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COMMENT

THE SINS OF THE SAVIOR: HOLDING THE UNITED NATIONS ACCOUNTABLE TO INTERNATIONAL HUMAN RIGHTS STANDARDS FOR EXECUTIVE ORDER DETENTIONS IN ITS MISSION IN KOSOVO

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TABLE OF CONTENTS

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Kosovo is like so many post-conflict societies. Having survived a devastating war, the region found itself home to a new cadre of leaders intent on re-establishing order. In the name of peace and security, these new leaders used the state of turmoil of the post-war environment to centralize their powers. In efforts to normalize society, they rounded up those suspected of ethnic hate crimes and placed them in indefinite detention. Despite the expiration of detention orders and judicial condemnations of such devices, detainees languished in prison while those in power continued to proclaim their commitment to human rights standards from the perspective of state immunity. While the scene may be reminiscent of the ascent of warlords and rebel fighters into power, there is one striking difference in Kosovo. These leaders were not warlords or rebel fighters; they were representatives of the United Nations ("U.N."). With no systems in place to check the U.N.'s behavior, the

harbinger of human rights had now become its leading defaulter: immune and unaccountable.

INTRODUCTION

As the example of Kosovo illustrates, questions of U.N. accountability have arisen[1] as the U.N. takes a leading role in response to international crises.[2] Since its inception, the U.N. has engaged in more than fifty peace-keeping operations[3] and thirteen peace-building missions.[4] To permit the U.N. to function quickly and efficiently in politically unstable environments, the Security Council

1. *See* Fredrick Rawski, *To Waive or Not To Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L L. 103, 125 (2002); *see also* Carla Bongiorno, *A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor*, 33 COLUM. HUM. RTS. L. REV. 623, 676-77 (2002); David Marshall & Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 95 (2003); Ralph Wilde, *Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor*, 7 INT'L L. STUDENTS ASS'N J. INT'L & COMP. L. 455, 455 (2001).

2. *See* Laurence I. Rothstein, Note, *Protecting the New World Order: It is Time to Create a United Nations Army*, 14 N.Y.L. SCH. J. INT'L & COMP. L. 107, 112 (1993) (noting the growing need for U.N. peacekeeping intervention). *See generally* David Bills, Note, *International Human Rights and Humanitarian Intervention: The Ramifications of Reform on the United Nations' Security Council*, 31 TEX. INT'L L.J. 107, 108-09 (1996) (arguing that the Security Council's growing interest in addressing human rights abuses has meant increased U.N. involvement in international crises); Rajendra Ramlogan, *Towards a New Vision of World Security: The United Nations Security Council and the Lessons of Somalia*, 16 HOUS. J. INT'L L. 213, 258-59 (1993) (advocating that the U.N. take a preventive approach to pending international crises in order to avoid continued strains on its ability to effectively maintain peace). *See also* Yogesh K. Tyagi, *The Concept of Humanitarian Intervention Revisited*, 16 MICH. J. INT'L L. 883, 898 (1995) (arguing that the U.N. has responded to international humanitarian crises without adequate attention to its capacities as an organization).

3. *See* United Nations Department of Public Information, *United Nations Peacekeeping Operations, Background Note: June 18, 2003*, U.N. Doc. DPI/1634/Rev.29 (2003) (noting that since 1948 the U.N. has been involved in 56 operations, including 14 current operations costing $28.74 billion), *available at* http:/www.un.org/peace/bnote010101.pdf (last visited September 3, 2003) (on file with the American University Law Review).

4. *See* United Nations Department of Public Information, *United Nations Political and Peace-Building Missions, Background Note: June 15, 2003*, U.N. Doc. DPI/2166/Rev.8 (2003) (indicating that nearly 400 international civilian personnel and over 600 local civilian personnel have been involved in the operations), *available at* http:/www.un.org/peace/ppbm.pdf (last visited September 3, 2003) (on file with the American University Law Review); *see also* International Peace Academy, Transitional Administrations, *U.N. State Building Missions Since 1945* [hereinafter IPA, Transitional Administrations Chart] (listing the types of state functions assumed by the U.N. in its missions over the last half century), *at* http://www.ipacademy.org/Programs/Research/ProgReseTransAdmin_Print.htm (last visited July 26, 2003) (on file with the American University Law Review). The chart demonstrates that more recent missions have seen expanded U.N. authority into the executive, legislative and judicial branches. *Id.* In the case of the U.N.'s work in East Timor, the IPA notes that the interim administration even had treaty-making powers. *Id.*

has granted U.N. officials broad authority.[5] In recent missions, regulations authorized legislative, executive and some judicial authority in U.N. actors,[6] allowing these individuals to operate as the new state administrators.[7]

At the same time that the U.N. and its agents have become state actors, they are not bound by the same human rights standards required of States.[8] Although the U.N. has recently acknowledged the relevance of these standards in the administration of a territory,[9]

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5. *See, e.g.*, S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg. at 2-3, U.N. Doc. S/RES/1272 (1999) [hereinafter U.N. Resolution 1272] (authorizing the United Nations Transitional Administration in East Timor ("UNTAET"), the Mission in East Timor, to "take all necessary measures to fulfill its mandate").

6. *See generally* UNMIK Regulation 1999/1, *On the Authority of the Interim Administration in Kosovo*, § 2 (July 25, 1999) [hereinafter UNMIK Regulation 1999/1] (stating "[a]ll 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"), *available at* http://www.unmikonline.org/regulations/1999/reg01-99.htm (on file with the American University Law Review); U.N. Resolution 1272, *supra* note 5, at 2 (establishing UNTAET, "which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice").

7. *See* Bongiorno, *supra* note 1, at 632 (noting that in many situations the U.N. has undertaken partial or total sovereign powers in its missions in regions such as Namibia, Cambodia, Eastern Slavonia, Kosovo and East Timor). *See generally* Sir Robert Jennings, *Sovereignty and International Law*, *in* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 30-31 (Gerard Kreijen ed., 2002) (discussing the void filled by the U.N. in areas that lack governments with centralized power such as Bosnia and Kosovo).

8. *See* Bongiorno, *supra* note 1, at 644-47 (finding that in the past, the U.N. has claimed that it could not be formally bound by international humanitarian law because it could not consent to the conventions). Because it cannot consent, the U.N. required participating States to train the State's incoming U.N. personnel. *Id.* In 1993, the U.N. took over training its forces in humanitarian practices in Rwanda, but did not give a clear definition of what that entailed. *Id.* at 646-47.

9. *See* UNMIK Regulation 1999/1, *supra* note 6, § 2 (providing that, "[i]n 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") (emphasis added); UNMIK Regulation 1999/24, *On the Law Applicable in Kosovo*, § 1.1 (Dec. 12, 1999) [hereinafter UNMIK Regulation 1999/24] (listing the internationally recognized human rights standards to which public officials acting in their official capacities would be beholden), *available at* http://www.unmikonline.org/regulations/1999/reg24-99.htm (on file with the American University Law Review); *see also* UNTAET Regulation 1999/1, *On the Authority of the Transitional Administration in East Timor*, § 2 (Nov. 27, 1999) [hereinafter UNTAET Regulation 1999/1] (providing more guidance than UNMIK Regulation 1999/1 by enumerating the applicable international standards in its resolution), *available at* http://www.un.org/peace/etimor/untaetR/etreg1.htm (on file with the American University Law Review). Section 2 of UNTAET Regulation 1999/1 provides that:

> [i]n exercising their functions, all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards, as reflected, in particular, in:

traditional human rights conventions and treaties, to which States are beholden,[10] are not legally enforceable on international organizations.[11] Furthermore, U.N. regulations grant blanket privileges and immunities to actors within these organizations, making it unclear how, and by whom, international human rights standards will be enforced on U.N. personnel in humanitarian missions.[12]

> 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.
>
> They 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 all other status.

Id.

10. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 301(2) (1987) [hereinafter RESTATEMENT] (explaining that "'party' means a State or international organization that has consented to be bound by the international agreement and for which the agreement is in force"). States are only bound to international standards when they express consent to the convention or treaty. *Id.* However, even without their consent, States may be bound to international standards when these standards have reached the level of *peremptory norms*. *Id.* § 102, cmt. k. Some human rights principles have become universally accepted, such as the prohibition of genocide, war crimes, and aircraft hijackings. *Id.* § 404.

11. *Id.* For the purposes of this Comment, the term "international organizations" will refer to inter-governmental organizations unless otherwise specified.

12. *See* UNMIK Regulation 2000/47, *On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo* (Aug. 18, 2000) [hereinafter UNMIK Regulation 2000/47] (granting U.N. personnel immunity when they are acting within their official capacity), *available at* http://www.unmikonline.org/regulations/2000/reg47-00.htm (on file with the American University Law Review). The Regulation grants broad immunity to members of KFOR and UNMIK that extends even after the expiration of the mission. *Id.* § 5. The Secretary-General, however, may waive immunity in any case, and the regulation does provide some remedies for third party liability. *Id.* §§ 6-7. Third party claims for "property loss or damage and for personal injury, illness or death, arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not arise from 'operative necessity' of either international presence, shall be settled by Claims Commissions established by KFOR and UNMIK . . . ." *Id.* § 7. *Compare id.* §§ 2, 3 (outlining the immunities of KFOR and UNMIK), *with* U.N. Doc. S/RES/1244 (1999) [hereinafter U.N. Resolution 1244], at 11(j) (emphasizing the mission's commitment to human rights) *and* UNTAET Regulation 1999/1, *supra* note 9, § 2 (describing the international standards applicable to interim personnel). It is unclear how the commitment to human rights comports with the grant of privileges and immunities in interim administrations and whether a viable claims commission has been established. *See* OMBUDSPERSON INSTITUTION IN KOSOVO, SECOND ANNUAL REPORT 2001–2002 2 (2002) [hereinafter OMBUDSPERSON ANNUAL REPORT 2002] (reporting a lack of public information regarding UNMIK and KFOR supported claims commissions designed to address human rights violations), *available at*

The United Nations Mission in Kosovo ("UNMIK") exemplifies the problems created when centralizing authority.[13] As a consequence of the lack of adequate institutional checks in international missions,[14] the Special Representative of the Secretary-General ("SRSG") continued to unlawfully detain suspected criminals.[15] UNMIK justified the use of this practice[16] despite condemnation from human rights groups and the Kosovo judiciary.[17] Beyond inequitable results

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http://www.ombudspersonkosovo.org/doc/spec%20reps/Final%202%20Annual%20Report%202002%2010-07-2%20English.doc (on file with the American University Law Review).

13. *See, e.g.*, Organization for Security and Co-operation in Europe, Mission in Kosovo, Department of Human Rights and Rule of Law, *Report 2-The Development of the Kosovo Judicial System: June 10–Dec. 15, 1999* (Dec. 17, 1999) [hereinafter OSCE, LSMR 2] (recognizing that defendants in pre-trial custody waited for up to six months for judicial proceedings because of serious problems in the administration of, and the resources available to, the Kosovo judiciary), *available at* http://www.osce.org/kosovo/documents/reports/justice/report2.htm (on file with the American University Law Review).

14. *See* OMBUDSPERSON INSTITUTION IN KOSOVO, SPECIAL REPORT NO. 3, THE CONFORMITY OF DEPRIVATIONS OF LIBERTY UNDER 'EXECUTIVE ORDERS' WITH RECOGNISED INTERNATIONAL STANDARDS 8 (2001) [hereinafter OMBUDSPERSON, SPECIAL REPORT NO. 3] (recommending the creation of judicial panels composed, at least in part, of international judges who could review the SRSG's conformity to human rights standards), *available at* http://www.ombudspersonkosovo.org/doc/spec%20reps/pdf/sr3.pdf (on file with the American University Law Review); *see also* Joel C. Beauvais, Note, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT'L L. & POL. 1101, 1107-08 (2001) (identifying tensions within the directives of the U.N. mandate for East Timor since the U.N. has a dual role of building institutional capacity while administering the region as a governorship). One task emphasizes distribution of responsibility while the other emphasizes centralization of authority. *Id.*

15. *See generally* OMBUDSPERSON, SPECIAL REPORT NO. 3, *supra* note 14, at 5 (reviewing the SRSG's violation of international guidelines for detention); Press Release, Amnesty International, Federal Republic of Yugoslavia (Kosovo), Amnesty International Calls for an End to Executive Orders of Detention (Aug. 3, 2001) [hereinafter Amnesty, Executive Orders] (condemning SRSG Hans Haekkerup for violation of the rights of detainees under Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, or "ECHR"), *available at* http://web.amnesty.org/library/Index/ENGEUR700172001?open&of=ENG-2EU (on file with the American University Law Review). The press release specifically stated that the executive orders violated the detainees' rights because detainees were not notified about the reason for their arrest, did not have a chance to seek judicial review, could not challenge the legality of the action, and were not afforded a means to obtain compensation for unlawful detention. *Id.*

16. *See UNMIK Refutes Allegations of Judicial Bias and Lack of Strategy*, UNMIK NEWS (Division of Public Information, UNMIK Pristina), June 25, 2001 [hereinafter UNMIK, *Judicial Bias*] (justifying U.N. use of measures such as executive detention because of the state of emergency recognized in Kosovo), *at* http://www.unmikonline.org/pub/news/nl98.html (on file with the American University Law Review).

17. *See* Press Release, Amnesty International, Amnesty International Protests the Unlawful Detention of Afrim Zeqiri (Feb. 21, 2001) [hereinafter Amnesty, Afrim Zeqiri] (criticizing the SRSG's detention of a Kosovar Albanian after Executive Orders had expired), *at* http://www.amnesty.org (on file with the American University Law Review); HUMAN RIGHTS WATCH, WORLD REPORT 2002: EUROPE AND CENTRAL ASIA OVERVIEW (2002) (charging U.N. administrators with deviating from

for individuals, brazen executive revocation of institutional checks undermines the legitimacy of the U.N.'s work[18] and erodes local incentive to comply with international human rights standards.[19] For this and many other reasons,[20] international organizations that assume responsibilities of States in tumultuous times should adopt and enforce international standards that are typically required of States.[21]

This Comment will examine existing practices of, and problems with, international organizations taking on state functions. It concludes that when the U.N. undertakes peace-keeping operations that include state functions, it should abide by the corresponding international human rights standards and institute measures for effective enforcement. This Comment evaluates this problem through the example of the UNMIK SRSG's use of Executive Orders for prolonged detention of suspected criminals. To provide historical perspective, Part I will examine the role of the U.N. in interim administrations and the lack of applicable standards. Part II

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international human rights standards and due process in the name of security), *available at* http://www.hrw.org/wr2k2/europe.html (on file with the American University Law Review).

18. *See generally* Annemarie Devereux, Conference Paper Abstract, *Searching for Clarity: A Case-Study of UNTAET's Application of International Human Rights Norms* (advocating that U.N. missions adopt human rights reporting requirements and measures that ensure accountability in order to thwart threats to the U.N.'s commitment to human rights), *at* http://www.nottingham.ac.uk/law/hrlc/PCconfabstracts/Devereux.doc (last visited July 8, 2003) (on file with the American University Law Review).

19. *See* Wilde, *supra* note 1, at 459-60 (describing the antagonism cultivated against the interim administration when international actors conduct their duties arbitrarily and are not held accountable); *see also* UNHCR/OSCE, *Update on the Situation of Ethnic Minorities in Kosovo, Report 5, Feb.–May 2000*, at 20 (May 31, 2000) (noting that the U.N. has an opportunity to be a model of human rights in its administration of Kosovo), *at* http://www.osce.org/kosovo/documents/reports/minorities/minrep05eng.pdf (on file with the American University Law Review).

20. *See* Simon Chesterman, *The United Nations as Government: Accountability Mechanisms for Territories Under U.N. Administration* (outlining three reasons for institutional checks on United Nations missions: (1) to prevent the use of power in a dictatorial or fascist manner—or fascist governance; (2) to prevent the use of power in contradiction to human rights norms—or bad governance; and (3) to prevent the use of power in violation of the ideals which one would like to see such power used in the future administration of the region by local actors—or "do-as-I-say-not-as-I-do governance"), *at* http://www.ipacademy.org/PDF_Reports/ un_as_govt_for_web.pdf (last visited July 26, 2003) (on file with the American University Law Review). These reasons will not be addressed in this Comment.

21. *See generally* Theodor Meron, *Towards a Humanitarian Declaration on Internal Strife*, 78 AM. J. INT'L L. 859 (1984) (endorsing the application of humanitarian law to the internal conflict of States); John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, 12 EUR. J. INT'L L. 469, 475-78 (2001) (noting that KFOR as a whole may be held to international human rights standards because its members are bound by the human rights obligations of their respective home States).

will discuss U.N. accountability. This part first explains the rise of privileges and immunities and the response to abuses of these powers. It then examines the legal basis for the expansion of U.N. functions and argues that because of this expansion, human rights law should apply to the U.N. Part III traces the U.N.'s instrumental role in the development of human rights standards, particularly those relating to detentions, and discusses the absence of any binding effect of these documents on the U.N. This part also provides arguments for the legal basis for applying human rights instruments. Part IV will explore the administration of UNMIK as a case study on the abuse of human rights through centralized authority. This part will also examine the methods the U.N. has employed to correct these abuses. Part V will discuss recommendations on how to incorporate checks on the administration of human rights standards in U.N. missions. Finally, Part VI will discuss the implications of applying human rights law to the U.N.

I. THE HISTORY OF U.N. AND INTERNATIONAL ORGANIZATION INVOLVEMENT IN INTERIM ADMINISTRATIONS

A. The History of U.N. and International Organization Administration

For more than a century, international organizations have been involved in interim territorial administrations[22] without clear guidance on what international human rights standards they undertake when conducting affairs of States.[23] The U.N.'s predecessor, the League of Nations, engaged in many forms of territorial administration.[24] The League of Nations exercised governmental function in the Free City of Danzig[25] and limited

22. *See* Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583, 583 (2001) (recounting that the U.N. and its predecessor, the League of Nations, have been involved in the administration of refugee camps, the operation of relief assistance programs and the conduct of government).

23. *See supra* note 8 and accompanying text. For activities prior to the creation of the International Bill of Human Rights, states followed international human rights standards that were a result of custom. Bongiorno, *supra* note 1, at 638.

24. *See* Wilde, *supra* note 22, at 583; *see also* M.S. RAJAN, THE EXPANDING JURISDICTION OF THE UNITED NATIONS 35-36 (1982) (reviewing questions of jurisdiction and sovereignty raised in the involvement of the U.N. and the League of Nations in the administration of non-self governing territories). *See generally* R.C. Longworth, *End of Sovereignty: Nations' Internal Affairs Now the World's Business*, CHI. TRIB., Sept. 19, 1993, at 1C (arguing that the U.N. has an *inherent* capacity to administer territories) (emphasis added).

25. *See* Wilde, *supra* note 22, at 586 (noting this administration continued from 1920-1939).

governmental functions in the German Saar Basin,[26] the Columbian town and district of Leticia[27] and in Lithuania.[28] Following World War II, Member States[29] also authorized the U.N. to use administrative powers over the Free Territory of Trieste, though the U.N. never actually assumed this role.[30]

In the creation of the U.N., the drafters explicitly authorized the U.N.'s involvement in trusteeships,[31] which began the Organization's nearly fifty-year involvement in the administration of former colonies.[32] Following its experience with trusteeships, the U.N. received authorization from the Security Council to begin a series of territorial administrations during the Cold War era.[33] The U.N. administered Irian Jaya, or western Guinea, during the transition from Dutch to Indonesian control of the region.[34] The U.N. also helped administer the Congo from 1960-1964.[35] Although authorized to administer South West Africa, or Namibia, it did not because of South African protest.[36]

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26. *Id.* (noting League of Nations administration of the Saar between 1920 and 1935).

27. *Id.* (noting League of Nations administration of Leticia from 1933-1934).

28. *Id.* (noting that the League of Nations appointed the president of the Upper Silesia Mixed Commission in 1922 and the chair of the Memel Harbor Board in Lithuania in 1924).

29. As used in this Comment, "Member States" refers to the Member States of the U.N. A complete list of U.N. Member States is posted on the U.N. home page at http://www.un.org/Overview/unmember.html.

30. Wilde, *supra* note 22, at 586 (discussing the 1947 U.N. authorization to exercise governmental powers in Trieste).

31. U.N. CHARTER ch. XII; *see* Michael J. Matheson, *United Nations Governance of Post-Conflict Societies*, 95 AM. J. INT'L L. 76, 76 (2001). Based on the authority of Article 77 of the U.N. Charter, the League of Nations trusteeship passed to the U.N. *Id.*

32. *See* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1129 (Bruno Simma ed., 2002) (noting that the U.N. terminated its last trusteeship in 1994 but decided to suspend the Trusteeship Council activities rather than dissolve the institution); *see also infra* notes 33-36 and accompanying text (describing ways in which the U.N. has been involved in territorial administration and trusteeships).

33. *See generally* RAJAN, *supra* note 24, at 201 (crediting the expansion of the U.N.'s jurisdiction also to the call from peoples of Africa, Asia and Latin America for "international accountability for the welfare of colonial peoples").

34. *See* Agreement Concerning West New Guinea (West Irian), Aug. 15, 1962, Indon.-Neth., 437 U.N.T.S. 274 (establishing the administration of West New Guinea); *see also* Matheson, *supra* note 31, at 77 (noting that Indonesia and the Netherlands made an agreement in which they delegated to the U.N. interim control over western Guinea for a seven-month period during 1962-1963).

35. *See* Wilde, *supra* note 22, at 586; *see also* RAJAN, *supra* note 24, at 159 (outlining the framework of an agreement between the Congo and the U.N. for the maintenance of peace and security in the region).

36. *See* G.A. Res. 2248, U.N. GAOR, 5th Spec. Sess., Supp. No. 1, at 1, U.N. Doc. A/6657 (1967); *see also* Wilde, *supra* note 22, at 586; Matheson, *supra* note 31, at 77 (noting that the U.N. had even set up a Council for Namibia to carry out the functions of governance). *But see* IPA, Transitional Administrations Chart, *supra* note 4 (listing a U.N. state-building mission in Namibia from 1989-1990 that worked primarily on elections).

After the Cold War, international organizations, predominately the U.N., engaged in a second series of territorial administrations[37] in response to regional conflicts.[38] In 1991, the Security Council authorized the U.N. to administer Western Sahara[39] and Cambodia[40] in an effort to promote regional stability.[41] With the rise of the conflict in the Balkans in the 1990s, the European Union became involved in the administration of Mostar[42] while the U.N. administered Bosnia and Herzegovina.[43] At the conclusion of the Bosnian war with the Dayton process,[44] the U.N. led the administration of Slavonia, Baranja and Western Sirmium, or Eastern Slavonia, all of which are located in Croatia.[45]

The most recent U.N. missions have raised questions of what obligations the U.N. assumes in the administration of territories.[46] Following the North Atlantic Treaty Organization ("NATO")

37. *See* Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L. J. 301, 303-04 (1995) (arguing that the U.N.'s recent efforts at humanitarian intervention is the modern incarnation of the trusteeship). *See generally* Thomas M. Franck, *United Nations Based Prospects for a New Global Order*, 22 N.Y.U. J. INT'L L. & POL. 601 (1990) (discussing the role of the U.N. after the Cold War).

38. *See* Edward C. Luck, *Book Review*, 94 AM. J. INT'L L. 603, 603 (2000).

39. *See* Wilde, *supra* note 22, at 586 (acknowledging the U.N. has not yet assumed its administrative role in Western Sahara). *See generally* Yahia H. Zoubir, *The Western Sahara Conflict: A Case Study in Failure of Pre-negotiation and Prolongation of Conflict*, 26 CAL. W. INT'L L.J. 173, 212-13 (1996) (describing the conflict in Western Sahara and U.N. involvement in peace negotiations).

40. *See* Carol Umhoefer, *United Nations Towards a U.N.-Sponsored Cambodian Solution*, 32 HARV. INT'L L.J. 275, 277 (1991) (noting increased U.N. involvement in Cambodia after peace negotiations failed).

41. *See* Wilde, *supra* note 22, at 586.

42. *See* Eur. Comm'n Bulletin of the Eur. Union, *Memorandum of Understanding on the European Union Administration of Mostar* (June 10, 1994) (acknowledging that the E.U. would administer Mostar, not the U.N.), *available at* http://law.gonzaga.edu/library/ceedocs/bosnia/mostar94.htm (on file with the American University Law Review); Eur. Comm'n Bulletin of the Eur. Union, *Former Yugoslavia* (Feb. 14, 1996) (pledging the European Unions' commitment to the Memorandum of Understanding ("MOU") on its Administration of Mostar), *available at* http://europa.eu.int/abc/doc/off/bull/en/9601/p104008.htm (on file with the American University Law Review).

43. *See* S.C. Res. 1035, SCOR 50th Sess., 3613 mtg. S/RES/1035 (1995) (establishing U.N. administration of Bosnia and Herzegovina); *see also* S.C. Res. 1088, SCOR 51st Sess., 3723 mtg. S/RES/1088 (1996) (extending the mandate for U.N. administration of Bosnia and Herzegovina). The mission terminated on Dec. 31, 2002. For more information on the U.N. mission in Bosnia, visit the home page of the United Nations Mission in Bosnia and Herzegovina ("UNMIBH"), at http://www.unmibh.org/index.asp.

44. *See generally* SUMANTRA BOSE, BOSNIA AFTER DAYTON: NATIONALIST PARTITION AND INTERNATIONAL INTERVENTION 1-4 (2002) (criticizing the Dayton Peace Agreement that ended the Bosnian war and effectively divided the region into three states).

45. *See* Wilde, *supra* note 22, at 586 (noting U.N. administration from 1996-98).

46. *See supra* note 1 and accompanying text (describing issues of U.N. accountability in interim administrations thus far raised in legal scholarship).

bombing of the disintegrating former Yugoslavia,[47] the U.N. began administering Kosovo.[48] Three months later, the U.N. also assumed the administration of East Timor under a similarly worded Security Council mandate.[49] These recent missions were unique in that they included substantial civil administration, including the administration of justice and the rule of law, a role the U.N. undertook for the first time in such a holistic form.[50] Until these later missions, detention issues had not arisen as a matter of human rights law for the U.N.[51] Thus, while the present review of international organization involvement in territorial administration is by no means exhaustive, it highlights the breadth of U.N. and international organization involvement in territorial administration. Although the U.N. has increasingly expanded its administrative powers in territorial administrations to include more than just executive authority,[52] there has been little or no discussion of detentions until recent missions.[53]

47. *See* U.N. Resolution 1244, *supra* note 12 (authorizing the interim administration in Kosovo).

48. *See* TIM JUDAH, KOSOVO: WAR AND REVENGE (2000). Following Slobodan Milosevic's unwillingness to negotiate an agreement to curb the violations of human rights and the failure of Rambouillet talks, the United States led a campaign to end Serb aggression. *Id.* at 197-226. The events concluded with the passage of Security Council Resolution 1244, authorizing the U.N. administration of Kosovo. *Id.* at 297.

49. *See* U.N. Resolution 1272, *supra* note 5 (authorizing the administration of East Timor).

50. *See* REFORMING THE UNITED NATIONS: THE QUIET REVOLUTION 866 (Joachim Muller ed., 2001) (noting that UNMIK was the first mission where the U.N. assumed almost complete administrative responsibilities of a state ranging from establishing customs to collecting garbage). The author notes that prior to UNMIK and UNTAET, the U.N. had only engaged in "elements of civil administration." *Id.* at 866. *See* IPA, Transitional Administrations Chart, *supra* note 4 (cataloguing the types of powers the U.N. assumed in its state-building missions).

51. *See* Bulletin on the Observance by United Nations Forces of International Humanitarian Law, U.N. Doc. ST/SGB/1999/13, § 1.1 (1999), *reprinted in* 38 I.L.M. 1656, 1658 (1999) [hereinafter Bulletin] (outlining provisions for the treatment of civilians, combatants, and detainees in accordance with the Third Geneva Convention of 1949). The Bulletin notes that provisions regarding U.N. observation of humanitarian law are applicable in situations of *armed conflict* or when peace-keepers engage in use of force as self defense. *But see* Peter Finn, *U.S. Troops Seize 6 Terror Suspects Freed by Bosnia*, WASH. POST, Jan. 18, 2002, at A16 (noting that issues of unlawful detention also arose in the context of international peace-keepers' defiance of orders from a Bosnian court to release six individuals, five of whom had naturalized Bosnian citizenship). U.S. officials arrested the men after the Bosnian government released them. *Id.* They were eventually transferred to detention facilities in Guantanamo Bay, Cuba. *Id.*

52. IPA, Transitional Administrations Chart, *supra* note 4.

53. *See* Bulletin, *supra* note 51, § 1.1 (outlining provisions for the treatment of detainees).

B. The Lack of Norms for Laws Applicable in Administration

Although the U.N.'s role in territorial administration has been extensive, the legal standard it should observe in these situations is not as clear.[54] The purposes listed in the U.N. Charter serve as an overarching standard[55] but are only principles without binding authority.[56] Since the U.N. typically intervenes in situations of gross violations of human rights, it often uses exigency as justification for deviation from human rights norms.[57] As a result, the nature of the intervention usurps discussion on the standards by which the U.N. should abide.[58] U.N. derogation from human rights is viewed as subsidiary to the atrocities committed by the existing government,[59] and media attention reinforces such a notion.[60] Additionally, as "interim" signifies, the U.N. considers its presence temporary, so it places emphasis on intervention rather than accountability.[61] In the rare instances where there are discussions of accountability, they are framed in terms of protecting international personnel.[62]

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54. *See* Devereux, *supra* note 18 (urging the U.N. to establish human rights monitoring and reporting systems and to increase its accountability in the field compatible with its privileges and immunities).

55. *See infra* notes 143-51 and accompanying text (describing the purposes of the U.N.).

56. *See* N.D. WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS 225 (1996) (noting that the language in the Preamble and Article 1(3) of the U.N. Charter merely promotes "increased respect" for human rights). *But see* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 8 I.L.M. 679, 691-92 (entered into force Jan. 8, 1980) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

57. *See, e.g.*, UNMIK, *Judicial Bias*, *supra* note 16 (justifying the U.N.'s use of executive orders based on the continued state of emergency in Kosovo).

58. *See id.* (responding to accusations of violations of international human rights standards by stating that "Kosovo still ranks as an internationally-recognized emergency," even though the mission at this point had been existent for nearly two years). The article further noted that "international human rights standards accept the need for special measures that, in the wider interests of security, and under prescribed legal conditions, allow authorities to respond to the finding of intelligence that are not able to be presented to the court system." *Id. See generally* KELLY-KATE S. PEASE, INTERNATIONAL ORGANIZATIONS: PERSPECTIVES ON GOVERNANCE IN THE TWENTY-FIRST CENTURY 212-16 (2d ed. 2000) (equating humanitarian intervention with a form of "dictatorial interference" with the affairs of a sovereign State).

59. *See, e.g.*, OSCE, KOSOVO/KOSOVA: AS SEEN, AS TOLD (1999) (reviewing the OSCE-Kosovo Verification Mission's documentation of human rights abuses committed by the Serb regime in the year prior to NATO Bombing).

60. *See, e.g.*, Guy Dinmore, *Atrocity Probes Begin as Serbs Pull Out*, CHI. TRIB., Oct. 1, 1998, at N8 (focusing on Western diplomats plans to examine accusations of Serbian atrocities against ethnic Albanians and possible atrocities committed by ethnic Albanians).

61. *See* Wilde, *supra* note 1, at 458.

62. *See, e.g.*, Walter Gary Sharp, Sr., *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93, 96 (1996) (discussing protection of military

Recent missions have been more conscious of human rights standards.[63] In an address at Harvard, Secretary-General Kofi Annan acknowledged his commitment to promoting human rights in U.N. work.[64] These values have translated into the language of Security Council resolutions.[65] For example, the authorization for UNMIK includes broad statements of protecting and promoting human rights.[66] The authorization of the United Nations Transitional Administration in East Timor ("UNTAET") was more specific with a list of enumerated human rights standards by which U.N. personnel were bound.[67] Despite the broad pledges to observe human rights, the specific method to implement these guidelines remains unclear,[68] particularly when coupled with the use of centralized power in administering these territories and the grant of blanket immunities to U.N. personnel. Thus, the lack of guidelines, in addition to the lingering tolerance for U.N. derogation from human rights and interim mindset, makes it difficult to curb improper U.N. policies, particularly in areas like unlawful detentions.[69]

II. OBLIGATIONS FOLLOWING FUNCTIONS: HOLDING THE U.N. ACCOUNTABLE TO INTERNATIONAL STANDARDS THAT ARE REQUIRED OF STATES

Despite the lack of clarity surrounding human rights implementation, the goal of achieving U.N. accountability remains unchanged and can be justified in several ways. Member States have recognized that the U.N. has the capacities of a State, including that

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personnel serving the international community); *see infra* Part II.A (discussing reactions to abuses of privileges and immunities).

63. *See* U.N. Resolution 1272, *supra* note 5 (including a list of human rights conventions that the mission planned to observe).

64. Kofi A. Annan, *Strengthening United Nations Action in the Field of Human Rights: Prospects and Priorities*, 10 HARV. HUM. RTS. J. 1, 6 (1997) (committing the U.N. to respecting human rights law as it is intimately related to long-lasting peace and sustainable development).

65. *See* U.N. Resolution 1244, *supra* note 12 (including in the responsibilities of the international civilian presence "protecting and promoting human rights"); *see also* U.N. Resolution 1272, *supra* note 5 (listing the human rights conventions applicable to the mission).

66. U.N. Resolution 1244, *supra* note 12, at 11(j). *But see supra* note 9 (noting UNMIK's adoption of international human rights standards through regulation 1999/24, rather than Security Council resolution).

67. *See* UNTAET Regulation 1999/1, *supra* note 9.

68. Annan, *supra* note 64, at 6 (acknowledging that "[h]uman rights considerations need to be integrated fully in all our approaches and activities, and in all our policy-making and programs, both at Headquarters and in the field," but not clarifying how such goals should be achieved).

69. *See* Bongiorno, *supra* note 1, at 677 (arguing that the lack of articulated standards of human rights creates a gap in accountability).

of privileges and immunities and the ability to claim reparations for its agents.[70] While the U.N.'s functions have expanded, the U.N. has not undertaken the reciprocal obligations that would be required of a State.[71] This section reviews the grant of privileges and immunities to the U.N. and the ability of the U.N. to claim reparations, concluding that the U.N.'s obligations should parallel the rights afforded to it.[72]

A. Privileges Afforded to International Organizations: The Privilege of Immunities

The U.N.'s exercise of privileges and immunities without comparable obligations demonstrates the inequity of applying standards based on status, rather than function.[73] Although the U.N. is not beholden to the same human rights standards as States,[74] it enjoys many of the benefits given to States,[75] such as privileges and immunities.[76] Recently, some non-governmental organizations have taken steps to curtail the application of privileges and immunities by applying humanitarian law to peace-keeping troops so that functions and obligations may more equally match.[77] Still, it remains unclear how the competing obligations of privileges and immunities and humanitarian law operate together.[78] While the application of

70. *See infra* Part II.A-B (discussing privileges and immunities and the international legal personality of international organizations).

71. *See* FINN SEYERSTED, UNITED NATIONS FORCES: IN THE LAW OF PEACE AND WAR 392 (1966) (describing the U.N.'s limited adoption of the humanitarian law obligations that would be required of States); *see also infra* note 94 and accompanying text.

72. *See infra* Part II.B (describing the rights the U.N. as an international organization has acquired in conducting its functions).

73. *See* Rawski, *supra* note 1, at 125 (arguing that the recognition of immunities in U.N. interim administrations at times may contradict the mission's commitment to human rights standards).

74. *See supra* note 8 (noting that the U.N. has not consented to humanitarian law or human rights law).

75. *See Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 179 (April 11) [hereinafter *Reparation Case*]. As a part of its recognition of personality, the I.C.J. noted that the U.N. has been able to conclude treaties, to make claims on behalf of its agents, and to engage in activities for the fulfillment of its purposes. *Id.*

76. *See* Convention on the Privileges and Immunities of the United Nations, art. 3, sec. 9, Feb. 13, 1946, § 2, 21 U.S.T. 1418, 1422, 1 U.N.T.S. 15, 20 [hereinafter Convention on Privileges and Immunities] (recognizing that official U.N. communications are of equivalent status as those of state diplomatic missions and are therefore afforded equally favorable treatment); U.N. CHARTER art. 105(1) (requiring Member States to recognize U.N. privileges and immunities). *But see* RESTATEMENT, *supra* note 10, § 223, cmt. b (stating that international organizations "do not generally enjoy diplomatic immunity.").

77. *See generally* SEYERSTED, *supra* note 71 (describing early attempts by the International Red Cross to persuade the U.N. to observe international humanitarian standards under the Geneva Conventions).

78. *See* OSCE, Mission in Kosovo, Department of Human Rights and Rule of Law,

humanitarian law to peace-keeping troops is an important first step, the U.N. has not made similar international human rights standards applicable to its non-military personnel.[79] The presence of these privileges without reciprocal obligations again underlines the inequity of the U.N.'s privileged status.[80]

Member States have acknowledged that privileges and immunities should be granted to international organizations because the drafters of the U.N. Charter endowed the U.N. with such an authorization.[81] In Article 105, the U.N. Charter recognizes that the Organization "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes."[82] Such privileges are commonly formalized through additional agreements.[83] With its Member States, the U.N. formalized these guidelines in the Convention on the Privileges and Immunities of the United Nations.[84] Among other privileges, the treaty gave U.N. officials immunity from legal process and exemption from tax and duty charges.[85] In present-day missions, the U.N. often concludes agreements with States to provide similar forms of privileges and immunities particular to the situation.[86]

After reports of abuses, the U.N. moved to curb privileges and immunities afforded to peace-keeping troops through the adaptation of humanitarian law to its peace-keeping operations.[87] Questions of

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Review of the Criminal Justice System: February 2000–July 2000, 1, 16-17 [hereinafter OSCE, LSMR 1] (observing that the Ombudsperson may provide guidance on the compatibility of international law with domestic laws in Kosovo, but it is unclear whether this guidance will be treated as binding on the Kosovo courts), *available at* http://www.osce.org/kosovo/documents/reports/justice/ criminal_justice.pdf (last visited July 8, 2003) (on file with the American University Law Review).

79. *See supra* note 8 (noting that the U.N. has not formally consented to the application of human rights or humanitarian law standards to its operations).

80. *See* Rawski, *supra* note 1, and accompanying text.

81. U.N. CHARTER art. 105(1).

82. *Id.*

83. RESTATEMENT, *supra* note 10, § 467, cmt. f (citing the Headquarters agreement and the International Organizations Immunities Act as supplementary sources of privileges and immunities for the U.N.).

84. Convention on Privileges and Immunities, *supra* note 76, at pmbl.; *see* United Nations Treaty Collection, Multilateral Treaties Deposited with the United Nations Secretary-General (listing 146 countries as parties to the Convention, which was first adopted in 1946 and entered into force at the end of that year), *available at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty1.asp (last visited July 8, 2003) (on file with the American University Law Review).

85. Convention on Privileges and Immunities, *supra* note 76, at sec. 18.

86. *See generally* Convention on Privileges and Immunities, *supra* note 76 (stipulating that Member States afford certain privileges and immunities to the U.N.). *But see, e.g.*, UNMIK Regulation 2000/47, *supra* note 12 (declaring unilaterally that the UNMIK and KFOR will be afforded privileges and immunities without the consent of the host state, the Federal Republic of Yugoslavia).

87. *See* Daphna Shraga, *U.N. Peacekeeping Operations: Applicability of International*

the abuse of privileges and immunities arose in the 1990s when the post-Cold War climate created regional power struggles that ultimately demanded international military intervention.[88] After reports of U.N. peace-keeping troops committing abuses in Rwanda,[89] Mozambique,[90] and Somalia,[91] the U.N. was forced to look at the mechanisms to hold international peace-keepers accountable.[92] The International Committee for the Red Cross ("ICRC") led the way with a meeting to discuss U.N. accountability.[93] The conference attendants helped draft a report that formed the foundation of the Secretary-General's Bulletin on the Observation by United Nations Forces of International Humanitarian Law ("Bulletin").[94] The document enumerated the specific provisions of international

Humanitarian Law and Responsibility for Operations-Related Damage, 94 AM. J. INT'L L. 406, 407-09 (2000) (observing the changing role of peace-keeping operations and the need for legally binding standards of accountability to match these developments); *see also* Bulletin, *supra* note 51 (enumerating the fundamental principles and rules of international humanitarian law applicable to United Nations forces).

88. *See generally* Kelly Childers, Note, *United Nations Peacekeeping Forces in the Balkan Wars and the Changing Role of Peacekeeping Forces in the Post-Cold War World*, 8 TEMP. INT'L & COMP. L.J. 117 (1994) (crediting the end of the Cold War to the increase in the number of complex peacekeeping missions deployed under the auspices of the U.N.).

89. *See* Jennifer Gould, *Peacekeeping Atrocities: U.N. Soldiers Accused of Torture, Murder, Sexual Exploitation of Children*, VILLAGE VOICE, June 24, 1997, 1997 WL 11416180 (reporting that "[i]n Rwanda, in addition to 'mismanaging' $26 million, U.N. peacekeepers were accused of smuggling, sexual exploitation of women and children and criminal abuse of diplomatic immunity").

90. *See id.* (reporting that U.N. troops in Mozambique were accused of sexually exploiting women and children).

91. *See id.* (noting that two Belgian soldiers were to stand trial for "roasting" a Somali child on an open fire during a U.N. peace-keeping mission in 1993). Another Belgian soldier will face prosecution "for forcing a Somali child to drink salt water, vomit, and worms." *Id.*; *see* Raf Casert, *U.N. Peacekeepers Accused of Atrocities During Somalia Mission*, LAS VEGAS REV.-J., June 24, 1997, 1997 WL 4547124 (noting that Italian peacekeepers allegedly raped Somali women and that "Canadian peacekeepers beat a Somali teenager to death and shot other civilians unprovoked"); *see also Peacekeepers' Atrocities in Somalia Stir Outrage*, SEATTLE POST-INTELLIGENCER, June 24, 1997, at A2, 1997 WL 3199705 (stating that the U.N. Secretary-General expressed outraged at the atrocities of U.N. peace-keeping troops from Canada, Italy and Belgium). *See generally* Rawski, *supra* note 1, at n.6 (summarizing instances where the U.N. should be held accountable in its field work).

92. *See* Shraga, *supra* note 87, at 406 (exploring the development of the guidelines for applying international humanitarian law to U.N. peace-keeping operations).

93. *Id.* at 407. *See generally* SEYERSTED, *supra* note 71 (describing early attempts by the International Committee for the Red Cross to persuade the U.N. to observe international humanitarian standards under the Geneva Conventions). While the U.N. assured the ICRC that its forces would comply with the spirit of the agreements, the U.N. did not make further arrangements to be bound by these conventions. *Id.* The U.N. argued that, though it was not a signatory, Member States were parties and could determine how to apply the laws to their contingents. *Id.* at 393.

94. Bulletin, *supra* note 51, at art. 6.1-6.3.

humanitarian law that the U.N. would respect, including prohibition of certain forms of combat and weapons,[95] prohibition of certain orders,[96] proper treatment of civilians and persons,[97] and protection of the wounded, the sick, and medical and relief personnel.[98] The agreement also included specific provisions on the treatment of detained persons, specifying how the U.N. should treat prisoners of war and detailing, among other things, that prisoners of war should receive sanitary housing, food and medical attention and remain free from torture.[99] While extensive, these agreements do not include complete observation of human rights standards[100] and are limited to the peace-keeping personnel engaged in armed conflict.[101]

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95. *Id.*
96. *Id.* art. 6.5.
97. *Id.* art. 7.
98. *Id.* art. 9.
99. *Id.* art. 8. The Bulletin provides that:

> The United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention. Without prejudice to their legal status, they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them mutatis mutandis. In particular:
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> (a) Their capture and detention shall be notified without delay to the party on which they depend and to the Central Tracing Agency of the International Committee of the Red Cross (ICRC), in particular in order to inform their families;
>
> (b) They shall be held in secure and safe premises which provide all possible safeguards of hygiene and health, and shall not be detained in areas exposed to the dangers of the combat zone;
>
> (c) They shall be entitled to receive food and clothing, hygiene and medical attention;
>
> (d) They shall under no circumstances be subjected to any form of torture or ill-treatment;
>
> (e) Women whose liberty has been restricted shall be held in quarters separate from men's quarters, and shall be under the immediate supervision of women;
>
> (f) In cases where children who have not attained the age of sixteen years take a direct part in hostilities and are arrested, detained or interned by the United Nations force, they shall continue to benefit from special protection. In particular, they shall be held in quarters separate from the quarters of adults, except when accommodated with their families;
>
> (g) ICRC's right to visit prisoners and detained persons shall be respected and guaranteed.

Id.

100. *See* BLACK'S LAW DICTIONARY 745 (7th ed. 1999) (defining humanitarian law as including the "law dealing with such matters as the use of weapons and other means of warfare, the treatment of war victims by the enemy, and generally the direct impact of war on human life and liberty"). It also defines human rights law as "the freedoms, immunities and benefits that, according to modern values (especially at the international level), all human beings should be able to claim as a matter of right in the society in which they live." *Id.* Since U.N. interim administrations are typically post-conflict, humanitarian law is not applicable in a U.N. civil society development mission such as UNMIK or UNTAET. It is unclear whether human rights law is

The application of codified and customary international humanitarian law to peace-keeping troops has raised questions of enforcement and competing obligations under privileges and immunities treaties.[102] As Member States have preferred to serve as proxies for the attachment of responsibility for their nationals,[103] there has been limited success in pursuing violations, unless the conduct is exceedingly egregious.[104] States are unlikely to prosecute unless the U.N. provides other institutional checks.[105] Thus, unlawful conduct may continue with impunity without U.N. involvement or media attention.[106] In effect, while the international humanitarian law applicable to a State is now applied to U.N. peace-keeping missions, a gap of effective enforcement remains.[107] Furthermore, it is unclear how obligations under the Bulletin comport with blanket privileges and immunities granted to U.N. personnel on its missions.[108]

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legally applicable since the typical vehicle would be the State rather than the U.N.

101. Bulletin, *supra* note 51, at pmbl., § 1.1 (applying "fundamental principles and rules of international humanitarian law applicable to United Nations forces when in situations of armed conflict").

102. *See* Bongiorno, *supra* note 1, at 650 (observing that while the U.N. promotes the integration of "human rights components" into peace-keeping operations, it does not empower these components with judicial or enforcement action when they discover violations). *But see* Shraga, *supra* note 87, at 412 (arguing that even though international humanitarian law was not applicable to peace-keeping troops, the U.N. "implicitly assumed" and "practically implemented" these standards long before their formal recognition).

103. *See* Bulletin, *supra* note 51, § 4 (reserving prosecution of members of U.N. military personnel to their respective national courts).

104. *See* Stephen Bates, *Troops Cleared on Child Roasting*, THE GUARDIAN, July 1, 1997, 1997 WL 2389469 (reporting that a Belgian court had acquitted the two U.N. peace-keepers whose photo was taken with a child roasting over a fire). The article noted that the decision was unexpected. *Id.* It also reported that nine other paratroopers had been acquitted of abusing civilians. *Id.*; *see supra* note 91 and accompanying text.

105. *See* OMBUDSPERSON INSTITUTE OF KOSOVO, FIRST ANNUAL REPORT 2000–2001 (2001) [hereinafter OMBUDSPERSON INSTITUTE OF KOSOVO, FIRST ANNUAL REPORT] (tabulating sixty-two complaints filed with the Ombudsperson's office against KFOR, forty-six on which the Ombudsperson could not take action because of the limited nature of his mandate), *available at* http://www.ombudspersonkosovo.org/annual%20report2000_2001.htm (last visited July 8, 2003) (on file with the American University Law Review). It is unclear whether any action has been taken on these cases.

106. *See generally supra* note 91 (noting Belgium's move toward prosecution of peace-keepers after allegations of misconduct but eventual acquittal of these charges).

107. *See* Bongiorno, *supra* note 1, at 648-49 (criticizing the narrowing of international humanitarian obligations under the Bulletin to only certain provisions and the limitation of liability of third party claims that may be incurred by peace-keeping troops).

108. OMBUDSPERSON INSTITUTION IN KOSOVO, SPECIAL REPORT NO. 1, ON THE COMPATIBILITY WITH RECOGNIZED INTERNATIONAL STANDARDS OF UNMIK REGULATION NO. 2000/47 ON THE STATUS, PRIVILEGES AND IMMUNITIES OF KFOR AND UNMIK AND

While criticism persists, the recognition of the applicability of humanitarian law to U.N. military operations is an important first step to diluting the artificial legal boundary between an international organization and a State when the fundamental question revolves around the function performed.[109] The deployment of troops under the umbrella of an international organization does not make a long tradition of humanitarian law inapplicable.[110] The U.N.'s adoption of principles of humanitarian law embodied in the Bulletin is an important step in tailoring an entire body of law to the Organization.[111] However, given that humanitarian law is inapplicable in post-war settings, the U.N. should take a similar step in applying human rights law to its personnel in interim administrations.[112]

B. The Reparation Case*: The Recognition of International Organizations As Having International Legal Personality*

In addition to privileges of immunity, the U.N. has also been recognized as possessing another characteristic traditionally afforded to States—international legal personality.[113] Such a capacity allows the U.N. to take on duties once exclusively reserved to States.[114]

THEIR PERSONNEL IN KOSOVO AND ON THE IMPLEMENTATION OF THE ABOVE REGULATION ¶ 82 (2000) [hereinafter OMBUDSPERSON, SPECIAL REPORT NO. 1] (concluding that UNMIK and KFOR privileges and immunities were incompatible with international standards), *at* http://www.ombudspersonkosovo.org/doc/spec%20 reps/pdf/sr1.pdf (on file with the American University Law Review).

109. *But see* Major Joseph P. "Dutch" Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F. L. REV. 1, 57-58 (2001) (criticizing the promulgation of the Bulletin as providing a "one-size-fits-all" approach to applying humanitarian law to peace-keeping troops and advocating the adaptation of such law to the type of operation being executed).

110. *See supra* note 91 and accompanying text. The newspaper articles cited indicate that the U.N. peace-keeping soldiers were tried in their home States. In cases of egregious conduct, the norm is for individual States to try their soldiers in the soldier's home States. Traditionally, a combination of international humanitarian law and domestic law, therefore, are applied to members of an international brigade.

111. *See* Bulletin, *supra* note 51, § 2 (adopting a non-exhaustive list of principles and rules of international humanitarian law upon military personnel). *But see* Julianne Peck, *The U.N. and the Laws of War: How Can the World's Peacekeepers Be Held Accountable?*, 21 SYRACUSE J. INT'L L. & COM. 283, 309-10 (1995) (advocating that the U.N. accede to the Hague and Geneva Conventions to ensure that the Organization is held to the same standard as States in conduct during warfare).

112. *See* HUMAN RIGHTS WATCH, WORLD REPORT 2002, *supra* note 17 (criticizing UNMIK for not meeting international human rights standards); *see also* OMBUDSPERSON, SPECIAL REPORT NO. 1, *supra* note 108, ¶ 84 (recommending the imposition of limits on UNMIK and KFOR immunity).

113. *See* THE UNITED NATIONS AND INTERNATIONAL LAW 390 (Christopher C. Joyner ed., 1997)(noting that the I.C.J. acknowledged the legal personality of an international organization, a status typically reserved to States).

114. *See generally* A.S. MULLER, INTERNATIONAL ORGANIZATIONS AND THEIR HOST

Although the notion of functional necessity has been advantageous to expanding the U.N.'s role, it has not been coupled with reciprocal obligations.[115] The following section reviews *Reparation for Injuries Suffered in the Service of the United Nations*[116] ("*Reparation Case*") and argues its approach as the foundation for asserting obligations upon the U.N. based on the functions it undertakes.[117]

1. A review of the Reparation Case

The seminal *Reparation Case* has provided the legal basis allowing international organizations to take on roles traditionally afforded to States.[118] In the case, the International Court of Justice ("I.C.J.") held that the U.N. had legal personality based on the notion of functional necessity.[119] The court noted that organizations such as the U.N. had capacity similar to a State.[120] Member States had endowed the U.N. with certain duties and responsibilities so that the U.N. would be "exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane."[121] Emerging from the I.C.J.'s language was the theory of functional necessity, which implied that the U.N. did in fact have some degree of international legal personality, though this personality did not rise to the level of a State.[122] Although not explicit in the *Reparation Case*, the I.C.J. clarified in a subsequent opinion that

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STATES: ASPECTS OF THEIR LEGAL RELATIONSHIP 72 (1995) (finding that, although the U.N.'s charter does not mention legal personality, in a survey of constituent instruments of international organizations, few had provisions explicitly granting international legal personality to the organization).

115. *Id.* at 172. *But see* Bongiorno, *supra* note 1, at 643-44 (interpreting the possession of "duties" as the legal equivalent to obliging the U.N. to international human rights standards).

116. *Reparation Case*, *supra* note 75, at 179.

117. While functional necessity is a term of art associated with the *Reparations Case*'s discussion of privileges and immunities, it is a useful term in discussing how rights and obligations should follow each other in the law of international organizations.

118. *See* HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY § 1563 (3d rev. ed. 1995) (noting that during the twentieth century there was a growing recognition of international organizations having legal personality separate from its Member States and stating that scholars have generally accepted this view); *see also Reparation Case*, *supra* note 75, at 179 (arguing that the U.N. is an international person with corresponding international rights and duties).

119. *Reparation Case*, *supra* note 75, at 179; *see* U.N. CHARTER art. 104 (acknowledging that the U.N. has "legal capacity" in the territory of a Member State to exercise its functions and to fulfill its purposes).

120. *Reparation Case*, *supra* note 75, at 175.

121. *Id.* at 179.

122. *Id.*

the U.N. should interpret functional necessity broadly.[123] The recognition of functional necessity as the basis for U.N. capacity has allowed for significant expansion of the roles which the U.N. may undertake—so much so that the U.N. arguably behaves as a State more so than an international organization.[124]

2. The problem with a function-based approach to grants of power for international organizations

While the *Reparation Case* has allowed for significant expansion of U.N. powers,[125] it has also created an inconsistent standard for the law applicable to international organizations.[126] Based on the notion of functional necessity, an international organization may exercise the powers implied in its purposes.[127] Some of these functions, such as the interim administration of a region, mirror the functions of a State.[128] Yet, since the international organization is not a State, it is not legally obligated to abide by the treaties and conventions to which States are signatories.[129] The problems inherent in this approach are similar to those presented by the granting of privileges and immunities.[130] Impunity prevails until tragedy spurs the U.N. to reform its notion of accountability.[131] Similarly, in interim administrations, the U.N. has been delinquent in formally

123. *See generally* MULLER, *supra* note 114, at 53 (clarifying that in the *Mazilu* Advisory Opinion, the I.C.J. rejected a restrictive interpretation of functional necessity). It must be noted, however, that the *Mazilu* case dealt with the issue of functional necessity in the context of privileges and immunities of U.N. personnel.

124. *Id. But see Reparation Case*, *supra* note 75, at 179 (arguing that the U.N. should be governed by international law because it has international rights and duties).

125. *See* MULLER, *supra* note 114, at 34-35 (interpreting the I.C.J.'s *Certain Expenses of the United Nations* as allowing the U.N. to exercise a wide array of powers); *see also* MAGDALENA M. MARTIN MARTINEZ, NATIONAL SOVEREIGNTY AND INTERNATIONAL ORGANIZATIONS 77-78 (1996) (concluding that an international organization's constituent instruments are not typically interpreted restrictively because a narrow interpretation may styme the development of the international organization's future activities).

126. *See supra* note 8; *see, e.g.*, *infra* note 200 (limiting signatories to human rights conventions to States though the U.N. had begun expanding its role to include state functions that would require analogous duties to a State).

127. *See* Manuel Rama-Montaldo, *International Legal Personality and Implied Powers of International Organizations*, 1971 BRIT. Y.B. INT'L L. 111, 147-49 (1971) (noting that the I.C.J. upheld the legality of the U.N.'s actions based on the function and purpose of the organization).

128. *See* SEYERSTED, *supra* note 71 (noting that jurisdiction over territories is one of the powers the U.N. possesses that is similar to a State).

129. *See supra* note 8 and accompanying text; *see also* SCHERMERS & BLOKKER, *supra* note 118, § 1573 (noting that the U.N. is not a party to many of the human rights conventions and that it is not bound because it has not manifested consent).

130. *See supra* Part II.A (discussing privileges and immunities).

131. *See supra* notes 93-100 and accompanying text (describing the abuses committed by the U.N. peace-keeping troops before the organization adopted some standards of international humanitarian law).

acknowledging which standards apply to these missions, despite its long involvement in interim administrations.[132] The functional necessity approach therefore creates a loophole where international organizations are not held to the same standards as States performing the same tasks.[133] Despite the *Reparation Case*'s acknowledgement of "duties,"[134] without formal consent to, and enforcement of, these obligations, the U.N.'s actions remain unchecked.[135]

One suggestion to correct for the lacuna created in a functional approach is to begin to tear down the artificial separation between international organizations and States.[136] While international organizations do not possess the traditional characteristics of a State, they have begun to adopt functions once exclusively reserved to States.[137] Privileges, immunities, reparations and territorial administration are all powers once exclusively considered within the domain of a State.[138] Thus, in the case of interim administrations, the U.N. should be expected to abide by the human rights obligations of a State.[139] Such an approach dilutes the distinction between States and international organizations and emphasizes capacity exercised by an organization, rather than its official status.

III. THE U.N. SHOULD BE HELD ACCOUNTABLE TO THE HUMAN RIGHTS INSTRUMENTS IT HELPED CREATE

Because of these expanding functions,[140] the U.N. should be held accountable to the human rights standards it helped create and

132. *See supra* Part I.A.

133. *See supra* Part II.B.1 (describing the application by the of the functional necessity standard to the U.N. in the *Reparation Case*).

134. *See Reparation Case*, *supra* note 75, at 179.

135. *See supra* note 69.

136. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 696 (5th ed. 1998) (noting that the duties of an international organization should be correlated to reciprocal responsibilities).

137. *See* SEYERSTED, *supra* note 71, at 402 (enumerating the capacities enjoyed by intergovernmental organizations that mirror the acts of sovereign States). Seyersted notes that the U.N., much like States, exercises functions not authorized anywhere in its constituent instrument, so that the only functions it does not exercise are those that it has not yet had a reason to exercise. *Id.* *But see* RESTATEMENT, *supra* note 10, § 223, cmt. a (differentiating international organizations from States in that States exercise power of implied statehood and state sovereignty, whereas international organizations generally do not).

138. *See supra* note 137 and accompanying text; *see also* RESTATEMENT, *supra* note 10, § 223(a) (including in the capacities of a State its status as legal person and its ability to acquire and transfer property, to make contracts and treaties, and to pursue remedies under such agreements).

139. *See generally* RESTATEMENT, *supra* note 10, § 223 (recognizing that the U.N. has "duties created by international law" without clarifying whether such obligations would ever extend to human rights obligations).

140. *See* IPA, Transitional Administrations Chart, *supra* note 4.

universalize, even though it is not a signatory to these conventions.[141] Although there has been some acknowledgement of U.N. accountability to humanitarian law, the U.N. has been slow to take similar steps in applying human rights standards to its missions.[142] The following section outlines ways in which the U.N. has asserted its interest in human rights through its Charter and through its involvement in the creation of human rights instruments. It then discusses the creation of regional human rights instruments that developed out of these international standards. It also highlights the legal framework these instruments have created for dealing with unlawful detentions. This section concludes that these instruments should apply to the U.N. because they represent principles which the U.N. has committed to follow in its charter. Some of these norms have reached a level of customary international law, and these instruments contain rights afforded to individuals, for which the U.N. is an intermediary.

A. The U.N.'s Commitment to Human Rights Through Its Charter and Sponsorship of International Human Rights Standards

The U.N. Charter repeatedly states the U.N.'s commitment to human rights and social justice.[143] In several provisions, the Charter reiterates the need for awareness and respect for human rights. In its preamble, the U.N. Charter clarifies that part of its purpose is "to reaffirm faith in fundamental human rights"[144] and "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."[145] To achieve these ends, the peoples of the U.N. aim "to practice tolerance and live together in peace with one another as

141. *See infra* note 188 (recognizing human rights conventions permit only State Parties to be signatories). *See generally* Bongiorno, *supra* note 1, at 692 (demonstrating that the U.N. undertakes international human rights obligations when it behaves as a State).

142. *Compare* U.N. Resolution 1244, *supra* note 12 (including a broad commitment to human rights standards), *with* U.N. Resolution 1272, *supra* note 5 (enumerating the human rights conventions the mission deems applicable to its work, a notion absent in earlier U.N. missions). *See generally* Mark Gibney et al., *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 267 (1999) (noting the contradiction in human rights law in that it is considered universal but largely applied by States in their own territories).

143. IAN BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS 1 (3d ed. 1992). *See generally* GLOBAL AGENDA: ISSUES BEFORE THE UNITED NATIONS 2001-2002 157-59 (outlining the ways in which the U.N. has been involved in human rights). The current Secretary-General of the U.N., Kofi Annan, has emphasized the importance of punishing those who abuse human rights. *Id.* at 157.

144. U.N. CHARTER pmbl.

145. *Id.*

good neighbours."[146] While the contents of the preamble are not binding, they do provide context to the purposes of the U.N.[147]

The articles of the U.N. Charter build upon the notion of U.N. interest in human rights. In Article 1, the U.N. acknowledges its purpose of maintaining international peace and security by bringing about "by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[148] The U.N. reiterates its commitment to human rights by noting as a purpose the achievement of "international co-operation in solving international problems of [a] . . . humanitarian character" and in "promoting and encouraging respect for human rights and for fundamental freedoms."[149] The theme of promotion of human rights is affirmed again and again in the U.N. Charter,[150] underscoring the facilitative role that the U.N. plays in the formation of these ideals.[151] These values, however, have not created legally binding obligations. In the end, such language remains an idealistic goal.

As an institution, the U.N. has been active in the promotion and codification of human rights.[152] Under its auspices, the U.N. developed the three major documents that form the International Bill of Human Rights: the Universal Declaration of Human Rights

146. *Id.*

147. *See* Vienna Convention on the Law of Treaties, *supra* note 56, art. 31 (setting out broad rules for the interpretation of treaties).

148. U.N. CHARTER art. 1(1).

149. *Id.* art. 1(3).

150. *See, e.g.*, *id.* arts. 55(c), 62(2), 68 (noting under the chapter for international economic and social cooperation that the U.N. must promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"). Article 62(2) states that one of the functions and powers of the Economic and Social Council is that "[i]t may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." Article 68 proclaims that "the Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions." *See* BROWNLIE, *supra* note 143, at 1 (noting the emphasis that the drafters of the U.N. Charter placed on the issue of human rights).

151. *See* U.N. CHARTER art. 13 (stating the General Assembly's responsibility to promote cooperation between countries in the areas of politics, economics, culture, education, health, and human rights).

152. *See* BROWNLIE, *supra* note 143, at 1 (naming bodies within the U.N. which set international standards in the area of human rights, as well as emphasizing the U.N.'s effort in composing "legal instruments containing detailed provisions"). *See generally* CHRISTOF HENS & FRANS VILJOEN, THE IMPACT OF THE UNITED NATIONS HUMAN RIGHTS TREATIES ON THE DOMESTIC LEVEL 5 (Kluwer Law Int'l 2002) (observing that U.N. treaties have molded modern concepts of basic human rights and the limitations of those rights).

("UDHR"),[153] the International Covenant on Civil and Political Rights ("ICCPR"),[154] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[155] The drafters of the UDHR saw the document as a standard of "common understanding" that would aid in the "full realization of this pledge."[156] The UDHR was to serve as a bridge between international peace and human rights.[157] More than fifty years later, scholars view the fundamental rights enumerated in the UDHR as customary international law[158] and thus perceive the document as having binding effect on States.[159] As of August 2002, an overwhelming majority of States had become signatories to the ICCPR and the ICESCR.[160] The broad dissemination of the UDHR[161] and the near universal adoption of the

153. *Universal Declaration of Human Right*s, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/811 (1948) [hereinafter UDHR].

154. *International Covenant on Civil and Political Rights*, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR] (recognizing basic human rights and freedoms, such as the right of self determination and striving to protect those rights and freedoms from suppression).

155. *International Covenant on Economic, Social and Cultural Rights*, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]. *See generally* United Nations High Commission on Human Rights, *Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights* 1, 2 (describing the process of preparation and adoption of the ICCPR and the ICESCR and the reasons for similarities between the two documents), *available at* http://www.unhchr.ch/html/menu6/2/fs2.htm (last visited July 8, 2003) (on file with the American University Law Review). The major point of divergence from the ICCPR is that the ICESCR enumerates more specific rights of workers such as the right to work, the right to social security, the right to food, clothing, and housing, and the right to an education. *Id.* arts. 6, 9, 11, 13. The convention puts the onus upon State Parties to the covenant to take "international action for the achievement of the rights recognized in the present Covenant." *Id.* art. 23. The convention names the ways in which the states may promote the rights enumerated in the covenant, such as "the conclusion of conventions," and "the adoption of recommendations." *Id.*

156. UDHR, *supra* note 153, pmbl. *See generally* PEASE, *supra* note 58, at 237 (acknowledging that the UDHR, though not legally binding, "serves as an authoritative guide to interpretation of the U.N. Charter and represents the sense of the international community").

157. *See* PEASE, *supra* note 58, at 237.

158. *See* BROWNLIE, *supra* note 136, at 575 (commenting on the influence of the UDHR); *see also* Elsa Stamatopoulou, *The Development of United Nations Mechanisms for the Protection and Promotion of Human Rights*, 55 WASH. & LEE L. REV. 687, 687 (1998) (crediting the U.N. with the development of human rights laws and noting the worldwide increase of "pro-human rights movements" in the years after the adoption of the UDHR).

159. *See generally* BROWNLIE, *supra* note 143, at 21 (commenting on the UHDR's "considerable indirect legal effect").

160. *See* Office of Human Commissioner of Human Rights, *Status of Ratification of the Principle Human Rights Treaties* (2003) (listing 149 states as parties to ICCPR and 146 states as parties to ICESCR as of May 2003), *available at* http://www.unhchr.ch/pdf/report.pdf (last visited July 8, 2003) (on file with the American University Law Review).

161. United Nations High Commissioner for Human Rights, *The Universal Declaration of Human Rights is the Most Universal Document in the World* (noting that the Guinness Book of World Records recognized the UDHR as the most widely

two other documents are a testament to the recognition of the three documents as a basis for international human rights standards.[162]

Other intergovernmental organizations have adopted regional standards of human rights to supplement those outlined in international covenants.[163] Using the broad support of the UDHR as a foundation, European nations sponsored the drafting of the European Convention of Human Rights ("ECHR"),[164] which further specified human rights obligations of States.[165] The Convention attempted to provide a mechanism for collective enforcement of the human rights standards adopted in the lofty principles of the UDHR.[166] The U.N.'s involvement in and promotion of human rights norms reaffirms the Organization's commitment to the creation of international human rights standards.[167]

B. The International Human Rights Instruments' Commitment to Rights of Detainees

These human rights instruments, many of which the U.N. played a role in creating, include an express commitment to the rights of detainees. The UDHR outlines several rights that may be implicated in the use of Executive Order detentions like those occurring in Kosovo. First, in Article 3, the UDHR states that everyone has the right to liberty.[168] The UDHR also recognizes an individual's right to

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translated document with its principles translated into more than 300 languages), *at* http://www.unhchr.ch/udhr/miscinfo/record.htm (last visited July 8, 2003) (on file with the American University Law Review). While such a feat does not testify to the universal recognition of the document, it is a testament to the push, at least within the UNHCHR office, to promulgate the statement of universal rights to all corners of the world.

162. *See* David Weissbrodt, *An Introduction to the Sources of International Human Rights Law*, C399 A.L.I.-A.B.A. 1, 9 (1989) (crediting the U.N. with the codification of international human rights law).

163. *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 260 (3d ed. 1999) (enumerating rights listed in the European Human Rights Convention). This Comment will not discuss the international human rights conventions relevant to regions outside of Europe as they are not relevant to a discussion of UNMIK. However, it must be noted that other regions, such as the member States of the Organization of American States, have also adopted regional human rights instruments. *Id.* at 272-73.

164. Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221, 222 [hereinafter ECHR].

165. *See, e.g.*, *id.* art. 2 (protecting against the arbitrary deprivation of one's life).

166. *See European Court of Human Rights, Historical Background, Organisation and Procedure* ¶ 1 (Jan. 2003) (citing the impetus of drafting the ECHR as the need to assure there were means of "collective enforcement" of UDHR), *available at* http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm. (on file with the American University Law Review).

167. *See supra* notes 152, 162 and accompanying text (recognizing the U.N.'s role in shaping modern human rights law).

168. UDHR, *supra* note 153, at art. 3.

"effective remedy by the competent national tribunal" for violation of rights.[169] The subsequent article provides that "no one shall be subjected to arbitrary arrest [or] detention,"[170] thus explicitly condemning such practices. Finally, Article 10 states that "everyone is entitled to a fair and public hearing by an independent and impartial tribunal."[171] Taken together, these articles emphasize that those in detention should receive a hearing and that they should be provided with a means for remedy if none exists.

Similarly, the ICCPR provides guidance on the rights of detainees.[172] It states that "[n]o one shall be subjected to arbitrary arrest or detention"[173] and that those who are arrested should be notified promptly of the charges.[174] In addition, the ICCPR provides that a defendant should "be brought promptly before a judge"[175] and should be "entitled to take proceedings before a court."[176] The ICCPR only allows derogation from these principles in case of exigent circumstances.[177] Some of these provisions have become customary international law creating a binding obligation on States.[178]

Finally, the ECHR also includes provisions clarifying the rights and remedies of detainees.[179] Article 5 enumerates an individual's "right to liberty and security of person."[180] Much like the ICCPR, the ECHR mandates that those arrested be informed in their own language of the charges against them[181] and be "brought promptly before a judge."[182] The Article makes clear that a trial must be held within a reasonable time of detention[183] and that the detainee must be released "if the detention is not lawful."[184] Unique in the ECHR is a provision that mandates that those arrested or detained in contravention to Article 5 should "have an enforceable right to

169. *Id.* art. 8.
170. *Id.* art. 9.
171. *Id.* art. 10.
172. *See* ICCPR, *supra* note 154, at art. 9 (outlining the rights and procedures taken to those who are or might be detained).
173. ICCPR, *supra* note 154, art. 9(1).
174. *Id.* art. 9(2).
175. *Id.* art. 9(3).
176. *Id.* art. 9(4).
177. *See id.* at art. 4(1)-(3) (stating that derogation may occur "in the time of public emergency which threatens the life of the nation").
178. *See* RESTATEMENT, *supra* note 10 (recognizing that several practices are prohibited under customary international law, including prolonged arbitrary detention and violations of internationally recognized human rights).
179. ECHR, *supra* note 164, at art. 5
180. *Id.* art. 5(1).
181. *Id.* art. 5(2).
182. *Id.* art. 5(3).
183. *Id.* art. 5(4).
184. *Id.* art. 5(4).

compensation."[185] The express attention to the rights of detainees in the UDHR, ICCPR, and ECHR, as well as the broad acceptances of these standards, emphasizes the importance of affording human rights in detention situations.

C. Applying International Human Rights Instruments to the U.N.

Despite the broad scope and acceptance of these human rights standards, it is evident that their full application is lacking. The norms created by these documents should be applicable to the U.N. when it performs state functions.[186] While the U.N. has been instrumental in the creation of international human rights standards,[187] the U.N. itself is not a signatory to these conventions since the drafters write conventions from the perspective of States and expressly recognize States as signatories.[188] Additionally, some

185. *Id.* art. 5(5).

186. *See* Wilde, *supra* note 1, at 456-57 (clarifying the non-sequitor in which U.N. personnel are allowed to take on functions performed by state actors but not held to comparable obligations). Wilde attributes this shortcoming to two factors: (1) because international law assumes that international organizations and States perform different functions; and (2) because administration of a territory is considered temporary. *Id.* at 457-58; *see supra* note 10 and accompanying text (outlining some provisions of human rights treaties that have gained the status of custom and thus are also binding on states). *But see* C.F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 240 (James Crawford & David Johnston eds., 1996) (arguing that although international organizations do not exercise the same powers as States, they do enter into agreements that "could give rise to international obligations").

187. *See* U.N. CHARTER pmbl. (noting that one of the purposes of the U.N. is "to reaffirm faith in fundamental human rights"). The charter also states in Section a that the General Assembly (G.A.) will promote the development of international law and its codification and stating in section b that the G.A. should assist "in the realization of human rights and fundamental freedoms." *Id.* art. 13, para. 1; *see* Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP L. REV. 213, 217-18 (2002), *citing* ROY LEE, MULTILATERAL TREATY-MAKING AND NEGOTIATION TECHNIQUES: AN APPRAISAL IN CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARTZENBERGER ON HIS EIGHTIETH BIRTHDAY 157-58, 177-216 (Bin Chang & Edward Brown eds., 1998) (crediting international organizations with the rise in regulation of prominent sectors of international law, such as international human rights law, through treaties).

188. *See* ICCPR, *supra* note 154, at pmbl. (beginning with "[t]he States Parties to the present Covenant"); *see also* ICESCR, *supra* note 155, at pmbl. (beginning with "[t]he States Parties to the present Covenant"). The language of the preamble of both conventions explicitly recognizes the obligations as relating to States rather than international legal personalities. *But see* U.N., HUMAN RIGHTS, A COMPILATION OF INTERNATIONAL INSTRUMENTS, DECLARATION ON THE RIGHTS OF PERSONS BELONGING TO NATIONAL OR ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES 140, art. 9, U.N. Doc. ST/HR/1/Rev.5, U.N. Sales No. E94.XIV.1 (Vol. I, Part 1) (1994) (specifying that "specialized agencies and other organizations of the United Nations system shall contribute to the full realization of the rights and principles set forth in the present Declaration, within their respective fields of competence"). While Article 1 emphasizes the importance of States adopting legislation to achieve the declarations aims, Article 9 makes clear an intent of the G.A. to extend obligations to the entire U.N. It must be noted that resolutions of the G.A. are not considered binding.

scholars argue that such obligations should not be imposed upon an international organization because it has not consented.[189]

Nonetheless, human rights law should be applied to an international organization functioning as a State. First, despite the lack of binding status of human rights conventions and declarations on the U.N., the Organization has recognized in its Charter a commitment to the promotion of these principles.[190] These conventions are in fact the expansion and development of the principles of the U.N. Charter.[191] As such, even though the U.N. is not a signatory, it is obligated to follow international human rights standards based on the purpose enumerated in its own charter.[192] In applying this argument to the administration of territories, one can argue that the U.N. is the source of the law.[193] As such, the U.N. must enforce adherence to international human rights standards and provide a means of remedy for violations.[194]

Second, the UDHR and ICCPR recognize that obligations may be attached to non-state entities, thus supporting the application of human rights law to the U.N. Article 30 of the UDHR and Article 5 of the ICCPR recognize that "any State, group or person" may not derogate from the rights and freedoms enumerated in each instrument.[195] Under a broad interpretation of the term "group," the U.N. should be included since it is an intergovernmental organization stepping in for the State.[196] Consequently, the UDHR

189. *See* SCHERMERS & BLOKKER, *supra* note 118, § 1572 (raising the question of whether international organizations, which do not possess the traditional characteristics of a State, such as territory, may be bound by the standards of international law and customary international law without their consent); *see also supra* Part III.A (discussing U.N. accountability in humanitarian law).

190. U.N. CHARTER pmbl.

191. *See* U.N. CHARTER art. 13, para. 1 ("The General Assembly shall initiate studies and make recommendations for the purposes of . . . promoting international co-operation in the political field and encouraging the progressive development of international law and its codification.").

192. *See* U.N. CHARTER art. 1, para. 1 (stating that the purposes of the U.N. are to "maintain international peace and security" and "to take effective collective measures for the prevention and removal of threats to the peace" by conforming to "principles of justice and international law").

193. *See, e.g.*, UNMIK Regulation 1999/1, *supra* note 6 (charging the U.N. with the duty of administering the interim administration, including many of the functions of a State).

194. *See infra* Part VI (discussing the liabilities created in taking a function based approach, which may require the creation of a claims commission); *see also* Rawski, *supra* note 1, at 124-25 (arguing that broad grants of immunity violate an individual's right to remedy).

195. UDHR, *supra* note 153, at art. 30; ICCPR, *supra* note 154, at art. 5.

196. *See* UDHR, *supra* note 153, at art. 30 (finding that the articles of the UDHR go further than applying its delegation solely to the States by specifically mentioning "any . . . group," and thus the U.N. fits into this category); *see also* ICCPR, *supra* note 154, at art. 5.

and ICCPR may be applicable to the U.N. when it performs functions as a surrogate for the State, even though the Organization is not a signatory and has not expressed other forms of consent. These standards provide valuable guidelines for the administration of a State, particularly for interim administrations because such institutions do not have a culture of historical standards from which to direct their activities.[197] The approach also avoids the inconsistency of results in the case of human rights standards applicable to the territory of Kosovo. Since the Federal Republic of Yugoslavia ("FRY")[198] had only acceded to the conventions to which Yugoslavia had signed, which did not include the ECHR, the U.N.'s adoption of the ECHR made applicable conventions that were not binding to FRY as a whole.[199]

Finally, while human rights instruments recognize State Parties,[200] the rights are afforded to individual citizens of the State as the vehicle for promoting the enumerated rights.[201] As such, the rights continue with the individual, despite U.N. intervention.[202] With the rights vested in the individual, the U.N. intervention is merely a surrogate vehicle for the administration of human rights standards applicable to the community.[203] This approach emphasizes that legal rights flow to the individual with the U.N. as an intermediary.[204]

Although not evidence of a valid legal basis for applying human rights standards to the U.N., it is interesting to note that human rights groups and national judiciaries often cite the ECHR and

197. *See supra* note 156 and accompanying text (commenting that the UDHR aids in the understanding of the U.N. Charter and also embodies the sentiments of the international community of signatory states).

198. FRY is presently called Serbia and Montenegro, of which Kosovo is still legally recognized as a part.

199. UNMIK Regulation 1999/24, *supra* note 9.

200. *See, e.g.*, ICCPR, *supra* note 154, at pmbl.; ICESCR, *supra* note 155, at pmbl.; UDHR, *supra* note 153, at pmbl. All three documents emphasize that signatories are limited to State Parties or Member States.

201. *See, e.g.*, ICCPR, *supra* note 154, at pmbl.; ICESCR, *supra* note 155, at pmbl. (emphasizing that signatories are limited to State Parties but acknowledging that the rights are manifest in "all members if the human family" and the "individual").

202. *See* BLACK'S LAW DICTIONARY, *supra* note 100, at 745 (describing "human rights" as rights that individuals should claim in a society); ICCPR, *supra* note 154, at pmbl. (illustrating that despite the recognition of "State Parties" the preamble refers to the duties individuals have to other individuals in a community). It also states that in relation to detentions, the rights are afforded to "everyone" and "anyone." *Id.* art. 9. This language implies that because the rights are afforded to individuals through the state, individuals themselves may be responsible for the monitoring and implementing of rights.

203. *See* ICCPR, *supra* note 154, at pmbl. (singling out the individual as having a duty to protect the rights set forth in the ICCPR).

204. *See id.*

ICCPR.[205] The use of these instruments emphasizes their importance in providing an internationally recognized standard. While these human rights groups and national judiciaries have not articulated the legal basis for applying these standards, one can argue that the if U.N. is a subject of international law,[206] it is at least bound to the conventions that have risen to the level of custom. The regular use of these conventions as international standards, however, necessitates a clarification of how international organizations should apply international human rights standards, as their application may have implications on enforcement and remedies.[207] The U.N.'s role in the creation of human rights law,[208] the recognition of these obligations as forming international standards,[209] and the regular application of these standards[210] provide strong support for the use of international human rights standards as the basis for U.N. obligations in interim administrations.[211]

IV. THE UNITED NATIONS MISSION IN KOSOVO

Despite uncertainty regarding accountability, the U.N. has historically engaged in interim administrations and is likely to continue its involvement.[212] UNMIK is one of the more recent examples of U.N. involvement in state-building.[213] In the following

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205. *See, e.g.*, UNMIK Regulation 2000/38, *On the Establishment of the Ombudsperson Institution in Kosovo* § 1.1 (June 30, 2000) [hereinafter UNMIK Regulation 2000/38] (enumerating the ECHR and its Protocols and the ICCPR as the particular human rights standards that should guide the Ombudsperson's analysis), *at* http://www.unmikonline.org/regulations/2000/reg38-00.htm (on file with the American University Law Review).

206. *See Reparation Case*, *supra* note 75, at 179 (referring to the U.N. as an organization that embodies internationalism).

207. *See generally* Rex Honey, *Human Rights and Foreign Policy*, *in* UNIVERSAL HUMAN RIGHTS? 227, 236 (Robert G. Patman ed., 2000) (advocating the accession of organizations like the World Bank, International Monetary Fund and World Trade Organization to human rights norms); UNMIK Regulation 2000/44, *On the Privileges and Immunities of the World Bank Group and its Officials in Kosovo* § 2 (Aug. 10, 2000) (clarifying the immunity status of another international organization, the World Bank, and its personnel, but shedding no light on its human rights obligations while working in Kosovo), *available at* http://www.unmikonline.org/regulations/2000/reg44-00.htm (on file with the American University Law Review).

208. *See supra* notes 152-62 and accompanying text.

209. *See supra* notes 163-67 and accompanying text.

210. *See supra* note 205 and accompanying text.

211. *See* BROWNLIE, *supra* note 136, at 696-97 (arguing that while there is no system by which to hold an international organization accountable, international law may provide grounds for deeming actions unlawful).

212. *See* Wilde, *supra* note 22, at 586-87 (describing the U.N.'s past involvement in territorial administrations).

213. *See, e.g.*, UNMIK Online, *UMNIK at a Glance* (including in the mission's mandate the U.N.'s role in state-building), *at* http://www.unmikonline.org/intro.htm (last visited July 8, 2003) (on file with the American University Law

section, this Comment will examine the tangible consequences of the deviation from, and lack of enforcement of, human rights standards with the UNMIK SRSG's use of Executive Orders for detentions. The discussion will begin with background on the mission, the creation of institutional checks, and the inability to correct violations despite the creation of additional offices.

A. The Authorization of the Mission

Following the NATO bombings of the former Yugoslavia, the U.N. deployed international personnel to assist in the rebuilding of Kosovo.[214] Under U.N. Security Council Resolution 1244, the U.N. assumed the responsibility of maintaining international peace and security, as delegated to the Security Council in its Chapter VII powers.[215] The mission undertook the tasks of providing humanitarian relief, facilitating reconstruction, and overseeing the development of provisional institutions.[216] Additionally, the resolution expressly recognized the responsibility of the international civilian presence[217] in "[p]rotecting and promoting human rights."[218] Matched to these responsibilities, the U.N. divided the mission into four phases: humanitarian relief, reconstruction, institution building and democratization, and a transitional administration.[219]

To achieve these ends, the Secretary-General appointed a Special Representative to oversee the territorial administration of Kosovo.[220] In the first regulation that the interim administration promulgated, the SRSG announced the scope of his power to encompass legislative, executive and some judicial authority.[221] In effect, the SRSG became the center of authority with no one but the Security Council and the

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Review).

214. *See* U.N. Resolution 1244, *supra* note 12 (authorizing the deployment of civil and security presences to Kosovo).

215. *Id.*

216. *Id.* § 11.

217. *Id.* § 10 (including in the international civilian presence those working in OSCE, UNMIK and other international agencies providing humanitarian assistance and institutional support).

218. *Id.* § 11(j).

219. *See UNMIK at a Glance*, *supra* note 213.

220. *See* U.N. Resolution 1244, *supra* note 12, § 6 (authorizing the Secretary-General to appoint a Special Representative "to control the implementation of the international civil presence" and "to coordinate closely with the international security presence to ensure that both presences operate toward the same goals and in a mutually supportive manner").

221. *See* UNMIK Regulation 1999/1, *supra* note 6, § 1(1). Section 1(2) states that the "Special Representative of the Secretary-General may appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person." *Id.* § 1(2). The two paragraphs taken together illustrate the almost absolute power vested in the SRSG.

Secretary-General as his check.[222] While UNMIK Regulation 1999/1 explicitly authorizes the SRSG to assist only in administering the judiciary, it also allows the SRSG to appoint and to remove judges, which in effect creates absolute judicial authority in the SRSG.[223]

The rationale for vesting so much authority with an international actor flows from the tumultuous history of the former Yugoslavia.[224] In Kosovo particularly, the U.N. recognized that the decade-long oppression under the Serbian-led Yugoslav Army made it impossible to guarantee respect for human rights and fundamental freedoms without an international presence.[225] Furthermore, local Kosovar Albanians, who had created parallel institutions during the years of apartheid in provincial administration, had not been involved in official regional administration for more than a decade,[226] creating a knowledge-gap in administering institutions.[227] Additionally, with the

222. *See* Beauvais, *supra* note 14, at 1110-11 (dubbing the UNTAET authority of the administration of East Timor as the "de facto governmental authority," much like the mission in Kosovo); *see also* UNTAET Regulation 1999/1, *supra* note 9, § 1 (indicating that all legislative authority, executive authority, and judicial administration is vested in UNTAET for exercise by the Transitional Administrator). Interestingly, the language of UNTAET Regulation 1999/1 mirrors UNMIK Regulation 1999/1. While Secion 2 of both regulations recognize international human rights standards as those that will govern the mission, the UNTAET Regulation explicitly enumerates the conventions that will be applicable to the interim administration. *Id.* § 2.

223. *See supra* note 221 and accompanying text.

224. By the time of the Kosovo crisis, the U.N. had been involved in two other missions in the former Yugoslavia, one in Bosnia and Herzegovina and a temporary mission in Slavonia in Croatia. *See generally* RICHARD WEST, TITO: THE RISE AND FALL OF YUGOSLAVIA (1999) (providing historical perspective on the formation and disintegration of Yugoslavia).

225. *See generally* LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION (1997) (describing the splintering of the Republics of former Yugoslavia); *see also* TIM JUDAH, KOSOVO: WAR AND REVENGE (2000) (recounting the events leading the bombing of Kosovo and its consequences). Ironically, while the criticism for the last decade had been of the Serbian oppression of Kosovars Albanian, one phenomenon of the end of the war was Kosovar Albanian retaliation against remaining Serb populations and other ethnic minorities who were accused of being complicit or outright supporting the Serb regime while it was in power in Kosovo. *Id.* at 295. *But see* Nataša Kandi , *The Lesson of Orahovac: The International Administration in Kosovo Encourages Violence Against Serbs*, Feb. 1, 2000 (accusing UNMIK, OSCE and KFOR of supporting the violence committed against Serb minority communities in southeastern Kosovo), *at* http://www.kosovo.com/ orahovac.html (on file with the American University Law Review).

226. *See* NOEL MALCOLM, KOSOVO: A SHORT HISTORY 349 (1999) (recounting the history of human rights abuses against Kosovar Albanians and their dismissal from positions in schools and hospitals).

227. *See* OSCE, Factsheet: OSCE and Capacity-Building (June 2002) (listing co-operation as one of the challenges of capacity-building in Kosovo since its citizens have a long history of working in parallel structures), *available at* http://www.osce.org/kosovo/documents/factsheet/general/capacitybuilding_ factsheeteng.pdf (on file with the American University Law Review).

fear of reprisal, as witnessed in other missions,[228] the U.N. hesitated to vest full and immediate control in local hands.[229] With these factors in mind, the SRSG deemed it best to centralize authority as promulgated in UNMIK Regulation 1999/1.[230]

B. Creation of Institutional Checks

Responding to an earlier commitment of the mission,[231] the first SRSG Bernard Kouchner initiated the creation of an Ombudsperson's office.[232] The mandate assigned the Ombudsperson to "promote and protect the rights and freedoms of individuals and legal entities."[233] Although appointed by the SRSG, the Ombudsperson was to act independently and free of charge.[234] The jurisdiction of the office extended to the investigation of "complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution."[235] The mandate explicitly authorized the application of the ECHR[236] and its Protocols and the ICCPR.[237]

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228. *See, e.g.*, Amnesty International, *Bosnia-Herzegovina: The International Community's Responsibility*, Jan. 6, 1996, at 45-48 (describing the revenge attacks following peace settlements in Bosnia).

229. *See generally* Kosovo Temporary Media Commissioner, *Report 2000-2001*, *available at* http://www.osce.org/kosovo/bodies/tmc/pdf/tmcreport.pdf (last visited July 8, 2003) (on file with the American University Law Review). In one of the most egregious incidents of local reprisal, the local Albanian-language newspaper *Dita* published the name, workplace and route of travel of a Serbian man working for UNMIK. *Id.* at 7. The newspaper accused him of working for the Serb regime during the NATO bombing of Kosovo. *Id.* The man was later found dead. *Id.* While the OSCE condemned the acts and placed sanctions on *Dita*, such types of allegations continued, creating an atmosphere of fear and hostility between the majority Albanian community and the ethnic minorities within the territory of Kosovo. *Id.*

230. *See* UNMIK Regulation 1999/1, *supra* note 6, § 1 (vesting authority in the SRSG for effectively all government functions).

231. *See* OSCE Permanent Council, PC Journal No. 237, Agenda Item 2, Dec. No. 305, July 1, 1999 [hereinafter OSCE, Decision 305] (including in its mandate that the OSCE would facilitate the creation of an Ombudsperson Institute), *available at* http://www.osce.org/docs/english/pc/1999/decisions/pced305.pdf (on file with the American University Law Review).

232. *See* UNMIK Regulation 2000/38, *supra* note 205 (directing the SRSG to appoint an Ombudsperson in Kosovo to ensure UNMIK complies with the U.N. Security Council resolution standard of human rights for the region).

233. *Id.* § 1.1. *See generally* Linda C. Reif, *Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection*, 13 HARV. HUM. RTS. J. 1, 19-23 (2000) (outlining the role which ombudspersons institutions may play in promoting human rights in the State).

234. UNMIK Regulation 2000/38, *supra* note 205, § 2.1-2.2.

235. *Id.* § 3.1.

236. *See id.* § 1.1 (ensuring that all persons of Kosovo can exercise those human rights and fundamental freedoms provided by the international human rights standards of the ECHR). The SRSG authorized the application of ECHR even

Despite widespread support for creating the institution, numerous constraints delayed the establishment of the office and the appointment of an Ombudsperson until nearly the end of the second year of the mission.[238] In addition, the mandate expressly excluded the Kosovo Force ("KFOR") from the jurisdiction of the Ombudsperson.[239] The regulation limited the Ombudsperson's authority to submitting reports and recommendations to the KFOR commander based on the complaints the Ombudsperson received.[240] The KFOR commander determines further action.[241] The inclusion of the international military presence under the mandate of the Ombudsperson is a noticeable step forward in recognizing the responsibility of peacekeeping troops. As NATO-deployed troops, KFOR falls directly under the oversight of an international organization and works in coordination with the U.N. While documents such as the *Bulletin* open the way for military forces of international organizations to be held accountable for war time conduct, the limited jurisdiction of the Ombudsperson over KFOR point to the ever-present gap in the realm of human rights law over military forces.

C. U.N. and KFOR Abuse of Privileges and Immunities

Since it became operational, the Ombudsperson's office has been handling a full caseload[242] with considerable focus on the abuses of

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though Yugoslavia, the country of which Kosovo remained a part, had not become a party to the agreement. *Id.*; *see supra* Part III (discussing the application of human rights standards to the U.N.). Although this Comment does not discuss the implications of this arrangement, this situation creates an interesting wrinkle in that the source of the law is actually the interim state rather than the host state. In the Kosovo Mission, the U.N. undertook obligations the government of the former Yugoslavia may not find legally valid.

237. *See id.* § 1.1 (ensuring that all persons of Kosovo can exercise those human rights and fundamental freedoms provided by the international human rights standards of the ICCPR); *see also* United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, ICESCR (listing Yugoslavia as having ratified the ICESCR in 1967, 1971, and again Mar. 12, 2001, after the break up of its republic), *available at* http://untreaty.un.org/ENGLISH/bible/englishinternet bible/partI/chapterIV/treaty5.asp#N2 (last visited July 8, 2003) (on file with the American University Law Review).

238. *See generally* OSCE Mission in Kosovo, Independent Bodies-Ombudsperson's Institution (mentioning that presently the Permanent Council of the OSCE and the United States provide funding for the Ombudsperson Institute), *at* http://www.osce.org/kosovo/bodies/ombudsperson/ (last visited July 8, 2003) (on file with the American University Law Review).

239. UNMIK Regulation 2000/38, *supra* note 205, § 3.5.

240. *Id.* In part, this distinction is made for KFOR since the troops deployed in Kosovo came under NATO auspices, rather than directly under U. N. command, so that KFOR operates in coordination with UNMIK.

241. *Id.*

242. OMBUDSPERSON INSTITUTE OF KOSOVO, FIRST ANNUAL REPORT, *supra* note 105.

U.N. and KFOR.[243] In Special Report No. 1, Ombudsperson Marek Antoni Nowicki questioned the compatibility of UNMIK privileges and immunities under UNMIK Regulation 2000/47 with international human rights standards following complaints that KFOR had occupied or damaged private property.[244] The report concluded that the UNMIK Regulation on privileges and immunities was incompatible with the ECHR standard for international human rights.[245] The Ombudsperson recommended that the SRSG establish a Claims Commission to address the complaints of the citizenry, ensure dissemination of this information to the public, and take steps to encourage KFOR compliance and compensation for damages.[246]

Although the report focused on the privileges and immunities of KFOR, the Ombudsperson also drew attention to the consolidation of power within the office of the SRSG.[247] The Ombudsperson noted that investing the powers of two branches within the SRSG was contrary to fundamental principles of law when there was no judicial review, as is the case when applying UNMIK Regulation 2000/47.[248] Additionally, civilians did not have access to the regulation because it was written only in English and had not been translated to Serbian or Albanian, the languages spoken by the local populations.[249] The combination of overbroad protections and the lack of information to the citizenry leads to potential abuses. Accordingly, Nowicki argued that the UNMIK Regulation 2000/47 did not protect citizens from the arbitrary application of law by the government.[250]

The annual report cited that approximately 1,000 persons visited the Institution following its opening and these persons lodged 344 formal complaints. *Id.* at 2. Of the applications filed, the Ombudsperson rejected about sixty percent. *Id.* Of the 344 applications filed, the subject matter of the cases divided as follows: property issues such as governmental takings, 141 cases; employment issues, 92 cases; fair trial issues, 38 cases; and personal liberty and security issues, 30 cases. *Id.* at 8. The remaining cases dealt with impunity, abuse of authority, standard of living, right to respect for the home, freedom from inhuman or degrading treatment, and equal protection. *Id.* at 9.

243. OMBUDSPERSON, SPECIAL REPORT NO. 1, *supra* note 108, ¶ 2.

244. *Id.*

245. *Id.* ¶ 82.

246. *Id.* ¶ 84.

247. *Id.* ¶ 24.

248. *Id.*

249. *Id.* ¶ 25.

250. *Id.* ¶ 27. *See generally* Press Release, Amnesty International, No Impunity for the International Community (June 18, 2002) [hereinafter Amnesty, No Impunity] (describing another incident of human rights abuse and the U.N. response to an Austrian police officer's alleged maltreatment of a detainee), *at* http://web.amnesty.org/library/Index/ENGEUR70052002?open&of=ENG-YUG (on file with the American University Law Review).

D. Executive Orders for Detention

1. The Ombudsperson on detentions

Bearing in mind this ineffectiveness of the UNMIK system, the Ombudsperson issued a comprehensive report outlining the problems with Executive Order detentions based on the applicable human rights law.[251] The issue of the incompatibility of law in Special Report No. 1[252] became the focus of Special Report No. 3 in which the Ombudsperson addressed the issue of "Conformity of Deprivations of Liberty under 'Executive Orders' with Recognized International Standards."[253] The SRSG's prolonged detention of Kosovars has raised considerable ire against the U.N. administration among Kosovars,[254] international human rights organizations,[255] and the Organization of Security and Co-operation ("OSCE").[256] In analyzing the SRSG's obligations under regional human rights instruments, the Ombudsperson concluded that the detentions under the Executive Order of the SRSG were not lawful under ECHR Article 5(1), which outlines an individual's right to liberty and security.[257] The Ombudsperson emphasized the necessity of judicial review over detentions.[258] As noted earlier, the Ombudsperson viewed the vesting

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251. OMBUDSPERSON, SPECIAL REPORT 3, *supra* note 14.

252. OMBUDSPERSON, SPECIAL REPORT 1, *supra* note 108.

253. OMBUDSPERSON, SPECIAL REPORT 3, *supra* note 14.

254. *See generally* Kosovapress News Agency, *Protests Continue Over Kosovo Albanian's Extended Detention*, Sept. 1, 2000 (reporting that more than 500 protesters gathered in a village in eastern Kosovo to demand the release of Afrim Zeqiri who was being held under SRSG Orders).

255. *See* Press Release, Amnesty International, Criminal Justice System Still on Trial (Nov. 23, 2000) [hereinafter Amnesty, Criminal Justice] (raising concerns regarding whether a judge had authorized the prolonged detention of Zeqiri who was arrested in May 2000), *at* http://www.amnesty.org/library/Index/ENGEUR700632000?open&of=ENG-YUG (on file with the American University Law Review); Amnesty, Afrim Zeqiri, *supra* note 17 (criticizing SRSG Hans Haekkerup's continued detention of Zeqiri after the initial Executive Orders had expired and without legal process); AMNESTY INTERNATIONAL, ANNUAL REPORT 2002 EUROPE: FEDERAL REPUBLIC OF YUGOSLAVIA (2002) (stating that the Detention Review Commission "failed to provide detainees with the means to challenge their detention."), *available at* http://www.amnesty.org (on file with the American University Law Review).

256. *See* OSCE, LSMR 2, *supra* note 13 (criticizing pre-trial detention orders); *see also* OSCE, Mission in Kosovo, Department of Human Rights and Rule of Law, *Review of the Criminal Justice System: September 2001-February 2002*, at 45-46 (2002) [hereinafter OSCE, LSMR 4] (criticizing Executive Order detentions).

257. ECHR, *supra* note 164, at art. 5(1) ("Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."). Article 5 goes on to specify the parameters of detention and arrest. *See infra* note 259.

258. OMBUDSPERSON, SPECIAL REPORT NO. 3, *supra* note 14, ¶ 17 (concluding that the centralization of authority in the SRSG violated the principle of separation of powers).

of judicial administration in the SRSG as creating a prima facie violation of the ECHR because the SRSG could effectively deny judicial review to a detainee.[259]

2. Abuses of detention

a. The case of Afrim Zeqiri: Institutional checks without the teeth

The SRSG's use and abuse of executive orders in Kosovo demonstrates the problems that arise from a virtually unchecked centralized authority. The case of Afrim Zeqiri emphasizes the need to rethink the means by which the Security Council applied and enforced human rights standards on interim administrations. U.N. police arrested Zeqiri, an ethnic Albanian, for the murder of three Serbs and the attempted murder of two in the Kosovo village Cernica.[260] He was arrested in May 2000 and held him based on judicial detention orders until late July 2000. Following the lapse of the judicial detention order, Bernard Kouchner extended Zeqiri's detention[261] pursuant to UNMIK Regulation 1999/26[262] because local prosecutors chose to abandon the case.[263] In September 2000, an international investigating judge permitted another thirty-day extension.[264] When the series of executive orders and judicial

259. *Id.* ¶ 21; *see also* ECHR, *supra* note 164, at art. 5, ¶ 3 ("Everyone arrested or detained in accordance with the provision of para. 1.c. of this articles shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.").

260. *Kouchner Prolongs Detention of Albanian Murder Suspect*, AGENCE FRANCE PRESSE, July 29, 2000 [hereinafter *Kouchner Prolongs Detention*], *available at* http://www.balkanpeace.org/hed/archive/ july00/hed400.shtml (on file with the American University Law Review). *See* Interview with Michael Hartmann, UNMIK International Prosecutor Feb. 2000-Jan. 2003 and prosecutor for the Zeqiri case (June 2003) (noting that "Serb reaction to this ethnic hatred motivated attack caused severe public order and political problems for UNMIK, which had been criticized by NGOs and OSCE for failing to adequately protect minority rights and safety."). Statements are his personal opinion, and do not necessary reflect the position of UNMIK.

261. *Kouchner Prolongs Detention*, *supra* note 260.

262. UNMIK Regulation 1999/26, *On the Extension of Periods of Pre-trial Detention*, Dec. 22, 1999 [hereinafter UNMIK Regulation 1999/26] (permitting an Ad Hoc Court of Final Appeal to extend pre-trial custody for up to six months), *available at* http://www.unmikonline.org/regulations/1999/reg26-99.htm. (last visited July 26, 2003) (on file with the American University Law Review).

263. Interview with Michael Hartman, *supra* note 260 (noting that Kouchner decided to extend the detention of murderers because the local judiciary's decision to pursue the case seemed founded on ethnic bias).

264. Press Briefing, UNMIK, Zeqiri (Sept. 15, 2000), *available at* http://www.unmikonline.org/press/trans/tr150900.html (on file with the American University Law Review). *See* Interview with Michael Hartmann, *supra* note 260 (noting that the judiciary permitted the extension of the detentions because an international prosecutor was attempting to re-open the case). An international

decisions to extend detention expired in November 2000, Zeqiri remained in a detention center at the U.S. Army Base.[265] In response to the Ombudsperson's request for clarification of the legal basis for the prolonged detention, the Director of the Department of Judicial Affairs wrote that Executive Order detentions were lawful based on the broad mandate of Resolution 1244 which permitted the SRSG to take "any measure necessary to ensure public safety and order and the proper administration of justice."[266] After nearly two years in prison, KFOR released Zeqiri from detention because of the lack of evidence against him.[267]

Zeqiri's case underscores the difficult balancing law enforcement undertakes in interim administrations. As ethnic violence against minorities raged, the U.N. found itself unable to curb quickly and effectively the violence.[268] The same human rights groups that were critical of detention orders had been pushing the U.N. to take action against inter-ethnic violence.[269] Mounting criticism encouraged the SRSG to take decisive measures, including the creation of Executive Order detentions to hold those suspected of ethnic violence while

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investigating judge granted the initial petition, but an appeals panel made up of a majority of local judges reversed the decision. *Id.* A second attempt to re-open the case ultimately was refused in December 2000. *Id*

265. Amnesty, Afrim Zeqiri, *supra* note 17 (protesting the continued detention of Afrim Zeqiri after the expiration of judicial orders).

266. Letter from Fernando Castanon, Director of the Department of Judicial Affairs, to Marek Antoni Nowicki, Ombudsperson (Mar. 29, 2001), *at* http://www.ombudspersonkosovo.org/doc/Incoming%20Letters/29%20March%20concerning%20the%20case%20of%20Afrim%20Zequiri%201.pdf (page one) and http://www.ombudspersonkosovo.org/doc/Incoming%20Letters/29%20March%20concerning%20the%20case%20of%20Afrim%20Zequiri%202.pdf (page two) (on file with the American University Law Review).

267. Interview with Michael Hartman, *supra* note 260 (pointing out that there was only one eye witness for the prosecution, an ethnic Serb who was not a persuasive witness); *Court Releases Kosovo Albanian for Lack of Evidence after Two-Year Detention*, BBC MONITORING INT'L REPORTS, June 17, 2002.

268. Amnesty International, *Six Months On, Climate of Violence and Fear Flies in the Face of U.N. Mission*, Dec. 23, 1999 (recognizing the U.N.'s inability to protect the human rights of ethnic minorities in the first six months of its mission, *at* http://www.amnesty.org/library/Index/ENGEUR701361999?open&of=ENG-YUG (on file with the American University Law Review).

269. *Compare* Press Release, Amnesty International, FRY/Kosovo: End Deliberate Attacks on Serb Civilians (Feb. 16, 2001) (calling on the U.N. and KFOR to take action against the perpetrators of the Nis Express bus attacks), *at* http://www.amnesty.org/library/Index/ENGEUR700032001?open&of=ENG-YUG (on file with the American University Law Review) *and* Amnesty International, *Kosovo: KFOR Must Act Now to Curb Violence Against Ethnic Minorities*, Jan. 13, 2000 (criticizing KFOR's inability to prevent the murder of a Slavic Muslim family in southern Kosovo despite the presence of more than 42,000 troops in the region), *at* http://www.amnesty.org/library/Index/ENGEUR 70003200?open&of=ENG-YUG (on file with the American University Law Review), *with infra* Part IV.D.2.b (noting the prolonged detention of those involved in the bus attacks).

investigations were pending.[270] Initially, the judiciary gave great deference to the SRSG by approving extensions of detentions orders.[271] Yet, when the courts raised concerns over the prolonged and unjustified detentions, the SRSG made only perfunctory responses.[272] He justified continued detentions despite more than two years passage and little or no evidence implicating Zeqiri.[273]

b. The case of the bus bombing suspects

At the same time as Zeqiri's detention, Amnesty International reported that the U.N. and KFOR were holding seventy persons without clarification of the legal basis for the detentions.[274] One of the most notable cases was the detention of three Albanian men arrested in connection with the bombing of the Nis Express, a shuttle service for Kosovar Serbs.[275] Although the men were arrested in March and a panel of international judges found no grounds for the detention, the men remained in UNMIK custody because of successive Executive Orders for their detention.[276]

In response to protests from the Kosovo judiciary, the Ombudsperson's office and human rights groups, the SRSG established a detention review commission to review Executive Order detentions.[277] However, the SRSG alone appointed the judges for the

270. *See supra* notes 260-62.
271. *See supra* note 264.
272. *See supra* note 266.
273. *See supra* note 266.
274. *See* Amnesty, Afrim Zeqiri, *supra* note 17 (noting Amnesty's request to the SRSG to explain the grounds for detentions); *see also* Interview with Michael Hartmann, UNMIK International Prosecutor Feb. 2000-Jan. 2003 and prosecutor for the Zeqiri case (June 2003) (recalling that the U.N. held six persons for executive order detentions—Zeqiri, four Nis Bombing Suspects and a suspected assassin of two Serb priests).
275. Amnesty, Executive Orders, *supra* note 15 (highlighting the continued detentions of the three men in a letter to the SRSG urging him not to use Executive Orders to detain criminal suspects); *see also 2 Serbs Killed, 5 Injured in Bus Attack*, UNMIK NEWS, Newsletter No. 27, *available at* http://www.unmikonline.org/pub/news/nl27.html (last visited July 8, 2002) (on file with the American University Law Review).
276. Amnesty, Executive Orders, *supra* note 15; *see also* Press Release, UNMIK, UNMIK/PR/394, Background Note on Zeqiri Detention (Oct. 18, 2000) (justifying Zeqiri's detention by executive order on the basis of the SRSG's ultimate responsibility "for providing a safe and secure environment and maintaining the public safety and order in Kosovo" under U.N. Resolution 1244), *at* http://www.unmikonline.org/press/press/pr394.html (on file with the American University Law Review).
277. UNMIK Regulation 2001/18, *On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders*, Aug. 25, 2001 [hereinafter UNMIK Regulation 2001/18], *available at* http://www.unmikonline.org/regulations/2001/reg18-01.pdf (on file with the American University Law Review).

review commission, creating an insular relation.[278] When the commission reviewed the detention of the Nis Express bombing suspects, it found the detention lawful and extended the period of pre-trial custody of the suspects for an additional three months.[279] The OSCE, on the other hand, reported that there was never sufficient evidence to detain the persons.[280]

Although the SRSG has informal checks such as the Ombudsperson's office, the Kosovo judiciary, and the OSCE, these bodies do not have the authority to correct the SRSG's abuses.[281] While the creation of a commission was a commendable effort to correct problems arising from unlawful detention, it did not have sufficient independence from the SRSG to provide meaningful oversight.[282] As a result, the possible use of Executive Order detentions remains intact, despite condemnation from human rights groups and local institutions for the lack of compliance with human rights standards.[283]

V. RECOMMENDATIONS TO CORRECT ABUSE OF DETENTION ORDERS

The use of unlawful detentions supports the idea that increasing U.N. accountability is tantamount to effective interim administrations.[284] While the U.N.'s role in future interim

278. *Id.* § 2.1; *see* Press Release, UNMIK, UNMIK/PR/637, SRSG Establishes Detention Review Commission (Sept. 3, 2001) (announcing the SRSG's intention to create a special detention review commission to provide an extra-judicial check on administrative actions), *at* http://www.unmikonline.org/press/2001/press-r/pr637.html (on file with the American University Law Review).

279. Press Release, UNMIK, UNMIK/PR/649, Detention Review Commission Supports Detention of Bus Bombing Suspects (Sept. 21, 2001), *at* http://www.unmikonline.org/press/2001/press-r/pr649.html (on file with the American University Law Review).

280. *See* OSCE, LSMR 4, *supra* note 256, at 46 (arguing that "the current status of the [Nis Express case] proves that there has never been enough evidence against the suspects and that the executive intervention was only meant to keep the suspects detained while investigators were expected to collect evidence against them").

281. *See* UNMIK Regulation 2000/38, *supra* note 205, § 4.1 (limiting the Ombudsperson's power to the ability to investigate, to make recommendations, and to advise the parties in dispute); UNMIK Regulation 1999/1, *supra* note 6, § 1(1) (recognizing that the SRSG exercises authority over administration of the judiciary); OSCE, Decision 305, *supra* note 231 (delegating to the OSCE capacities of monitoring and reporting, but with no mention of any authority over other pillars of the U.N. mission in Kosovo).

282. *See* OSCE, LSMR 4, *supra* note 256, at 45-46 (noting that the SRSG flew in specially recruited judges for the commission for merely one day to review Executive Order detentions).

283. *But see* OSCE, LSMR 4, *supra* note 256, at 45 (acknowledging the decrease in the number of Executive Order detentions). Although the number of persons detained by the KFOR fluctuated, overall it significantly decreased from 100 persons in September 2001 to one person in February 2002. *Id.*

284. *See supra* note 20 and accompanying text (describing the potential problems

administrations remains uncertain, the use of Executive Order detentions in Kosovo underscores the importance of institutional checks.[285] The Ombudsperson's Office, the OSCE and human rights groups have attempted to bring light to this issue by providing analysis and discourse on human rights standards.[286] Unfortunately, these institutions do not have the political clout in the interim administration to counteract human rights violations beyond their role of giving recommendations.[287] Since the only check on the SRSG is through the Security Council or the Secretary-General, the check is an impractical means to hold the SRSG accountable for human rights violations that do not rise to a level of egregiousness that sounds international alarms.[288] Many times, Executive Order detentions do not appeal to some of the sensationalist media outlets that focus on torture, genocide and rape; however, it is important to remember that unlawful detentions take away a person's freedom to move and constitute the ultimate restraint on liberty.

There are a number of ways in which the U.N. may be able to correct for the type of shortcomings exhibited by the practice of Executive Order detentions. First, the U.N. needs to focus on the role of the judiciary in interim administrations and the meaningful distribution of power to such offices.[289] The involvement of a judiciary ensures an independent check on the interim administration and a de-centralization of power.[290] Although this may not be possible at the outset of a humanitarian intervention mission,[291] U.N. personnel must give deference to an independent

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encountered when international organizations administer inconsistently espoused principles). *See generally* Wilde, *supra* note 1, at 460 (advocating analysis of how to make U.N. actors more accountable for their conduct in interim administrations).

285. *See supra* Part IV.D (examining the problems with Executive Order detentions). *See generally* Amnesty, Criminal Justice, *supra* note 255 (insisting pre-trial detentions remain exclusively a judicial function).

286. *See supra* Part IV.D.

287. *See supra* note 281 and accompanying text (discussing the limitations of these organizations' ability to check the SRSG).

288. *See, e.g.*, *supra* Part IV.A (noting that peace-keeping violations did not stir attention until reports of egregious conduct surfaced).

289. *See supra* note 248 and accompanying text; *see also* Amnesty, Criminal Justice, *supra* note 255 (condemning administrative detentions for their lack of judicial review). *See generally* Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 61-62 (2001) (prioritizing the development of the judiciary as part of the U.N.'s "first-phase response" to civil society development).

290. *Id.*

291. Wendy Betts, et al., *The Post Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371, 376-79 (2001) (outlining the challenges in establishing the Kosovo judiciary following U.N. intervention).

judiciary,[292] particularly when such a body determines that the SRSG violated international human rights law.[293] The SRSG, as any state actor, must respect the rule of law as it is interpreted by courts.[294] This may be accomplished through designation in Security Council resolutions and increased obligations placed on the SRSG to conform to international human rights standards.[295] As with any State violating human rights norms, if the U.N. wishes to thwart human rights based on an exigency justification, it must outline the nature of the exigency and the dangers posed to the public.[296]

Second, the SRSG could have moved controversial cases into the domain of international judges who had been incorporated into the local judicial system,[297] a common practice in war crimes cases tried locally. The broad U.N. regulation permitted the transfer of cases whenever there was fear of ethnic bias.[298] The use of this feature, which existed at the time of these cases, would allow for continued development of the fledging judicial system while balancing the exigency concerns of the SRSG.[299] Through such action, the SRSG

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292. *See* Wilde, *supra* note 1, at 457 (noting that the interpretation of U.N. mandates has permitted the actions of international officials to go unchallenged by the judiciary).

293. *See supra* Part IV.D.2.b and accompanying text. *See generally* UNMIK Regulation 1999/1, *supra* note 6, at 1.1 (limiting the SRSG's judicial powers to administration of the judiciary). *See also* Betts et al., *supra* note 291, at 387 (emphasizing the importance of an independent judiciary that upholds human rights standards).

294. *See supra* note 248 and accompanying text.

295. *See, e.g.*, U.N. Resolution 1272, *supra* note 5 (designating which human rights conventions the Security Council considered applicable to the mission).

296. *See* ICCPR, *supra* note 154, at art. 4(3) (requiring that States that derogate from the ICCPR stipulate the reasons for derogation to the Secretary-General of the U.N.); *see also* United Nations, Human Rights Committee, General Comment 29, State of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) (outlining the pre-conditions necessary to designate a state of emergency that permits derogation from human rights standard).

297. *See* UNMIK Regulation 2000/6, *On the Appointment and Removal from Office of International Judges and International Prosecutors* (Feb. 15, 2000) [hereinafter UNMIK Regulation 2000/6] (establishing the integration of international judges in the Kosovo judiciary), *available at* http://www.unmikonline.org/regulations/2000/reg06-00.htm. (on file with the American University Law Review).

The U.N. had attempted to make a separate war crimes court in Kosovo, but the U.N. could not secure funding for the proposal. Adrian Foreman, *New War Crimes Court in Kosovo*, BBC NEWS, Apr. 26, 2000, *available at* http://news.bbc.co.uk/2/hi/europe/727531.stm (last visited Aug. 30, 2003). Eventually, the U.N. incorporated international judges and prosecutors for cases where ethnic bias was a concern. *See supra* UNMIK Regulation 2000/6.

298. UNMIK Regulation 2000/6, *supra* note 297.

299. *See* E-mail from Clive Baldwin, formerly of the OSCE Department of Human Rights and Rule of Law, in Prishtina, Kosovo, to the author (Mar. 15, 2003) (on file with the American University Law Review) (suggesting that the SRSG could have used the existing international judges, who had been appointed as part of the Kosovo judicial system, to deal with cases where evidence may have been sensitive).

would be enabling conformity to international human rights for both the U.N. and the defendant. The U.N. would be subject to the requirement of judicial scrutiny,[300] and the defendant would have been brought before an impartial arbitrator who would not be subject to local political whims.[301]

Finally, if the SRSG feared the lack of independence from a local judiciary, even with international judges, the U.N. should have provided for the hybridization of authority rather than complete usurpation of judicial involvement.[302] Following criticism from several watchdog institutions, the SRSG instituted an independent commission to evaluate the Executive Order detentions.[303] One problem with the commission was its lack of independence and diversity, which could have been resolved through hybridization in its membership.[304] To add credibility to the commission, the U.N. could have appointed existing international judges working in Kosovo or required that appointments be made in consultation with the judiciary. The hybridization of the commission to include input from the SRSG, as well as the judiciary, increases the likelihood that the body would put forth independent opinions.[305]

The concepts of redistribution and hybridization of authority are ways to create a fair administration and to enforce international human rights standards. While acknowledging the need for quick action in humanitarian intervention, the current application of Executive Orders in Kosovo does not provide sufficient institutional

300. *See* OMBUDSPERSON INSTITUTION IN KOSOVO, SPECIAL REPORT NO. 4, ON THE ESTABLISHMENT OF A DETENTION REVIEW COMMISSION FOR EXTRA-JUDICIAL DETENTION BASED ON EXECUTIVE ORDERS ¶ 25 (Aug. 25, 2001) [hereinafter OMBUDSPERSON, SPECIAL REPORT NO. 4] (suggesting that the lack of judicial oversight of Executive Order detentions creates an inherent conflict with ECHR), *at* http://www.ombudspersonkosovo.org/doc/spec%20reps/pdf/sr4.pdf (on file with the American University Law Review). The Report went on to recommend that panels with international judges be formed to review the practice of executive order detentions to suggest means by which they may comply with international standards. *Id.* ¶ 27.

301. Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 221, 222 (recognizing that everyone has the right to a fair trial before an independent and impartial tribunal).

302. Interestingly, the SRSG extended the detention of the Nis bombers through the time of local elections, in which many western nations wanted Serb participation. These extended detentions were allowed to lapse quietly following the elections.

303. *See supra* Part IV.D.2.b (outlining the institution of the Detention Review Commission).

304. *See* UNMIK Regulation 2001/18, *supra* note 277 (authorizing that the SRSG alone select the judges for the detention review commission).

305. *See, e.g.*, OSCE, LSMR 2, *supra* note 13 (recommending the incorporation of international judges to improve the application of human rights standards). *See* OMBUDSPERSON, SPECIAL REPORT NO. 4, *supra* note 300 (recognizing the importance of judicial review in the detention process).

checks.[306] Current regulations permit up to six months of detention,[307] which arguably already violates international human rights norms as embodied in the ECHR, the ICCPR and the UDHR.[308] Since instruments like the ECHR emphasize the need for judicial authorization in detentions, the extra-judicial authorization of prolonged detentions violates concepts of hybridization and redistribution of authority.[309] Judicial involvement in these processes would serve to legitimize the executive's action and to provide a needed check in an interim administration.[310] Measures such as these, though requiring some additional time, are ways to increase conformity to international human rights standards to which even international organizations should be held.[311]

VI. THE IMPLICATIONS OF APPLYING HUMAN RIGHTS LAW TO THE U.N.

By advancing a more powerful role to the judiciary through hybridization and redistribution of authority, the U.N. may be able to curb the unchecked abuses of its personnel.[312] In such a system, adoption and enforcement of a function-based approach to human rights obligations may provide the legal basis for U.N. accountability.[313] This approach has several important practical implications for the operation of the U.N. First, application of human rights to the U.N. will mean a rethinking of the concept of privileges and immunities within missions.[314] The broad authorization of immunities is unworkable as it provides little or no means to bring claims against those acting in an administrative

306. Amnesty, Criminal Justice, *supra* note 255.

307. *See* UNMIK Regulation 1999/26, *supra* note 262 (permitting up to an additional six months of administrative ordered detentions for pre-trial custodial arrests).

308. *See* OMBUDSPERSON, SPECIAL REPORT NO. 3, *supra* note 14 (discussing the findings of the Ombudsperson that certain Executive Orders issued by the SRSG resulted in deprivations of liberty and are inconsistent with recognized international standards).

309. *See* ECHR, *supra* note 164, art. 6(1) ("[e]veryone arrested or detained . . . shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.").

310. *See* OMBUDSPERSON, SPECIAL REPORT NO. 3, *supra* note 14 (noting the need for judicial checks on Executive Orders).

311. *See* Bongiorno, *supra* note 1 (arguing for the application of human rights law to the U.N. in East Timor in response to the existing "culture" of impunity).

312. *See supra* Part IV (discussing the U.N. Mission in Kosovo and abuses by the U.N. and KFOR of privileges and immunities).

313. *See supra* Part II.B.2.

314. *See* Rawski, *supra* note 1, at 132 (advocating that privileges and immunities be aligned with human rights standards in order to increase the integrity of future U.N. governance operations).

capacity.[315] When combined with the lack of meaningful institutional checks, victims of human rights violations are completely left without recourse.[316] The grant of privileges and immunities, while necessary, must be tailored in a manner to compensate those harmed in the implementation of administrative policy.[317]

Second, the adoption of a function-based model creates the obvious question of when and what human rights standards are applicable, as missions vary significantly in mandate.[318] One solution would be to have the U.N. articulate which conventions should apply.[319] In creating mission mandates, the Security Council could enumerate the applicable human rights standards.[320] However, as history demonstrates, self-monitoring can be problematic because the U.N. is not always forthcoming in applying standards to itself.[321] Alternatively, the U.N. may evoke the laws applicable to a territory based on the conventions to which the State has already become a signatory.[322] As such, the rights would be a continuation of the duties of the previous State.[323] However, problems may arise in this context because some states will not have consented to some conventions,[324] and the U.N. will still be monitoring itself in continuing the State's duties.[325]

Finally, the creation of U.N. accountability raises the more global issue of enforcement. Applying human rights law to the U.N.

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315. *See supra* Part II.A (relating the abuse of privileges and immunities by the U.N. and KFOR).

316. *See* Amnesty, No Impunity, *supra* note 250 (describing the events surrounding the alleged torture and ill-treatment of an Albanian detainee by a member of the U.N. Civilian Police).

317. *See* Rawski, *supra* note 1, at 104-05 (arguing that while immunity protections are necessary to shield the U.N. and its personnel, particularly in unstable political environments where regular institutions of law and order are inoperable, such immunities must be reconciled with basic human rights).

318. *See* UNMIK Regulation 1999/24, *supra* note 9 (enumerating the human rights standards applicable to public officials in Kosovo acting in an official capacity); *see also* U.N. Resolution 1272, *supra* note 5 (authorizing the U.N. Mission in East Timor and specifying that public officials must observe the internationally recognized human rights standards established in instruments such as the UDHR and the ICCPR).

319. *See* U.N. Resolution 1272, *supra* note 5.

320. *Id.*

321. *See supra* Part III (discussing the U.N.'s belated adoption of humanitarian law to peace-keeping operations).

322. *See, e.g.*, UNMIK Regulation 1999/24, *supra* note 9, § 1 (providing that the applicable law in Kosovo shall include the regulations promulgated by the SRSG as well as the law that was in force in Kosovo on Mar. 22, 1989).

323. *Id.*

324. *See* UNMIK Regulation 2000/38, *supra* note 205 (applying in Kosovo the rights established in the ECHR, despite the fact that Yugoslavia, to which Kosovo still belonged, was not a signatory to the agreement).

325. *See infra* notes 326-30.

inherently creates liabilities for the Organization,[326] and the U.N. may thus be fiscally accountable for the actions of its personnel.[327] It is clear that self-monitoring is unlikely. As suggested by the Ombudsperson for UNMIK, the U.N. should create an independent commission to adjudicate claims against the Organization.[328] In addition to being valuable for a broadly-mandated mission, such as the case in Kosovo, this type of institution would be valuable for the entire U.N. system.[329] The presence of a claims commission accessible at the location of a mission with administrators who are not part of the mission would facilitate compensation of victims. Furthermore, it would provide a means of identifying institutional problems at an earlier stage during a mission, thus providing more possibilities for correcting abuses.[330] If such an institution existed in Kosovo, it would serve both as a deterrent against the SRSG in sidestepping international human rights law and the mandate of the mission, and as a means for victims to receive just compensation for grievances.

CONCLUSION

The U.N., as the harbinger of human rights standards, should be held accountable as it continues to undertake obligations traditionally falling under the domain of the State. While the presence of exigent circumstances may be a legitimate reason for centralizing authority, the rationale wears thin as three years pass in a mission and no mechanisms for accountability are set in place. As the U.N. is a facilitator in the development of the entire body of international human rights law, it is only appropriate that it model the means through which to achieve good governance. Accountability is of fundamental importance in the success of a U.N. mission and the successful transition of authority to local actors. Consequently, the U.N. must provide the example to which local actors can aspire through the application and enforcement of human rights standards in its missions.

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326. *See* UNMIK Regulation 2000/47, *supra* note 12 (providing recourse for third parties suffering injuries through Claims Commissions established by KFOR and UNMIK).

327. *Id.*

328. *See* OMBUDSPERSON, SPECIAL REPORT NO. 1, *supra* note 108, at 19 (recommending the establishment of the claims commission envisioned in Section 7 of UNMIK Regulation 2000/47, one that would provide individuals with access to an independent and impartial tribunal that would protect their guaranteed civil rights).

329. *Id.*

330. *See, e.g.*, *supra* Part IV (discussing the Ombudsperson's contribution as an institutional check).