Articles

14. A/54/549, para. 488; ‘Knowing that any other course of action would jeoparize the lives of the troops, we tried to create – or imagine – an environment in which the tenets of peacekeeping – agreement between the parties, deployment by consent, and impartiality – could be upheld’.
15. A/54/549, paras. 490 and 491.
19. Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda of 15 December 1999, III.1.; “UNAMIR, (....), was not planned, dimensioned, deployed or instructed in a way which provided for a proactive and assertive role (....).”
26. Articles 2 of the Charter of the United Nations: The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
....
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
28. On examples from past experience of peace operations and international politics see ibid.
31. Where one party to a peace agreement clearly is violating its terms, continued equal treatment of all parties by the UN can in the best case result in ineffectiveness and in the worst may amount to complicity with evil.; Report of the Panel, Executive Summary, Implications for peacekeeping.
33. Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda of 15 December 1999, III.19.; ‘Whether or not an obligation to protect civilians is explicit in the mandate of a peacekeeping operation, the Rwandan genocide shows that the United Nations must be prepared to respond to the percep- tion and the expectation of protection created by its very presence.’
37. A/54/549.
38. A/50/60, para. 36; para. 35; ‘To blur the dis-tinction between the two can undermine the viability of the peace-keeping operation and endanger its personnel’.
39. A/50/60, para. 35.
41. Report of the Panel, III.E., paras. 56-64.
42. Report of the Panel, III.F., paras. 64.
53. A/54/549, para. 474.
54. A/54/549, para. 486.
60. Report of the Panel, II.D., para. 47(c).
62. A/54/549, para. 474.
63. A/54/549, para. 486.
73. A/55/502, paras. 27-35.
74. A/55/502, paras. 67 and 68.
75. A/55/502, paras. 69-76; 80; 111.
76. A/55/502, paras. 112-118; 131; 154.
77. A/55/502, paras. 7(h).
78. A/55/502, paras. 7(c). 62.

The United Nations in Kosovo and East Timor – Problems of a Trusteeship Administration

1. The Historic Phenomena and an Attempted Definition

In Kosovo and East Timor, the international community used, and considerably developed, an old conflict management technique, a type of foreign presence on the two territories which can be called a "trusteeship administration". This type of administration occurs in a political context where the "old" state, i.e. the state to which the territory has so far belonged, is politically or de facto barred from further exercising its sovereign governmental powers over the territory in question. In this situation, an international organization or a group of states takes over these governmental powers - not as the new sovereign, but provisionally for a certain time with the aim to hand the territory over to the "new" state, which may be the old one or another. The term "trusteeship" is appropriate because this administration takes place in the interest, or on behalf of, another corporate body, the old or new sovereign and/or the population of the territory, which constitute, to take up the technical term, the "cestui que trust", or the "trustor". The question has to be asked (and will be dealt with below) who in each case is the trustor. Are there several trustees? An early example of this technique was the administration of the Saar territory.
by the League of Nations, pursuant to Article 49 of the Versailles Treaty, as a trustee of the German Reich. The UN undertook similar functions in West Irian in 1962/63 to smooth the transfer of this territory from the Netherlands to Indonesia United Nations Temporary Executive Authority – UNTEA).

Certain UN operations in “failed States” sometimes come close to this model, for instance UNTAC in Cambodia. The basic principle of trusteeship administration also appears in other contexts. The construction of a state or states exercising public authority outside their own territory as trustees for another entity also underlies the trusteeship system created by the Charter of the United Nations. The occupation of Germany after World War II can, cum grano salis, be equated to a trusteeship administration, as the Four Allied Powers, by their declaration of 5 June 1945, took over the supreme authority in Germany.

The characteristic criterion of a trusteeship administration, as the term is used in this paper, is the complete take-over of governmental functions by the trustee, i.e. the United Nations. This distinguishes a trusteeship administration from “normal” peacekeeping, where the UN operation does not completely displace the government of the State to which the territory in question belongs. The distinction can be illustrated by comparing the set-up created by the Dayton Agreement with that for Kosovo: in Bosnia-Herzegovina, the Dayton Agreement establishes a foreign military presence and also a civil presence of the UN and the OSCE which have important functions. But these “presences” exercise their functions besides the governmental institutions of the State of Bosnia-Herzegovina, including its political subdivisions. No such governmental authority is exercised by the Federal Republic of Yugoslavia or any other state in relation to Kosovo. Although this is not explicitly stated in the relevant Security Council resolution, which authorizes the Secretary-General to establish a UN “civil presence” in Kosovo, comprehensive legislative and executive powers have indeed been transferred to the United Nations. The text of the resolution puts this in a kind of understatement by enumerating certain functions, of which the most essential ones are:

- Promoting the establishment of self-government
- Performing basic civilian administrative functions
- Economic reconstruction
- Humanitarian relief
- Maintaining civil law and order.

In practical terms, these functions cannot be performed by the United Nations without possessing full governmental powers in the territory. Indeed, on 25 July 1999, the Special Representative of the Secretary-General, Mr. Kouchner, signed a regulation vesting all legislative and executive authority in the territory in UNMIK. The relevant provision reads as follows:

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.

2. The Special Representative of the Secretary-General may appoint any person to perform functions in the civil administration of Kosovo, including the judiciary, or remove such person. Such functions shall be exercised in accordance with the existing laws, as specified in Section 3. and any regulations issued by UNMIK.

It is the Special Representative of the Secretary-General, with or without the agreement of the local political forces which are represented in a Interim Administrative Council (IAC), who adopts the laws which govern the territory, e.g. the election law for the municipal elections or the introduction of the DM as local currency and, last but not least, the territory’s budget.

In the case of East Timor, the formulation of the relevant Security Council resolution is much clearer; it describes the function of the UN operation in unequivocal terms:

“The Security Council

... 1. Decides to establish, in accordance with the report of the Secretary-General, a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including administration of justice.”

This clearly takes up the formulation used in the UNMIK regulation just quoted. The first regulation issued by the Special Representative of the Secretary-General for East Timor practically constitutes a copy of the Kosovo regulation. Thus, the principle of the exercise of the full range of governmental powers by the United Nations is well established.

In both cases, there is a military element which forms an integral part of the arrangement. Its status, however, different in each case.

In respect of the military element of UNTAET, the “military component” forms an integral part of UNTAET. As regards Kosovo, this is not so. The “security presence” unlike the “civil presence”, is not established by the Secretary-General, but Member States are authorized to establish it. Annex 2 to the relevant resolution states that the security presence is to be established "with substantial North Atlantic Treaty Organization participation". The States which use the authorization expressed in Resolution 1244 receive their mandate directly from the Security Council, not through the Secretary-General as part of UNMIK. Thus, it has to be asked whether not only the UN, but also these states or NATO are to be considered as trustees. The essential