1.1. The lack of security and ethnically motivated violence

According to the report "Preliminary assessment of the situation of ethnic minorities in Kosovo", a great deal of persons belonging to ethnic minorities had left Kosovo, following the withdrawal of the Yugoslav forces. The security situation of those who stayed, especially Serbs and Roma remained tense as significant numbers of people faced arson attacks, threats to their person and in extreme cases even murder. Whether or not a community was attacked depended to a large extent on whether the group in question was perceived of as having been involved in the Serb atrocities, or of having even passively supported the Serb regime.¹³⁰ The reports of the UN Secretary-General on UNMIK covering the same period of time also voiced a concern over the violence and attacks against minorities, which was seen

¹³⁰ Preliminary Assessment Of the Situation of Ethnic Minorities in Kosovo. UNHCR/OSCE 26 July 1999. Taken from

as the overriding human rights issue. Serbs, Roma and Slavic Muslims were often victims of killings, abductions, illegal arrests, arbitrary detentions, beatings, threats and harassment, but also ethnic Albanians suspected of having collaborated with Yugoslav authorities were targeted.¹³¹ Towards the end of this period serious crime rates had decreased, but they still remained unacceptably high and indicated that ethnically motivated crimes continued on a regular basis. As minorities and Kosovo Albanians living in Serb dominated areas remained vulnerable for attacks, the international community had to provide protection through permanent KFOR presence in minority areas, in order to safeguard life and property. In addition, KFOR guards also protected important sites such as churches, homes and businesses. During this period, two-thirds of the KFOR soldiers were assigned to security operations, and most of them were geared at protecting minority communities.¹³² In order to improve the conditions an Ad Hoc Task Force on Minorities, led by UNHCR-OSCE was also established on the 14th of July, and this organ played a crucial role in the development of a variety of measures designed to improve the security for minority groups at risk, and in advocating for better protection for minorities.¹³³ These efforts, especially the huge KFOR static guarding is indicative of the extremely sensitive security situation of minority communities at this time.

The UNHCR-OSCE report also acknowledges that the lack of a fully independent and impartial judiciary has particularly grave consequences for minority groups. The absence of means of addressing the violence against minorities or for providing the victims of such violence redress, means that they suffer from a double violation of their rights. Moreover, without any effective avenue of redress, there was no deterrent for those who engaged in crimes against members of minority groups, which in turn created a culture of impunity with regard to such crimes. In addition, the report also indicates that suspects of crime belonging to minority groups were treated worse than other suspects.¹³⁴ UNMIK's efforts to redress the ethnic imbalance in the judiciary were hampered by the security concerns and

<http://www.osce.org/kosovo/documents/reports/minorities/>.

¹³¹ UN Doc. S/1999/987 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, p. 1-2. Taken from: <http://www.un.org/Docs/reports/1999/s1999987.htm>, UN Doc s/1999/1250 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, p. 1-2. Taken from: <http://www.un.org/Docs/reports/1999/s19991250.htm>.

¹³² UNHCR OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering November 1999 through January 2000), p. 1-2, 5. <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹³³ These measures included: reinforcement of doors, installation of emergency calling devices in homes, and the establishment of a hotline between lead agencies and KFOR. See Ward, p. 43-44, 2000.

¹³⁴ UNHCR OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering November 1999 through

reported intimidation. While the Emergency Judicial System, was still functioning none of the appointed Serb judges, and only a three Muslim Slavs and one Turk remained in their posts beyond early October, and of a total of 180 judges sworn in during January only eight belonged to minority communities. Similarly only 13 out of 73 lay judges, and 2 out of 39 prosecutors were from a minority community.¹³⁵ These figures all bear evidence of the fear for the personal security of members of minority communities. The police also carry out a great deal of the work required to re-establish the rule of law. With regard to the amount of work, the UNMIK Police with some 1.970 police officers at this time, was understaffed, and thus dependent upon the back up of KFOR. Members of Kosovo Police Service (KPS) had also taken up policing, but it comprised only of 173 officers at this time. From a minority protection point of view it was very important that the KPS recruited also members from minority communities, since a properly functioning police force has to draw on all sectors of society. In addition it is also essential that the majority recruits are willing to protect minorities, and that all sectors of society respect the multi-ethnic police force. In this regard, a few members of the KPS were dismissed due to unacceptable behaviour towards minorities.¹³⁶

4.2.1.2. The lack of freedom of movement coupled with problems in accessing basic public services

Another huge problem for minority groups was the lack of freedom of movement, as they were concentrated to isolated mono-ethnic enclaves, out of which movement had been restricted. Consequently, minority groups also suffered from lack of access to public services, especially education, health care and pensions, and from discrimination.¹³⁷ The restrictions on the freedom of movement could range from being totally housebound in the absence of a security escort, to being able to move outside the area inhabited by the same ethnic group, but being dependent upon the availability of security escort in order to venture further a field in ethnically mixed areas. In order to alleviate the

January 2000), p. 8-9. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹³⁵ UNHCR OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering November 1999 through January 2000), p. 12-13. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹³⁶ UNHCR OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering November 1999 through January 2000), p. 6. Of the first 173 graduates there were eight Kosovo Serbs, three Muslim Slavs and seven Turks, the rest being Kosovo Albanians. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹³⁷ UN Doc S/1999/1250 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, p. 5. Taken from: <http://www.un.org/Docs/reports/1999/s19991250.htm>.

hardships of the communities most affected by these difficulties the UNHCR provided KFOR escorted bus services to facilitate the freedom of movement.¹³⁸

4.2.1.3. Access to political structures

An important indicator of the normalisation of life for minority communities is often the extent to which they are politically active. At the time of this report, the Joint Administrative Structure (JIAS), created through an agreement signed by the SRSG and three Kosovo Albanian parties and later established by Regulation 2000/1, was the most important political issue on the agenda. Regulation 2000/1 on the JIAS thus provided that “all communities shall be involved in the provisional administrative management” and that there shall be “a fair representation of all communities” in these structures. Nevertheless, the Kosovo Serb political leaders did not sign the agreement despite invitations and ongoing efforts to encourage minority participation in this important political forum.¹³⁹

To conclude, one can assert that grave concerns for physical security, the lack of freedom of movement coupled with limited access to public services, and the absence of a fair and functioning judiciary curbing crimes against members of minority groups were the biggest problems facing the minority communities during the first period after the deployment of UNMIK.

4.2.2. February 2000 – September 2000

4.2.2.1. The lack of security and ethnically motivated violence

The lack of security and freedom of movement remained the most fundamental problems for minority communities during the first half of this period. Criminal activity remained unacceptably high, and crime continued to affect minority communities at levels disproportionate to their numbers. Violence and in particular major crimes, like murder, arson and aggravated assault committed against members of minorities peaked during the first weeks of February and the last weeks of March and the beginning

¹³⁸ UNHCR OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering November 1999 through January 2000), p. 12-13. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹³⁹ UNHCR OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering November 1999 through

of April.¹⁴⁰ This type of violence tended to be especially high in areas where minority groups and Kosovo Albanians lived close to each other. Illustrative of the magnitude of this problem is that according to UNMIK police analysts two thirds of the serious crimes committed between March and June were inter-ethnic in nature, and mostly directed at Serbs.¹⁴¹ Toward the end of this period the violence, although remaining high and affecting minority communities disproportionately, seemed to have decreased in some areas, but it was still too early to regard it as a lasting improvement in the overall security situation.¹⁴²

In order to improve security itself and the perception of security, KFOR continued to provide static and mobile guard patrols, which included permanent guard posts in the vicinity of minority enclaves and at important religious sites, road checkpoints, and foot and vehicle points. With the passing of time the use of static guards had been modified in accordance with the improved situation, but it remained a reality however, that a high number of KFOR soldiers continued to be assigned to guarding functions primarily directed at the protection of minority communities.¹⁴³

The lack of a functioning and impartial judiciary still continued to allow crimes against minority communities to be perpetrated with a large degree of impunity.¹⁴⁴ Monitoring of the legal system raised concern over the impartiality of the judiciary, and in order to remedy the situation with a biased judiciary UNMIK decided in February to deploy international judges and prosecutors.¹⁴⁵ Even if seven international judges and three international prosecutors had been appointed until September, the criminal justice system remained ill-equipped to provide redress for human rights violations, and

January 2000), p. 10. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁴⁰ UNHCR/OSCE Update on the Situation of Ethnic Minorities in Kosovo (Period covering February through May 2000), p. 1-3. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁴¹ UN Doc. S/2000/538 Report of the Secretary-General on the United Nations Interim Administration in Kosovo, 6 June 2000, p. 4.

¹⁴² UNHCR/OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering June through September 2000), p. 4. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁴³ UNHCR/OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering June through September 2000), p. 8. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁴⁴ UNHCR/OSCE Update on the Situation of Ethnic Minorities in Kosovo (Period covering February through May 2000), p. 1-3, 5-6. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁴⁵ Especially the continuing tensions in the Mitrovica are prompted UNMIK to appoint international judges and prosecutors. Through Regulation No. 2000/6 these judges were given the authority and the responsibility to perform the functions of their office, including the authority to select and take responsibility for new and pending cases within the jurisdiction of the court. See UNMIK Regulation No. 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors. Taken from <http://www.un.org/peace/kosovo/pages/regulations/reg06.html>.

irregularities in some cases involving members of minority communities indicated that the judiciary continued to be biased towards minorities.¹⁴⁶ Especially trials concerning ethnically motivated crimes had given rise to serious concerns of actual bias by the judiciary against mainly Kosovo Serbs. The UNCHR/OSCE Report also asserted that monitoring activities suggested unwillingness on behalf of the public officials to investigate crimes committed by Kosovo Albanians against Kosovo Serbs. The mono-ethnic character of the judiciary also impacted on the perceived impartiality of the system, and the increasing of the number of minority judges and prosecutors alongside other changes would have been extremely important for the justice system.¹⁴⁷ The deployment of UNMIK Police reached 3,030 personnel in late May, and around the same time 798 recruits, out of which 95 were members of minority communities, had graduated from the KPS police training school.¹⁴⁸ In October the number of UNIMK police stood at 4,155, while the strength of the local KPS stood at 2284, out of which 247 came from minority communities. The increased deployment was welcomed and it had positive effects in reducing the number of incidents and in improving the minorities' perception of their security.¹⁴⁹

4.2.2.2. The lack of freedom of movement coupled with problems in accessing basic public services

The lack of freedom of movement, which continued to prevent minorities from accessing public services and exercising their basic rights, remained likewise a huge problem for minority communities. In practice Serb and Roma needed security escorts always when going beyond a mono-ethnic enclave. In the beginning of this period the KFOR-escorted bus services were suspended due to a rocket attack on one of them in the beginning of February, but most of the escorted bus routes resumed towards the spring. In addition to the bus service operated by UNHCR, KFOR also provided escort to commercial bus lines, and to convoys of private vehicles moving in and out of the enclaves.¹⁵⁰ In addition, the train service had also improved, which was welcomed by minority communities.¹⁵¹

¹⁴⁶ UN Doc. S/2000/878 Report of the Secretary-General on the United Nations Interim Administration in Kosovo, September 2000, p. 7-8.

¹⁴⁷ UNHCR/OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering June through September 2000), p. 12. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁴⁸ UNHCR/OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering June through September 2000), p. 12. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁴⁹ UNHCR/OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering June through September 2000), p. 7. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁵⁰ UNHCR/OSCE Update on the Situation of Ethnic Minorities in Kosovo (Period covering February through May 2000),

Another huge problem for minority communities, which to a large extent was due to the lack of freedom of movement, was the access to public services, especially health care and education. During this period most communities could access primary health care locally, but problems arose as soon as further care was needed, due to the security concerns when travelling outside their enclaves. In addition also hospitals themselves may have restricted admission or discriminated in the treatment of some minority patients. The outcome of this was that many minority communities had to rely on health services obtained outside the normal health care system. This meant that Serbs sought health care from separate systems, or from Serb dominated areas, whereas Albanians living in Serb dominated areas used facilities in areas dominated by Albanians. Moreover, KFOR also provided services to minority communities, but it is clear that reliance on KFOR in this respect was neither sustainable, nor appropriate.¹⁵² The situation regarding access to secondary and tertiary services stayed the same throughout the whole period, with only small improvements in the later months.¹⁵³ With regard to education services, which had resumed in the early spring after having been disrupted during the winter months, the report regards the bad conditions of the schools attended by minorities, and the security concerns involved when sending children to school to be the main problems.¹⁵⁴ Furthermore, the determination of issues like languages of instruction, textbooks and curriculum content provided challenges for future.¹⁵⁵

4.2.2.3. Access to political structures

This period first saw some notable improvements in the political participation of minorities, as the Kosovo Serbs participated provisionally in the JIAS. Moreover, increased dialogues between the Kosovo Albanian and Kosovo Roma, Ashkali and Egyptian leaders were reported. The overriding issue concerning political participation was of course the adoption of regulation 2000/45 On the self-

p. 5. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁵¹ UNHCR/OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering June through September 2000), p. 11. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁵² UNHCR/OSCE Update on the Situation of Ethnic Minorities in Kosovo (Period covering February through May 2000), p.14. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁵³ UNHCR/OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering June through September 2000), p. 21. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁵⁴ UNHCR/OSCE Update on the Situation of Ethnic Minorities in Kosovo (Period covering February through May 2000), p. 15-16. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁵⁵ UNHCR/OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering June through September

government of municipalities in Kosovo, which established provisional institutions for democratic and autonomous self-government at municipal level as a step in the progressive transfer of administrative responsibilities from UNMIK, which still will oversee the consolidation of these institutions, and the upcoming municipal elections.¹⁵⁶ A major setback was though that the Kosovo Serbs and the Turks did not participate in the registration process for the municipal elections to be held on the 28 of October, and did not participate in those elections. This meant of course that the executive bodies formed after the elections, and assuming responsibility for running the municipalities would not be fully representative of the populations they serve.¹⁵⁷ Regulation 2000/45 included however, certain special mechanisms in the form of committee structures in order to ensure that the interests of the minority communities were monitored and addressed at the municipal level. Thus municipal assemblies were obliged to set up Communities committees and Mediation Committees, and in addition, the SRSG had the power to co-opt additional members to the Municipal Assembly if he deems it necessary in order to ensure representation of all communities. Moreover, UNMIK, and in particular the SRSG and the Municipal Administrators still played a crucial role in monitoring how the new structures protect minorities, as they could intervene when necessary, for instance by setting aside decisions which did not sufficiently take into account the rights and interests of minority communities.¹⁵⁸

4.2.3. October 2000 – August 2001

4.2.3.1. The lack of security and ethnically motivated violence

The security situation during this last period was still characterised as precarious. Incidents of murders, arson, grenade attacks and cases of intimidation were still haunting some minority groups regularly, while other minority groups were living under relatively stable conditions. Nevertheless, the overall trend in ethnically motivated violence pointing downwards. The beginning of this period was however

2000), p. 20. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁵⁶ UNMIK Regulation No. 2000/45 On self-government of municipalities in Kosovo. Taken from <http://www.un.org/peace/kosovo/pages/regulations/reg045.html>.

¹⁵⁷ UNHCR/OSCE Update on the Situation of Ethnic Minorities in Kosovo (Period covering February through May 2000), p. 1. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>, UNHCR/OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering June through September 2000), p. 3. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁵⁸ UNMIK Regulation No. 2000/45 On self-government of municipalities in Kosovo. Sections 21,22,23 and sections 47, 48. Taken from <http://www.un.org/peace/kosovo/pages/regulations/reg045.html>.

marked by deterioration in the security situation. All minority groups, including Kosovo Albanians in Serb dominated areas were targets of attacks both against persons and against property, which undermined efforts to stabilise and improve the security situation. November and especially February are singled out as the blackest months, as there was a sharp escalation in violence in February. The UNCHR-OSCE Report covering October through February 2001 highlighted the change in the pattern of violence. The violent attacks against minority groups appeared now to be more orchestrated or organised as campaigns aiming at terrorising minority populations, destabilising the situation and thus preventing the democratisation process and peaceful co-existence.¹⁵⁹ The continuing malfunctioning of the judiciary and the resulting general climate of impunity had also continued to undermine the sense of security of minority communities. With regard to this, the UNHCR and the OSCE assert in their report that numerous lesser crimes against minority groups, such as intimidation, threats, stone throwing and theft were left unreported due to the general climate of impunity, and the risk for further retribution.¹⁶⁰ Another problem with regard to the judiciary was still the evidenced bias of the judiciary against minority groups, both when they were victims of crimes and when they were defendants, as pointed out by the UN Secretary-General in his report. This problem had been persistent despite the appointment of international judges and prosecutors, and other efforts in order to secure the impartiality of the justice system.¹⁶¹

From March onwards to August the overall security situation then improved.¹⁶² Security still remained an overriding concern for minority communities, but it was not as dominant a factor as before. The general security situation for all minority communities stabilised noticeably, and the number of serious incidents affecting minority groups showed a decreasing trend. The improved security situation was also reflected in the population figures, which showed that less persons belonging to minority communities had left Kosovo. Nevertheless, despite the overall improvement in the security situation

¹⁵⁹ UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering October 2000 through February 2001. p. 1,3. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁶⁰ UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering October 2000 through February 2001. p. 7. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁶¹ UN Doc. S/2000/1196 Report of the Secretary-General on the United Nations Interim Administration in Kosovo 15 December 2000. By the time of writing the report 10 international judges and three international prosecutors were serving throughout Kosovo, and further recruitment was under way.

¹⁶² According to UNMIK Police crime statistics, the number of murders, arson and abductions decreased during this period. The same statistics also reveal that the total number of murders have gone down from 245 in year 2000 to 118 during 2001, whereas the corresponding numbers for arson was 520 in year 2000 and 218 in year 2001. See UNMIK Police crime

the eight UNHCR-OSCE report pointed out that lesser threats and incidents of intimidation against minority groups still remain far too common.

The UNHCR-OSCE Report also acknowledged a growing effectiveness on part of the police and the judiciary, sending out the message to all communities that criminal behaviour would not be tolerated, which in turn also had a positive impact on the security situation for minority groups. The fact that the police force functioned more effectively and its increased presence led to an overall reduction in crime, and in particular in crimes perpetrated against minority communities. Despite the problems still coupled with building up a local impartial and independent police force, the KPS was nevertheless showing a growing capacity, and was getting more and more accepted by the population as well.¹⁶³

4.2.3.2. The lack of freedom of movement coupled with problems in accessing basic public services

Unfortunately, very little progress had been made concerning access to health care since the last reports. Access to in particular secondary and tertiary health care remained a persistent problem for minority groups and it was still related to security issues and the limited freedom of movement.¹⁶⁴ The improved security situation from March onwards also led to a slight improvement concerning the freedom of movement, but the lack of freedom of movement and the hardships in accessing many basic services could still be characterised as one of the main concerns for minority communities.¹⁶⁵ During the latter part of this period there were some positive initiatives, including the use of security escorts, with regard to access to education, which improved the access to education for minority students. The long-term objective, namely to establish sustainable mechanisms which ensure access and retention of minority children in the school system and creates an education system that reflects the multi-ethnicity of Kosovo, remained however to be achieved.¹⁶⁶ Some improvements with regard to the general freedom

statistics at <http://www.unmikonline.org/civpol/statistics.htm>.

¹⁶³ UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering March through August 2001), p. 1-5. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁶⁴ UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering October 2000 through February 2001. p. 2,12. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁶⁵ UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering March through August 2001), p. 2, 6. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁶⁶ UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering March through August 2001), p. 12. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>

of movement were also reported. The escorted bus service previously operated by the UNHCR was since July managed by UNMIK, and some additional services has been instituted in order to enhance the freedom of movement. In addition, the situation also improved thanks to new train routes.¹⁶⁷

4.2.3.3. Access to political structures

The turnout for the municipal elections in October was exceptionally high. Many minority communities, with the notable exception of Kosovo Serbs and some sections of the Turkish community, participated actively. With regard to political participation of minorities, the issue of appointing minority members to the municipal assemblies after the elections had been the most crucial issue, as these new structures were to gradually take over the administration at the municipal level. Several minority parties did gain elected seats in the election, and in the process of co-opting members of minorities onto Municipal Assemblies, minority representatives were appointed for all but six municipalities.¹⁶⁸ The Municipality structures were up and running in most municipalities, but the Communities Committees and Mediation Committees were often not fully constituted or fully operational. The full engagement of minority representatives in the Municipality Assemblies also remained a challenging task, as some minority members appointed to the assemblies by the SRSG did not participate. It was also unfortunate that members of minority communities as well as members of the majority boycotted and obstructed assembly business, and thus eroded the public's faith in the political process.¹⁶⁹

Another even more important event during this period was the adoption regulation 2001/19 containing The Constitutional Framework for Provisional Self-Government in Kosovo on the 15th of May, which provided the foundation for a new era of self-governance and self-administration in Kosovo, and which will shape the future of Kosovo and thus have far-reaching effects also on minority communities.¹⁷⁰ As

¹⁶⁷ UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering March through August 2001), p. 7. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁶⁸ UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (period covering October 2000 through February 2001). p. 21-25. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁶⁹ UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering March through August 2001), p. 17-18. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁷⁰ UNMIK Regulation No. 2001/19 15 May 2001 Constitutional Framework for provisional self-government. Taken from <http://www.un.org/peace/kosovo/pages/regulations/constitframework>.

we saw in the previous chapter a range of international human rights instruments, including the ECHR, the ICCPR, The European Charter for Regional or Minority Languages and the CoE Framework Convention for the Protection of National Minorities were made directly applicable, in the Constitutional Framework. In addition to the general human rights incorporated into the legal system the national communities and their members were also guaranteed additional rights in order to preserve and express their national cultural religious, and linguistic identities. The Constitutional Framework also included a whole chapter on the rights of the communities and their members, including key issues such as use of language and symbols and receipt of a range of services in accordance with applicable standards.¹⁷¹ Moreover, an Assembly of Kosovo was created through article II (1). The assembly consists of 120 members only 80 are elected directly, since 40 seats shall be elected by the members of the minority communities. Thus, this special arrangement guarantees representation of most minority groups in Kosovo.¹⁷² Furthermore, the diversity of the population was also to be reflected in the judiciary.¹⁷³ If the principles contained in the Constitutional Framework will be fully implemented they will enhance the protection of minority communities. Moreover, while the Assembly and the other bodies will assume a great deal of the legislative and executive powers within the framework for provisional self-government, the SRSG will still remain the ultimate guardian of the rights of minority communities. The SRSG namely, still retains the power under the Constitutional Framework to intervene in the exercise of self-government for the purpose of protecting the rights of communities and their members.¹⁷⁴ The Election Day for the Assembly elections was set for the 17th of November 2001, and so far considerable progress had been made with regard to registering of minorities. As the registration closed on the 22nd of September, some 70 000 people from communities, which did not register for the Municipal elections, mainly Kosovo Serbs, and some 100 000 IDP's in Serbia and

¹⁷¹ Ibid. Chapter 2 and 3. For a thorough analysis of the Constitution and its relation to the FRY Constitution, see Suksi, pp.23-28 and 34-37, 2001.

¹⁷² Ibid. Chapter 9. According to this design communities whose members constitute more than 0,5% of the Kosovo population, but less than 5% shall have ten of these seats, which will be divided among them according to their proportion of the total population, whereas communities whose members constitute more than 5% shall divide the remaining 30 seats equally. See also Suksi, p. 25-26, 2001.

¹⁷³ UNMIK Regulation No. 2001/19 15 May 2001 Constitutional Framework for provisional self-government. Taken from <http://www.un.org/peace/kosovo/pages/regulations/constitframework>

¹⁷⁴ UNMIK Regulation No. 2001/19 15 May 2001 Constitutional Framework for provisional self-government. Chapter 4.6. Taken from <http://www.un.org/peace/kosovo/pages/regulations/constitframework>.

Montenegro had registered.¹⁷⁵ This is to be seen as a very positive step, concerning the political participation of minority communities.

4.3.Lessons to be learned

4.3.1. Protection of persons belonging to minorities against violence

4.3.1.1. Obligation arising under human rights law

Before assessing UNMIK's ability to protect persons belonging to minority communities from violence, and giving recommendations for future operations, we need to take a closer look at what is required in this regard from a transitional administration. UNMIK has as we saw in the beginning of this chapter, obligations under international law to protect persons belonging to minority groups, and their rights. In this respect the obligation to protect the life and existence is a primordial one.¹⁷⁶ Besides being enshrined in article 27, this obligation also stems from the obligation to protect the right to life under human rights law, and the prohibition of Genocide.¹⁷⁷ Usually the threats to minorities stem from the state side, since the dominant group often uses the state power mechanisms to oppress minorities, but minority rights, such as the right to existence can also be threatened by rivalling ethnic or religious groups. Therefore it is important, especially in circumstances like in post-conflict Kosovo, that minority rights law also has a horizontal effect, meaning that the state, or in this case UNMIK is obliged to protect the existence and the rights of minorities against threats stemming from other groups of the population.¹⁷⁸

4.3.1.2. Assessment of UNMIK's efforts

To protect persons belonging to minorities has not been an easy task. The security situation of minority communities and the rate of crimes perpetrated against minorities have improved since the deployment

¹⁷⁵ UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering March through August 2001), p. 16. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

¹⁷⁶ Nowak, p. 502, 1993.

¹⁷⁷ Packer, p. 512, 1996.

¹⁷⁸ Nowak, p. 502-503, 1993. See also UN Doc. CCPR General Comment 23 The rights of minorities (Art. 27):08/04/94.

of UNMIK, but the situation is still tense and far from normal with a great deal of KFOR soldiers still assigned to guarding of minority enclaves and escorting bus routes used by minorities. After the horrifying first six months after the deployment, the security situation improved slightly and crime rates were on decrease, but during the autumn of year 2000 and the beginning of year 2001 the overall security situation got worse again, before it finally improved again during the summer of 2001. Security Council resolution 1244, which established UNMIK and also set out the mandate for both UNMIK and KFOR, gave KFOR the task of ensuring public safety and order until UNMIK could take responsibility over this task and the task of establishing a secure environment in which refugees and displaced persons can return. UNMIK, on the other hand was given the task of protecting and promoting human rights as well as the task of assuring the safe return of refugees and displaced persons to their homes.¹⁷⁹

In retrospective, one is bound to say that the international community may have underestimated the threats facing the minority communities in post-conflict Kosovo. First of all, protection of minority communities was mentioned separately in neither the mandate of UNMIK nor in the mandate of KFOR, which is in contrast with the reality as 2/3 of the KFOR soldiers were assigned to protect minority communities in January 2000. Secondly, the reports also tell us that KFOR and UNMIK Police were understaffed during most of the time, and thus unable effectively to keep law and order and prevent violence against minority groups, and bring the perpetrators to justice. In this connection Ward, concludes that the failure to deploy police quickly, to arrest and prosecute persons responsible for criminal attacks against minorities, and to establish a judiciary during the first months of the mission contributed to creating a culture of impunity for such violence.¹⁸⁰ Ward regards the attempts of the international community to protect minorities from violence in post-conflict Kosovo as a disastrous failure, and asserts that the ability to protect minority groups should be regarded as a key benchmark of the success of any post-conflict governance or civilian crisis management mission.¹⁸¹ Ward's critique is somewhat unfair given the efforts taken by KFOR and other personnel in protecting minority groups from violence, and the decreasing rates of crimes perpetrated against minorities, but the fact remains

(50th session).

¹⁷⁹ UN Doc. S/RES/1244(1999) Security Council resolution 1244 (1999) On the deployment of international civil and security presences in Kosovo, paras. 9 (c), (d) and 11 (j), (k). 10 June 1999

¹⁸⁰ Ward, p. 45, 2000.

¹⁸¹ *Ibid.*, p. 47, 2000.

that UNMIK was not able, at least not in beginning of its mandate to guarantee minority communities their primordial right under international law.

4.3.1.3. Recommendations

Nevertheless, the lesson to be learned in this respect is that the tense situation in the aftermath of an ethnic conflict and the threats that such situations pose for minority communities, as the majority community was the main victim during the conflict must never be underestimated. With regard to future post-conflict governance and crisis management operations these experiences call for the development of strategies for the protection of minorities prior to the deployment. Advance planning in both the short-term and the long term, and taking into account ethnic factors and possible tensions, alongside the obvious tensions should be the key words in this respect. In this regard, Ward emphasises the need for both civilian and military components to participate in the development of such strategies.¹⁸² This means that for future similar operations enough resources must be devoted to the protection of vulnerable minority groups, or any other groups perceived of to have been siding with the oppressor, against violence and revenge crimes. Furthermore, these resources need also to be accompanied with emergency arrangements for law and order, and confidence-building measures by civilian and military agencies during the first weeks of the mission.¹⁸³ The rationale behind these measures is naturally to protect the minority communities against violence, to create a sense of law and order and to halt the culture of impunity especially when it comes to crimes perpetrated against members of minority communities. In the long term these efforts need naturally to be contemplated with, as Ward points out thorough plans for reconciliation, law and justice.¹⁸⁴ There is as noted, a close connection between the malfunctioning and the lack of impartiality of the judiciary on the one hand, and the violence against minorities. We will return to this relationship and take a closer look at the lessons to be learned in that respect in the following chapter.

¹⁸² Ibid. p. 47, 2000

¹⁸³ Ibid. p. 47, 2000

¹⁸⁴ Ibid. p. 47, 2000.

4.3.2. Restricted freedom of movement

4.3.2.1. Obligation arising under human rights law

The freedom of movement is a basic human right enshrined in all major human rights conventions. This right provides for everyone lawfully within the state, to have the right to liberty of movement, which can be restricted only in order to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others.¹⁸⁵ When it comes to obligations on part of the state, this right requires that the state must ensure that liberty of movement is protected from both public and private interference.¹⁸⁶ The obligation to ensure equal treatment of minority groups and provide for equal access to public services is likewise at the heart of international minority rights. Even if UNMIK considering the circumstances in post-conflict Kosovo, could have restricted the freedom of movement of minority communities in order to protect national security for example, the obligation on part of UNMIK to protect the liberty of movement against private interference would have remained. Similarly, an obligation to provide minorities with equal access to public services would also remain.

4.3.2.2. Assessment of UNMIK's efforts

The restricted freedom of movement and the following confinement to enclaves has also been a persistent problem for minority communities. The restricted freedom of movement has also inhibited minority communities from exercising their basic rights and accessing public services. As a consequence of the tense security situation and the risks involved when moving in and out from a mono-ethnic enclave, minority communities have had great difficulties in accessing secondary and tertiary health care and educational services. In order to alleviate these hardships the UNHCR and KFOR established escorted bus lines, which over time improved the situation. Moreover, also health services were applied to minority communities, which were trapped in enclaves due to the tense security situation. These measures were of course necessary in the short term, but hardly sustainable in the long term.

¹⁸⁵ ICCPR, art. 12.

¹⁸⁶ UN Doc. UN Human Rights Committee General comment 27 Freedom of movement (Art. 12):.02/11/99. CCPR/C/21/Rev.1/Add.9, CCPR., paragraph 6.

4.3.2.3. Recommendations

The lesson to be learned for future operations is that the restricted freedom of movement, which of course is linked to the overall security situation, also restricts access to primary public services, and thus needs full attention from the beginning. Due to this linkage, the same recommendations as for improving the security situation apply also in this connection. The improvement in the security situation will thus also naturally improve the freedom of movement for minority communities.

4.3.3. Access to political structures

4.3.3.1. Obligations under human rights law

The right to political participation is also a basic human right for all, and as such also enshrined in major human rights conventions. For minorities it is especially important to have access to the decision-making bodies. According to Myntti, human rights instruments, and especially newer instruments stress the importance for minorities to be able to take part in the decision-making regarding issues that concern them directly.¹⁸⁷ Whether or not international law obligates the states to provide for special political rights to minorities, in order to ensure their effective participation, remains unclear. It is nevertheless clear that international human rights law allows for special treatment for these purposes, when it is needed.¹⁸⁸

¹⁸⁷ Myntti, p. 172-173, 1998.

¹⁸⁸ See for instance UN Doc. UN Human rights Committee CCPR General Comment 25. The right to participate in public affairs, voting rights and the right and equal access to public service (Art. 25):. 12/07/96, at paragraph 23. This view is also reflected in the concurring opinion by Prof. Scheinin in *Diergaardt v. Namibia*. Prof. Scheinin holds that “*there are situations where article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation.*”. See CCPR/C/69/D/760/1997 6 September 2000 Communication No 760/1997 : Namibia. 06/09/2000. Individual opinion by Martin Scheinin (concurring).

4.3.3.2. Assessment of UNMIK's efforts

With regard to access by minorities to the political structures in post-conflict Kosovo, we can distinguish between the provisional structures, the municipal elections and the municipal decision-making, and the Constitutional Framework and the decision-making bodies established under it.

With regard to minority participation, the Joint Administrative Structure (JIAS) established through regulation 1/2000, provided for a fair representation of all communities in the provisional administrative management, but the Kosovo Serb community did not despite encouragements participate in the Joint Administrative Structure from the beginning. Similarly the Kosovo Serb community chose together with some segments of the Turkish community also to boycott the municipal elections in October 2000. Nevertheless, all minority communities could however receive seats in the municipal assemblies and committees through the special arrangements designed to include minority communities in political process. As the overall situation of minorities seems to have improved, all communities, including the Kosovo Serb community chose to participate in the November 2001 elections for the Kosovo Assembly within the Constitutional Framework for provisional self-government. It remains however to be seen how these new structures will protect the minority communities. The special arrangements created in order to guarantee all minority communities representation in the assembly and other institutions, is a very necessary and good strategy. In this respect, participation by all groups in the elections for the Kosovo Assembly can be seen as an indication of UNMIK having succeeded in convincing minority communities to participate in the political structures and decision-making. The construction by which UNMIK itself remains as the highest protector of the rights of the minority communities, with the possibility to intervene must also be regarded as a good and necessary safeguard for the time being.

4.3.3.3. Recommendations

The lessons to be learned cannot be drawn yet, as the new structures have not started to work effectively yet. We can however conclude that the special arrangements for guaranteeing all minority communities representation in the decision-making bodies, is in line with the trend in recent human

rights law regarding effective participation of minorities. Moreover, handing over the responsibility to the local structures gradually, while retaining and exercising the power to intervene when necessary, especially if the rights of the minority communities are violated or their abilities to participate are hampered, seems also to be a good strategy.

5. Post-conflict governance and administration of justice

5.1. Remarks on the relation between human rights, the rule of law and the independence of the judiciary

The rule of law is today a general principle of law recognised by all civilised nations. It requires the supremacy of law over the government and its leaders, and it restricts arbitrariness. Thus, rule of law foresees a separation of powers into a legislative, an executive and a judicial power. Consequently, the rule of law requires that laws enacted by the legislator are faithfully executed by the officials, and that powers are not exercised arbitrarily. The principle of the rule of law is particularly important when it comes to the protection of fundamental rights, which protect the individual from the executive, as it requires that an individual wishing to enforce his or her rights has access to courts, which are independent from the executive.¹⁸⁹

According to Schwartz, the existence of the rule of law can be expressed in the following series of questions: Can people understand the law and comply with it? Is the law so stable that people can rely on it? Does it govern and limit the actions of both public officials and private citizens and involve instrumentalities of impartial justice to enforce those limits? Is it accepted as legitimately adopted, in compliance with the applicable higher-level standards such as a constitution or an international treaty, and applied according to fair and impartially applied procedures? And is it generally in accord with community standards of justice and morality?¹⁹⁰

If we then go back to the relationship between human rights, the rule of law and the independence of the judiciary, we can assert that it can be described as relationship where the effective protection of human rights is dependent upon the rule of law, for which in turn the independence of the judiciary is vital.¹⁹¹ The importance of this relationship is also reflected in the General Assembly resolution on "Basic Principles on the Independence of the Judiciary", which was adopted in 1985. On the independence of the judiciary, the first five principles provide the following:

¹⁸⁹ Jowell, p. 76, 1994.

¹⁹⁰ Schwartz, p. 8, 2000.

1. *The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*
2. *The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*
3. *The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.*
4. *There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.*
5. *Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.*
6. *The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.*
7. *It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.¹⁹²*

¹⁹¹ Chen, p. 87, 2000.

5.2. Re-building of a judicial system and establishing the rule of law in post-conflict societies

In a war-torn state the state structures, including the justice system has often been damaged and does not function. An international transitional administrator authorised to govern the territory and its population, has thus often been faced with the task of creating a functioning judicial system in accordance with the rule of law from scratch. The experiences from Kosovo and East-Timor prove that the administration of justice, or rather the restring of law and order and the re-building of a justice system deserve to be regarded as a top priority of the whole operation. This especially as criminal activity tend to flourish as criminal gangs make use of the legal and institutional vacuum, and as evidence of war crime, other violations of international humanitarian law and human rights abuses run the risk of being destroyed, while those responsible remain at large.¹⁹³ A failure to promptly address these past as well as ongoing violations can seriously impede the broader objectives of the mission. A functioning justice system and public confidence in that system, is extremely important in societies, which have undergone a violent inter-ethnic conflict. Post-conflict retribution and vigilantism are direct consequences of a society's sense of helplessness and lack of recourse. Betts, Carlson and Gisvold therefore, conclude, that a post-conflict justice system, must in order to gain public confidence, demonstrate to the population that it will uphold international human rights standards and bring to justice those who violate them. The access to, and the impartiality of the justice system is also an extremely important factor in gaining the public confidence for the justice system and thus gauging the ability to recourse by groups who were feeling victimized during the conflict.¹⁹⁴

A justice system that serves fairly and is also seen to serve fairly by all communities is extremely important in a post-conflict society like Kosovo. The OCSE-UNHCR Report on the situation of minorities in Kosovo, notes in this respect that a fair and functioning justice system is important not only for the Kosovo Albanians in order to help heal the wounds of the past, by properly prosecuting those guilty of past war crimes and human rights violations, but also for the Kosovo Serbs and other minority communities to counter the perception that they are made the scapegoats for those past crimes. An impartial and functioning judiciary adhering to the principle of the rule of law is equally important

¹⁹² UN Doc. GA/Res. 40/32 1985.

¹⁹³ Strohmeyer, p. 47, 2001.

¹⁹⁴ Betts, Carlson, Gisvold, p. 386, 2001.

also in order to counter the perception that crimes committed against persons belonging to these minority groups are treated with impunity. For the international community, tasked with the administration of justice in a post-conflict setting, it is also of utmost importance to show that the justice system reflects the principle of non-discrimination, upon which the transitional administration is based.

The establishment of a functioning independent and impartial judiciary and the building of genuine rule of law has been given a high priority in the current transitional administrations. With regard to both Kosovo and East-Timor, the UN Secretary-General has acknowledged the importance and the urgency of this matter. This has not been an easy task, even if the operations were given comprehensive mandates. It has however been difficult for both UNMIK and UNTAET to administer a justice system, when there was no system to speak of in place upon deployment. Both UNMIK and UNTAET found themselves in situations where there was no personnel to carry out judicial tasks, since they have left or were tainted by their perceived affiliation with the previous regime; and where the court houses and other facilities were destroyed; and where the laws to be applied were politically charged, and no longer acceptable to the majority of the population.¹⁹⁵

Betts, Carlson and Gisvold have identified three basic categories; 1.) Applicable law and the law-making process 2.) Judicial infrastructure and personnel; and 3.) Accountability for war crimes committed during the conflict, under which most of the measures taken in order to re-build a basic judicial system and establish the rule of law, would fall in a post-conflict setting.¹⁹⁶ These categories, accompanied with two additional categories, which are especially intended to highlight the problems concerning minority groups and post-conflict justice systems are thus the basis for the below assessment of UNMIK efforts to create an unbiased, independent and multiethnic judiciary.

¹⁹⁵ Strohmeyer, p. 48, 2001.

5.3. UNMIK and the post-conflict judicial system

5.3.1. UNMIK and the rule of law

As noted above UNMIK was given all legislative and executive authority, including the administration of the judiciary with respect to Kosovo. Consequently, UNMIK has the mandate to determine applicable law, to enact laws in the form of regulations that have precedence over existing laws, to repeal law, and to appoint judges and prosecutors, and to remove them from office.¹⁹⁷ The fact that there is no separation of powers –as UNMIK acts as both the legislator and the executive, and as it also has the competence to appoint judges and prosecutors, both international and domestic, can be seen as incompatible with the principle of the rule of law itself.¹⁹⁸ Such criticism is however not entirely fair, as an international transitional administration cannot be compared to municipal systems, for which the principle of the separation of powers is a cornerstone. In this respect the ICTY Appeals Chamber held in the *Tadic-case*, concerning the question whether the tribunal was established by law that: *“It is clear that the legislative, executive and judicial division of powers which is largely followed in most municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization, such as the United Nations.”*¹⁹⁹ The issue whether or not the ICTY was established by law, is certainly not similar to the exercise of the administration over the judiciary by UNMIK, but both are extraordinary creations of the UN Security Council, and cannot always be subject to aspects of the principle of the rule of law in the similar way as municipal systems.

In his first report, the Secretary-General asserted that the judicial system in place in Kosovo prior to the conflict had almost collapsed.²⁰⁰ This was due to the fact that many of the court facilities, equipment, legal texts and other materials had been destroyed during the conflict. In addition to deficiencies in the physical infrastructure and more importantly, the Kosovo legal system also suffered from a lack serious

¹⁹⁶ Ibid. p. 372.

¹⁹⁷ UNMIK Regulation No. 1/1999. On the Authority of the Interim Administration in Kosovo.

¹⁹⁸ See for example Mole, pp. 280-299, 2001.

¹⁹⁹ Case IT-94-1 Prosecutor v. Dusko Tadic. Decision on the defence motion for interlocutory appeal on jurisdiction 2 October 1995, para. 43. Taken from: <http://www.un.org/icty/ind-e.htm>.

²⁰⁰ UN Doc. S/1999/779 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, paras. 66-89.

lack of judicial expertise.²⁰¹ The communist rule and ten years of repression had impacted greatly on the judiciary. When UNMIK was established, there was no functioning court system, and most of the judges, which were Kosovo Serbs, as the Kosovo Albanians had not had access to offices in the judiciary, had either fled or were often denounced for having served under Belgrade's repressive regime.²⁰² The Secretary-General, thus acknowledged the urgent need to re-establish an independent, impartial and multi-ethnic judiciary, and to build a genuine rule of law, and for that end to ensure that the police, courts, administrative tribunal and other judicial structures are operating in accordance with international standards of criminal justice and human rights.²⁰³ This was not being an easy task. Since the beginning UNMIK has had difficulties in convincing persons belonging to minority groups to participate or to remain in the judicial system. Allied to the legacy of discrimination and violence, the violence, persecution and human rights abuses against minority groups has since the beginning hampered UNMIK's abilities to establish a court system, which would offer a sufficient guarantee of impartiality for all Kosovars.²⁰⁴

The situation in East-Timor was, if possible even worse than in Kosovo, as the pre-existing judicial infrastructure was destroyed, and as almost all judges, prosecutors, lawyers who were perceived of as having been sympathetic to the Indonesian regime had fled. Thus, UNTAET was first of all charged with building a justice system from scratch, and adopting a regulatory framework before it could start administering a judiciary.²⁰⁵

The below analysis will be focused on the re-building of the rule of law in Kosovo, due to the minority issues, but consequent comparisons will be made to East-Timor when relevant. UNMIK's efforts to establish a functioning, unbiased, independent and multi-ethnic judiciary, will be examined through measures taken within the categories: 1) efforts taken to establish an impartial judiciary; 2) determination of applicable law; 3) accountability for genocide, crimes against humanity, war crimes and ethnically motivated crimes; and 4) remedies against discrimination. These categories, which to a

²⁰¹ Betts, Carlson, Gisvold, p. 377, 2001.

²⁰² OSCE LSMS Review of the criminal justice system February 2000 –July 31 2000, p. 11. Betts, Carlson, Gisvold, p. 376–377, 2001

²⁰³ UN Doc. S/1999/779 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, paras. 66-86.

²⁰⁴ OSCE LSMS Review of the criminal justice system February 2000 –July 31 2000, p. 11.

²⁰⁵ Strohmeyer. 50, 2001.

certain extent overlap, are all central for the establishment of the rule of law, and they all also have some bearing on the situation of minority groups.

5.3.2. Efforts to secure an impartial legal system

5.3.2.1. International human rights standards

Effective law and order is an essential prerequisite for the transformation of a collapsed war-torn society into a stable democratic society. The creation of an unbiased, independent and multi-ethnic judiciary, which effectively counters impunity and thus gains confidence from all communities is also essential for a society like post-conflict Kosovo. Therefore the creation of such judicial system has been a priority task for UNMIK.

Before going into UNMIK's efforts in order to establish a judiciary, which would also be unbiased towards minority groups, we will take a closer look upon what is expected of an impartial tribunal, in international human rights law. In this respect article 14 of the International Covenant on Civil and Political Rights (ICCPR), which can be taken as a starting point, states that:

“1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...”²⁰⁶

The European Convention on human rights contains a similar provision in article 6, which stipulates that:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”²⁰⁷

²⁰⁶ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Hereinafter this instrument will be referred to as the ICCPR.

Moreover, the right to a fair and public hearing by an independent and impartial tribunal established by law, is also reinforced in principle 2 of the UN Basic Principles on the Independence of the Judiciary, which reads as follows:

*“2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”*²⁰⁸

The impartiality and the independence of the tribunal are regarded as precondition of the fairness of judicial proceedings. The European Court of Human Rights has dealt with the issue of impartiality in several cases, and holds that the impartiality requirement of art. 6(1) entails both a subjective and an objective test. The subjective test entails that a judge must be shown to act on the basis of personal bias to fail the subjective test²⁰⁹, whereas the objective test draws from the common law doctrine “that justice must not only be done: it must be seen to be done”²¹⁰. With regard to the objective test the European Court of Human Rights has held that “any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw”, and furthermore that “What is decisive is whether the fear can be objectively justified”.²¹¹

5.3.2.2. The impartiality of the courts in Kosovo

In sum we can hold that, with regard to the impartiality of the judiciary, international human rights standards puts an obligation on part of the authorities to ensure an environment, in which officials within the judiciary are free to make decisions impartially. The authorities in Kosovo have reportedly

²⁰⁷ Convention for the Protection Of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

²⁰⁸ Basic Principles on the Independence of the Judiciary. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Taken from: http://www.unhchr.ch/html/menu3/b/h_comp50.htm.

²⁰⁹ Harris, O’Boyle, Warbrick, p. 234-235, 1995.

²¹⁰ European Court of Human Rights Delcourt v. Belgium. Judgement 17/01/1970.

²¹¹ European Court of Human Rights Hauschildt v. Denmark Judgement. 11/1987/134/188.

had great difficulties in this regard. As noted above, UNMIK has had great difficulties in convincing minority judges or prosecutors to remain in the justice system, due to security concerns. Moreover, also the serving judges and prosecutors have expressed concerns over their security, as they hold public positions. The OSCE LSMS Review of the justice system in Kosovo has in several reports held that the continuing climate of ethnic conflict has had a severe impact on the objective impartiality of the courts, and also expressed concerns over the existence of actual bias on part of some judging panels.²¹²

With regard to the objective test, the OSCE-LSMS holds in the report covering the period between 1 February and 31 July 2000, that due to the continuing climate of ethnic intolerance, the objective impartiality test may arguably be violated in cases where a mono-ethnic tribunal tries a member of the Kosovo Serb, Bosnian-Muslim or Roma minority.²¹³ The Vuckovic case is illustrative for the impartiality issue. In this case a Kosovo Serb was convicted before a panel consisting of 4 Kosovo Albanian judges and one international judge, for genocide despite insufficient evidence.²¹⁴ The domestic law and UNMIK regulation 1999/7 On appointment and removal from office of judges and prosecutors, both provide legal safeguards against impartial courts. The FRY criminal procedure code provide for the disqualification of judges from a panel in cases where “circumstances obtain which endanger doubts as of his impartiality”, and the UNMIK Regulation 1999/7, which established the Advisory Judicial Commission, which receives complaints in relation to judges and public prosecutors, lists serious misconduct and having been placed, by personal conduct or otherwise, in a position incompatible with the due execution of office, as grounds for removal.²¹⁵ So far LSMS was unaware of any judges having been removed, and argue that there is no effective system for the investigation and removal of judges, as the oath of office and self-regulation are wholly insufficient to remedy the objective perception of bias in relation to judges for war crimes and ethnically motivated crimes trials. The potential violations of the objective test are according to the OSCE-LSMS, to a great extent a consequence of political and social climate in Kosovo.²¹⁶

²¹² OSCE-LSMS Review of the Criminal Justice System in Kosovo 1 February – 31 July 2000. p.58-60. Taken from: <http://www.osce.org/kosovo/documents/reports/justice/>.

²¹³ OSCE-LSMS Review of the Criminal Justice System in Kosovo 1 February – 31 July 2000. p. 60. Taken from: <http://www.osce.org/kosovo/documents/reports/justice/>.

²¹⁴ OSCE LSMS Review of the criminal justice system 1 September 2000-28 February 2001, p. 95-97.

²¹⁵ UNMIK Regulation 1999/7 On appointment and removal from office of judges and prosecutors 7 September 1999. Taken from: <http://www.un.org/peace/kosovo/pages/regulations/reg7.html>.

²¹⁶ OSCE-LSMS Review of the Criminal Justice System in Kosovo 1 February – 31 July 2000. p. 60-61. Taken from: <http://www.osce.org/kosovo/documents/reports/justice/>.

With regard to the subjective test, the OSCE-LSMS Report also asserts that there have been cases, which raise the concern of actual bias on part of the courts. In this regard unequal treatment of persons belonging to minorities with regard to pre-trial detention is reported to have arisen in several cases. Concerns for bias of the court arose for example in the so-called Momcilovics Case, which gave rise to a special OSCE-LSMS Report, in which several breaches of human rights standards were highlighted. In this respect, the length of the pre-trial detention, malicious prosecution motivated by the ethnicity of the defendants, and the failure to prevent such malicious prosecutions and the severe sentences were seen as indications of the actual bias of the courts by the LSMS.²¹⁷ The International Helsinki Federation Mission to Kosovo, 13-17 February 2001, assert in similar terms that independent monitoring show a tendency that where Kosovo Albanians were victims of alleged crimes perpetrated by Kosovo Serbs, the verdict was of guilt even if the evidence was weak. The prosecutors, on the contrary often dropped indictments, or courts found that there was not enough evidence to convict, in cases where the roles were the opposite.²¹⁸

5.3.2.3. Measures taken by UNMIK in order to secure the right to an impartial tribunal

UNMIK has tried to alleviate the concerns with respect to impartiality mainly by the introduction of international judges and prosecutors to deal in particular with serious criminal cases involving defendants from minority communities. As a response to the public unrest and ethnic violence in Mitrovica/Mitrovice in February 2000, the SRSG promulgated Regulation 2000/6, which provide for the appointment of an international judge and a prosecutor to Mitrovica/Mitrovice,²¹⁹ and through Regulation 2000/34 the powers to appoint international judges and prosecutors was extended to the whole territory.²²⁰ So far 11 international judges and 5 international prosecutors have been appointed, and according to the most recent report of UN Secretary-General, they have successfully taken the lead

²¹⁷ OSCE-LSMS Review of the Criminal Justice System in Kosovo 1 February – 31 July 2000. p. 65-68. Taken from: <http://www.osce.org/kosovo/documents/reports/justice/>.

²¹⁸ Report on the Judicial System, Freedom of the Media and the Situation of Minorities in Kosovo, p. 3-4. International Helsinki Federation Mission to Kosovo, 13-17 February 2001.

²¹⁹ UNMIK Regulation No. 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors.

²²⁰ UNMIK Regulation No. 2000/34 Amending UNMIK Regulation No. 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors.

in processing war crimes and ethnically motivated crimes, which are sensitive issues for the peace-building process.²²¹ Nevertheless, the OSCE Legal System Monitoring Section, although welcoming and acknowledging the important role of the international judges and prosecutors, has asserted that the appointment of so few international judges together with the restricted scope of their powers still failed to effectively address the impartiality concerns. This is especially due to the FRY Criminal Procedure Code, according to which the verdicts are given by panels consisting of 5 judges, in which each judge carry an equal vote. Bearing in mind the limited number of international judges, one can easily agree with the OSCE LSMS, that the real impact of an international judge upon a potential verdict motivated by ethnic bias is thus severely reduced.²²² To address these concerns UNMIK promulgated Regulation 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue, which sought to provide a system by which international personnel was allocated properly and to ensure that the powers granted to international judges were sufficient to effectively exclude at least the perception of bias.²²³ Section 1 of this regulation thus grants the accused, and the prosecutor the right to petition to the Administration of Justice (ADoJ) for the assignment of international judges and prosecutors to a case, where it is necessary in order to ensure the independence and impartiality of the judiciary or the proper administration of justice. In addition, ADoJ may also itself assign international judges or prosecutors to a case. If the petition is approved, a panel consisting of an international prosecutor, an international investigating judge and/or a panel consisting of three judges out of which at least two are international, is assigned to the case.²²⁴ The OSCE-LSMS report regards the regulation as a welcomed improvement, but regrets that no criteria have been finalised and not disseminated to counsel, so as to ensure that cases of similar nature and seriousness are treated equally. Moreover, the OSCE-LSMS also holds that the fact that the regulation prohibits transfer of cases after the trial has begun, reduces its effectiveness essentially, as bias may emerge during the proceedings.²²⁵

²²¹ UN Doc. S/2001/ 565 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo 7 June 2001, p. 12.

²²² OSCE LSMS Review of the criminal justice system February-July 2000, p. 69-70. OSCE LSMS Review of the criminal justice system 1 September 2000-28 February 2001, p. 75-76.

²²³ UNMIK Regulation 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue. See also OSCE LSMS Review of the criminal justice system 1 September 2000-28 February 2001, p. 75-76.

²²⁴ UNMIK Regulation No. 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue.

²²⁵ OSCE LSMS Review of the criminal justice system 1 September 2000-28 February 2001, p. 76.

The appointment of international judges and prosecutors has been welcomed as they have been perceived of as objective, and as they were familiar with international human rights standards. On the basis of these reports and the scholarly views it seems that the appointment of international judges and prosecutors, and the training and mentoring of local personnel is inevitable for ensuring impartiality and the application of international standards in circumstances like the ones in Kosovo. The number of international jurists deployed in Kosovo seem however to be insufficient. The Secretary-General also acknowledges this insufficiency in his latest report, where he asserts that the number of international judges and personnel must at least be doubled.

In addition to the appointment of international judges, UNMIK has also sporadically tried to alleviate impartiality concerns by taking additional measures, such as appointing judges from the same community to panels so as to alleviate the lack of the appearance of objective impartiality.²²⁶

To conclude we can hold that the appointment of international judges and prosecutors was a welcomed measure, but that these appointments came too late and in too few numbers, in order to be able to effectively alleviate concerns about impartiality and to secure equal treatment for equally serious cases.

5.3.3. Determination of the applicable law

The issue of determining which law to apply was not only a pressing one, but also a sensitive one. The urgency of this matter can easily be understood as the lack of an agreed upon criminal code or set of procedures, prior to the deployment led to ad hoc application of different national laws by the security forces carrying out large-scale arrests in different KFOR sectors.²²⁷

In the first regulation, UNMIK set out its “grundnorm”, as section 2 stated that: “*in exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, colour, language religion, political or other opinion, national, ethnic or*

²²⁶ OSCE LSMS Review of the criminal justice system February-July 2000, p. 71.

²²⁷ International Crisis Group, ICG Balkans Report No. 83, Starting from scratch in Kosovo: The honeymoon is over, 13 December 1999, p. 12. Taken from: <http://www.intl-crisis-group.org/projects/balkans/reports>.

social origin, association with a national community, property, birth or other status.”²²⁸. The international standards were neither mentioned nor spelt out, and according to Mole the regulation did not either indicate that UNMIK realised that it would not be able comply with those standards.²²⁹ Moreover, in section 3 UNMIK identified the applicable law in Kosovo to be: *“The laws applicable in the territory of Kosovo prior to 24 March 1999...insofar as they do not conflict with standards referred to in section 2, the fulfilment of the mandate given to UNMIK under United Nations Security Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK.*”²³⁰

This decision was made due to practical reasons: to avoid a legal vacuum, and to avoid having to introduce the local lawyers to an entirely new legal system. This decision has however been criticised by both the Kosovo Albanian community and by international observers. Firstly, the Kosovo Albanian judges, prosecutors and lawyers were outraged by this decision and refused to apply the FRY/Serbian law, as they regarded it as discriminatory.²³¹ The Yugoslav criminal laws were considered by the Kosovo Albanians as one of the most potent tools of the policy of discrimination against and repression of the Kosovar Albanian population.²³² Secondly, also international experts questioned this decision since the selection of applicable law was made without consulting those who would apply the law and those who are bound by that law. Furthermore, the decision did not provide for any guidance on how to reconcile the FRY/Serbian law with international human rights standards. This omission put, according to the International Crisis Group, into question the commitment of UNMIK to implementing the international human rights standards that were the genesis of its involvement.²³³ The resistance towards the application of FRY/Serbian law created a confusion in the legal system, which resulted in application of a diverse collection of legal provisions and standards, by judges, KFOR and the UNMIK civilian police, and consequently violations of international human rights standards.²³⁴ The situation was stabilised as UNMIK, through regulations 24/1999 and 25/1999 decided that the law applicable in Kosovo on March 22, 1989 – that is before Belgrade stripped away the autonomy, would apply, insofar

²²⁸ UNMIK Regulation No. 1/1999. On the Authority of the Interim Administration in Kosovo. Section 2.

²²⁹ Mole, p. 295, 2001.

²³⁰ UNMIK Regulation No. 1/1999. On the Authority of the Interim Administration in Kosovo.

²³¹ International Crisis Group, ICG Balkans Report No. 83, Starting from scratch in Kosovo: The honeymoon is over, 13 December 1999, p. 12. Taken from: <http://www.intl-crisis-group.org/projects/balkans/reports>.

²³² Strohmeyer, p. 58-59, 2001.

²³³ Betts, Carlson, Gisvold, p. 374-376, 2001.

²³⁴ Ibid. p. 375.

as they were compatible with international human rights standards, the mandate of the UNMIK, or any regulations issued by UNMIK.²³⁵ This decision ended the question of which law should be applicable, but it still did not resolve the issue of compatibility with international human rights standards, as these laws were by no means more democratic than the Yugoslav criminal laws. Thus, the lawyers were faced with a situation where they had to interpret the penal code and the criminal procedure code through the lenses of international human rights law, and to apply only those provisions, which met international human rights standards, and substitute those which did not with appropriate international standards.²³⁶

The path chosen by UNTAET in East-Timor with regard to the applicable law, was similar to the one chosen by UNIMK. Sections 2 and 3 of regulation 1/1999 set out that the Indonesian laws in force prior to 25 October 1999, insofar as they do not conflict with the enumerated international standards in section 2, the mandate of UNTAET and regulations adopted by UNTAET, would constitute the applicable body of law. The death penalty was however repealed already from the outset, and in addition also several laws, which were regarded as incompatible with the international standards faced the same destiny.²³⁷ As in Kosovo, the decision to apply the law applicable before the establishment of the transitional administration was also met with some criticism in East-Timor. According to Linton the criticism stemmed from the lack of East-Timorese participation in the adoption process.²³⁸ Later on in September 2000 UNTAET adopted, after having consulted the National Consultative Council, a code on transitional rules for criminal procedure, which consisted of 55 sections and thus superseded the Indonesian laws.²³⁹

²³⁵ UNMIK Regulation 24/1999 on the Law applicable in Kosovo.

²³⁶ Strohmeyer, p. 59, 2001.

²³⁷ These standards are: The Universal Declaration on Human Rights of 10 December 1948; The International Covenant on Civil and Political Rights of 16 December 1966 and its Protocols; The International Covenant on Economic, Social and Cultural Rights of 16 December 1966; The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979; The Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; The International Convention on the Rights of the Child of 20 November 1989. Furthermore, section 2 also prescribes that all persons undertaking public duties or holding public office in East Timor shall observe, the above mentioned standards, and not discriminate against any person on any ground such as sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or all other status. UNTAET Regulation No. 1/1999 On the Authority of the transitional administration in East-Timor. Taken from: <http://www.un.org/peace/etimor/untaetR/etreg1.htm>.

²³⁸ Linton, p. 137, 2001.

²³⁹ UNTAET Regulation No. 2000/30 On Transitional rules of criminal procedure 25 September 2000.

The determination of applicable law is first and foremost a pressing issue due to a legal vacuum and/or applications of different laws and standards, but it is also a very sensitive issue in a climate of inter-ethnic conflict. To avoid a period of a legal vacuum or the application of laws, which do not correspond to international human rights standards, or application of different laws, a decision has to be made as soon as possible after the deployment. Likewise it is also of importance that a body of law, which is perceived of as neutral and acceptable to the local population is chosen.

5.3.4. The Judicial infrastructure and personnel

In addition to the difficulties regarding the determination of applicable law UNMIK's efforts to re-establish the judiciary, were also faced with two serious problems relating to the judicial infrastructure and personnel. First of all, the lack of facilities, equipment and materials, which was due to the destruction during the war, posed an obstacle for holding efficient and effective trials. Secondly, there was also a serious lack of local judicial expertise. Prior to the conflict, a substantive majority of the judges were Kosovo Serbs, as Kosovo Albanian legal professionals had been severely discriminated against, and not been allowed to enter the legal profession since the revocation of the autonomy in 1989. The lack of judicial expertise is a result of the discriminating Yugoslav policy, as most of the Kosovo Serb judges had left Kosovo after the conflict.²⁴⁰ From this point of departure UNMIK set out to establish a judiciary and to strengthen the rule of law. The declared goal of the UN administration in this respect was thus to establish a judiciary that reflected the various ethnic communities.²⁴¹

In order to overcome these difficulties UNMIK first established an emergency judicial system. In this respect the Joint Advisory Council on Provisional Judicial Appointment, was mandated to make recommendations for 3-month renewable appointments of judges and prosecutors.²⁴² Shortly after the establishment of the emergency judicial system, UNMIK proceeded with the establishment of a permanent judiciary. Through regulations 1999/6 and 1999/7 the Advisory Judicial Commission on

²⁴⁰ Betts, Carlson, Gisvold, p. 376 – 377, 2001. The Serbian Ministry of Justice had suspended the offering of the bar exam in Kosovo in 1990, and as a result of this no new lawyers had been admitted to the Chamber of Advocates in 10 years. See also OSCE LSMS Report No.1: Material needs of the emergency judicial system of November 7 1999. Taken from <http://www.osce.org/kosovo/publications/law/legal1.htm>

²⁴¹ UN Doc. S/1999/779 Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, paras. 66-86.

²⁴² OSCE LSMS Report No.1: Material needs of the emergency judicial system of November 7 1999.

Appointment of Judges and Prosecutor (AJC) and the Advisory Commission on Judiciary and Prosecution Service (TAC), were established in order to facilitate the process.²⁴³ Until August 2000 UNMIK had thus been able to fill over 600 positions in the judiciary, but as these were recruited among locals, they lacked training, which would have enabled them to identify provisions in the applicable law which did not meet international human rights standards, and which then should have been superseded by international standards.²⁴⁴ This problem was met with two different strategies, namely by training of local judges and by appointing international judges and prosecutors. Besides ensuring impartiality in sensitive cases, the appointment of international judges serves two functions. First of all, they were also expected to ensure compliance with international human rights standards, and secondly they were expected to serve as examples for the local judges and prosecutors on what is expected of legal professionals in terms of efficiency, application of equal standards, and lastly, but not least in terms of treatment of persons belonging to minorities.²⁴⁵

5.3.5. Accountability for Genocide, Crimes against humanity, War crimes and ethnically motivated crimes²⁴⁶

5.3.5.1. In general

In the aftermath of an inter-ethnic conflict the justice system can play a crucial role in restoring order, installing democracy and in preventing further violence. In order to accomplish this role the justice system must meet the population's demands for justice for crimes perpetrated during the conflict. The reconciliation process and the pacification of society are both affected by how the justice system addresses the population's sense of vulnerability and injustice.²⁴⁷ In addition to addressing past

²⁴³ UNMIK Regulation No. 1999/6 On recommendations for the Structure and Administration of the Judiciary and the Prosecution Service, UNMIK Regulation No. 1999/7 On the Appointment and Removal From Office of Judges and Prosecutors.

²⁴⁴ OSCE LSMS Report No. 6: Extension of time limits and the rights of detainees: The unlawfulness of regulation 1999/26. (April 29 2000).

²⁴⁵ Betts, Carlson, Gisvold, p. 378, 2001. The institution of international judges and prosecutors was introduced through UNMIK Regulation No. 2000/6.

²⁴⁶ The term "ethnically motivated crimes" refers here as in the OSCE reports to aggravated murder, murder and attempted, rape and aggravated rape, theft, robbery and threats which are motivated by the ethnicity of the victim. See for example OSCE LSMS Review of the criminal justice system 1 February 2000- 31 July 2000, p. 74.

²⁴⁷ Ibid. p. 380, 2001.

violations of human rights and war crimes, the justice system must also prove effective and impartial in processing ethnically motivated crimes perpetrated after the conflict.

5.3.5.2. The ICTY involvement

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has under its statute, also formal jurisdiction over grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity, committed during the armed conflict in Kosovo.²⁴⁸

The chief prosecutor of the ICTY, thus outlined in September 1999 that the ICTY would investigate high level civilian, police and military leaders, of whichever party to the conflict who may be held responsible for crimes committed during the armed conflict in Kosovo. Furthermore, she also held that other individuals, who may have committed particularly serious crimes, and perpetrators of sexual violence during the course of the armed conflicts, may on a case by case basis be object for investigation and prosecution. The chief prosecutor held however that the mandate and the resources of the ICTY would not allow it to act as the primary investigative and prosecutorial agency for all crimes committed in Kosovo. Crimes falling outside the scope of jurisdiction of the ICTY were properly declared to be the responsibility of UNMIK. In accordance with rules on concurrent jurisdiction, universal jurisdiction and domestic legislation Del Ponte also asserted that the judicial authorities in Kosovo also had the competence to try cases involving the sort of crimes that fall within the jurisdiction of the ICTY.²⁴⁹

With regard to concrete action taken by the ICTY with regard to Kosovo, we can note that the president of the FRY, Slobodan Milosevic and Milan Milutinovic, the President of Serbia, Nikola Sainovic, Deputy Prime Minister of the FRY, Dragoljub Ojdanic Chief of the General Staff of the VJ, and Vljako Stojiljkovic, Minister of Internal Affairs of Serbia were indicted for crimes against humanity and

²⁴⁸ UN Doc. S.C.Res. 827. The Statute for the ICTY.

²⁴⁹ Statement by Carla Del Ponte, Prosecutor of International Criminal Tribunal for the Former Yugoslavia, on the investigation and prosecution of Crimes committed in Kosovo, ICTY Press Release, 29 September 1999. Taken from <http://www.un.org/icty/latest/latestdev-e.htm>, 11.12.2001.

violations of the laws or customs of war with regard to the Kosovo conflict.²⁵⁰ In addition, Del Ponte also announced on a press conference on the 21st of March 2001 that the jurisdiction of the ICTY covers on-going events in Kosovo, south Serbia and the Former Yugoslav Republic of Macedonia because the continuing violence in each area did indeed satisfy the legal criteria for the definition of "armed conflict" for the purposes of the crimes set out in the statute of the Tribunal. On the same occasion Del Ponte also stated that two new investigations with respect to possible violations of the laws or customs of war and crimes against humanity in Kosovo had been opened. The first of these involved allegations about the activities, against Serbs and other minorities, by unidentified Albanian armed groups in Kosovo from June 1999 until the present.²⁵¹

The involvement of the ICTY is as we can see more geared towards investigating the responsibility of the "big fish", and as such not a sufficient means for addressing all past violations. Therefore, past war crimes and other atrocities needed to be addressed in other forums as well.

5.3.5.3. War crimes and ethnically motivated crimes trials in local courts

In Kosovo, war crimes trials had also commenced in the local courts. These trials were however held without adequately skilled personnel, sufficient security, interpretation and equipment. Moreover, the continuing climate of ethnic conflict and the tensions, also impacted upon the impartiality of the courts and impeded the progress of war crimes prosecutions in the domestic courts.²⁵²

In order to achieve credible neutrality in the war crimes and ethnically motivated crimes proceedings UNMIK took several measures. Firstly, UNMIK proposed, to establish the Kosovo War and Ethnic Crimes Court (KWECC), which would have served as an interim tribunal processing serious ethnic crimes and war crimes. The KWECC was to have jurisdiction over war crimes, crimes against humanity, genocide, and serious crimes committed on the grounds of race, ethnicity, religion,

²⁵⁰ Case No. IT-99-37-PT Milosevic et al. (IT-99-37) "Kosovo". Second amended indictment 29 October 2001. Taken from: <http://www.un.org/icty/ind-e.htm>.

²⁵¹ Statement given by the Prosecutor of the ICTY, Carla Del Ponte, at the Press Conference on 21 March 2001 with the President of the ICTY, Judge Claude Jorda, Mr. Grubac, the Minister of Justice of the Federal Republic of Yugoslavia, and Mr. Batic, the Minister of Justice of the Republic of Serbia. The Hague, 21 March 2001.FH/P.I.S./578e. Taken from <http://www.un.org/icty/latest/latestdev-e.htm>.

²⁵² Betts, Carlson, Gisvold, p. 381. 2001.

nationality, association with an ethnic minority, or political opinion, and it was planned to be staffed with multiethnic national and international personnel, in order to ensure international involvement and oversight in trials concerning war crimes and ethnically motivated crimes. Even though KWECC was perceived of as a key initiative in the international efforts designed to assist the Kosovar population in moving from ethnic division towards reconciliation, the plans to establish it were abandoned in September 2000. Instead, UNMIK relied upon appointing international judges and prosecutors, which would especially ensure impartiality and oversight in trials concerning war crimes and ethnically motivated crimes.²⁵³ With reference to what has been said above we can conclude that the appointment of international judges and prosecutors has been acknowledged as very useful and important, although insufficient means.

Secondly, UNMIK also promulgated resolution 2000/4 On the prohibition against inciting to national, racial, religious or ethnic hatred, discord or intolerance, which criminalizes inciting, which is a very dangerous tool in the post-conflict climate. Importantly, regulation 2000/4 also stipulates that committing the crimes systematically, or by taking advantage of ones position or authority is to be seen as an aggravating circumstance.²⁵⁴

5.3.5.4. Comparison: UNTAET and past atrocities

With regard to accountability for genocide, crimes against humanity, war crimes and other serious crimes, UNTAET applied a different model than UNMIK. Firstly, as there is no international tribunal similar to the ICTY, the district court of Dili was given exclusive jurisdiction over genocide, crimes against humanity and war crimes, and over torture, murder and sexual offences that were committed between 1 January and 25 October 1999, through regulation 2000/11.²⁵⁵ Special panels, composed of both international and East-Timorese judges with exclusive jurisdiction over the above-mentioned serious criminal offences were then established at the District Court of Dili through Regulation 2000/15.²⁵⁶ These panels are thus internationalised institutions acting under the jurisdiction of the

²⁵³ Ibid, p. 381.

²⁵⁴ UNMIK Regulation No. 2000/4 On the prohibition against inciting to national, racial, religious or ethnic hatred, discord or intolerance

²⁵⁵ UNTAET Regulation No.2000/11 On the organization of courts in East-Timor 6 March 2000.

²⁵⁶ UNTAET Regulation No. 2000/15 on the Establishment of Panels with exclusive jurisdiction over serious criminal offences 6 June 2000. This type of mixed international/local panels is not an entirely new phenomenon. The East-Timorese

District Court of Dili applying both international law and the hybrid laws of East-Timor. In order to ensure impartiality and independence, each panel consists of two international judges and one East-Timorese judge. With regard to the subject matter jurisdiction, regulation 2000/15 incorporates almost verbatim provisions and the general principles of law contained in the Rome Statute (the Statute for the International Criminal Court).²⁵⁷

The solution or model created by UNTAET is from the outset well equipped for dealing with the past atrocities, especially as they are dealt with in a special, partly international forum, which can better ensure impartiality and international human rights standards for the defendants, than local courts. The East-Timorese model has however had its difficulties as well. First of all, as it incorporates provisions meant for the ICC, into a district court of one of the world's poorest nations it created in practise a tremendous financial and legal burden. UNTAET may have as Linton points out, "bitten of more than it can chew", as the Serious Crimes Unit, the investigating body, is not able to function adequately due to the limited financial as well as human resources. The incorporation of the highest international standards is naturally a good thing, but the international community must also be prepared to equip an important institution such as these panels with adequate resources so that they are able to function. Secondly, the adoption of regulation 2000/15 was not well received by the East-Timorese judges, prosecutor and lawyers, who voiced anger over that they were not included in a meaningful way in the consultation process leading to the adoption of regulation 2000/15.²⁵⁸ To date, two Special Panels have been established, and so far 15 cases have been heard and 33 indictments charging 83 individuals filed.²⁵⁹

In addition to the special panels for serious criminals offences, also other means for dealing with past crimes have been established. After consultation with the National Council, UNTAET promulgated regulation, which established a Truth, Reception and Reconciliation Commission (TRR Commission), for enabling the East-Timorese to create a public record of human rights abuses since 1975, to facilitate

model draws inspiration from the Cambodian decision to establish an internationalised panel to try the former leaders of Khmer Rouge. (Linton, p. 146, 2001).

²⁵⁷ UNTAET Regulation No. 2000/15 on the Establishment of Panels with exclusive jurisdiction over serious criminal offences 6 June 2000.

²⁵⁸ Linton, p. 148-150, 2001.

²⁵⁹ UN Doc. S/2002/80 Report of the Secretary-General on the United Nations Transitional Administration in East Timor (for the period from 16 October 2001 to 18 January 2002) 17 January 2002.

the reintegration of returning refugees and to promote community reconciliation by dealing with low-level offences committed in 1999. The TRR Commission does not grant amnesty to those involved in serious crimes, and is not to be seen as an alternative to justice, but as a complement strengthening the efforts to achieve reconciliation.²⁶⁰ Moreover, the Indonesian government is also in the process of establishing a special human rights tribunal in Indonesia for the prosecution of serious crimes against East-Timorese people.²⁶¹

Even if the process has been slow in East-Timor, the model for dealing with past atrocities established by UNTAET is better than the path chosen by UNMIK in this regard. Reliance on mixed international/local tribunals is a better solution than relying on local ordinary courts, when it comes to prosecution of genocide, crimes against humanity, war crimes and ethnically motivated crimes in post-conflict societies. This, especially since the judicial systems in such circumstances is not able to function in accordance with the rule of law, and deal with these sensitive issues without concerns for the impartiality and respect for international standards regarding the rights to a fair trial. In addition, UNTAET has had a more comprehensive approach to dealing with past atrocities and reconciliation, not only because of the establishment of the Special Panels, but also since it established the Commission for Reception, Truth and Reconciliation, as complementary means in the reconciliation process.

5.3.6. Remedies against discrimination

Minority communities in Kosovo have faced discrimination, not only in the judicial system, but also in accessing services, education or the myriad of services provided by the local authorities, and in employment cases. These problems can only be addressed through effective mechanisms, which can evaluate the alleged discrimination impartially and propose an enforceable solution. The remedies could be legal, that is courts or quasi-judicial bodies which decide on discrimination, or administrative,

²⁶⁰ UNTAET Regulation No. 10/2001 On the establishment of a commission for Reception, Truth and Reconciliation in East-Timor 13 July 2001.

²⁶¹ UN Doc. S/2001/719 Progress report of the Secretary-General on the United Nations Transitional Administration in East Timor 24 July 2001. According to the latest report of the Secretary-General, Report of the Secretary-General on the United Nations Transitional Administration in East Timor (for the period from 16 October 2001 to 18 January 2002), The Indonesian Prosecutor General's Office and the Justice Ministry have reported that 30 judges for this Ad Hoc Human rights Court have been selected. The process has however not been completed yet.

whereby public institutions are held directly responsible for responding to alleged discrimination in their practises. In order to be effective, these means must also be enforceable. In short, what is needed is minority protection and non-discrimination in law and access to the courts or other appropriate bodies, for seeking remedy.²⁶²

The legal framework on the prohibition of discrimination in post-conflict Kosovo was quite strong as international human rights standards on non-discrimination such as art. 26 of the ICCPR, and article 2 of the Universal Declaration on Human Rights were in force as part of the human rights obligations of the FRY. Moreover, international human rights standards including non-discrimination provisions were made applicable through UNMIK Regulation 1/1999, which also prescribed that: *“In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, color, language religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status.”*²⁶³ In addition, UNMIK has also systematically repealed discriminatory legislation. In June 2000 UNMIK also established an Ombudsman institution, with the mandate to investigate human rights violations and discrimination,²⁶⁴ and regulation 2000/45 On self-government of municipalities in Kosovo, addressed the issue of discrimination in the exercise of municipal functions.²⁶⁵ Furthermore, the adoption of the Constitutional Framework for self-government in Kosovo also improved the protection against discrimination, as it made international human rights instruments directly applicable.²⁶⁶

The main problem for minority communities with regard to effective remedies has, according to the latest OSCE-LSMS Report, been the inability of the courts to receive and judge impartially cases of discrimination against members of minority communities. Another issue is the fact that the judicial system is still in the process of reactivation, and the courts thus still limited to take criminal matters in the first hand, while effective civil remedies lag far behind. On top of that, the report asserts that

²⁶² UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering March through August 2001), p. 18. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

²⁶³ UNMIK Regulation No. 1999/1 On the authority of the interim administration in Kosovo, 23 July 1999.

²⁶⁴ UNMIK Regulation No. 2000/38 on the establishment of the Ombudsperson institution in Kosovo, June 30 2000.

²⁶⁵ UNMIK Regulation No. 2000/45 on self-government of municipalities in Kosovo, 11 August 2000.

²⁶⁶ UNMIK Regulation No. 2001/9 Constitutional Framework for provisional self-government, 15 June 2001.

effective administrative remedies are completely absent.²⁶⁷ These findings show that the legal framework for protecting minorities is more or less strong, but that the judiciary is still far from functioning normally. Efforts to secure the impartiality are thus very much needed, not only with regard to serious crimes, but also with regard to civilian matters.

5.4. Lessons learnt

5.4.1. General lessons

Both UNMIK in Kosovo and UNTAET in East-Timor were given responsibility for the administration of justice. Their mandates gave them thus powers to determine applicable law, to enact laws in the form of regulations that have precedence over existing laws, to repeal law, and to appoint judges and prosecutors, and to remove them from office.²⁶⁸ The administration of justice was an enormous task, which in practise required a complete re-creation of the judiciary, as the one prevailing prior to the conflict had collapsed. The reconstruction of the justice system requires a coherent approach, which places equal importance on all its elements, namely the police, the prosecution, the judiciary and the correctional system. The institutional vacuum in Kosovo was almost total as the political and administrative cadres, including judges and prosecutors, and the security and law enforcement apparatus, which almost exclusively consisted of Serbs, had fled. The situation was thus chaotic upon the arrival of UNMIK. Law enforcement and the judicial system had collapsed, and looting, arson, forced expropriation of apartments belonging Serb and other minorities, and killings and abductions of non-Albanians were daily phenomena. In addition, criminal gangs took advantage of the legal and institutional vacuum, and the KLA (Kosovo Liberation Army) returned and penetrated the territory, and often installed its own administrative structures- parallel to the UN administration and urged Serbs and other minorities to leave. In these circumstances, and in response to the security situation KFOR, in the

²⁶⁷ UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering March through August 2001), p. 18-19. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

²⁶⁸ UNMIK Regulation No. 1/1999. On the Authority of the Interim Administration in Kosovo. UNTAET Regulation No.1999/1 27 November 1999 Regulation No. 1999/1 on the authority of the transitional administration in East-Timor. See also UN Doc. S.C. Res 1244 and UN Doc. S.C. Res. 1272.

absence of law-enforcement machinery had to start carrying out large-scale arrests of persons responsible for arson, murder and violations of humanitarian law.²⁶⁹

From these points of departure UNMIK started to re-build an impartial and functioning justice system adherent to the principles of the rule of law. UNMIK faced difficult challenges in this regard as the previous sections revealed. The malfunctioning of the judiciary and its perceived bias towards minorities has been a constant problem, and the efforts to establish an impartial judiciary adherent to the principle of the rule of law, namely the introduction of international judges and prosecutors was not a sufficient remedy, as they were deployed too late, and in too few numbers. The determination of the applicable law turned out to be a difficult issue as well, as the laws in force prior to the conflict were politically charged and were no longer acceptable to the population who saw them as the tool for the prior oppression. The ability of the judiciary to prosecute past atrocities and to hold those responsible for ethnically motivated revenge crimes is extremely important in a post-conflict environment with regard to the peace and reconciliation process. The fact that the ICTY concentrated on the so-called big fish, and the concerns about impartiality against both minority suspects and victims with regard to these crimes hampered the reconciliation process. In East-Timor, the introduction of so-called mixed tribunals, proved to be a better solution, at least in alleviating the impartiality concerns. Moreover, neither the justice system nor the administration could provide any effective remedies for members of minority communities with regard to the discrimination.

There are many lessons to be learned for future crisis management operations or transitional administrations concerning the administration, or rather the re-building of a judicial system in a post-conflict society. The primary lesson is that creating law and order and the re-building of the justice system must be regarded as a top priority. Criminal activity tends to flourish as criminal gangs make use of the legal vacuum, which is a result of the collapse of the prevailing system, including the law enforcement machinery. Moreover, a failure to address past and ongoing atrocities and ethnically motivated crimes promptly and impartially, may impede the reconciliation process, whereas a functioning judicial system, which can bring those responsible for violations of international humanitarian law and human rights law to justice will have positive effects on reconciliation and

²⁶⁹ Strohmeyer, p. 48-49, 2001.

confidence-building efforts. Furthermore, the restoration of the political stability necessary for the development of democratic institutions, the establishment of an atmosphere of confidence necessary for the return of refugees and the implementation of development and reconstruction programs, are also as long-term objectives of a mission affected by the absence of a functioning judicial system. The ability to restore law and order and to address past and ongoing atrocities is often also linked to the overall success of a mission. Strohmeier asserts in this respect, that the inability to respond quickly to crime and public unrest, and to detain and prosecute suspected criminals promptly and impartially and in accordance with international human rights standards, may also lead to a situation where the public loses faith in the organisation responsible for the administration of the territory, and its willingness to respect the rule of law.²⁷⁰

5.4.2. Towards an international interim criminal code

5.4.2.1. The Brahimi Report

In addition to this primary or overarching lesson, there are also lessons to be learned with regard to the specific issues examined in this chapter.

The challenges faced by the transitional administrations with regard to the re-building of the judicial system and the re-establishment of the rule of law, were also highlighted in the so-called “Brahimi Report”, which was transmitted to the Secretary-General on the 17th of August 2000.²⁷¹ In this respect the “Brahimi Panel” asserted the determination of applicable law to be one of the most pressing issues, and recommended that a common UN justice package, including an interim directly applicable legal framework or code should be created. On this point, the panel stressed that the issue of determining the applicable law proved to be very crucial in both Kosovo and East-Timor, as the local judicial and legal capacity was more or less non-existent, and especially since the law and the legal system prevailing prior to the conflict were rejected by the groups considered as the victims of the conflict. Thus, the

²⁷⁰ Strohmeier, p. 60, 2001.

²⁷¹ UN Doc. A/55/305-S/2000/809 Identical letters dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council. The so-called “Brahimi Panel” undertook a thorough review of the UN peace and security activities, and then presented a clear set of specific, concrete and practical recommendations to assist the UN in conducting these activities better in the future. These findings were then presented in the Brahimi Report.

Brahimi Report recommended the adoption of a directly applicable interim legal code, which would contain the basics of both law and procedure and build upon international standards concerning human rights and humanitarian law, together with guidelines for police, prosecutors and penal systems. Moreover, it should also contain international standards for such crimes as murder, rape, arson, kidnapping and aggravated assault, so that it would enable an operation to apply due process, and to effectively prosecute those who are responsible for such crimes. The rationale behind this recommendation, lies in addition to the above-mentioned, also in that applying an international interim criminal code would mean that the judiciary could start functioning effectively from the start, as no time would be wasted on teaching the international jurists deployed the local codes and procedures.²⁷²

5.4.2.2. Scholarly views

With regard to this issue, Strohmeyer, as well as Betts, Carlson and Gisvold have adopted a similar standpoint as the Brahimi Panel. Thus Betts, Carlson and Gisvold hold, that the international community should in the emergency-phase of the mission apply an international interim criminal code, which would build on international human rights standards, and include criminal procedural rules and basic substantive criminal law, as well as a code regulating the activities of the police. In this respect Strohmeyer urges the UN and the international community to start working on such an immediately applicable legal framework, and emphasises the need to include also a code regulating the activities of the police, in the framework.²⁷³ Moreover, Betts, Carlson and Gisvold also hold that the international administration should start a legislative drafting process aiming at the adoption of a body of permanent law, as soon as the interim code is in place. With regard to the legislative process, they stress the need to involve the local communities.²⁷⁴

On this point, one has to agree fully with the above mentioned, especially since the local law might not be compatible with international human rights standards and not perceived of as legitimate by all communities in the society, whereas an international interim code would on the other hand be perceived of as neutral. Moreover, the application of an international legal framework would also reduce the

²⁷² UN Doc. A/55/305 S/2000/809 Report of the Panel on United Nations Peace Operations, paragraphs 79-83.

²⁷³ Betts, Carlson, Gisvold, p. 384, 2001. See also Strohmeyer, p. 62, 2001, and UN Doc. A/55/305 S/2000/809 Report of the Panel on United Nations Peace Operations, paragraphs 79-83, Strohmeyer, p. 62, 2001.

problems arising because of any uncertainty about applicable provisions. A sense of law and order could be achieved faster when it would be clear from the beginning to the international judges and prosecutors which law applies, and which standards apply with regard to the international police having responsibility for the law-enforcement.

5.4.3. Deployment of international judicial personnel

With regard to the personnel, Strohmeyer recommends the establishment of *judicial ad hoc arrangements* in the early days of the mission, in order to avoid any judicial or law enforcement vacuums. These arrangements would entail the rapid deployment of military lawyers, who in the emergency phase would have the power to execute legal functions, including arrest, detention, prosecution, and initial adjudication. The military arrangement would only be in place for a short and clearly defined period, until a proper adequately functioning civilian body could replace them. Moreover, Strohmeyer also underlines that the military arrangement would have to act strictly in accordance with international human rights standards.²⁷⁵ Concerning the recruitment of personnel, Betts, Carlson and Gisvold conclude that it was unrealistic of UNMIK to rely on local judges and prosecutors from the beginning, considering their qualifications and the tense situation in Kosovo. Therefore, they hold, differently to what Strohmeyer recommended, that the international community should during the first emergency phase of a transitional administration deploy a group of international judges, prosecutors and defence counsel who have been pre-trained in the interim legal framework, discussed. As soon as this system is in place, the international administration should then focus on training and mentoring of local judges and prosecutors. This strategy would provide the foundation for a basic judicial system, which is capable of immediately applying international standards, and which would be perceived of as impartial, which is extremely important when dealing with a post-conflict situation, where war crimes investigations and prosecution is likely.²⁷⁶

The need for the international community to establish a standby network of international experienced lawyers, which could be deployed rapidly to a territory under international administration, is regardless

²⁷⁴ Betts, Carlson, Gisvold, p. 384, 2001.

²⁷⁵ Strohmeyer, p. 60-61, 2001.

²⁷⁶ Betts, Carlson, Gisvold, p. 384-386, 2001.

of the use of military arrangements, also one of the points on Strohmeyer's list of recommendations. In this connection, Strohmeyer similarly to Betts, Carlson and Gisvold foresees that these lawyers are pre-trained in the interim legal framework and in international human rights law, so that they in addition to functioning as judges and prosecutor, also can function as trainers and mentors for the local judges and prosecutors. With regard to the need for the international community to provide legal training for the newly appointed local lawyers, judges and prosecutors, Strohmeyer underlines the importance of the training and mentoring of the local professionals, so that the judiciary will be strongly committed to the principles of the independence of the judiciary, and so that the judiciary will respect human rights and understand how to protect them in its daily work.²⁷⁷

The recommendations to deploy international judges and prosecutors in the emergency phase of a mission are extremely important. It is especially important from a minority perspective due to the concerns over the impartiality of the courts in the sensitive circumstances of a post-conflict society. One has however to be sceptical towards Strohmeyer's suggestion to deploy military lawyers, since international human rights law tries to limit the use of extra-ordinary courts.²⁷⁸ Therefore, the need to develop a standby network of experienced international judges, prosecutors and defence counsel pre-trained in the international interim legal framework and international human rights law, which could be deployed from day one of future transitional administrations or crisis management operations, which bear the responsibility for the re-building of a collapsed legal system, should be underlined.

5.4.4. The need to ensure accountability for Genocide, Crimes against humanity, War Crimes and ethnically motivated crimes

Betts, Carlson and Gisvold assert that these crimes should not be treated in the same manner as ordinary crimes, and that international community's response to the challenges posed by the demands for justice and accountability for these crimes can either quell or exacerbate the tensions in the society. Thus, the collection of information and the documentation process plays a significant role. Moreover, Betts, Carlson and Gisvold stress that taking into account the sensitivity surrounding these crimes and

²⁷⁷ Strohmeyer, pp. 60-63, 2001.

²⁷⁸ See for example UN Doc. CCPR General comment 13. (General Comments) equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14) : . 13/04/84.

the risks for impartiality, the information needs to be acted upon by an unbiased and highly trained group of judges, prosecutors and defence counsel.²⁷⁹ In Kosovo, the local legal professionals did not have these qualifications, and taking into account the reported bias of the courts in trials concerning these crimes, the decision to let ordinary local courts consisting of local judges and prosecutors process these crimes in such circumstances, stands out as a serious mistake. The response by UNMIK, to deploy a very limited number of international judges, at a quite late stage was according to Betts, Carlson and Gisvold both belated and insufficient. With regard to the accountability for such crimes they underline the need to immediately establish proper judicial and enforcement bodies, comprising of well-trained international legal experts for the processing of these crimes.²⁸⁰ The OSCE-LSMS also stated in their report that concept of the KWECC should be re-conceived. The International Peace Academy Workshop Report on Managing Post-Conflict Peace-building took a firm standpoint on this issue by holding, that war crimes and ethnically motivated crimes require a specialised court from the beginning, and that these crimes should not be dealt with in the local courts in circumstances like the ones in Kosovo.²⁸¹

Taking into account the high risks for bias in trials concerning Genocide, Crimes against humanity, War crimes and ethnically motivated crimes, in circumstances such as in Kosovo, where the judiciary is almost exclusively comprised of judges and prosecutors from the ethnic group regarded as the victim in the conflict, and often subject to intimidation, it is necessary to establish a special or several special courts comprised of international judges and prosecutors with exclusive jurisdiction over these cases. The establishment of a judicial body similar to the planned KWECC, or the special panels used in East-Timor is an absolute necessity for future similar operations. Such an arrangement could function as a complement to an international ad hoc tribunal or the International Criminal Court, which inevitably will have to concentrate on the so-called “big fish”.

²⁷⁹ Betts, Carlson, Gisvold, p. 386-387, 2001.

²⁸⁰ Ibid., p. 386-387, 2001.

5.4.5. Combating discrimination

In a society plagued by a conflict with ethnic dimensions and with a history of systematic discrimination it is also of extreme importance for the international administrator to include safeguards against discrimination in the interim legal framework and to repeal all discriminatory legislation. Furthermore, it is also necessary to provide for administrative as well as legal mechanism for curbing discrimination. In this respect, the OSCE-LSMS Report pinpoints accurately that what is needed is minority protection and non-discrimination in law and access to the courts or other appropriate bodies.²⁸² This holds true for other similar missions as well.

5.4.6. Other recommendation for future missions

In his list of recommendations Strohmeyer also includes the reconstruction of the correctional systems. In this regard Strohmeyer stresses the need for transitional administrations or crisis management operations, which will be entrusted with the task of re-building the justice system, to also give urgent priority to the immediate establishment of an adequate prison infrastructure, and thus also to deploy international prison guards and wardens.²⁸³ This point, is also very important, especially with regard to international human rights standards regarding the treatment of prisoners and concerns with respect to the impartiality.

²⁸¹ International Peace Academy Workshop Report, "Managing Security Challenges in Post-Conflict Peacebuilding", 22-23 June 2001. Taken from <http://www.ipacademy.org/Programs/Programs.htm>

²⁸² UNHCR-OSCE Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering March through August 2001), p. 18. Taken from <http://www.osce.org/kosovo/documents/reports/minorities/>.

²⁸³ Strohmeyer, p. 62, 2001.

6. Recommendations for EU's emerging civilian crisis management

6.1. In general

With regard to the deployment of an EU civilian crisis management operation, we can in accordance with the findings of chapter two, assert that such a deployment should be authorised by the Security Council, or have its legal basis in an international agreement or in an invitation from the concerned government.

The tasks and the responsibilities of UNMIK in Kosovo and UNTAET in East-Timor, which were highlighted in this study do as we have seen coincide to a great extent with the priority or target areas for EU's emerging civilian crisis management capabilities. This is especially true for the second priority area, the strengthening of the rule of law, but also for policing and efforts aiming at strengthening civilian administration. The general lesson that this study has proven is that an international actor or crisis manager engaged in the administration of a post-conflict society, which have undergone a conflict between a minority and a central government, needs to be very sensitive for minority issues. All decisions and measures have an impact on the minority-majority issue, and need therefore to aim at preventing further hostilities, reducing the tensions between the rivalling groups and facilitating reconciliation.

Below, recommendations drawn from the findings of chapters four and five of this study, concerning aspects which should be taken into account when formulating more specific measures within the target areas of EU's civilian crisis management functions, are presented according to the priority areas. These recommendations are here presented in general terms and in a summarising fashion, and should also thus be read in conjunction with the lessons to be learned sections of chapters four and five.

6.2. Policing

The creation of law and order and halting criminal activity, including in particular ethnically motivated crime is a top priority for all missions. Law enforcement cannot however operate in a legal vacuum, but needs a clear set of rules concerning detention/arrest and searches/seizures. In order to be able to deploy a police force, which could fulfil its functions effectively and at the same time ensure a coherent and equal treatment in respect of international human rights standards, an international interim code regulating the core areas of police activity should be adopted in cooperation with the UN and other international organisations involved.

The efforts in the policing section, should also aim at building up or strengthening a local police force, which can take over gradually. In this respect it is also of importance that the deployed police are trained in international human rights law, so that they, for this aim also can train and mentor the local police in democratic policing. In a post-conflict or otherwise divided society, it is of utmost importance that the law enforcement machinery is perceived of as neutral and impartial. Thus, it is important that it draws from all communities of a society. When building up or strengthening a local police force, the international actor involved should therefore ensure that persons from all communities within society are recruited to the local police force, and also see to it that they are trained to act as an institution respecting human rights and the rights of minority communities.

6.3. Strengthening the rule of law

Strengthening the rule of law and restoring and re-building the justice system is one of the most urgent tasks in an international crisis management operation. With regard to strengthening the rule of law we can distinguish between two tasks, namely the performance of the judicial functions in the short term and the re-building of the local judiciary in the long term. As an international administrator or crisis manager is given the mandate to administer the judicial system in a war-torn country, it is likely that the local system that was in place before the conflict has collapsed and that the international actor finds itself in the situation where it has to perform the judicial functions in the short term, in order to combat lawlessness and impunity. The experience from Kosovo shows that the remains of the local system,

including the prosecution, judiciary and the police cannot be expected to restore law and order and to protect vulnerable minority groups from revenge crimes, and to handle war crimes and ethnically motivated crimes cases impartially. Therefore it is recommendable that an international interim “justice package”, which could be lifted in when needed in post-conflict governance or crisis management operations, for performing these functions would be created. Such a “justice package” should include an immediately applicable legal framework, which should consist of procedural rules, basic criminal laws and provisions regarding police activities. It is of utmost importance that such a “justice package” should build on and comply with international human rights standards. Moreover, international judges, prosecutors and defence counsel, which are pre-trained in the legal framework and international human rights standards should also be part of the interim “justice package”, which should serve in the first emergency phase of the operation.

In order to build up such capacities, the EU should within the framework of the civilian crisis management capabilities aim at creating standby networks of judges, prosecutors and defence counsel. Moreover, it is also important to organise a coherent training programme for the judges, prosecutors and defence counsel in the network.

In the long term, international efforts for strengthening the rule of law should aim at re-building an impartial independent local judicial system adhering to the principle of the rule of law, and at gradually transferring responsibility to local authorities. In this respect, attention should be paid at training and mentoring of the local judges and prosecutors in international human rights standards. Furthermore, the training of judicial personnel should also be accompanied with more long-term strategies aiming at strengthening the rule of law and the local institutions.

Moreover, as the international interim legal framework should only be applied until it can be replaced by domestic legislation, the international actor involved should also initiate the local legislation process and ensure that the legislation is compatible with international human rights standards. In this respect it is important that international actor also offers expertise regarding the constitution-building, and the design of the legal order in general. In this respect, constitutional guarantees for minority communities, including guaranteed representation in the future decision-making bodies is important.

One of the biggest problems in Kosovo was that the judiciary tended to treat both defendants and suspects of crimes belonging to minority groups partially, and that crimes against such groups were often left without proper investigation. This is an issue that needs urgent attention in post-conflict societies, so that there would be a deterrent for such crimes, and so that also vulnerable minority groups would gain confidence in the justice system again. Deploying the above-described interim “justice package” could at least alleviate these problems, as it could halt the hostilities and bring those responsible for inter-ethnic violence to justice, and guarantee impartiality and thus reduce the tensions between the rivalling groups.

Another problem that needs attention also in civilian crisis management operations is accountability for war crimes and other atrocities perpetrated during the conflict. Ensuring accountability for those crimes is a necessity for the reconciliation process. Processing of such crimes before ordinary local courts, which are likely not to pass the impartiality test, and which are very vulnerable to intimidations and threats, should be avoided. Therefore, it is recommendable that the EU civilian crisis management capabilities within the framework of strengthening the rule of law would consider the possibilities for contributing to the formation of special courts, similar to the special panels in East-Timor, for trying persons responsible for war crimes and other international crimes in post-conflict settings.

6.4. Strengthening civilian administration

With respect to the tasks within this framework, namely to improve the selection, training and deployment of civil administration experts for duties in the re-establishment of collapsed administrative systems, it is important that this personnel is trained in international human rights law, including also minority issues. It is also important that the international transitional administrator or crisis manager aims at re-building local authorities, which reflect the diversity of the population, and which can gradually take over the responsibility. The training of local civil administration officials in societies in transition, which have undergone a conflict between a central government and a minority group or years of systematic discrimination, should also put special emphasis on human rights and the treatment of persons belonging to minority groups. In such circumstances it is also very important that the

international actor involved ensures that persons belonging to minority groups are recruited to the civil administration, which gradually takes over the responsibility.

7. Concluding remarks

If we turn back to the relationship between respect for human rights and the rights of minorities, the rule of law and peace in society, described in the introduction, we can first of all conclude that this relationship is most relevant also in post-conflict societies.

This study has shown that minority groups are extremely vulnerable in post-conflict societies, especially in societies, such as Kosovo, which have a history of systematic discrimination against one population group, and a conflict between the central government and this group. In these circumstances the population groups perceived of as having sided with the central government responsible for the discrimination and atrocities very easily become scapegoats for these atrocities and are treated accordingly. The conclusion that we can draw from this is that the international community has to focus on the prevention of further violence and hostilities between the rivalling groups, reducing the tensions, reconciliation, and facilitating means for including all groups in future decision-making structures, when intervening and re-building such societies.

The third general conclusion is that restoring and re-building the rule of law is essential for the future of a post-conflict society. The creation of an impartial and functioning judiciary and law enforcement structures, which restore law and order, protect the rights of all population groups, and is able to deal with past atrocities in an objective and thorough manner is a necessity for the future of such a society. Therefore, strategies aiming at strengthening such institutions deserve to be the top-priority of post-conflict governance and crisis management operations.

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