

1 INTRODUCTION, METHODOLOGY AND DEFINITIONAL CONSIDERATIONS

“The innocence of the intention abates nothing of the mischief of the example”

- Rev. Robert Hall¹

1.1 ILLUSTRATING THE ACCOUNTABILITY DEFICIT: THE ROMA LEAD-POISONING CASE

In the aftermath of the foreign intervention in 1999, as overall administration over the territory of Kosovo was assumed by an international presence pursuant to UN Security Council Res. 1244 (1999), Kosovo experienced a massive reflux of previously expelled persons, followed by a widespread expulsion of members of Kosovo’s various local minorities. Between October 1999 and January 2000, the Office of the UN High Commissioner for Refugees (UNHCR) – together with its executive partners and under the overall authority of the United Nations Mission in Kosovo (UNMIK) – set up three temporary camps in order to house a large group of internally displaced persons (IDP) belonging to the Roma, Ashkali and Kosovo Egyptian local minorities.² Located in the northern part of

¹ Rev. Robert Hall, English Baptist Minister, during his sermon ‘The sentiments proper to the present crisis’, preached at Bridge Street, Bristol on 19 October 1803, as included in Tryon Edwards, *A Dictionary of Thoughts*, p. 154.

² According to a Kosovo Statistical Office estimate in 2002, the Roma, Ashkali and Kosovo Egyptian minorities make up 2% of the total population of Kosovo, roughly totalling some 38000 individuals, see <<http://www.ks-gov.net/ESK/eng/>>. Prior to the events of 1999, the area around the southern part of the city of Mitrovica housed around 8000 members of the mentioned minorities, most of which fled to camps in Montenegro, Serbia proper or joined their families throughout countries in western Europe, see Society for Threatened Peoples, The Kosovo Medical Emergency Group, *Dossier of Evidence Supporting the Call to Take Decisive Action to Implement Immediately an Emergency Evacuation and the Highest Level of Medical Treatment for all Roma, Ashkali and Kosovan-Egyptian Families in the Displaced Persons Camps of North Kosovo*, p. 8, at <<http://www.gfbv.de/uploads/download/download/Dossier%20of%20Evidence.pdf>> (all internet sites, unless stated otherwise, were last accessed 10 January 2011) (Dossier of Evidence). The Dossier of Evidence is compiled by the Society for Threatened Peoples, a German non-governmental organization actively

Mitrovica and Zvečan, the camps – Česmin Lug, Žitkovac and Kablare – were to house the families for 45 days until a permanent solution was found and the burned homes of the families in the southern part of Mitrovica were reconstructed.³ At the time, the Special Representative of the Secretary-General (SRSG), Bernhard Kouchner, confirmed that the camps would be closed within 45 days.⁴

The camps were set up in an area surrounded by the Trepča mines, a complex of over 40 mining facilities. Burdened by mismanagement, a lack of interest in basic environmental standards and political tensions during the preceding decade, Trepča's lead emission rates had reached staggering levels.⁵ In August 2000, citing health and environmental hazards, UNMIK took control of the mines and partially closed them: “[w]e are now the administration of all the complex of Trepča”, Bernhard Kouchner reportedly proclaimed.⁶

Despite this closure, neighbouring toxic slag heaps continued to fill the air with lead dust while lead-contaminated soil affected local crops. This resulted in the IDPs' ongoing direct exposure to various heavy metals, predominantly lead.⁷ The camps continued to remain operational, and in the summer of 2000 the first reports began to reach UNMIK and the World Health Organization concerning the alarming levels of lead found in blood samples taken during random tests conducted amongst the IDPs. However, the immediate relocation recommended by the reports did not take place.⁸

engaged in the matter. The dossier contains original data, analyses, reports and communications and is used throughout this introduction as a main point of reference. In general, *see also* HRW, *Kosovo: Poisoned by Lead, A Health and Human Rights Crisis in Mitrovica's Roma Camps*, Report, 23 June 2009 (HRW Report 2009). *See* Stone Sweet (1999), at 17: “Judicialization is a political process sustained by the interdependence of dyads and triads, and of rules and strategic behavior. It is observable, and therefore measurable, as modifications in the conduct of dispute resolution and social exchange”.

³ Dossier of Evidence, p. 9.

⁴ *Id.*, p. 10.

⁵ For a detailed analysis of the hazardous effects thereof, *see e.g.* Michael Palairat, *Trepča 1965-2000*, A report to the European Stability Initiative (ESI) & the Lessons Learned and Analysis Unit of the EU Pillar of UNMIK in Kosovo, 11 June 2003, at <http://www.esiweb.org/index.php?lang=en&id=156&document_ID=62>.

⁶ ABC News, *U.N. Takes over Mining Complex in Kosovo*, 17 August 2000, at <<http://abcnews.go.com/International/story?id=82865&page=1>>.

⁷ Once absorbed, lead affects all organs, causing, amongst other things, irreversible damage to the brain (encephalopathy), the kidneys, the nerve and immune system and impairment to bone growth. High exposure levels can cause death. Most vulnerable are children under the age of six, pregnant women and infants conceived at the site, *see* Dossier of Evidence, pp. 36-37.

⁸ UNMIK did conduct additional tests amongst local UNMIK policemen who had been jogging in the area between Česmin Lug and Kablare. The test results prompted UNMIK to immediately repatriate the policemen for treatment, *see* Dossier of Evidence, p. 13.

In 2004, during which time the camps were still housing IDPs, the World Health Organization resumed random blood testing amongst inhabitants. Results showed that *all* children under the age of six had life-threatening levels of lead in their blood. With 45µg/dl being the lead level after which therapy is recommended,⁹ most levels recorded were above 65µg/dl, the highest level readable by the instruments used to carry out the tests.¹⁰

International attention involving the situation in the IDP camps intensified from 2004. UNMIK organized discussions with relevant non-governmental organizations (NGO) and, in turn, NGOs provided aid to the affected population and organized trips to Belgrade where treatment was, at times reluctantly, provided. Other organizations, such as the International Committee of the Red Cross (ICRC)¹¹ and Amnesty International,¹² demanded that the IDPs be evacuated from the camps. Furthermore, the UN special envoy to Kosovo at the time, Kai Eide, called for the immediate removal of the camps, characterizing the situation as an “emergency”.¹³ Local institutions also voiced their dismay. The Ombudsperson Institution in Kosovo (OIK) called for UNMIK to take action. Moreover, Kosovo’s international Ombudsperson, Marek Antoni Nowicki, on one occasion added that it was his “deep suspicion that these people are being treated this way for no other reason than that they are Roma”.¹⁴ Despite all of the attention, the camps remained as they were while medical tests continued to result in “some of the highest lead levels in medical history”.¹⁵

In 2005, UNMIK announced the reconstruction of a deserted former French military compound, camp Osterode, aimed at providing new temporary housing for the IDPs. As it was located in the direct vicinity of the three original camps, SRSG Joachim Rücker and the World Health Organization declared camp Osterode “lead *safer*” and in 2006, some 400 inhabitants of camps Žitkovac and Kablare were moved to Osterode.¹⁶ Since then, NGOs have continued to demand final evacuation of the camps, while various UN human rights bodies have paid considerable attention to the situation.¹⁷ UNMIK responses have

⁹ Dossier of Evidence, p. 43, citing the United States Centre for Disease Control.

¹⁰ *Id.*, pp. 38-43.

¹¹ *Id.*, p. 11.

¹² Amnesty International (AI), *Kosovo: Protect the right to health and life*, News Service No. 189, 13 July 2005.

¹³ Report to the UN SG by Ambassador Kai Eide, *A Comprehensive Review of The Situation in Kosovo*, UN Doc. S/2005/635, 7 October 2005, p. 11.

¹⁴ International Herald Tribune, *In Kosova's Camps, a Story Waits for an Ending*, 12 January 2005.

¹⁵ See Dossier of Evidence, p. 38 for an overview of results obtained through tests conducted in the period between 2005 and 2008.

¹⁶ *Id.*, p. 20; HRW Report 2009, p. 29.

¹⁷ E.g. Human Rights Council (HRC), 4th Session, *Report of the Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living, Mr.*

ranged from joint efforts to rebuild the houses of the IDPs to controversial claims that the IDPs themselves were to blame for the lead contamination, citing the illegal smelting of car batteries in the camps as the cause of the pollution.¹⁸

Following the 2008 political turn of events in Kosovo, the responsibility for the camps was transferred by UNMIK to the local authorities. In February 2010, a full decade after establishment, the remaining camps – Česmin Lug and Osterode – still housed approximately 600 Roma, Ashkali and Kosovo Egyptian inhabitants.¹⁹ Human Rights Watch (HRW) reported in December 2010 that the remaining camps were being shut down by the European Commission and the US Agency for International Development.²⁰ However, at the time of writing February 2011, the ICRC in Kosovo was not able to confirm the complete closure of the camps.²¹

The impact of the described situation cannot be established with absolute certainty, as medical records, including the registration of miscarriages, remain poor because autopsies have not been carried out. Estimates indicate that between the end of armed hostilities in 1999 and February 2009, approximately 80 persons have died in the camps.²² The Council of Europe Commissioner for Human Rights, Thomas Hammarberg, concluded after a visit to the camps in February 2010 that “[t]he fact that the camps have been inhabited for a full decade is no less than a scandal. The international community has a large part of the responsibility for this situation”.²³ Taken together, the claim made by

Miloon Kothari, Addendum, Summary of communications sent and replies received from Governments and other actors, UN Doc. A/HRC/4/18/Add.1, 18 May 2007, §§ 64-66; AI, Briefing to the Human Rights Committee during the 87th Session in July 2006, AI Index: Eur 70/007/2006, p. 25; CommHR, Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Report of the Special Rapporteur, Okechukwu Ibeanu, Addendum, Summary of communications sent to and replies received from Governments and other actors during 2005, 62nd Session, UN Doc. E/CN.4/2006/42/Add.1, 27 March 2006, §§ 11-15; Human Rights Committee (HRCee), Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo Since June 1999, Kosovo (Serbia and Montenegro), UN Doc. CCPR/C/UNK/1, 13 March 2006.

¹⁸ HRCee, *Document submitted by the United Nations Interim Administration Mission in Kosovo under articles 16 and 17 of the Covenant, Kosovo (Serbia)*, UN Doc. E/C.12/UNK/1, 15 January 2008, § 557 and HRW Report 2009, p. 30.

¹⁹ HRW Report 2009, pp. 41-42.

²⁰ HRW, *Lead-Contaminated Roma Camps in Kosovo Shut Down*, News Release, 9 December 2010.

²¹ Information provided by the ICRC in Northern Mitrovica, 22 February 2011.

²² Dossier of Evidence, p. 47. The casualty figures include children and persons who had to be returned to the camps after they underwent treatment in Belgrade.

²³ Council of Europe (CoE), *Kosovo: Commissioner Hammarberg calls for stop of forced returns and immediate evacuation of Roma from lead-contaminated camps*, at <http://www.coe.int/t/commissioner/News/2010/100215Kosovo_en.asp>. See also CoE,

Commissioner Hammarberg and the events underlying the lead-poisoning drama prompt the question as to through which mechanisms can Kosovo's international administration be held to account. In this book, the broader context of this question is addressed, namely the accountability of international territorial administrations and the emergence and possible added value of public law principles in the realm of international law.

1.2 THE SUBJECT MATTER

International territorial administration (ITA) has been the subject of extensive academic debate.²⁴ In this book, the focus is on the accountability of

Report of the Council of Europe Commissioner for Human Rights' Special Mission to Kosovo(1), Doc. CommDH(2009)23, 2 July 2009, pp. 24-26.

²⁴ Some authors discuss the issue of sovereignty and legal status of internationally administered territories, e.g. Knoll B. (2008), *The Legal Status of Territories Subject to Administration by International Organizations*, New York: Cambridge University Press; Zaum D. (2007), *The Sovereignty Paradox. The Norms and Politics of International Statebuilding*, Oxford: Oxford University Press; Smyrek D.S. (2006), *Internationally Administered Territories – International Protectorates?: An Analysis of Sovereignty over Internationally Administered Territories with Special Reference to the Legal status of Post-War Kosovo*, Berlin: Duncker & Humblot; Knoll B. (2002), 'UN Imperium: Horizontal and Vertical Transfer of Effective Control and the Concept of Residual Sovereignty in 'Internationalized' Territories', 7(3) *Austrian Review of International and European Law*, pp. 3-52. Others have focused on historical precedents, e.g. Wilde R. (2008), *International Territorial Administration. How Trusteeship and the Civilizing Mission Never Went Away*, Oxford: Oxford University Press. The linkage between peacekeeping, foreign occupation and international administration of territory has also been assessed, e.g. Brabandere E. (2009), *Post-conflict Administrations in International Law; international territorial administration, transitional authority and foreign occupation in theory and practice*, Leiden: Martinus Nijhoff Publishers; Caplan R. (2006), *International Governance of War-Torn Territories*, New York: Oxford University Press; Ratner S. (2005), 'Foreign Occupation and International Territorial Administration: The Challenges of Convergence', 16(4) *European Journal of International Law*, pp. 695-719; Wilde R. (2003), 'Taxonomies of International Peacekeeping: An Alternative Narrative', 9 *ILSA Journal of International and Comparative Law*, pp. 391-398. ITA has also been referenced extensively in the broader context of an emerging constitutionalization of international law, e.g. Klabbers J., Peters A. & Ulfstein G. (2009), *The Constitutionalization of International Law*, Oxford: Oxford University Press; De Wet E. (2004), 'The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law', 8 *Max Planck Yearbook of United Nations Law*, pp. 291-340. Finally, the issues of legitimacy and accountability of ITA missions has been discussed in some depth or as part of overall assessments of the ITA concept, e.g. Stahn C. (2008), *The Law and Practice of International Territorial Administration*, Cambridge: Cambridge University Press; Pacquée D. & Dewulf S. (2007), 'International Territorial Administrations and the Rule of Law: The Case of Kosovo', 4(1) *Essex Human Rights Review*, pp. 1-14; Knoll B. (2007)(1), 'Legitimacy and UN-Administration of Territory', 8(1) *German Law Journal*, pp. 39-56; Stahn C. (2005)(3), 'Governance Beyond the State: Issues of Legitimacy in International Territorial Administration', 2(1) *International organizations Law Review*, pp. 9-56; White N.D. &

international missions established under an ITA mandate. Before the topic is discussed any further, however, the ITA concept requires certain preliminary clarifications.

1.2.1 INTERNATIONAL TERRITORIAL ADMINISTRATIONS: LEGAL CONTOURS

ITA has been perceived as a peculiarity within the international legal order. The phenomenon is intriguing, as it goes against certain legal patterns to which we have become accustomed. Receiving a stamp with UN markings instead of the usual national insignia upon entering an internationally administered territory or seeing a UN mission listed amongst states in membership listings of certain international associations or amongst treaty signatories is simply at odds with the way in which we perceive the international legal order.²⁵

Although ITA as a phenomenon reflects a development rather than a static concept, a working definition is indispensable at this point. Two main characteristics define ITA. In the first instance, an international administering entity, whether an international organization or a *sui generis* international body, enjoys virtually all-encompassing authority to exercise public power within a particular territory. In other words, international entities are charged with the administration of all facets of a particular society, ranging from healthcare to economy, from foreign policy to the administration of justice. In order to exercise this mandate, the international entity enjoys legislative and executive powers and is responsible for the judiciary. Over time, the international administrator will usually engage in a gradual transfer of powers to local authorities while retaining the final say. However, territories remain under international administration as long as the ultimate decision-making authority remains with the international entity. Thus, the second defining characteristic

Klaasen D. (eds.) (2005), *The UN, human rights and post-conflict situations*, Manchester: Manchester University Press; Chesterman S. (2005), *You, the people: the United Nations, transitional administration and state-building*, Oxford: Oxford University Press.

²⁵ See e.g. the Central European Free Trade Agreement to which UNMIK became a party on behalf of Kosovo on 19 December 2006. The preamble, Art. 1 and the signatures on the last page of the agreement place UNMIK on an equal footing with other signatories, at <<http://www.cefta2006.com/sites/default/files/CEFTAMAINTEXT2006.pdf>>. In 2011 UNMIK took over the Chairmanship of CEFTA. Also on behalf of Kosovo, UNMIK signed the European Common Aviation Area agreement in June 2006. See in particular p. 5 and Protocol IX, at <http://ec.europa.eu/transport/air_portal/international/doc/reference/background/com_2006_0113_en.pdf>. As a final illustration, UNMIK used to be listed as a separate entity listed right after Ukraine on a site dealing with the Universal Human Rights Index of United Nations Documents, at <<http://www.universalhumanrightsindex.org/en/geographical/7.html>>. The entry was replaced by Kosovo following the political turn of events in 2008.

rests in the fact that the power enjoyed by the international actors is ultimate in nature and remains with the international administering entity throughout the process of gradual transfer of power. This means that an entity possessing a fully-fledged network of governmental bodies – for example Bosnia and Herzegovina (BiH) – is still considered to be an internationally administered territory, as long as the ultimate decision-making power is held by an international organ placed above local governing structures. This definition results in two main determinants of this book's theme.

Firstly, *international territorial administration typifies a unique interplay between the international and local legal domain*. ITA illustrates the fusion of two traditionally separate legal realms. The international administration engages in the legislative, executive and judicial administration of a territorial entity and its inhabitants. In so doing, the international administration exercises power traditionally belonging to states. Secondly, *this interplay results in international decision-making processes having direct impact at the local level*. As a consequence of the aforementioned interplay, local societies and legal orders are shaped directly through international decision-making processes. In other words, individuals at the local level are directly subjected to decisions taken by international entities that operate at the local level. These decisions impact individuals without being filtered by or embedded in national – or otherwise applicable – rules and legislation since at that moment these decisions in fact *are* the applicable rules and legislation.²⁶

Together, these two determinants shape a 'common zone of impact' at the local level: namely, one in which individuals, and other subjects, are directly affected by the exercise of public power wielded by both local and international actors, and where the distinction between the two is blurred.²⁷ Perceived as such, ITA is most pointedly exemplified by the institutional design and practice of the UN's administration of East Timor²⁸ between 1999 and 2002 and the territory of

²⁶ E.g. Knoll (2006), 'Beyond the *Mission Civilisatrice*: The Properties of a Normative Order within an Internationalized Territory', 19(2) *Leiden Journal of International Law*, pp. 275-304.

²⁷ Stahn makes the same argument by stating "International territorial administration illustrates more vigorously than any other form of international governance that international organizations and other non-state actors can affect individual and group rights in the same manner as states. In this setting, governmental responsibility cannot strictly be tied to the concept of the state, but should be founded upon an impact-based assessment of responsibility, namely 'the degree to which actors can impact an individual's or group's human rights'", see Stahn (2005)(3), p. 55, quoting Mégret F. & Hoffmann F. (2003), 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', 25(2) *Human Rights Quarterly*, p. 321.

²⁸ Pursuant to an agreement between Indonesia and Portugal on the transfer of authority to the UN, on 25 October 1999, SC Res. 1272 (1999) was adopted establishing a United Nations Transitional Administration in East Timor (UNTAET). UNTAET was in charge of the overall

Kosovo from 1999 onwards,²⁹ as well as the international governance of BiH by the Office of the High Representative (OHR) since 1995.³⁰ With respect to Kosovo and BiH, emphasis is placed on UNMIK and the OHR, respectively. The European Union (EU) has steadily been increasing its engagement in the administration of these territories. This increased engagement has thus far been complex on paper and ambiguous in practice, resulting in an unclear relationship between the EU missions on the ground and the UN-led administrations. The legal complexities surrounding these EU-led missions merit separate research, however, and for that reason the EU's engagement in ITA missions will not be analyzed in this book.³¹

1.2.2 THE RESEARCH QUESTION: HOLDING INTERNATIONAL TERRITORIAL ADMINISTRATIONS TO ACCOUNT

The main theme of this book involves a reoccurring aspect of ITA missions: namely, their systemic accountability deficit. In this respect, the nature of missions such as UNMIK can be misleading. ITA missions avail themselves of a presupposed legitimacy based on their linkage with peacekeeping and they operate in conflict-affected areas where, one is inclined to argue, things can hardly get any worse. Such reasoning tends to push the question of ITA mission accountability to the sidelines of the debate, under the pretext that the international administrator can do no wrong. As a matter of principle, however, assumed benevolence is not considered sufficient to the extent that it warrants a marginalization of the need for accountability.

civil administration of the territory and contained a military component composed of a multinational force previously deployed pursuant to SC Res. 1264 (1999). UNTAET's mandate was formally terminated on 20 May 2002, upon the independence of East Timor, now officially named Timor-Leste.

²⁹ On 10 June 1999, SC Res. 1244 (1999) was adopted, deciding on an "international civil and security presence" and paving the way for the establishment of UNMIK.

³⁰ The General Framework Agreement for Peace in Bosnia and Herzegovina negotiated in Dayton, Ohio, USA, and signed in Paris on 14 December 1995 (Dayton Peace Agreement), established the OHR as an international administration holding the final authority with regard to the implementation of the peace agreement.

³¹ For UNMIK, this means that the emphasis is placed on the period during which the UN mission was fully functional: *i.e.* the period between June 1999 and 9 December 2008, the deployment date of the European Union Rule of Law Mission in Kosovo (EULEX). Nominally, UNMIK continued to operate after that date based on its original mandate. Likewise, EULEX technically operates within the ambit of SC Res. 1244 (1999), despite the telling statement of Yves de Kermabon, first head of EULEX, in which he said that as of 9 December 2008, "EULEX will switch on and UNMIK will switch off", at <<http://www.emportal.rs/en/news/serbia/72082.html>>. For a brief overview of the EU's engagement in BiH and Kosovo, see Section 2.2.2 below.

The Roma lead-poisoning drama pointedly illustrates the need for accountability. Furthermore, the example highlights the actual accountability deficit. During the relevant period, accountability was pursued through various legal means. At the local level, the European Roma Rights Center in 2005 filed a criminal complaint with the Office of the Public Prosecutor in Priština on behalf of a resident of the IDP camps.³² The complaint alleged a violation of the Provisional Criminal Code of Kosovo, a local law adopted by way of a UNMIK regulation.³³ Human Rights Watch reported that action was taken by the prosecutor's office pursuant to this complaint.³⁴ Complaints were also filed with the Ombudsperson Institution in Kosovo and the Human Rights Advisory Panel (HRAP), institutions established by UNMIK for precisely this purpose. Ultimately, these institutions were prevented from achieving their goal, as will be shown in Sections 5.2.2 and 5.2.3 below. At the international level, the European Roma Rights Center attempted to involve the European Court of Human Rights (ECtHR) by filing an application in 2006. The application alleged violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and in particular the right to life, the right to a fair trial and the adjacent right to an effective legal remedy. One day after the application was filed, the ECtHR informed the applicants that it was not competent to accept the case, as UNMIK was not party to the ECHR.³⁵ Finally, internal UN mechanisms were set in motion. In 2006, a third-party compensation claim was filed under UN General Assembly Res. 52/247.³⁶ Internal UN oversight bodies were also informed about the state of affairs in the IDP camps.³⁷ The complaints were in vain.

The work of the International Law Association (ILA) and the International Law Commission (ILC) indeed recognizes that accountability issues arise in situations of territorial administration.³⁸ The emblematic situation as presented in the previous part of this introduction shapes the conditions in which accountability of relevant international actors can legitimately be demanded. In addressing this demand, it is taken as a point of departure that certain public law principles and accountability are interrelated. Accountability implies that there

³² The complaint was filed on 31 August 2005.

³³ UNMIK Reg. 2003/25, 6 July 2003, as amended.

³⁴ HRW Report 2009, pp. 32-33.

³⁵ European Roma Rights Center, *European Court of Human Rights Has No Jurisdiction in Kosovo Lead Poisoning Case*, 3 April 2006, at <<http://www.errc.org/cikk.php?cikk=2568>>.

³⁶ GA Res. 52/247, 17 July 1998.

³⁷ Internal mechanisms are discussed in Sections 5.1.2, 5.1.4 and 5.2.1 below.

³⁸ ILA, Committee on Accountability of International Organizations, Final Report 2004, *Report of the Seventy-First Conference*, Berlin 2004 (ILA 2004). The ILC included the topic of "Responsibility of International Organizations" into its long-term program of work in 2000, at <<http://www.ila-hq.org>> and <<http://www.un.org/law/ilc/>>.

are limits as to how public power is to be exercised.³⁹ Such limits can be established by institutionalizing certain public law principles: namely, the rule of law, reviewability and an independent judiciary through the diffusion of powers. In other words, these public law principles are considered to enhance accountability. A second presupposition is that accountability has a legitimizing effect on the exercise of public power.⁴⁰ Taking this into consideration, the described accountability deficit is approached in this book from a public law perspective, guided by the following question:

What is the potential of public law principles in conceptualizing the systemic accountability deficit inherent to missions engaged in international territorial administration?

1.2.3 WHY A PUBLIC LAW APPROACH?

ITA missions are generally considered the most far-reaching embodiment of a steady evolution of UN peacekeeping and peacebuilding practice. However, this assumption is problematic. In short, peacekeeping and peacebuilding are conceptually unable to address the aforementioned accountability-related challenges.

While the ITA concept did gain momentum in the context of evolving peacekeeping and peacebuilding practice, it cannot be perceived as merely a part thereof. Admittedly, there is no precise distinction between ITA missions and adjacent international undertakings such as peacekeeping. However, emphasis is placed on the fact that ITA missions face decidedly distinct challenges compared to more traditional military undertakings: namely, challenges for which international law provides neither a clear legal framework nor institutional solutions.⁴¹

This book adopts as a point of departure that the functional parallel between states and internationally administered territories creates the basis upon which accountability issues should be addressed. This parallel rests on two foundations: similarity of power and similarity of problem. The extent of public power vested in ITA missions only nominally falls short of being identical to the

³⁹ Bovens considers this to be the constitutional perspective of accountability, *see* Bovens M. (2007), 'Analysing and Assessing Accountability: A Conceptual Framework', 13(4) *European Law Journal*, p. 463.

⁴⁰ *Id.*, p. 464.

⁴¹ Accountability related to these more traditional military undertakings, as well as the military components of ITA missions, is not discussed in this book. For a critique of mainstream approaches in terms of conceptualizing ITA missions, *see* Wilde R. (2004), 'Representing International Territorial Administration: A Critique of Some Approaches', 15(1) *European Journal of International Law*, pp. 71-96.