
EVALUATING A DEMAND FOR INCLUSIONARY GOVERNANCE IN POST-CONFLICT SITUATIONS

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ABSTRACT

An international administration of a territory (ITA) can adopt decisions in individual situations while a proper legal framework for regulating transparency, participation in decision-making and access to justice (i.e. inclusionary governance) is lacking. The type of public power exercised by ITAs and its impact on the local level raises serious concerns relating to inclusionary processes in the decision-making procedures of ITAs. Therefore, the principal objective of this paper is to critically analyse whether inclusionary governance can be required from ITAs. In order to do so, the paper will firstly evaluate ITA mandates for inclusionary governance provisions. The author asserts that, while power-sharing arrangements are made between ITAs and local authorities, this does not necessarily amount to inclusionary governance, as the inclusion of the individual is the key. Secondly, the paper discusses the review of international organisations on the inclusion/exclusion of individuals in decision-making by ITAs. Lastly, the paper contends that the exclusion of individuals in decision-making procedures forms a more general problem in international law; therefore, a concise comparison is made between the exercise of public power by ITAs and that by international organisations.

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Introduction

A temporary international administration of territory (ITA) by an international organisation or a group of states in post-conflict situations exercises public power extensively. An international administrator can adopt decisions without engaging in significant consultations with affected individuals. An administrator can, for example, adjudicate property disputes,³¹⁹ operate/reconstruct public utilities and dismiss people from public office.³²⁰ Similarly, several international institutions adopt decisions with direct impact on individuals while these individuals are not quite included in the process of decision-making, for instance the UN Security Council adopting financial sanctions against individuals. The all-encompassing governance by ITAs and the adoption of decisions in individual situations lead, in particular, to a significant constraint of state sovereignty, and directly affect the lives and opportunities of millions of people.³²¹ The exercise of public power in this manner has led various international bodies to raise a claim for inclusionary processes into the decision-making procedures in individual situations of an ITA.³²²

Given the impact of the adoption of decisions in individual situations by ITAs and the exclusion of the individuals from decision-making procedures by ITAs, the principal objective of this paper is to present a critical analysis of the claim for inclusionary processes into decision-

making procedures by ITAs. In order to do so, the paper will firstly evaluate ITA mandates for inclusionary governance provisions. Within this assessment the role of human rights standards within ITAs will be taken into account, i.e. whether a claim for inclusionary governance can be further substantiated on the basis of the applicability of human rights standards to the conduct of ITAs. Subsequently, how the functioning of ITAs is assessed by international organisations will be examined; in other words, whether international organisations have identified a lack of inclusionary governance in relation to ITAs and whether they warrant inclusionary governance by ITAs. Lastly, the paper contends that the exclusion of individuals in decision-making procedures forms a more general problem in international law. Therefore, a concise comparison is made between the exercise of public power by ITAs and that by international organisations.

Individual decision-making procedures of ITAs

An ITA can be defined as the temporary governance of a territory in a post-conflict situation by an international organisation or group of states, such as the UNMIK³²³ in Kosovo, UNTAET³²⁴ in East-Timor and OHR³²⁵ in Bosnia and Herzegovina (BiH). ITAs exercise public authority extensively. The missions are argued to:

“...assume all-encompassing authority to exercise public power within a given territory for a temporary period of time and...this authority is ultimate in nature: that is, it supersedes all governing institutions possibly existing at the local – that is, the national – level”.³²⁶

³¹⁹ Buyse, A.C. *Post-Conflict Housing Restitution. The European Human Rights Perspective, with a Case Study on Bosnia and Herzegovina* (Antwerpen: Intersentia, 2008).

³²⁰ Knaus, G. and F. Martin. “Lessons from Bosnia and Herzegovina: Travails from the European Raj” *Journal of Democracy* 14 (2003) 60–74.

³²¹ Buchanan, A and R.O. Keohane. “The Legitimacy of Global Governance Institutions”, *Legitimacy in International Law* (Berlin, Springer: 2008) 25 at p. 27.

³²² European Commission for Democracy through Law of the Council of Europe (“Venice Commission”), *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, CDL-AD (2005) 004 (Venice, 11–12 March 2005) (“Venice Commission OHR”); Parliamentary Assembly of the Council of Europe, Resolution 1384 (2004), available at <http://assembly.coe.int/> (7 November 2011); European Stability Initiative, *Reshaping international priorities in Bosnia and Herzegovina – Part II International Power in Bosnia* (Berlin: European Stability Initiative 2000).

³²³ United Nations Interim Administration Mission in Kosovo (UNMIK). <http://www.unmikonline.org/>.

³²⁴ United Nations Transitional Administration in East Timor (UNTAET). <http://www.un.org/en/peacekeeping/missions/past/etimor/etimor.htm>.

³²⁵ Office of the High Representative of the international community, Bosnia and Herzegovina (OHR). <http://www.ohr.int>.

³²⁶ Momirov, A. *Accountability of International Territorial Administrations – a Public Law Approach*, (Utrecht: Eleven Publishing, 2011). p. 49.

The wide range of competences assumed by ITAs is notably described in the Brahimi report:

"[ITAs] [s]et and enforce the law, establish custom services and regulations, set and collect business and personal taxes, attract foreign investment, adjudicate property dispute and liabilities for war damage, reconstruct and operate all public utilities, create a banking system, run schools and pay teachers and collect the garbage".³²⁷

Among many measures, ITAs adopt several decisions in individual situations, which is the focus of this paper. Decision-making in individual situations concerns decisions of an administrative nature which influences the lives of individuals either directly or indirectly, e.g. regarding permits or infrastructure projects, and thus does not concern those procedures that are norm-developing, such as the development of legislation or policy standards.³²⁸ ITAs adopt decisions in individual situations, e.g. when removing a person from holding a public office or deciding on an individual case of housing restitution. The question is whether and to what extent individuals are included in these decision-making procedures.

Three-dimensional approach to inclusionary governance

This research paper adopts as its point of departure a three-dimensional approach to inclusionary governance: transparency, participation in the decision-making procedures and access to justice. It is generally accepted that, for proper inclusion of affected individuals it is these three elements that are paramount.³²⁹

The first dimension concerns transparency, implying that there should be free access to information, i.e. the right to seek information and the right to receive information. Transparency is generally considered a prerequisite for meaningful participation.³³⁰ The element of transparency builds on the right to freedom of information, which takes various forms within human rights treaties, most often protected through freedom of expression.

The second dimension concerns participation in decision-making procedures of a public administrator. Participation can be realised through both formal and informal procedures. Participation in decision-making procedures finds limited reflection in human rights treaties. Nevertheless, various human rights bodies, including the Committee on Economic, Social and Cultural Rights, emphasise the need to mainstream inclusionary processes in decision-making, e.g. in relation to the right of adequate housing.³³¹

The third dimension concerns access to justice in relation to which two separate elements can be identified. Firstly, this dimension focuses on the extent to which individuals directly affected by the decision can request a review thereof before an impartial entity. Secondly, it concerns the possibility of recourse to a remedy when rights protected by the other two dimensions are impaired. Within human rights treaties access to justice is protected by the right to a fair trial.

The complementarity between the three dimensions implies that the lack or weakness of one dimension may to some

³²⁷ Report of the Panel on United Nations Peace Operations (Brahimi report) UN Doc. A/55/305-S/2000/809, p. 21 August 2000, available at http://www.un.org/peace/reports/peace_operations (7 November 2011), para. II.H. The report questions the urge of the UN to classify the ITAs as peace operations and questions whether the UN should be engaged with this kind of mission at all.

³²⁸ Hey, E. "International Institutions", *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007), 749 at pp. 749–759.

³²⁹ Ebbesson, J. "Public Participation" in Bodansky, Brunneé and Hey, *The Oxford Handbook of International Environmental Law*, see above n. 10, 681 p. 684. Global Administrative Law has identified these three principles as the core principles of administrative decision-making, see B. Kingsbury, N. Krisch, R.B. Stewart and

J.B. Wiener, "Global Governance as Administration: National and Transnational Approaches to Global Administrative Law", *Law and Contemporary Problems* 68:3–4 (2005) 1–14 and B. Kingsbury, N. Krisch, and R.B. Stewart, "The Emergence of Global Administrative Law", *IIJ Working Paper 2004/1* (Global Administrative Law Series), available at www.iiij.org. Similarly, Multilateral Development Banks rely on these three principles for the decision-making procedures. See: e.g. the Operational Policies and Procedures of the World Bank at <http://go.worldbank.org/2G5SSZAET0> (7 November 2011).

³³⁰ Boyle, K. "Thought, Expressions, Association and Assembly" in D. Moeckli, S. Shah and S. Sivakumaran, *International Human Rights Law*, (Oxford: Oxford University Press, 2010), p. 268.

³³¹ Tempenman, J.T. "Public Participation in Times of Privatisation: A Human Rights Analysis" *Erasmus Law Review* 4:2 (2011).

extent be compensated by broader protection under the other dimension(s). For instance, a lack of participation in decision-making procedures might be compensated by providing more possibilities of redress.³³² The paper will mainly focus on the concept of inclusionary governance and, only where necessary, will a reference to a specific dimension will be made.³³³

Contextualising a claim for inclusionary governance by ITAs

Practice shows that the regulation and implementation of inclusionary processes in decision-making procedures by ITAs remain deficient.³³⁴ However, is there a sufficient ground to claim for inclusionary governance by ITAs? In order to do so, the paper will firstly evaluate ITA mandates for inclusionary governance provisions. Secondly, the paper discusses the review of international organisations on the inclusion/exclusion of individuals in the decision-making by ITAs. Lastly, the paper evaluates whether the exclusion of individuals forms a more general problem in international law by assessing whether and to what extent the exercise of public power by ITAs in individual situations can be compared with the exercise of public power by international institutions.

EVALUATING ITA MANDATES FOR INCLUSIONARY PROCESSES

Power-sharing arrangements between local authorities and ITAs: a basis for inclusionary governance?

According to the handbook on UN Multidimensional Peacekeeping operations ITAs were set out to:

“...[administer] a territory for a transitional period, thereby carrying out

all the functions that are normally the responsibility of a government”, which creates a situation in which the international presence is “responsible for directly managing all aspects of civilian life while simultaneously working to devolve its responsibilities to local authorities”.³³⁵

The responsibility for ITAs to transfer power to local authorities lies at the core of the mandate of the ITAs.³³⁶ The long-term objective of ITAs is to “do themselves out a job” by devolving authority back to the local community.³³⁷ This would imply close cooperation with the local people. As stated by the UN Panel on Peace Operations, “effective state-building requires active engagement with the local parties”.³³⁸ In other words, a growing consensus can be identified with the need to strengthen local ownership in the process of peace-building.³³⁹

A brief survey of ITA mandates

Within the mandates of ITAs, special provisions were adopted in which power sharing arrangements between the ITA and the local authorities were included. As early as 1968, the General Assembly mandated the Council of Namibia to “administer South West Africa until independence, with the maximum possible participation of the people of the Territory”.³⁴⁰ A further example is the mandate of the UNMIK in Kosovo. It was mandated to organise and supervise the development of provisional institutions for

³³² See in this light e.g. the claim for an ombudsman in BiH and Kosovo due to limited involvement of citizens, whereas in East-Timor such a claim was never made. In UNTAET, citizens were involved, both directly and indirectly, as regulated in the ITA’s mandate.

³³³ This paper’s findings are to be part of a doctoral research project. For further research results, please contact the author.

³³⁴ Stahn, C. *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge: Cambridge University Press, 2008); Momirov, A. *Accountability of international territorial administrations*, above n. 8.

³³⁵ United Nations, *Handbook on United Nations Multidimensional Peacekeeping Operations*, Department of Peacekeeping Operations, Peacekeeping Best Practices Unit (December 2003) pp. 2, 35 cited in Momirov, A. *Accountability of International Territorial Administrations*, above n. 8, pp. 51–52.

³³⁶ Momirov, A. *Accountability of International Territorial Administrations*, above n. 8, p. 153.

³³⁷ International Commission on Intervention and State Sovereignty (2011), *Report: Responsibility to protect* (Ottawa: International Development Research Centre), available at <http://www.responsibilitytoprotect.org/index.php/publications> (visited 7 November 2011), para. 5.31.

³³⁸ Report of the Panel on the United Nations Peace Operations, UN Doc. A/55/305-S/2000/809, above n. 9, para. 37.

³³⁹ Report of the Secretary-General of the United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, 23 August 2004, para. 17.

³⁴⁰ Stahn, C. *The Law and Practice of International Territorial Administration*, above n. 18, p. 718; GA Res. 2248 (1968) para. 1(a).

democratic and autonomous self-government by “transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo’s local provisional institutions”.³⁴¹ Similarly, the UNTAET was mandated to exercise its authority “with a view to...transfer to these institutions to its administrative and public service functions”.³⁴²

In the case of Iraq, the Security Council requested the administrator to cooperate with the Iraqi Council in the exercise of its functions.³⁴³ The CPA regulated the cooperation in CPA Regulation No. 6, which stated that, “the Governing Council and the CPA shall consult and coordinate on all matters involving the temporary governance of Iraq, including the authorities of the Governing Council”.³⁴⁴ Hence, recent ITA mandates contain more explicit obligation to transfer authority and to cooperate with the local authorities. A short survey of mandates shows that power-sharing arrangements and thereby involvement by domestic authorities became an integral part of the mandate of ITAs.³⁴⁵

Diminishing the effect of the power-sharing arrangements: final authority of ITAs

However, the promising inclusion of local authorities via power-sharing arrangements in the decision-making by ITAs needs to be mitigated to a certain extent. As is significant with the exercise of public power by ITAs, the final authority stayed with the ITAs for the duration of the administration even after the transfer of powers to the local authorities. One can, therefore, question the effect of these power-sharing arrangements, since at the end the final say remained with the international

administrator of territory.³⁴⁶ This complex relation between the local authorities and the ITA can be identified in each of the administrations. To illustrate, UNTAET had a system of “co-governance” in the second phase of the transition, while the ultimate authority stayed with the UNTAET. The Constituent regulations stated that those powers vested in the domestic authorities (power-sharing basis) did not prejudice the final authority of the administrator.³⁴⁷ Furthermore, several executive decisions/powers stayed with the exclusive ambit of the administrator.³⁴⁸

Hence, even though ITA mandates include specific power-sharing arrangements with local authorities, the final authority of the ITAs diminishes the actual involvement of local authorities. Furthermore, ITAs often excluded the local authorities in the decisions to be taken at the executive level.

To sum up: can inclusionary governance provisions relating to ITA decision-making procedures be identified?

The survey pointed out the importance of power-sharing arrangements and the necessity for ITAs to promote and institutionalise local ownership throughout the mission. Nevertheless, even though power-sharing arrangements were made between the local authorities and the ITAs, this does not necessarily provide a sufficient ground for a claim for inclusionary processes in the decision-making procedures in individual situations of ITAs. First of all, concrete provisions, which hint at such inclusionary processes in decision-making procedures, can hardly be identified in the mandates. For instance, within UNMIK, requirements for inclusionary processes can only be identified in relation to the legislative branch, but not in relation to

³⁴¹ SC Res. 1244 (1999) art. 11 (c) and (d).

³⁴² SC Res. 1271 (1999) artt. 2(b) and 8.

³⁴³ Stahn, C. *The Law and Practice of International Territorial Administration*, above n. 18, p. 722; SC Res. 1511 (2003) paras 4–6.

³⁴⁴ See section 2 of Coalition Provisional Authority (CPA) Regulation No. 6, 13 July 2003.

³⁴⁵ Stahn, C. *The Law and Practice of International Territorial Administration*, above n. 18, p. 718.

³⁴⁶ Momirov, A. *Accountability of International Territorial Administrations*, above n. 8, p. 160.

³⁴⁷ UNTAET Reg. 1999/2 (2 December 1999) Section I art 1.3 and UNTAET Reg. 1999/3 (3 December 1999) artt. 11.2, 13.2 and 14.2.

³⁴⁸ Momirov, A. *Accountability of International Territorial Administrations*, above n. 8, p. 160.

the decision-making in individual situations. Secondly, some powers stayed within exclusive competence of the administrator throughout the existence of the ITA, to a large extent consisting of executive powers, e.g. individual decisions. For example, UNMIK kept full competence to decide to remove a person from holding public office without a requirement to involvement local authorities.³⁴⁹ Thirdly, those arrangements made on decision-making procedures were solely between local authorities and ITAs, not with the individual against whom a decision was taken. In other words, on the basis of the survey of the ITA mandates, no role can be identified for the individual to be somehow included in the ITA's decision-making procedures.

The role of human rights when governing ITAs

As argued, the regulation of the inclusionary processes in the decision-making of ITAs seem to remain deficient. Therefore, this paper turns to the role of the ITAs and their objectives within post-conflict situations to examine whether and to what extent a claim for inclusionary governance can be based on the goals and objectives of the ITAs. It is the task of the ITA to promote and guarantee citizens' involvement in the decision-making procedures of the domestic government. Within the mandates of UN missions in post-conflict situations we can find specific references to the creation of stable and democratic societies.³⁵⁰ As the Secretary-General pointed out:

"United Nations...peace-builders have a solemn responsibility to respect the law themselves, and especially to respect the rights of the people whom it is their mission to help...the United Nations should reaffirm its commitment to respect

adhere to and implement international law, fundamental human rights and the basic standards of due process".³⁵¹

The importance of human rights within a peace-building mission can also be identified on the basis of a short survey of the ITA mandates. The UN Secretary-General interpreted the UNMIK mandate and thereby UNMIK's legal framework as follows: "...[i]n assuming its responsibilities UNMIK will be guided by internationally recognised standards of human rights *as the basis for the exercise of its authority*".³⁵² Furthermore, the protection and promotion of human rights was formulated as one of the main responsibilities of UNMIK.³⁵³ Nevertheless, UNMIK officials challenged the applicability of human rights treaties in Kosovo by stating that this did not imply that these treaties and conventions were in any way binding on UNMIK.³⁵⁴ The problem was that the regulation did not state that international human rights standards were *directly* applicable in Kosovo nor did the regulation provide that such standards form the legal framework within which the administration should function.³⁵⁵

The human rights framework was less problematic within UNTAET. The mandate of UNTAET referred, amongst other things, "to support capacity building for self-

³⁴⁹ UNMIK Reg. 2001/9 "On a Constitutional Framework for Provisional Self-Government in Kosovo" (15 May 2001) as amended by UNMIK Reg 2002/9 (3 May 2002), UNMIK Reg 2007/29 (4 October 2007), UNMIK Reg. 2008/1 (8 January 2008) and UNMIK Reg. 2008/9 (8 February 2008) Chapter 8 Article 8.1.

³⁵⁰ Cambodia, see: E. De Brabandere, *Post-Conflict Administrations in International Law* (Leiden/Boston: Martinus Nijhoff Publishers 2009) p. 332.

³⁵¹ "Report of the Secretary-General, In Larger Freedom: Towards Security, Development and Human Rights for All", UN Doc. A/59/2005, para. 113.

³⁵² Emphasis added by author. Report of the Secretary-General on UNMIK, UN Doc. S/1999/779, 12 July 1999, para. 42. See also paragraph 75 in which the Secretary-General states that UNMIK laws should be adapted in accordance with human rights standards.

³⁵³ SC Res. 1244 (1999) (11)(j).

³⁵⁴ Momirov, A. *Accountability of International Territorial Administrations*, above n. 8, p. 120. Human Rights Committee, 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, paras 123–124. See also the criticism by NGOs of UNMIK's attitude, e.g., Amnesty International (AI), *Human Rights Protection in Post-status Kosovo/Kosova: Amnesty International's Recommendations in Relation to Talks on the Final Status of Kosovo/Kosova*, EUR 70/008/2006, 24 July 2006, p. 8.

³⁵⁵ UNMIK Regulation No. 1999/24 on the Applicable Law in Kosovo; D. Marshall and S. Inglis, "The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo" 16 *Harvard Human Rights Journal* (2003) p. 104.

government".³⁵⁶ Noteworthy is, however, the omission of any reference to "promoting and protecting human rights" within the mandate of UNTAET.³⁵⁷ Nevertheless, UNTAET interpreted its mandate as including a human rights component.³⁵⁸ This is further confirmed by one of UNTAET's first actions, setting a regulatory framework for the exercise of power in the ITA. Regulation 1999/1 established that, "international human rights standards would overrule the application of national laws"³⁵⁹ and that power should be exercised in East-Timor in a manner consistent with international human rights standards.³⁶⁰

It is clear that human rights protection is one of the core objectives of ITAs. However, it cannot be automatically assumed that human rights provisions are applicable to the conduct of ITA officials.³⁶¹ Nevertheless, it is often argued that human rights standards should be part of the legal framework regulating the conduct of ITA officials. Commonly used reasoning is that the UN administrations should be bound by human rights on the basis of the UN Charter as the over-arching constitution, incorporating human rights protection and acting as legal framework for the

missions.³⁶² Furthermore, scholars have argued that human rights are applicable to ITAs on the basis of their legal status, i.e. customary law status or in some cases *ius cogens* status.³⁶³ More clear-cut is the applicability of human rights standards via the constituent documents of the ITAs explicitly stating so. However, the short survey of ITA mandates shows that often an explicit reference to human rights standards as legal framework for the conduct of the ITA is lacking. As noted by Momirov, "...[ITAs] constituent documents fail to institutionalise international human rights law explicitly as part of the legal framework governing the activities of ITA missions."³⁶⁴ The failure to provide a clear legal framework for the governing activities can have tremendous consequences. Abuse of power seems to be the regrettable consequence as argued by Marshall and Inglis regarding UNMIK. "UNMIK's power could be used arbitrarily and unfairly, without accountability, transparency, or predictability – in contravention of the meaning of justice and the rule of law".³⁶⁵

Even though the legal framework for ITAs seems to be lacking or insufficient there is, nevertheless, consensus that, "international administrations cannot pretend to be "guardians" of human rights protection" while placing themselves above the law.³⁶⁶ This impasse results in strong criticism for the governing by ITAs and especially criticism for the position shared by most ITAs that human rights only have

³⁵⁶ UN SC Res. 1272 (1999) art. (2)e.

³⁵⁷ This is despite the fact that there was a reference to such a function in the report of the Secretary-General on the establishment of UNTAET. A. Devereux, "Searching for Clarity: a Case Study of UNTEAT's Application of International Human Rights Norms" N.D. White and D. Klaassen, *The UN, Human Rights and Post-Conflict Situations* (Manchester: Manchester University Press, 2005) p. 297; UN Doc. S/1999/1024, 4 October 1999.

³⁵⁸ Devereux, "Searching for Clarity", above n. 42, p. 299.

³⁵⁹ UNTAET Regulation 1999/1 section 3.

³⁶⁰ UNTAET Regulation 1999/1 section 2.

³⁶¹ Even though this argument can be made on the basis of sound reasoning, due to word limitations, the author will only touch briefly on the question whether human rights provisions are applicable to the conduct of ITAs. Instead, see for a detailed assessment, White and Klaassen. *The UN, Human Rights and Post-Conflict Situations*, above n. 39; Legal System Monitoring Section, Organisation for Security & Cooperation in Europe, "Review of the Criminal Justice System in Kosovo 1999–2005" (2005–2006), available at http://www.culex-kosovo.eu/training/material/docs/KR/KR_Material/osce2321.pdf (4 November 2011); Momirov, A. *Accountability of International Territorial Administrations*, above n. 8, pp. 115f–128.

³⁶² N.D. White and D. Klaassen, "An Emerging Legal Regime?" in N.D. White and D. Klaassen (eds.) *The UN, Human Rights and Post-Conflict Situations*, above n. 143, pp. 1–16, p. 7.

³⁶³ Reinisch, A. "Developing Human Rights and Humanitarian Law: Accountability of the Security Council for the Implementation of Economic Sanctions" 95 *AJIL* (2001) pp. 851–871.

³⁶⁴ Momirov, A. *Accountability of International Territorial Administrations*, above n. 8, p. 119. See for a detailed assessment of the lack of institutionalisation and implementation of human rights standards in the justice reform by UNMIK, Marshall and Inglis, "The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo", above n. 37.

³⁶⁵ Marshall and Inglis, *idem*, above n. 38, p. 104.

³⁶⁶ Stahn, C. *The Law and Practice of International Territorial Administration*, above n. 18, p. 749. See also the implicit acknowledgement by the Secretary-General in *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, above n. 23, para. 33.

to be obeyed to a certain extent. The Ombudsperson Institute in Kosovo remarkably argued that:

"It is ironic that the UN, the self-proclaimed champion of human rights in the world, has by its own actions placed the people of Kosovo under control, thereby removing them from the protection of the international human rights regime that formed the justification for UN engagement in Kosovo in the first place".³⁶⁷

In other words, while it is not clear to what extent human rights standards are applicable to the conduct of ITAs, one can conclude that the UN has a high responsibility to guarantee and respect human rights when governing a territory; especially, considering the vital role the UN plays in promoting human rights at the local level. Consequently one can argue that ITAs should uphold, at least, a certain minimum level of human rights standards, which further underlines the demand for inclusionary governance in decision-making by ITAs.

Assessment of functioning of ITAs – a short survey of critics by the international community

This section provides a concise overview of the review by international institutions and bodies of the role of individuals within the decision-making procedures of ITAs. The International Law Association concluded in its report on the accountability of international organisations that there is a general claim to be made that:

"...[international organisations] should incorporate basic human rights obligations into their operational guidelines, policies and procedures, particularly when exercising governmental authority in the conduct of temporary administration over a particular territory[.]"³⁶⁸

³⁶⁷ Ombudsperson Institute in Kosovo, Second Annual Report 2001–2002, 10 July 2002, obtainable from www.ombudspersonkosovo.org (5 November 2011) pp. 3 and 7.

³⁶⁸ Emphasis added by the author. International Law Association, Accountability of International Organisations, Final Report, Berlin Conference 2004, available at <http://www.ila-hq.org/>, p. 23.

More specifically, the exercise of public power by ITAs has led various international bodies to raise a claim for inclusionary processes in ITA's decision-making procedures in individual situations. The Venice Commission of the Council of Europe has criticised the exercise of public power by ITAs for human rights violations. In relation to the removal decisions by the OHR, removing public officials from office,³⁶⁹ the Venice Commission concluded that these decisions represented a serious interference with the officials' rights and therefore due process standards should have been followed.³⁷⁰ Furthermore, the addressees of the removal decisions were mainly officials elected by the citizens. The rights of their voters were also affected, and thereby it constituted a de-facto interference with *the voters'* rights to participate via elections (i.e. their elected representative got removed without a voice from the voters).³⁷¹

In other words, the individuals' rights to information was interfered with by not providing the grounds for the removal in due time. Their rights to participate were violated as they had no possibility of participating in the decision-making process. Lastly, they were denied access to justice, because they were not provided a fair hearing or a possibility for appeal. The Venice Commission concluded that the ITA violated the three dimensions of inclusionary processes, which implied that when adopting these decisions in individual situations, in this case removal decisions, ITAs should include the

³⁶⁹ The majority of the removals concerned persons not cooperating with the International Criminal Tribunal for the former Yugoslavia. Others included removals for corruption, mismanagement of public assets or other offences including interference with the judiciary. The officials were, in principle, removed indefinitely unless the imposed ban is lifted by the international administrator. See e.g. the OHR, *Decision Removing Dragan Covic from his Position as a Member of the Newly elected RS National Assembly* (8 October 1998) and the OHR, *Decision to Lift the Ban on Dragan Covic's Activities* (30 July 1999), both available at www.oht.int.

³⁷⁰ According to the Venice Commission, the decisions should follow "a fair hearing and be based on serious grounds with sufficient proof and the possibility of a legal appeal. The sanction has to be proportionate to the alleged defence." Venice Commission OHR, above n. 7, paras 92–97.

³⁷¹ Venice Commission OHR, above n. 7, para. 97.

individual in the procedure. In relating inclusionary processes to UNMIK the Council of Europe recalled that, despite all power-sharing arrangements,

"...[a]ll legal texts directly applicable in Kosovo, with the sole exception of UN Security Council Resolution 1244, may equally be revised or revoked by an [international administrator] without the need for consultation with any local body or the possibility of any parliamentary or judicial review".³⁷²

By having the authority to revise or revoke any legal text in Kosovo, UNMIK excludes the local actors from the process of decision-making, whereas inclusion of local authorities into the decision-making by ITAs is required according the Council of Europe. The critique coming from international organisations is based significantly on the all-encompassing authority of ITAs, which is to a large extent comparable with a state exercising public power.

In this light, the Venice Commission concluded in relation to UNMIK that:

"In Kosovo UNMIK and KFOR carry out tasks which are *certainly more similar to those of a state administration than those of an international organisation proper*. It is unconceivable and incompatible with the principles of democracy, the rule of law and respect for human rights that they could act as state authorities and be exempted from any independent legal review".³⁷³

Concluding, ITAs do not provide sufficient inclusionary processes in the decision-making procedures for individual situations. Differently put, often individuals are excluded from the decision-making procedure, which directly affects them. For these reasons various human rights organisations demand inclusionary processes in the decision-making procedures by ITAs.

³⁷² Council of Europe, *Protection of Human Rights in Kosovo*, Report of the Committee on Legal Affairs and Human Rights, Doc. 10393, 6 January 2005, Section B(7) para. 7.

³⁷³ European Commission for Democracy through Law (Venice Commission), *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, CDL-DI (2004) 004, (Strasbourg, 8–9 October 2004), pp. 20–21.

Excluding the individual from decision-making procedures – a general problem of public international law?

While the exercise of public power by international institutions is not all encompassing in comparison with the ITA, international institutions do exercise public power. Several international institutions can adopt decisions that directly or indirectly affect individuals, which make their exercise of public power to a large extent comparable to ITAs' public power. Illustrative examples are the recognition of refugee status by the UNCHR,³⁷⁴ UN Security Council sanctions against individuals³⁷⁵ and World Bank decisions on financing projects.³⁷⁶ For instance, in relation to the Security Council many calls for inclusionary processes have arisen.³⁷⁷

As argued by von Bogdandy, Dann and Goldmann:

"...the listing of terrorist suspects by the UN Security Council provides the most dramatic example of governance that would be hardly permissible at the domestic level".³⁷⁸

Every listed individual or entity is subject to the sanctions of a freeze of assets, a travel ban and an arms embargo by all UN

³⁷⁴ Smrkolj, M. "International Institutions and Individual Decision-making: An Example of UNHCR's Refugee Status Determination" *German Law Journal* 9 (2008) 1779–1804; see also R. Wilde, "Quis Custodiet Ipsos Custodes?: Why and How UNHCR Governance of "Development" Refugee Camps Should be Subject to International Human Rights Law" 1 *Yale Human Rights & Development Law Journal* (1998) pp. 107–128.

³⁷⁵ Feinaugle, C.A. "The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protecting of Individuals", *German Law Journal* 9 (2008) pp 1513–1538.

³⁷⁶ Naude Fourie, A. *The World Bank Inspection Panel and Quasi-Judicial Oversight* (Utrecht: Eleven International Publishing, 2009).

³⁷⁷ Bianchi, A. "Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion" *EJIL* 17 (2007), pp 881–919.

³⁷⁸ von Bogdandy, A., P. Dann and M. Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance activities" *German Law Journal* 9 (2008) p. 1380. See also the declaration made by Liechtenstein at the discussions held at the Security Council at 30 May 2006, UN Doc. S/PV/5446 at 31:

The work undertaken by the United Nations over the last six decades to ensure that Governments respect human rights would suffer a great setback were we to allow the Organisation to treat individuals in a manner, which it would qualify as impermissible by states.

members.³⁷⁹ The problem with the listing procedure is, as summarised by Van der Herik:

"...Individuals are not heard at any time either before or after listing and, once listed, individuals do not have a proper avenue to complain directly to the sanctions committee about their listing and about the sanctions that are subsequently imposed".³⁸⁰

Similarly, the World Bank and the UNHCR have been criticised for insufficiently including the individual in decision-making procedures.³⁸¹ The UNHCR decision-making procedure in relation to refugee status determination has often been condemned for the lack of judicial review.³⁸² Hence, the exclusion of individuals from decision-making procedures forms a more general problem in international law, which is evidenced by the call for inclusionary governance in these procedures to the extent as they affect individuals.

CONCLUSION

Inclusionary governance is required when adopting decisions in individual situations by ITAs. This is warranted especially because the public powers normally exercised by local authorities ultimately are transferred to ITAs. Furthermore, the exclusion of individuals has significant negative impact on the accountability and legitimacy of decision-making by ITAs,³⁸³ which further warrant inclusionary governance. The assessment made on the basis of a three-dimensional approach to inclusionary governance reveals that the

regulation and implementation of inclusionary processes in decision-making procedures by ITAs remain deficient.

The assessment of ITA mandates and objectives reveals that, even though there are power-sharing arrangements between ITAs and local authorities, this does not result in inclusion of the individual in the decision-making procedures of ITAs. No provisions can be identified in ITA mandates referring specifically to inclusionary processes in decision-making by ITAs. This can be explained by the fact that most decisions in individual decisions concern executive decisions. The survey reveals that it is precisely the executive decisions that often stay within the exclusive ambit of the ITA and thereby do not include local authorities or the affected person in decision-making procedures.

The exclusion of the individual by ITAs when adopting decisions has resulted in an outcry by international institutions for inclusionary processes. Various human rights oriented organisations have condemned the conduct of ITAs for violating human rights standards when adopting decisions in individual situations.

Similarly, other international organisations also adopt decisions with direct impact on individuals while these individuals are not adequately included in the decision-making procedures. Evidently, the exclusion of individuals in decision-making procedures forms a more general problem in international law. In relation to what standards should be required and whether similar standards should be required for international organisations, such as the Security Council adopting decisions affecting individuals or ITAs adopting such decisions, one should look at the impact on the individual. As argued by Bogdandy: "...the more an international authority impacts an individual, the stronger the assumption is that international principles require legal arrangements which are functionally equivalent to what

³⁷⁹ Feinaugle, C.A. "The UN Security Council Al-Qaida and Taliban Sanctions Committee", above n. 57, p. 1520.

³⁸⁰ van den Herik, L. "The Security Council's targeted sanctions regimes" *Leiden Journal of International Law* 20 (2007) p. 799. See for a thorough assessment the Report "Addressing Challenges of Targeted Sanctions" (2009) which was prepared by the Watson Institute for International Studies, available at http://watsoninstitute.org/project_detail.cfm?id=4 (visited 2 November 2011).

³⁸¹ E.g. see Smrkolj in relation to the UNHCR, above n. 56; see Naude-Fourie in relation to the World Bank, above n. 58.

³⁸² von Bernstoff, J. "Procedures of Decision-Making and the Role of International Organisations". *German Law Journal* 9 (2008) p. 1957.

³⁸³ Momirov, A. *Accountability of International Territorial Administrations*, above n. 8; Stahn, C. *The Law and Practice of International Territorial Administration*, above n. 18.

is to be expected in the domestic realm".³⁸⁴

The Council of Europe Commissioner for Human Rights came to the same conclusion regarding ITAs specifically:

"...[w]hen international organisations exercise executive and legislative control as a surrogate state they must be bound by the same checks and balances as we require from a democratic government".³⁸⁵

In other words, while decision-making in individual situations by international organisations in general, and ITAs specifically, have a strong impact on individuals, this requires legal standards from an equivalent level as would be expected when domestic authorities adopt such decisions. When ITAs adopt decisions directly affecting individuals they need to include these individuals in the decision-making procedure in accordance with the generally recognised standards. This is also further warranted by the core objective of the ITA, which is to transfer all powers to the domestic authorities after (re-) establishing the rule of law and promoting and institutionalising human rights. Hence, there is a clear demand for inclusionary governance for ITAs adopting decisions in individual situations; its precise criteria have to be substantiated in further research.

³⁸⁴ von Bogdandy, A. "General Principles of International Public Authority: Sketching a Research Field", *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Heidelberg: Springer, 2010) para. 1918.

³⁸⁵ Council of Europe, Commissioner for Human Rights, Thomas Hammarberg, "International Organisations Acting as Quasi-Governments Should be Held Accountable", Viewpoints 2009, http://www.coe.int/t/commissioner/Viewpoints/090608_en.asp (visited 8 November 2011).

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