Articles

The Role of the United Nations and the European Union in the Privatization of Kosovo's Socially-Owned Enterprises

By Robert Muharremi[*]

A. Introduction

The privatization of Kosovo's socially owned property and enterprises differs significantly from privatization programs undertaken in other countries, especially in Eastern and South-Eastern Europe when they transitioned from communism to democracy and free market systems. What is unique about Kosovo's privatization program is that it was designed and implemented under the authority of the United Nations at a time when Kosovo was directly administered by the United Nations. It is perhaps so far the only privatization program that was initiated and implemented by the United Nations under Chapter VII of the United Nations Charter. Various other international organizations, such as the European Union, played a significant role in this process as part of their responsibilities in the administration of Kosovo. An obvious question is what the United Nations would have to do with privatization in the context of territorial administration under Chapter VII of the United Nations Charter and if the United Nation's authority to administer Kosovo would include the authority to privatize property, the legal nature of which was unclear even when it was developed in former Yugoslavia. The discussion of these and other legal questions and controversies which are related to the privatization process in Kosovo are the main subject of this article, with a focus on the role of the United Nations and the European Union in this process.

Although Kosovo developed from a territory under the administration of the United Nations to an independent state, the United Nations and the European Union still continue to be involved in Kosovo's privatization process. While Kosovo strives for international recognition as an independent state, United Nations Security Council resolution 1244 (1999) (Resolution 1244) remains in force leading to the odd situation that the United Nations is still authorized to administer Kosovo, which considers itself an independent state. This leads necessarily to legal conflicts between the sovereign authorities of Kosovo and the United Nations and the European Union which act in Kosovo under the authority of Resolution 1244. A judgment of the Constitutional Court of Kosovo of 2011 revealed fundamental legal differences related to the exercise of the judicial mandate of

[*] Dr.iur. Robert Muharremi is a lecturer of law at the European School of Law and Governance in Pristina, Kosovo. Email: robert.muharremi@gmail.com.

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

international judges appointed by the European Union Rule of Law Mission (EULEX) in the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters and the Constitution of Kosovo.[1]

The article will address only the privatization of socially owned property and will not deal with other privatization processes, such as the privatization of Kosovo's state enterprises, which is another source of legal controversy in Kosovo's relations to Serbia. The article will also blend out legal issues related to socially owned land, which requires a separate assessment from that of socially owned enterprises. The purpose of this article is to outline the development of Kosovo's privatization program in view of the role played by the United Nations, the European Union and other international actors in this process. It will also attempt to discuss the legal problems as they emerged throughout the development of the privatization program in order to provide an understanding of the legal complexity of this unique process. The second part of the article will elaborate the concept of socially-owned property, which is the object of privatization in Kosovo. The third part will discuss the beginnings of the privatization process and the legal controversies between the United Nations and the European Union which shaped the privatization framework. It will further illustrate the various privatization policies and legal issues with which UNMIK was confronted and it will outline the privatization related legal framework, which, with some modifications, is still in place. The fourth part will deal will the privatization process following Kosovo's declaration of independence, and the legal problems which have emerged as a result of the collision between Resolution 1244 and the Constitution of the Republic of Kosovo. The fifth part will address legal controversies that continue to affect the still ongoing privatization process following the end of the international supervision of Kosovo's independence. In a last part, the article will attempt to summarize some conclusions which could be drawn from the privatization process.

B. The Yugoslav Concept

Privatization in Kosovo refers essentially to the redistribution of socially owned property to private individuals or enterprises.[2] In Kosovo, as in all other components of the former Yugoslavia, most of the immovable property and enterprises were socially owned.[3] The concept of socially owned property was a novel and, at the same time, a controversial

[1] Constitutional Court of the Republic of Kosovo, Judgment in Case No KI 25/10 "*Constitutional Review of the Decision of the Special Chamber of the Supreme Court of Kosovo, ASC-09-089, dated 4 February 2010*", available at: http://www.gjk-ks.org/repository/docs/ki_25_10_ag_ang.pdf (last accessed: 27 June 2013).

[2] Organization for Security and Co-operation in Europe, *Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo* (OSCE) 5 (2008).

[3] Karim Medjad, *The Fate of the Yugoslav Model: A Case Against Legal Conformity*, 52 AMER. J. OF COMP L. 287 (2004).

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

feature of Yugoslav law, the legal nature of which remained unclear and disputed even during Yugoslav times.[4] It was a legal concept created in Yugoslavia based upon Marxist premises, claiming that private individuals could not be permitted to have uncontrolled ownership of the society's means of production.[5] It also reflected, following Yugoslavia's break with the Soviet Union, a rejection of the Soviet system and a symbolic return to orthodox Marxist ideology having workers' self-management as the core of its understanding of economic production.[6] In very general terms, socially owned property was based on the premise that all property belongs to society as a whole and not to private persons or the state.[7] It is a form of collective, though not state owned property[8], with the society being the supreme title holder[9].

Historically, socially owned property developed from state property.[10] Before the establishment of socialist Yugoslavia in 1945, property law was based on Roman law categories, with the civil law being influenced primarily by Austro-Hungarian legislation, supplemented, especially in the southern parts of Yugoslavia, including Kosovo, by Ottoman legal concepts, such as the Tapi system used for the registration of immovable property.[11] At the end of World War II, the new socialist regime embarked on a massive nationalization program targeting ownership of enemies, collaborators, the industrial sector and large private agricultural land owners.[12] Enterprises were required to operate in accordance with plans and objectives determined by the state, the typical features of a centralized and state planned economy.[13]

In the 1950's, the idea of workers' self-management was introduced in state enterprises, transforming them into 'Basic Organizations of Associated Labour', i.e. independent, self-

[4] M.E. Coronna, *The Concept of Social Property and the Rights of the Foreign Investor in Yugoslavia*, 11 REV. OF SOCIALIST L. 230 (1985).

[5] *Id*. at 227-228.

[6] Medjad, *supra* note 3, at 289.

[7] Coronna, *supra* note 4, at 228.

[8] Medjad, *supra* note 3, at 289.

[9] OSCE, *supra* note 2, at 6.

[10] Coronna, *supra* note 4, at 230.

[11] Medjad, *supra* note 3, at 288.

[12] Adil Fetahu, TRANSFORMATION AND PRIVATIZATION OF KOSOVO'S SOCIALLY OWNED ASSETS, Address at the Workshop on Legal Economic Aspects of Transformation of Socially Owned Property and Privatization, Kosovo Law Center/ World Bank (2002) 1-2; *see also* OSCE, *supra* note 2, at 6; Medjad, *supra* note 3, at 289.

[13] Fetahu, *supra* note 12, at 2.

managed units, also known as 'socially owned enterprises'.[14] These enterprises were administered by a board of directors elected by a workers' council, which was the enterprise's highest governing body.[15] Subsequently, state owned property, including movable and immovable assets, was denationalized into socially owned property[16] by transferring it to socially owned enterprises for economic production.[17] This reflected the deliberate attempt to disengage the state from economic activity[18] considering the system of self-management as part of the 'withering away of the state' in favor of direct workers' rule[19].

Denationalized socially owned property was in the custody, though not ownership, of a municipality, which decided to whom, and for what purpose, such property would be transferred.[20] The custodian function of the municipality included also the protection of the public interest.[21] If a socially owned enterprise did not use social funds appropriately or if it performed business contrary to the regulations and other self-management documents causing damage to the social community, the municipality was entitled to take measures, including the dismissal of the board, the dissolution of the workers, council, or other disciplinary measures.[22] The creation of a socially owned enterprise was typically a local initiative of a private group of individuals with the support of the local branch of the communist party[23], which also controlled the municipality that decided on the allocation of socially owned property to a socially owned enterprise. Thus, all control mechanisms related to socially owned enterprises were in fact concentrated in the communist party giving political control prevalence over legal control.

The development of socially owned property as a legal concept reached its heyday with the Constitution of the Socialist Federal Republic of Yugoslavia of 1974. The Constitution provided that all means of production and other means of collective labor, the output of

[14] Medjad, *supra* note 3, at 290.

[15] Medjad, *supra* note 3, at 293.

[16] *Id*. at 290.

[17] OSCE, *supra* note 2, at 6.

[18] Medjad, *supra* note 3, at 290.

[19] Lessons Learned and Analysis Unit of the EU Pillar of UNMIK in Kosovo, THE OTTOMAN DILEMMA – POWER AND PROPERTY RELATIONS UNDER THE UNITED NATIONS MISSION IN KOSOVO (LLA) 16 (2002).

[20] Medjad, *supra* note 3, at 290.

[21] LLA, *supra* note 19, at 12.

[22] *Id*. at 12.

[23] Medjad, *supra* note 3, at 292.

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

collective labor and the income earned through collective labor, the means required for satisfying public needs, natural resources as well as other assets designated for public use were socially owned property.[24] The Law on Associated Labour of 1976 classified socially owned property into means of production and other means of work, the output (product) of associated labor, and the means for the satisfaction of common and general social needs.[25] A person lawfully in possession of a socially owned asset enjoyed a right of possession for the purpose for which the asset was transferred and a right to keep the revenues.[26] However, such person had only a limited right of disposal, i.e. a socially owned asset could not be sold, and the possibility of using it as a collateral was very limited.[27]

The legal nature of socially owned property was a matter of controversy. Yugoslav scholars were divided into those who considered socially owned property to represent a form of ownership[28], and those who claimed that socially owned property was not property but an economic relationship[29]. Among those who claimed that socially owned property was a property right it was disputed as to which entity was the title-holder of such right, acting on behalf of society. Opinions ranged from the state to every self-management entity being the representative of society, including the opinion that the state, the republic, the local community and labor organizations held divided ownership.[30] It was also held that socially owned property was in essence state property given to workers' collectives in perpetuity for utilization and management.[31] This argument was based on the observation that socially owned property embraced all those means of production which were nationalized by the Yugoslav regime in the period from 1944 to 1959, and which were subsequently given to the working organizations for exploitation and self-management.[32] Those who claimed that socially owned property was merely an economic relation argued that the right to use socially owned property was a competence under public law, and not a property right.[33] The owner of socially owned property was society without an

[24] Kosovar Institute for Policy Research and Development, THE UNITED NATIONS MISSION IN KOSOVO AND THE PRIVATIZATION OF SOCIALLY OWNED PROPERTY (KIPRED) 5 (2005).

[25] Coronna, *supra* note 4, at 228.

[26] Medjad*, supra* note 3, at 291.

[27] *Id*. at 292.

[28] Coronna, *supra* note 4, at 230.

[29] *Id*. at 233.

[30] *Id*. at 230-232.

[31] Branko Peselj, *Socialist Law and the New Yugoslav Constitution*, 51 GEORGETOWN L. J.*, at* 698 (1963).

[32] *Id*. at 696.

[33] Coronna, *supra* note 4, at 234.

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

intermediary, i.e. it belonged to all and was owned by nobody, given that under workers' self-management there was no room for ownership as an absolute right entitling a person to exclude others from using an asset.[34]

While socially owned enterprises became the predominant form of business organization in industry and services[35], a number of enterprises which carried out specific economic activities that were of particular interest to the public, such as telecommunication, railways, airports, power plants and water supply, were organized in form of public enterprises.[36] Such enterprises, later called publicly owned enterprises, were established by law or by administrative decision and their founder was usually the federal, the republican or the municipal government.[37] The capital required for such enterprise was provided by the founding entity, while the enterprise's means of production and the revenue generated by them were socially owned property.[38]

The legal nature of socially owned property received attention at international law level from the Badinter Arbitration Commission in 1993 when discussing state succession between the Republics of the disintegrated Yugoslavia. The Commission established that socially owned property, which was held for the most part by "associated labour organizations", which were bodies with their own legal personalities operating in a single Republic and which were under the exclusive jurisdiction of a Republic would not be considered state property and would therefore not be subject to international law on state succession.[39] On the other hand, if and to the extent that other organizations operated socially owned property either at federal level or in two or more Republics, their property, debts and archives would have to be divided between the successor states if they exercised public prerogatives on behalf of Yugoslavia or of individual Republics.[40] In other words, socially owned enterprises were treated as commercial enterprises, not attributable to the state, while those organizations exercising public prerogatives, i.e. publicly owned enterprises, and their assets were state property and subject to the international law on state succession. Thus, the Commission crystallized the distinction between purely commercial enterprises and public enterprises; a distinction which was

[34] *Id*. at 233-234.

[35] Medjad, *supra* note 3, at 291.

[36] Fetahu, *supra* note 12, at 4-5.

[37] *Id*. at 5.

[38] *Id*. at 5.

[39] *Conference Report*- 'Opinion No. 14', 32 International Legal Materials, International Conference on the Former Yugoslavia Arbitration Commission 1594 (1993)

[40] *Id*. at 1594-1595.

later upheld by the regulations issued by the United Nations on socially and publicly owned enterprises in Kosovo.

Amidst economic depression and under pressure from international financial institutions[41], Yugoslavia launched in 1988 a program for the privatization of its socially owned enterprises. The Law on Enterprises formally abolished self-management and socially owned property relations.[42] The subsequently adopted Law on Social Capital permitted a gradual conversion of socially owned enterprises into joint stock companies.[43] Such conversion was optional and subject to a decision made by the workers' council of each socially owned enterprises.[44] In the event the workers' council opted for a conversion, the workers would be entitled to 60% of the equity in the joint stock company at a discount price, while the remainder could be distributed to private persons and pension funds.[45]

The year 1989 marked for Kosovo another, politically more important event. Under the Constitution of 1974, Kosovo was an autonomous province within the Republic of Serbia, while at federal level its legal status was nearly equivalent to that of the republics. As one of the first and crucial decisions leading to the break-up of Yugoslavia, the Republic of Serbia decided in 1989 to revoke Kosovo's status as an autonomous province and to put it under direct administration.[46] An official policy discriminating against Albanians characterized the 1990s including a discriminatory privatization regime.[47] As Knudsen explains, socially owned enterprises in Kosovo suffered from under-investment and capital depreciation, while their assets were transferred to socially owned enterprises in Serbia.[48] Most Kosovo socially owned enterprises came under emergency measures introduced by Belgrade.[49] Along with large-scale dismissal of Albanians, these measures included forced takeovers and mergers of Kosovo's companies with Serbian ones, and the sale of enterprises in a discriminatory manner excluding Albanians as well as other investors deemed unfavorable by the Belgrade regime.[50] The situation was further complicated by a

[41] Rita Knudsen, *Privatization in Kosovo: The International Project* 1999-2008, NORWEGIAN INSTITUTE OF INTERNATIONAL AFFAIRS 29 (2010).

[42] Joze Mencinger, *Privatization in Slovenia*, 3 SLOV. L. REV. 67 (2006).

[43] Medjad, *supra* note 3, at 304.

[44] *Id*. at 304.

[45] *Id*. at 304.

[46] Knudsen, *supra* note 41, at 30.

[47] *Id*. at 30.

[48] *Id*. at 31.

[49] *Id*.

[50] *Id*.

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

large number of property transfers described by Perritt as "off the books", since due to discriminatory legislation passed by Belgrade, Albanians were prohibited from being transferees of ownership and other property rights and property related transactions could only be effected informally.[51]

C. Privatization by UNMIK

I. The Re-emergence of Socially Owned Enterprises

In 1999, following NATO's military intervention, Kosovo was placed under the interim administration of the United Nations which ended the administrative authority of Federal Republic of Yugoslavia and the Republic of Serbia over Kosovo.[52] Acting under Chapter VII of the United Nations Charter, the Security Council adopted Resolution 1244 which authorized the Secretary-General to establish an international civil presence in Kosovo, known as the United Nations Interim Administration Mission in Kosovo (UNMIK).[53] UNMIK's mandate was to provide an interim administration for Kosovo.[54] UNMIK would be responsible for establishing and overseeing the development of provisional democratic self-governing institutions for Kosovo.[55] Kosovo's political status would be determined by a political process, within which UNMIK would have the limited role of facilitating it and, following the determination of Kosovo's future status, of overseeing the transfer of authority from Kosovo's provisional institutions to those established under a political settlement.[56]

The implications of Resolution 1244 on the sovereign title over Kosovo were not entirely clear. On the one hand, Resolution 1244 reaffirmed the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, which was interpreted as a formula for keeping a check on Kosovar aspirations for independence.[57] On the other hand, Resolution 1244 was interpreted as representing a thoughtfully negotiated ambiguity with respect to the question of whether Kosovo should be an independent sovereign state or only an

[51] Henry Perritt, *Economic Sustainability and Final Status for Kosovo*, 25 UNI. OF PENN. J. OF INT'L ECON. L. 268 (2004).

[52] United Nations Security Council resolution 1244, 10 June 1999, (S/RES/1244 (1999)).

[53] Resolution 1244, at *para*. 10.

[54] *Id*. at *para*. 10.

[55] *Id*. at *para*. 10.

[56] *Id*. at *para*. 11 (e) and (f).

[57] Bernhard Knoll, *From Benchmarking to Final Status? Kosovo and The Problem of an International Administration's Open-Ended Mandate*, 16 EUR. J. OF INT'L L. 638 (2005).

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

autonomous entity within the Yugoslav federation.[58] Uncertainty about Kosovo's final political status, and the ambiguity of the wording of Resolution 1244 required UNMIK to navigate between the Scylla of Kosovo's independence and the Charybdis of Yugoslavia's sovereignty.[59] The uncertainty and ambiguity inherent in Resolution 1244 caused significant problems in determining the scope of UNMIK's mandate particularly with respect to economic development, leading to roadblocks to early initiatives for economic restructuring[60] and resulting in controversies as to UNMIK's authority to privatize socially owned property.

The administrative authority of UNMIK under Resolution 1244 was extensive. All legislative and executive authority with respect to Kosovo was vested in the Special Representative of the Secretary-General (SRSG).[61] UNMIK included different international organizations, which, under the overall authority of the SRSG, were responsible for implementing Resolution 1244.[62] These international organizations included, besides the United Nations, the Organization for Security and Cooperation in Europe and the European Union, the latter being responsible for economic reconstruction. A Joint Interim Administrative Structure (JIAS) was set up in early 2000 allowing representatives of political forces in Kosovo to share provisional administrative management with UNMIK.[63]

One of the first regulations which were issued by the SRSG determined the law applicable in Kosovo under UNMIK's interim administration. The laws applicable in the territory of Kosovo prior to 24 March 1999 would continue to apply in Kosovo unless such laws were in contradiction with Resolution 1244 or any subsequent regulations issued by the SRSG.[64] The same regulation established that UNMIK would administer movable or immovable property, including monies, bank accounts, and other property of, or registered in the name of the Federal Republic of Yugoslavia or the Republic of Serbia or any of its organs, which was in the territory of Kosovo.[65] Socially owned property was not included and was therefore not under the administrative authority of UNMIK. It was only in late 2000 that

[58] Perritt, *supra* note 51, at 268.

[59] *Id*. at 638.

[60] Perritt, *supra* note 51, at 262.

[61] UNMIK Regulation No. 1999/1, amended by UNMIK Regulation No. 2000/54, Section 1; *see also* Rebecca Everly, *Reviewing Governmental Acts of the United Nations in Kosovo*, 8 GERM. L. J. 1 22 (2007), available at: http://www.germanlawjournal.com/index.php?pageID=11&artID=794 (last accessed: 27 June 2013).

[62] Perritt, *supra* note 51, at 268.

[63] UNMIK Regulation No. 2000/1, Section 1.

[64] UNMIK Regulation No. 1999/1, Section 3.

[65] *Id.* at Section 6.

UNMIK amended this regulation by including socially owned property in the list of properties to be administered by UNMIK.[66] The reason for this was an amendment to the regulation defining the law applicable in Kosovo. The Kosovo judiciary refused to recognized and apply the laws in force in Kosovo on 24 March 1999 because they considered such legislation to be discriminatory against the Albanian population in Kosovo, as it was adopted during a time, when Albanians were excluded from meaningful participation in Kosovo's government structures. In response to that resistance, UNMIK re-determined the law applicable as the law in force on 22 March 1989 and the regulations issued by the SRSG.[67] As a consequence, former Yugoslav laws which governed socially owned property re-emerged and privatization acts undertaken during the 1990's became legally questionable. UNMIK realized that socially owned property was a legal category of its own nature located somewhere between state and private ownership and that it was also responsible for taking care of those businesses which in Kosovo were still considered as socially owned enterprises. For that purpose, UNMIK established the Administrative Department of Trade and Industry to administer and act as trustee of any enterprise, which the SRSG determined to be administered by UNMIK, including granting concessions and leases with respect to property of such enterprise, and entering into arrangements for the lease, management, reconstruction or reorganization of such enterprise in the interest of Kosovo.[68]

II. The Origins of Kosovo's Privatization Program

Although UNMIK was vested with administrative authority over Kosovo in June 1999, there was an administrative vacuum which lasted until 2000. This administrative vacuum was filled in part by competing Kosovo Albanian factions, most notably the Provisional Government of Kosovo and the structures of the Republic of Kosovo.[69] During this period, alleged directors of socially owned enterprises seized control of the enterprises and their assets.[70]

During this time UNMIK was not willing or able to enforce the applicable laws against socially owned enterprises.[71] The socially owned enterprises used the administrative

[66] UNMIK Regulation No. 2000/54.

[67] UNMIK Regulation No. 1999/24, Section 1.

[68] UNMIK Regulation No. 2000/63, Section 2.2.

[69] Both government structures, as well as existing Serb parallel structures, were integrated into the JIAS and formally ceased to exist as of 31 January 2001, *see* UNMIK Regulation No. 2000/1.

[70] LLA, *supra* note 19, at 11.

[71] *Id*. at 9.

vacuum and the lack of law enforcement to unlawfully lease, in some cases also sell, their assets and to divert the revenues for personal enrichment.[72] The socially owned assets were leased to the private sector for exorbitant rental prices, while the lessees enjoyed no legal protection due to the illegal nature of the transactions.[73] UNMIK described the socially owned enterprises operating in this environment as 'quasi-feudal estates, where a privileged few wielded control over assets belonging to society as a whole and diverted the revenues for their own profit'.[74]

UNMIK's very first attempt to put socially owned enterprises under some control was based on the Yugoslav Law on Enterprises of 1988, which vested oversight authority over socially owned enterprises in municipalities.[75] However, this municipal oversight system did not succeed in establishing control over socially owned enterprises[76], primarily because local municipal authorities did not have the political will to take enforcement action[77]. It was in this context that UNMIK by regulation extended its authority over socially owned property and enterprises. These legislative changes prepared the ground for a new policy towards socially owned enterprises and which ended the period of municipal oversight. The new policy excluded municipalities from any control and oversight over socially owned enterprises and instead reinstated workers' self-management through workers' councils.[78] At the same time, UNMIK began to concession socially owned enterprises to the private sector, a policy also known as "commercialization".[79] This allowed UNMIK to attract private capital into a socially owned enterprise by giving the private sector the right to manage the enterprise and without addressing the complex questions related to socially owned ownership.[80] However, the success of the commercialization approach in attracting private capital was meager as only 12 concession agreements were concluded compared to a total of 330 socially owned enterprises which were then known to UNMIK.[81]

In view of the poor results of the commercialization policy UNMIK, primarily driven by its European Union component which was responsible for economic reconstruction, proposed

[72] *Id*. at 9-10.

[73] *Id*. at 9.

[74] *Id*. at 6.

[75] LLA, *supra* note 19, at 12.

[76] *Id.* at 12-13.

[77] *Id.* at 13.

[78] LLA, *supra* note 19, at 13-18; Knudsen, *supra* note 41, at 49-50.

[79] LLA, *supra* note 19, at 18; Knudsen, *supra* note 41, at 50.

[80] LLA, *supra* note 19, at 18.

[81] *Id*. at 21.

the establishment of a Kosovo Trust Agency, which would be in charge of privatizing socially owned enterprises. The Kosovo Trust Agency would privatize socially owned enterprises through a 'spin-off' procedure.[82] Under this approach, a socially owned enterprise, represented by the Kosovo Trust Agency, would transfer some or all of its assets to a newly established subsidiary company, whose shares would be sold to interested bidders.[83] The proceeds from the sale of the shares in the subsidiary company would become the enterprise's asset, which would then be liquidated.[84] In fact, the preceding commercialization policy was a substitute for privatization, which was identified by UNMIK already in late 1999 as its key policy to promote the growth and development of a market economy in Kosovo.[85]

Privatization was opposed by the United Nations because of liability concerns[86] and in view of doubts about the scope of UNMIK's mandate. The United Nations believed that the permanent change of property rights, that would be the result of privatization, went beyond the 'interim administration' mandate established in Resolution 1244, and that it was beyond UNMIK's authority to administer state property, which said nothing about the transformation of ownership rights.[87] The permanent disposal of state assets would be an attribute of sovereignty and not something that could be implied into the mandate of an interim administration.[88] Evidently, at that time, the United Nations still considered socially owned property as a form of state property. The United Nations was also concerned about possible liability claims against the United Nations that could arise from lawsuits by owners or creditors of socially owned enterprises that were privatized in the 1990's.[89] The United Nations held that the Kosovo Trust Agency, which was proposed by UNMIK to be established as the entity implementing the privatization process, would be a subsidiary organ of the Security Council.[90] As a consequence, the United Nations would be

[82] Zaum, *infra* note 85, at 157.

[83] *Id*. at 157.

[84] *Id*. at 157.

[85] Dominik Zaum, THE SOVEREIGNTY PARADOX – THE NORMS AND POLITICS OF INTERNATIONAL STATEBUILDING 155 (2007).

[86] LLA, *supra* note 19, at 18.

[87] Zaum, *supra* note 85, at 156.

[88] Hans Corell, *Note on UNMIK Draft Regulation on Kosovo Trust Agency* (23 November 2001), attached to a Code Cable dated 30 November from UN to UNMIK, at 4-5.

[89] Zaum, *supra* note 85, at 159.

[90] Corell, *supra* note 88, at 4. On UNMIK as a subsidiary organ of the Security Council see also European Court of Human Rights, *Grand Chamber Decision as to the Admissibility of Applications No. 71412/01 and 78166/01 (Agim Behrami and Bekir Behrami v France and Ruzhdi Saramati v France, Germany and Norway*, 2 May 2007), at para. 129.

internationally responsible for the actions of the Kosovo Trust Agency.[91] In the event a member state of the United Nations brought an international claim against the United Nations in respect of its property or on behalf of any of its nationals harmed by actions of the Kosovo Trust Agency, the United Nations would have to agree to immediate international adjudication, since in the absence of effective legal remedies in Kosovo, the United Nations could not insist upon exhaustion of local remedies.[92]

During negotiations between the United Nations and the EU, with the support of the US, on the modalities under which a privatization program could be acceptable, the United Nations endorsed the proposed privatization legislation under the following conditions: (i) the Kosovo Trust Agency was to be established as an entity separate from UNMIK in order to limit UNMIK's and the United Nations's exposure to liability claims, (ii) the role of the SRSG in the operations of the Kosovo Trust Agency was to be reduced as much as possible in order to distance him and UNMIK from possible liability claims, (iii) the Kosovo Trust Agency would administer both socially and publicly owned enterprises but privatization would be limited to socially owned enterprises only, (iv) the proceeds from the privatization of socially owned enterprises would be held in trust by the Kosovo Trust Agency to satisfy claims made by owners and creditors of socially owned enterprises`, and (v) a judicial review mechanism was to be established to adjudicate property and other privatization related claims made by possible owners and creditors.[93] The establishment of an effective judicial review mechanism was considered by the United Nations as a crucial prerequisite for approving the proposed privatization program. Since it was not easy to distinguish between publicly and socially owned property, any privatization of socially owned assets would require a determination of ownership, which, as an administrative decision, would have to be subject to judicial review.[94] Given that Kosovo's judicial system was in a poor state, the United Nations required that such administrative decisions would have to be reviewed by a court composed of international judges, who would guarantee independence and impartiality, and whose procedures would ensure that all who claimed ownership interests were able to make submissions and appear before the court irrespective of their ethnic origin.[95]

Based on this compromise the SRSG promulgated in 2002 two regulations, which constituted the legal foundations of Kosovo's privatization program, i.e. UNMIK Regulation No. 2002/12 on the Establishment of the Kosovo Trust Agency, and UNMIK Regulation No.

[91] Corell, *supra* note 88*,* at 4.

[92] *Id.* at 4.

[93] *Id.* at 158-160.

[94] Corell, *supra* note 88*,* at 9.

[95] *Id.* at 9.

2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters.

III. The Kosovo Trust Agency

1. General Legal Framework

At the time when the privatization regulations were passed, the general political and legal framework governing Kosovo and the relations between UNMIK and Kosovo had changed. In order to establish provisional self-governing institutions for Kosovo as required by Resolution 1244, UNMIK adopted in 2001 the Constitutional Framework for Provisional Self-Government in Kosovo (Constitutional Framework), which established Kosovo's Provisional Institutions of Self-Government (PISG).[96] The PISG consisted of the Assembly of Kosovo, the Government, the President, courts and other institutions and bodies established by the Constitutional Framework, such as the Ombudsperson Institution.[97] The PISG exercised certain "transferred responsibilities"[98], which were not deemed to be sovereignty related. On the other hand, the SRSG retained all powers under Resolution 1244, and continued to be the supreme legislative and executive authority in Kosovo. The SRSG had the authority to oversee the PISG, its agencies and officials, and to take measures when acts of the PISG were inconsistent with Resolution 1244 and the Constitutional Framework.[99] Laws adopted by the Assembly of Kosovo became effective only if promulgated by the SRSG, who could also make any changes to such laws prior to their promulgation.[100] The SRSG also retained powers concerning state and socially owned property. The Constitutional Framework explicitly stated that the authority to administer public, state and socially owned property and the regulation of public and socially owned enterprises remained a "reserved power" of the SRSG.[101] Thus, the adoption of the legal framework on privatization occurred under the reserved powers of the SRSG. This also reflected the limited influence of the PISG and the Kosovo public concerning the design of the privatization program. The PISG were just consulted and public hearings were limited. The major debates were held between various international actors, which, as discussed above, focused on limiting the United Nations's exposure to liability.

---

[96] UNMIK Regulation No. 2001/9, Chapter 1.5.

[97] *Id*. at Chapter 1.5.

[98] *Id*. at Chapter 5.

[99] *Id*. at Chapter 12.

[100] *Id*. at Chapter 9.1, at 45.

[101] *Id*. at Chapter 8.1 (q) and (r).

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

The Kosovo Trust Agency was established as an independent body[102], which would carry out its functions independently of the PISG[103]. The Kosovo Trust Agency was responsible for administering publicly and socially owned enterprises and their assets within the reserved powers of the SRSG.[104] It was managed by a Board of Directors consisting of four internationals and four locals, all of them appointed and subject to dismissal by the SRSG.[105] The Board was directly accountable to the SRSG, who had the authority to repeal or modify any decision of the Board, to instruct the Board and to order any action deemed necessary.[106] The Kosovo Trust Agency was thus established as an entity directly controlled by the SRSG, which operated within the reserved powers of the SRSG outside the realm of the PISG. The Kosovo Trust Agency qualified therefore as a subsidiary body of the Security Council with the United Nations being fully responsible for its actions.[107]

2. Privatization Process and "Status Determination"

While Kosovo Trust Agency's administrative authority extended over both publicly owned enterprises and socially owned enterprises, privatization was limited to socially owned enterprises only.[108] A publicly owned enterprise was defined as an enterprise created as publicly owned by a municipality or another public-political organization in Kosovo, the Republic of Serbia or the Federal Republic of Yugoslavia.[109] A socially owned enterprise, on the other hand, was defined as an enterprise created as socially owned under the Law on Enterprises or the Law on Associated Labour of the Federal Republic of Yugoslavia.[110] Under the "spin-off" procedure, the Kosovo Trust Agency was authorized to establish, on behalf of a socially owned enterprise, corporations and to transfer to such corporations the rights and interests in the assets of the socially owned enterprise.[111] The shares of the socially owned enterprise in the corporation were administered by the Kosovo Trust Agency, which could sell and transfer the shares of the socially owned enterprise in the

[102] UNMIK Regulation No. 2002/12, Section 1.

[103] UNMIK Regulation No. 2001/9, Chapter 11.

[104] UNMIK Regulation No. 2002/12, Section 2.1.

[105] *Id*. at Sections 12 and 13.4.

[106] *Id*. at Section 13.3, 24.2 and 24.3.

[107] *See also* Corell, *supra* note 82, at 3-4 and 7.

[108] UNMIK Regulation No. 2002/12, Section 6.1 and 6.2.

[109] *Id*. at Section 3.

[110] *Id*.

[111] *Id*. at Section 8.1.

corporation to bidders.[112] The proceeds from the sale accrued to the socially owned enterprise and were held in trust by the Kosovo Trust Agency for the benefit of potential creditors and owners of the socially owned enterprise.[113] Instead of privatizing a socially owned enterprise through "spin-off", the Kosovo Trust Agency could also initiate a voluntary liquidation of a socially owned enterprise if it considered such liquidation in the interest of the creditors and owners.[114]

A prerequisite for the implementation of this privatization process was an administrative decision, a so-called "status determination", to be made by the Kosovo Trust Agency as to whether an enterprise designated for privatization was indeed a socially owned enterprise. This included first of all an analysis if the enterprise was established in accordance with the Law on Enterprises and the Law on Associated Labour as a socially owned enterprise. In a second step, the Kosovo Trust Agency had to assess if the socially owned enterprise was transformed into a different business organization, in other words, if it was already privatized. Such transformation was only relevant if it had occurred before 22 March 1989, or, if the transformation had occurred after that date, the transformation was based on applicable law and was implemented in a non-discriminatory manner.[115]

The status determination turned into a major legal problem for the Kosovo Trust Agency Board. The legal uncertainties as to whether an enterprise qualified as a socially owned enterprise, and especially if a transformation should be taken into account, raised concerns among the Board members, who feared direct and personal liability claims before courts outside of Kosovo in the event of a "wrong" decision leading to "ultra vires" privatization.[116] The European Union led UNMIK component, which had seconded three Board members and which funded most of the Kosovo Trust Agency personnel, tried therefore to obtain functional immunity for its personnel from the United Nations.[117] This was rejected as the United Nations maintained that EU-funded Kosovo Trust Agency personnel, who were not United Nations staff members, did not enjoy the privileges accorded to the United Nations under the Convention on the Privileges and Immunities of the United Nations of 1946.[118] The European Commission also refused to recognize the EU-funded Kosovo Trust Agency personnel as officials of the European Commission as it considered its contribution to UNMIK merely as a grant, which was used to employ

[112] *Id*. at Section 8.4.

[113] *Id*. at Section 8.6.

[114] *Id*. at Section 9.1.

[115] *Id*. at Section 5.3.

[116] Zaum, *supra* note 85, at 164.

[117] *Id*. at 164.

[118] Knoll, *supra* note 52, at 654.

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

personnel under the authority of the SRSG and thus the United Nations. As a result of this controversy, the Kosovo Trust Agency Board ceased to meet and after only two privatization waves the privatization process was suspended.[119]

The following discussions between the United Nations, UNMIK and the EU resulted in a modification of the Regulation establishing the Kosovo Trust Agency, which aimed at mitigating the perceived legal risks associated with the status determination of socially owned enterprises. Instead of granting immunities to Kosovo Trust Agency personnel, the amended regulation[120] removed the requirement of a status determination as a prerequisite for privatization. The new regulation authorized the Kosovo Trust Agency to administer all enterprises which were registered as publicly or socially owned enterprises as of 31 December 1988 irrespective of any possible subsequent transformation.[121] Specifically for the purpose of privatizing socially owned enterprises, the Kosovo Trust Agency was authorized to presume that an enterprise registered as a socially owned enterprise on 31 December 1988 was still a socially owned enterprise and that no transformation had occurred since its registration. If, after privatization, it turned out that the Kosovo Trust Agency had disposed of assets which were lawfully transformed into private property after 31 December 1988, the owner of such assets had a right to compensation from the proceeds of the privatization of the socially owned enterprise.[122] A status determination was therefore required only after completion of the privatization process and only for the purpose of identifying any owners who were adversely affected by the privatization. A transformation would be considered for compensation purposes if it was based on and carried out in compliance with applicable law, if it was not discriminatory and not in breach of the principles of the European Convention on Human Rights and Fundamental Freedoms.[123] In a further amendment to the regulation, the Kosovo Trust Agency was authorized to presume that such transformation did not meet the requirements, which would trigger the obligation to compensate, unless there was clear evidence available to the Kosovo Trust Agency, which conclusively established that the transformation met these requirements.[124]

The amended regulation authorized the Kosovo Trust Agency to privatize socially owned enterprises in a manner that could result in a disguised expropriation of owners of assets which were transformed into other forms of ownership, subject to compensation from the

[119] Zaum, *supra* note 85, at 163-164; Knoll, *supra* note 52, at 655.

[120] UNMIK Regulation No. 2005/18.

[121] *Id*. at Section 5.1(a).

[122] *Id*. at Section 5.3.

[123] *Id*. at Section 5.4.

[124] UNMIK Regulation No. 2008/27, Section 5.3 (b).

proceeds of the privatization.[125] The Special Chamber decided in two cases that the provisions of the regulation on compensation from the proceeds and the lack of possibility to restitute lawfully acquired property, which was considered an asset of a socially owned enterprise, would be in violation of Article 6.1 and Article 1 of Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms.[126] While the amendments to the regulation reduced the perceived legal risks associated with status determination and thus avoided further controversies about immunities and liabilities of Kosovo Trust Agency personnel, the resulting possibility of de facto expropriation of legitimate owners brought the privatization process in conflict with the European Convention on Human Rights and Fundamental Freedoms and raised questions about the level of legal protection of lawfully acquired rights.

IV. Privatization and Judicial Remedies

As already stated, the establishment of a court composed of international judges to adjudicate ownership claims[127] was a critical prerequisite for the United Nations to approve the privatization process. The Regulation establishing the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters[128] (Special Chamber) was promulgated on the same day as the regulation establishing the Kosovo Trust Agency. This fulfilled the condition set by the United Nations that the establishment of such a court would have to be in place at the time when decisions affecting ownership were taken.[129]

The Special Chamber was composed of a panel of three international and two local judges appointed by the SRSG after consultation with the President of the Supreme Court.[130] The jurisdiction of the Special Chamber included challenges to administrative and privatization related decisions of the Kosovo Trust Agency as well as creditor and ownership claims brought against a publicly or socially owned enterprise.[131] The Special Chamber had exclusive first instance jurisdiction in these matters, unless it delegated cases to other courts in Kosovo. In the event of such delegation, the decision of the court could be

[125] Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, Judgment No. SCC-06-0100 of 20 November 2007; *see also* OSCE, *supra* note 2, at 26.

[126] Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, Judgment No. SCC-06-0100 of 20 November 2007, *and* Judgment No. ASC-10-0021 of 31 October 2011.

[127] Corell, *supra* note 88, at 9.

[128] UNMIK Regulation No. 2002/13.

[129] Corell, *supra* note 88, at 9.

[130] UNMIK Regulation No. 2002/13, at Section 3.1.

[131] *Id.* at Section 4.

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

appealed to the Special Chamber.[132] The remedies which the Special Chamber could grant were limited in two aspects. In the case of ownership claims, where the Special Chamber determined that an asset held by a socially owned enterprise was owned by the claimant, but the asset was transferred to a third party due to privatization, the claimant would not be granted a right to restitute the property but would instead be entitled to payment of monetary compensation equivalent to the value of the asset.[133] The Special Chamber could also not grant a remedy that would allow for the rescission of a transaction or the nullification of a contract entered into by the Kosovo Trust Agency.[134] Evidently, the purpose of these limitations was to protect buyers of socially owned enterprise assets which were transferred to them under the privatization scheme of the Kosovo Trust Agency. However, the limitation to monetary compensation instead of restitution, together with the fact that compensation was limited to the proceeds of the privatization, was considered by the Special Chamber as a violation of Articles 6.1 and Article 1 of Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms.[135] The fact that there was no possibility to appeal the decisions of the Special Chamber apart from the few cases of jurisdiction delegated to regular courts was also criticized as being inconsistent with Article 6.1 of the European Convention on Human Rights and Fundamental Freedoms.[136]

In response to these legal concerns, the Regulation on the Special Chamber was amended in 2008[137] but the amendments addressed these concerns only partially. The number of judges was increased to twenty judges, resulting in thirteen international and seven local judges.[138] Five panels, each of them consisting of three judges designated by the President of the Special Chamber, were established for the conduct of trials and adjudication of claims in the first instance.[139] The President of the Special Chamber, together with four other judges (two international and two local judges) constituted the appellate panel[140] which had exclusive jurisdiction to decide appeals against decisions of a trial panel[141].

---

[132] *Id.* at Section 4.2 and 4.3.

[133] *Id.* at Section 10.3.

[134] *Id.* at Section 10.5.

[135] *Supra* note 122 and 123.

[136] OSCE, *supra* note 2, at 37.

[137] UNMIK Regulation No. 2008/4.

[138] *Id*. at Section 3.1.

[139] *Id*. at Section 3.2.

[140] *Id*. at Section 3.3.

[141] *Id*. at Section 4.4.

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

Although two instances were established, there was no strict separation of the two instances, especially since the President of the Special Chamber could assign judges of the appellate panel to sit in the trial panels, and vice versa.[142] The rules limiting the remedies which could be granted by the Special Chamber were also modified. The rule that an owner would be entitled to monetary compensation and not to restitution remained in force provided the third party, to which the asset was transferred, was in good faith.[143] Similarly, a claimant could claim the rescission of a completed transaction or the nullification of a contract entered into and performed by the Kosovo Trust Agency, if the third party was not in good faith.[144]

As regards the legal nature of the Special Chamber, its formal denomination created the perception that it was an integral part of the Supreme Court of Kosovo. As such, the Special Chamber would be a court of the PISG and thus an institution of Kosovo and not another subsidiary organ of UNMIK. On the other hand, the view is held that the Special Chamber was a separate international court because it was established by UNMIK, the SRSG appointed the judges of the Special Chamber, and it had an internationally staffed Registry separate from that of the Supreme Court.[145] Judges of the Special Chamber were appointed by the SRSG for periods of six months each[146], and any further extension was in the sole discretion of the SRSG. The President of the Supreme Court of Kosovo had no other influence over the Special Chamber except of being consulted by the SRSG in matters related to the appointment of local judges.

A key feature of a subsidiary body is that it is both subsidiary and subordinate to the principal organ, which has established it.[147] This means specifically that subsidiary organs are, in principle, under the supervision or control of the related principal organ, and that the decisions adopted by subsidiary organs are not binding for the related principal organ.[148] As an exception, principal organs may also establish subsidiary bodies, usually in form or judicial bodies, which are neither subsidiary nor subordinate, and over which the principal body has no functional control and whose decisions bind the principal organ.[149]

---

[142] *Id*. at Section 3.3 (b).

[143] *Id*. at Section 10.3.

[144] *Id*. at Section 10.5.

[145] Knudsen, *supra* note 41, at 58.

[146] OSCE, *supra* note 2, a1t 38.

[147] CHITTHARANJAN FELIX AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 141-142 (2005).

[148] *Id*. at 141.

[149] *Id.* at 142.

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

Whether a subsidiary organ is of such nature depends, according to the International Court of Justice, on the intention of the principal organ and on the nature of the functions conferred upon it by its founding document.[150] Evidently, the Special Chamber was established by the SRSG under his reserved powers and within the authority vested in him by Resolution 1244. The SRSG, and not the PISG, had the sole authority to dissolve the Special Chamber. Further, the judges were appointed and dismissed by the SRSG. These elements indicate that the Special Chamber was under the legal control of the SRSG and thus the United Nations. The primary purpose for the establishment of the Special Chamber was to shield the United Nations from possible liability resulting from claims made by owners whose property was taken during the privatization process, and to avoid international adjudication of such claims in the event a member state exercised diplomatic protection for any of its nationals adversely affected by the privatization process.[151] Thus, in view of organizational structure, functional control and purpose, the Special Chamber would qualify as a subsidiary organ of UNMIK attributable to the United Nations rather than a court of Kosovo. Its attachment to the Supreme Court of Kosovo was only a matter of formal denomination, whereas in substance, while both legally and functionally, it had to be considered a separate international court established by the United Nations under Resolution 1244.

V. Land and Employees of Socially Owned Enterprises

Bearing in mind the specifics of socially owned property, socially owned enterprises were not the owners of the socially owned assets, especially land, which were in their possession. The privatization of a socially owned enterprise did not mean that the socially owned land in their possession was automatically privatized as well.[152] A separate legal instrument was necessary to address the legal aspects of socially owned land for privatization purposes. UNMIK did not transform socially owned land belonging to a socially owned enterprise into private ownership. Instead, a right of use of land, which was registered in the name of a socially owned enterprise, and which was transferred to a corporation established by the Kosovo Trust Agency for the purposes of a 'spin-off' or under liquidation procedures, was transformed into a leasehold right for a term of 99 years.[153] Although the leasehold was not supposed to affect or change the underlying ownership of the land[154], it contained certain features, which are specific for ownership

[150] ICJ Advisory Opinion, EFFECTS OF AWARDS OF COMPENSATION MADE BY THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL of 13 July 1954, at 61.

[151] Corell, *supra* note 88, at 4.

[152] Medjad, *supra* note 3, *at* 310.

[153] UNMIK Regulation No. 2003/13, Section 2.1, as amended by UNMIK Regulation No. 2004/45.

[154] UNMIK Regulation No. 2003/13, Section 8.

rights. The holder of such a leasehold right was entitled to possess, transfer and encumber the property,[155] and it could be inherited and transferred[156]. The leasehold right was subject to expropriation pursuant to the same rules as ownership and the exercise of rights associated with such leasehold were subject to the limitations and restrictions set out by law for ownership rights.[157]

The reason for this arrangement was the United Nations's hesitation, given the concerns about the scope of its mandate, to transform socially owned land into private ownership. The United Nations's position seems to have been that municipalities held residual legal title in land use rights vested in socially owned enterprises, as based on Yugoslav law municipalities were entitled to socially owned land which no longer was needed for the purposes of a socially owned enterprise.[158] On the other hand, the United Nations's intention was to make socially owned land useful for privatization purposes, and for this reason there had to be the legal possibility of freely transferring and encumbering such land. Thus, without addressing the ownership question, the leasehold right was meant to be a legal equivalent to ownership though not conveying, in a formal sense, full ownership. The expectation was that during the 99 years leasehold term, the question about Kosovo's final political status would be resolved, and the final sovereign would then transform the leasehold into full ownership.[159]

With reference to a special status of employees in socially owned enterprises, the SRSG determined that employees were entitled to 20% of the proceeds from the privatization of a socially owned enterprise.[160] An individual was eligible for being considered an employee if she was registered with the respective socially owned enterprise as an employee at the time of privatization and if it was established that she was on the payroll of the socially owned enterprise for at least three years.[161] Employees' lists were prepared by trade unions subject to review by the Kosovo Trust Agency.[162] Individuals who claimed that they were not registered with a socially owned enterprise due to discriminatory treatment could file a complaint with the Special Chamber for being included in the employees' list.[163]

---

[155] *Id.* at Section 2.1.

[156] *Id*. at Section 2.2.

[157] *Id*. at Sections 5 and 9.

[158] Zaum, *supra* note 85, at 162.

[159] Knudsen, *supra* note 41, at 74.

[160] UNMIK Regulation No. 2003/13, Section 10, as amended by UNMIK Regulation No. 2004/45.

[161] UNMIK Regulation No. 2003/13, Section 10.4.

[162] *Id*. at Section 10.2.

[163] *Id*. at Section 10.2.

According to Knudsen, the "20% rule" was included as compensation for the employees' loss of management rights in the socially owned enterprise, which had been significant during Yugoslav times, and had given employees a strong sense of ownership in the socially owned enterprise in which they were employed.[164] Initially, the United Nations's proposal was that part of the proceeds from privatization would go into a separate fund to be used for the development of municipal infrastructure.[165] However, due to political pressure from trade unions, and in order to "buy" the employee's and local support for privatization, the political decision as reflected in the "20% rule" favored employees over municipalities.[166]

The solutions on how to deal with land and employees shows again how insecure the United Nations's conception of the legal nature of socially owned property and enterprises was. It evidently tried to find practical arrangements by, at least partially, accommodating the interests of all relevant stakeholders based on the understanding that all legal arrangements were just temporary solutions.

D. Privatization After Independence

I. The Comprehensive Proposal for the Kosovo Status Settlement

Under the auspices of the United Nations, and facilitated by the United Nations Special Envoy Martti Ahtisaari, talks between Kosovo and Serbia on the political status of Kosovo began in early 2006.[167] Since no agreement was reached between the parties, in March 2007 the Secretary-General submitted to the Security Council Ahtisaari's "Comprehensive Proposal for the Kosovo Status Settlement" (Settlement Proposal), which proposed independence for Kosovo under international supervision and with legal safeguards for Kosovo's ethnic minorities.[168]

The Settlement Proposal also contained rules on how to deal with publicly and socially owned enterprises.[169] According to the Settlement Proposal, publicly owned enterprises

[164] Knudsen, *supra* note 41, *at* 83.

[165] Zaum, *supra* note 85, *at* 162.

[166] Knudsen, *supra* note 41, *at* 85; Zaum, *supra* note 85, *at* 163.

[167] United Nations Secretary-General Press Release (SG/A/955) of 15.11.2005, available at: http://www.un.org (last accessed: 25 May 2013)

[168] Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council (S/2007/168/Add.1) (hereinafter the "Settlement Proposal").

[169] Settlement Proposal, *supra* note 165, at Annex VII.

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

would be owned by the state of Kosovo.[170] With regard to socially owned enterprises, the Kosovo Trust Agency would continue exercising trusteeship for socially owned enterprises and their assets. The International Civilian Representative, appointed by an International Steering Group[171] to supervise Kosovo's compliance with the Settlement Proposal, was authorized to appoint three (3) members of the Kosovo Trust Agency Board of Directors, the Director of the Executive Secretariat of the Board of Directors, one (1) member in each liquidation committee and one (1) member in each review committee.[172] The Settlement Proposal also laid down certain principles, which would govern the Kosovo Trust Agency and the privatization process. The principle that compensation instead of physical restitution would continue to be applied, that trust funds comprising privatization and liquidation proceeds would be preserved to meet valid creditors' and ownership claims, and any surplus of the proceeds would, after having made all payments due to creditors and owners, be transferred to the Government of Kosovo.[173] UNMIK was required to amend existing Kosovo Trust Agency related regulations in accordance with these principles.[174]

The Settlement Proposal required that the final determination of ownership and adjudication of claims would continue to be handled by the Special Chamber.[175] The Special Chamber would have five (5) specialized panels, each of them composed of two (2) international and one (1) local judge.[176] In addition, an appeals panel comprising three (3) international and two (2) local judges would review Special Chamber decisions rendered at first instance.[177]

Efforts to have the proposal endorsed by the Security Council failed in July 2007 in view of signals from Russia and China to veto the proposal if submitted to a vote in the Security Council. Failure to resolve Kosovo's political status in the Security Council led representatives of the people of Kosovo[178] to declare independence in February 2008,

[170] *Id.* at Annex VII, Article 1.

[171] The International Steering Group was supposed to include France, Germany, Italy, Russia, the United Kingdom, the United States, the European Union and NATO; see Settlement Proposal, Annex IX, Art. 4.1.

[172] Settlement Proposal, *supra* note 165, at Annex VII, Article 2.2.

[173] *Id*. at Article 2.

[174] *Id*. at Article 2.

[175] *Id*. at Article 3.1.

[176] *Id*. at Art. 3.2.

[177] *Id*. at Art. 3.3.

[178] *See* International Court of Justice, Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo of 22 July 2010, Para. 109.

which was followed by the adoption of the Constitution of the Republic of Kosovo ("Constitution") which entered into force in June 2008[179]. The United Nations's reaction to Kosovo's declaration of independence was that pending guidance from the Security Council, the United Nations would continue to operate on the understanding that Resolution 1244 would remain in force and would constitute the legal framework for the mandate of UNMIK, and that UNMIK would continue to implement its mandate in the light of the evolving circumstances.[180] Thus, the foundations for the development of two legal systems were laid, one based on Resolution 1244 and the other based on the Constitution of the Republic of Kosovo, a development which had serious implications for the privatization process.

1. Privatization under the Constitution of the Republic of Kosovo

Despite the failure to adopt the Settlement Proposal in the Security Council, the Constitution incorporated the Settlement Proposal in its entirety. Neither the Settlement Proposal nor the Constitution recognized UNMIK to further exercise any government authority in Kosovo, except for a transitional period during which UNMIK would have to transfer all its authority to Kosovo.[181] However, the Settlement Proposal specifically provided that all authorities in the Republic of Kosovo must abide by Kosovo's obligations under the Settlement Proposal, whose provisions take precedence over all other legal provisions in Kosovo, including the Constitution.[182] The Constitution also confirmed that the International Civilian Representative and other international organizations and actors mandated under the Settlement Proposal would have the mandate and powers set out in the Settlement Proposal, and all Kosovo authorities were required to give effect to their decisions and acts.[183] It explicitly stated that the International Civilian Representative was the final authority for the interpretation of the Settlement Proposal, while no Kosovo authority had jurisdiction to review, diminish, or otherwise restrict the mandate and powers of the International Civilian Presence according to the Settlement Proposal.[184]

---

[179] Constitution of the Republic of Kosovo of 15 June 2008 (hereinafter the "Constitution"), available at: http://gazetazyrtare.rks-gov.net/Documents/Constitution%20of%20the.Republic%20of%20Kosovo.pdf.

[180] Report of the Secretary-General of the United Nations Interim Administration Mission in Kosovo of 28 March 2008 (S/2008/211), at para. 4.

[181] Settlement Proposal, *supra* note 165, at Annex IX, Article 15.

[182] Constitution, Art. 143.1 and Art. 143.2.

[183] *Id.,* Art. 146

[184] *Id.,* Art. 147.

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

The Constitution almost literally reiterated the Settlement Proposal's provisions on publicly owned enterprises.[185] In respect of socially owned enterprises, the Constitution was not that detailed but it required that all enterprises, which were wholly or partly in socially owned property prior to the effective date of the Constitution, had to be privatized in accordance with law.[186] The term "law" included laws adopted by the Assembly of Kosovo pursuant to the Constitution, and also all laws which were applicable on the date of the entry into force of the Constitution, i.e. UNMIK regulations and other legal acts defined by UNMIK as applicable law, until they were repealed, superseded or amended in accordance with the Constitution.[187]

More significantly, the Constitution changed the legal nature of socially owned property. It provided that all socially owned interests in property and enterprises in Kosovo were owned by the Republic of Kosovo.[188] The Settlement Proposal was silent as to the content and nature of socially owned property, and contained only provisions on the privatization process with emphasis on legal safeguards for creditors and owners. This gap was filled by the Constitution, which transformed socially owned property into state owned property. Thus, with the entry into force of the Constitution, socially owned property formally ceased to exist as a legal concept in Kosovo. The privatization of socially owned property, interpreted in consistency with the Constitution, would therefore mean the privatization of any rights of use socially owned enterprises would have in state property.

2. Privatization under the Constitution or Resolution 1244?

In May 2008, the Assembly of Kosovo, now acting under the authority of the Constitution, adopted a new Law on the Privatization Agency of Kosovo.[189] This law repealed previous UNMIK regulations on the Kosovo Trust Agency, and established the Privatization Agency of Kosovo as the successor of the Kosovo Trust Agency.[190] With the entry into force of the Law on the Privatization Agency of Kosovo, the Kosovo Trust Agency would cease to exist. The Privatization Agency of Kosovo was established entirely outside the legal framework of Resolution 1244 with no reference whatsoever to the SRSG or UNMIK. Five (5) of the eight

[185] *Id.,* Art. 160.

[186] *Id.,* Art. 159.1.

[187] *Id.,* Art. 145.2.

[188] *Id.,* Art. 159.2.

[189] Law No. 04/L-034 on the Privatization Agency of Kosovo (hereinafter the "PAK Law"), available at: http://gazetazyrtare.rksgov.net/Documents/Ligji%20per%20Agjencine%20Kosovare%20te%20Privatizimit%20(anglisht).pdf.

[190] Law No. 04/L-034 on the Privatization Agency of Kosovo, Article 1.

(8) members of the Board of the Privatization Agency of Kosovo were appointed by the Assembly of Kosovo, while three (3) Board members were appointed by the International Civilian Representative as required by the Settlement Proposal.[191] The Privatization Agency of Kosovo reported directly to the Assembly of Kosovo, and was no longer accountable to the SRSG.[192] In contrast to the mandate of the Kosovo Trust Agency, the Privatization Agency's authority was limited to socially owned enterprises only.[193] Authority over publicly owned enterprises was vested in the Government of Kosovo under a new law, which transformed publicly owned enterprises into enterprises owned by the Republic of Kosovo.[194] However, no new law on the Special Chamber was adopted and UNMIK regulations on the Special Chamber continued to apply.

The legal situation was interpreted differently by the United Nations which maintained that, despite Kosovo's declaration of independence, Resolution 1244 remained in force until repealed by the Security Council.[195] All executive and legislative powers with respect to Kosovo would continue to be vested in the SRSG. As a consequence, UNMIK did not recognize the Law on the Privatization Agency of Kosovo. In a clarification dated 12 November 2009 addressed to the Special Chamber, the SRSG pointed out that the UNMIK regulation, which had established the Kosovo Trust Agency, remained in force and was applicable in Kosovo based on Resolution 1244, and such regulation could only be repealed or amended by UNMIK through another regulation.[196] According to the SRSG, the Law on the Privatization Agency of Kosovo, without being promulgated by an UNMIK regulation, could not abolish or repeal an UNMIK regulation, nor could it extinguish the Kosovo Trust Agency as an independent agency.[197] The SRSG also confirmed that during the continuation of Resolution 1244 UNMIK would not approve any attempts by the Privatization Agency of Kosovo to assume succession or authority from the Kosovo Trust Agency.[198] In a separate letter dated 8 January 2010, the Director of UNMIK's Office of Legal Affairs made clear that

[191] *Id.,* Article 12.

[192] *Id.,* Article 20.

[193] *Id.,* Article 2.1.

[194] Law No. 03/L-087 on Publicly-Owned Enterprises, Article 3, available at: http://gazetazyrtare.rks-gov.net/Documents/T-Ligji%20per%20nderrmarrjet%20publike-anglisht.pdf.

[195] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12 June 2008 (S/2008/354), at para. 4.

[196] Constitutional Court of the Republic of Kosovo, Judgment in Case No. KI 25/10 of 31 March 2011, at para. 20.

[197] *Id*. at para. 21.

[198] *Id*. at para 21.

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

the Kosovo Trust Agency continued to exist as a legal person and that UNMIK would be the Kosovo Trust Agency's representative before the Special Chamber.[199]

The legal differences between the United Nations and Kosovo prevented a smooth transfer of authority from the Kosovo Trust Agency to the Privatization Agency of Kosovo. Because UNMIK did not recognize the new law on the Privatization Agency of Kosovo, former local Kosovo Trust Agency officials, appointed by the Kosovo authorities to official positions in the newly established Privatization Agency of Kosovo, took over the Kosovo Trust Agency compound with the support of the Kosovo Police.[200] However, UNMIK secured all official documents related to the direct involvement of UNMIK with the management of the Kosovo Trust Agency and the SRSG instructed the Central Bank of Kosovo not to allow any interference with the privatization funds unless authorized by the SRSG.[201]

The legal differences also led to a serious controversy between the Special Chamber and the Constitutional Court of Kosovo. The Special Chamber had to decide in a case, whether the Privatization Agency of Kosovo or the Kosovo Trust Agency would be authorized to represent socially owned enterprises before the Special Chamber. In a judgment dated 4 February 2010, the Appellate Panel of the Special Chamber ruled that the Kosovo Trust Agency would be the agency authorized to deal with the privatization of socially owned enterprises.[202] The Special Chamber would not accept the Law on the Privatization Agency of Kosovo as applicable law in Kosovo, and it would consider the Privatization Agency of Kosovo to be acting only factually, not legally, as the successor of the Kosovo Trust Agency.[203] This position was confirmed in a decision of 26 August 2010, where the Special Chamber explicitly stated that it would follow the SRSG's clarification dated 12 November 2009.[204] According to the Special Chamber, the regulation establishing the Kosovo Trust Agency was promulgated by the SRSG under Resolution 1244, and UNMIK regulations could only be repealed or amended by the SRSG as the legislator by way of another regulation; thus, the regulation establishing the Kosovo Trust Agency remained in force, as would Resolution 1244.[205] The Law on the Privatization Agency of Kosovo, without being

[199] *Id*. at para. 23.

[200] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, dated 24 November 2008 (S/2008/692), at para. 20.

[201] *Id*.

[202] Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, Decision No. ASC-09-0089 of 4 February 2010, at III.

[203] *Id*.

[204] Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, Decision No. ASC-10-0042 of 26 August 2010, at V.

[205] *Id.*

promulgated by the SRSG, could not repeal or replace the regulation establishing the Kosovo Trust Agency, nor could it extinguish the legal existence of the Kosovo Trust Agency.[206] The Privatization Agency of Kosovo had not been established on the basis of the law applicable in Kosovo in accordance with Resolution 1244, and could therefore not be treated as the Kosovo Trust Agency's legal successor.[207]

The judgment of the Special Chamber was brought by the Privatization Agency of Kosovo before the Constitutional Court of Kosovo with a request to review its constitutionality. The Constitutional Court declared the judgment invalid because it violated Articles 31[208] and 102 of the Constitution of the Republic of Kosovo (Constitution) and Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms.[209] According to Article 102 of the Constitution courts were required to adjudicate based on the Constitution and laws of the Republic of Kosovo. The Constitutional Court concluded that the Special Chamber did not recognize and apply the laws lawfully adopted by the Assembly of Kosovo and that it continued to ignore the existence of Kosovo as an independent state and the legislation emanating from its Assembly.[210] Since it did not apply the Law on the Privatization Agency of Kosovo, the Special Chamber did not ensure the uniform application of the law as envisaged in the Settlement Proposal, nor did it act in conformity with its duties under Article 102 of the Constitution.[211] For the Constitutional Court, the Special Chamber was part of the Supreme Court of Kosovo and therefore part of the court system of the Republic of Kosovo. As such, the Special Chamber was subject to the Constitution and required to adjudicate in accordance with the Constitution and those legal acts, which were recognized as law by the Constitution.

The Special Chamber's legal reasoning and resistance to recognize the Law on the Privatization Agency of Kosovo as applicable law may be interpreted as a confirmation of the view that the judges of the Special Chamber considered themselves as serving an international court established by the United Nations rather than a court of Kosovo. According to the Settlement Proposal and the Constitution, judges serving in Kosovo's court system were appointed by the President of Kosovo upon the proposal of the Kosovo

[206] *Id.*

[207] *Id.* at VI.

[208] Article 31 of the Constitution is the equivalent of Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

[209] Although Kosovo is not a signatory of the European Convention on Human Rights and Fundamental Freedoms, the Convention applies directly in Kosovo and prevails over any other legal acts of the Republic of Kosovo (Article 22 of the Constitution of the Republic of Kosovo).

[210] Case KI 25/10 of 31 March 2011, at para. 53.

[211] *Id*. at para. 60.

Judicial Council.[212] International judges serving in Kosovo's court system, including the Special Chamber, would be selected by the European Security and Defence Policy (ESDP) Mission, established by the Settlement Proposal, subject to prior approval by the International Civilian Representative.[213]

Pursuant to the Settlement Proposal, the International Civilian Representative would not only supervise Kosovo during the period of supervised independence but he would also be the Special Representative of the European Union (EUSR) in Kosovo, and in this capacity he would direct the ESDP Mission.[214] The ESDP Mission would have robust powers in the area of rule of law, focusing primarily on the judiciary, police, border control, customs and correctional services.[215] It would have the authority to investigate, prosecute and adjudicate cases, to monitor, mentor and advise in all matters related to the rule of law, and take action, even independently of Kosovo authorities, to ensure the maintenance and promotion of rule of law, public order and security.[216]

Since the Settlement Proposal was not adopted in the Security Council, the European Union was required to deploy its rule of law mission - the European Union Rule of Law Mission in Kosovo (EULEX) - within the framework provided by Resolution 1244 and under the overall authority of the United Nations.[217] While the Council Joint Action establishing EULEX made only a general reference to Resolution 1244 in its preamble [218], subsequent amendments to the Joint Action clearly placed EULEX under the authority of Resolution 1244[219]. According to both UNMIK and the Constitutional Court, the international judges assigned to the Special Chamber are EULEX judges.[220] Instead of being appointed in accordance with the Settlement Proposal and with the consent of the International Civilian

[212] Settlement Proposal, *supra* note 165, at Annex I, Art. 6.4; Constitution, Art. 104.1.

[213] Settlement Proposal, *supra* note 165, at Annex IX, Article 2.2.

[214] *Id*. at Annex IX, 2.3.

[215] *Id*.

[216] *Id*.

[217] *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo* (S/2008/354) (12 June 2008), at para. 8; reiterated in *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo* (S/2011/675) (31 October 2011), at para. 2; *see also Statement by the President of the Security Council of 26 November 2008* (S/PRST/2008/44).

[218] Council Joint Action 2008/124/CFSP of 4 February 2008.

[219] Council joint Action 2009/445/CFSP of 9 June 2009; Council Decision 2010/619/CFSP of 15 October 2010.

[220] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo dated 31 October 2011 (S/2011/675), at Para. 11; Constitutional Court of the Republic of Kosovo, Judgment in Case No. KI 25/10 of 31 March 2011, Para. (…).

Representative, EULEX judges were appointed under the authority of the SRSG and consistent with applicable law under Resolution 1244.[221] For EULEX judges, the applicable law was the law promulgated by the SRSG under Resolution 1244, and not the laws promulgated under the Constitution, as confirmed in the reasons provided by the Special Chamber on the applicability of the law on the Privatization Agency of Kosovo.

Before this background, and in response to the judgment of the Constitutional Court, the Assembly of Kosovo adopted a new Law on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters, which repealed the former UNMIK Regulation on the Special Chamber.[222] The new law explicitly established the continuity of the Special Chamber established by UNMIK and clarified that the Special Chamber was part of the Supreme Court of Kosovo[223], thus excluding any possibility to consider the Special Chamber as a special international court. The Special Chamber was composed of twenty (20) judges, twelve (12) being Kosovo citizens, and eight (8) being international judges.[224] International judges were defined as every judge of the ESDP Mission that was appointed in accordance with the Settlement Proposal.[225] The law also provided that the ESDP Mission appoints, re-appoints and dismisses the international judges in accordance with the internal rules and procedures of the ESDP Mission.[226] The law intentionally refers to ESDP Mission instead of EULEX. The purpose was to establish a direct link to the Settlement Proposal as the only legal basis for the operations of the European Rule of Law Mission and the appointment of international judges to the Special Chamber. EULEX judges appointed under the authority of Resolution 1244 would clearly not qualify as international judges as defined in the Law on the Special Chamber. EULEX would have to appoint its judges to the Special Chamber under the provisions of the Settlement Proposal, or, if they continued to be appointed under the authority of the SRSG and Resolution 1244, they would risk constitutional challenges to decisions rendered by the Special Chamber under Article 6.1 of the European Convention on Human Rights and Fundamental Freedoms for breach of national rules on the appointment of judges.[227]

---

[221] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo dated 17 March 2009 (S/2009/149), at Para. 13.

[222] Law No. 04/L-033 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters.

[223] *Id*. at Articles 1.1 and 1.3.

[224] *Id*. at Article 3.1.

[225] *Id*. at Article 2.1.7.

[226] *Id*. at Article 3.3.

[227] Robert Muharremi, *The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law*, 70 H'BERG J. OF INT'L L. 377 (2010).

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

UNMIK's reaction to the enactment of the new law on the Special Chamber was negative. The key concern was that international involvement in and oversight of the privatization and liquidation processes, which was previously assured by a majority of international judges appointed by EULEX, was being acutely curtailed by the new law, and international judicial oversight in particular would be limited to an appeals panel.[228] Despite its negative reaction, UNMIK was not able to prevent the law from entering into force and having its intended legal effects on the organization and composition of the Special Chamber. However, UNMIK's concerns clearly show that it was exercising control over the Special Chamber through EULEX judges and that such control would now be significantly diminished, as EULEX judges would only be in the majority at the appellate level, while the first instance would be controlled by a majority of local judges.

D. Privatization After the end of Supervised Independence

The international supervision of Kosovo's independence ended on 10 September 2012. The International Steering Group for Kosovo declared the end of the supervision of Kosovo's independence, and the end of the mandate of the International Civilian Representative.[229] It explicitly stated that the Settlement Proposal would no longer exist as a separate and superior legal power, and that the Constitution of the Republic of Kosovo would now constitute the sole basis for the country's legal framework.[230] The International Steering Group's statement was preceded by the adoption on 7 September 2012 of amendments to the Constitution, which removed all provisions that referred to the Settlement Proposal and the ICR.[231] On the same day, the Assembly of Kosovo also adopted a number of amendments to laws to ensure consistency with the amendments to the Constitution[232] and ratified an agreement with the European Union on EULEX[233].

---

[228] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo dated 31 January 2012 (S/2012/72), at Para. 31.

[229] *Communiqué of the Sixteenth and final meeting of the International Steering Group for Kosovo* (10 September 2012), available at: http://www.ico-kos.org/f/pdf/COMMUNIQUE16thISG-Eng.pdf (27 June 2013).

[230] *Id*.

[231] Official Gazette of the Republic of Kosovo, Amendments to the Constitution of the Republic of Kosovo Regarding the Ending of International Supervision of Independence of Kosovo of 7 September 2012, available at: http://gazetazyrtare.rks-gov.net/KK.aspx (last accessed: 27 June 2013)

[232] Law No. 04/L-115 on Amending and Supplementing the Laws Related to the Ending of International Supervision of Independence of Kosovo.

[233] Law No. 04/L-148 on the Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo.

The amendments to the Constitution not only removed the privatization related provisions of the Status Settlement but also deleted Article 159 which required that socially owned enterprises were to be privatized and which provided that all socially owned interests in property and enterprises in Kosovo were owned by the Republic of Kosovo. It is not clear why this provision was deleted as it provided the legal basis for the transformation of socially owned property into state owned property. In addition, the Law on the Privatization Agency of Kosovo still contains a reference to the deleted Article 159 of the Constitution, which was not harmonized with the amendments to the Constitution. In Article 3.1.16 of said law, state owned interests are defined as any and all socially owned interests, including social capital, in any socially owned enterprise or other legal entity that, by operation of Article 159.2 of the Constitution, are now owned by the Republic of Kosovo. The deletion of Article 159 of the Constitution without further addressing the legal nature of the former socially owned property may raise questions about the legal nature of the property held by socially owned enterprises which are still subject to administration by the Privatization Agency of Kosovo and whether such property is state owned.

Further to the amendments to the Constitution, the Assembly of Kosovo also amended the Law on the Privatization Agency of Kosovo and the Law on the Special Chamber. The Law on the Privatization Agency of Kosovo was amended only in regard of the composition of the Board of the Privatization Agency of Kosovo. It is now the Assembly of Kosovo which, upon nomination by the Government, appoints three international members as Directors of the Board.[234] Under the previous rule, the three international Directors of the Board were appointed by the International Civilian Representative. As the law does not require the international directors to belong to a certain institution or organization, e.g. the European Union or the United Nations, it is in the discretion of the Government and of the Assembly to decide on the appointment of the international directors and their qualifications.

In the Law on the Special Chamber the definition of 'international judge' was amended. Under the previous rule, the term 'international judge' was defined as every judge of the ESDP Mission that has been appointed in accordance with the provisions of the Status Settlement. The new definition just refers to every judge of the ESDP Mission that has been appointed in accordance with the Law on the Special Chamber.[235] This means that international judges will be appointed by EULEX in accordance with its internal rules and procedures without requiring anyone's approval. However, the rules on the appointment of international judges to the Special Chamber must be interpreted in the light of the so-called agreement between Kosovo and the European Union on EULEX, which refers to an

[234] Law No. 04/L-115 on Amending and Supplementing the Laws Related to the Ending of International Supervision of Independence of Kosovo, Article 4.

[235] Law No. 04/L-115 on Amending and Supplementing the Laws Related to the Ending of International Supervision of Independence of Kosovo, Article 6.

exchange of letters between the President of the Republic of Kosovo and the High Representative of the European Union for Foreign Affairs and Security Policy (High Representative) dated 4 September 2012.[236] In this exchange of letters, the President of Kosovo welcomes the extension of EULEX's mandate until 2014, which was already decided by the Council of the European Union on 5 June 2012.[237] Concerning the appointment of judges by EULEX, the President of Kosovo refers to Article 20 of the Constitution, which permits the authorities of Kosovo to delegate certain powers for specific matters to international organizations. In view of this provision, the President confirmed the delegation of powers from the Republic of Kosovo to EULEX under Article 20 of the Constitution to nominate and appoint judges.[238] EULEX would thus, when appointing judges, exercise sovereign powers delegated to it by the Republic of Kosovo, and it would not exercise such powers based on another source of legal authority.

Whether EULEX would indeed exercise powers delegated to it by the Republic of Kosovo may be questionable despite the wording of the President's letter to the High Representative. In her response to the President's letter, the High Representative did not make any reference to the Constitution of the Republic of Kosovo but only to EULEX's mandate under the Council's joint action establishing EULEX[239]. The joint action itself refers to Resolution 1244 as the legal framework within which the EU deploys its rule of law mission and the invitation expressed by the Security Council to the European Union and other international organizations to support the implementation of Resolution 1244.[240] The joint action also defines Kosovo organs, institution and authorities as those created on the basis of Resolution 1244[241], excluding thereby, by definition, those Kosovo authorities which derive their legitimacy from the Constitution of the Republic of Kosovo. The President of Kosovo refers to Article 20 of the Constitution which permits the delegation of specific state powers to international organizations. As stated in the letter, the President delegates state powers concerning the appointment of judges to EULEX. However, EULEX, like all common security and defense policy mission of the European Union, does not have legal personality.[242] State powers can therefore not be delegated to EULEX but only to the

[236] Law No. 04/L-148 on the Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo.

[237] Council Decision 2012/291/CFSP of 5 June 2012.

[238] Law No. 04/L-148 on the Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo.

[239] Council Joint Action 2008/124/CFSP of 4 February 2008.

[240] *Id*. at preamble , para. 1.

[241] *Id*. at para. 2.,

[242] European Court of Auditors, "The European Union Assistance to Kosovo Related to Rule of Law", Special Report No. 18 para. 92 (2012).

European Union. In order for the delegation of state powers to be binding for the European Union, the exchange of letters between the President of Kosovo and the High Representative must constitute an international agreement. Article 218 of the Treaty on the Functioning of the European Union vests the authority to conclude international agreements on behalf of the European Union in the Council; the High Representative has no legal authority to conclude international agreements. Also under international treaty law, more specifically Article 7.3. of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, a person is considered as representing an international organization for the purpose of expressing the consent of that organization to be bound by a treaty if that person produces appropriate full powers or it appears from the circumstances that it was the intention of the state and the international organization concerned to consider that person as representing the organization, in accordance with the rules of the organization. In view of Article 218 of the Treaty on the Functioning of the European Union, it may therefore be questionable if the High Representative can be considered to have had the authority, even under international treaty law, to represent the European Union for the purpose of concluding an agreement with Kosovo on EULEX. In view of the above, it seems that the purpose of the exchange of letters between the President of Kosovo and the High Representative was to create the perception as if Kosovo had given its sovereign consent to the EU for EULEX to exercise certain state powers in Kosovo, while in reality EULEX still continues to operate under Resolution 1244.

In addition to the legally ambiguous status of EULEX judges appointed to Kosovo courts, including the Special Chamber, privatization is still affected by the fact that Resolution 1244 remains in force and that the SRSG is considered by the UN to still have the highest legislative and executive authority in Kosovo. In a recent judgment, the Special Chamber acknowledged the legality of an agreement concluded between the Republic of Serbia and the Monastery of Decan in 1997 granting to the Monastery in form of a gift land that belonged to two socially owned enterprises.[243] Further to that it endorsed a waiver given by UNMIK not exercise the rights of the socially owned enterprises as well as confirmed that the Office of Legal Affairs of UNMIK, as representing the Kosovo Trust Agency, had legal standing as claimant on behalf of the two socially owned enterprises.[244] Thus, despite changes to the privatization laws, including the Law on the Special Chamber, to ensure their compliance with the Constitution, despite end of supervised independence and agreement between Kosovo and the EU on the delegated exercise of state powers by

[243] Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters, Cases SCC-08-0227 and SCC-08-0226 dated 27 December 2012, both available at: http://www.eulex-kosovo.eu/en/judgments/CV-Special-Chamber-KTA.php. (last accessed: 27 June 2013); InfoGlobi News Agency, *Property Claim against Monastery Rejected* (2012), available at: http://eng.infoglobi.com/index.php/kosovo/art/property-claim-against-monastery-rejected (last accessed: 27 June 2013).

[244] *Id*.

https://doi.org/10.1017/S2071832200002066 Published online by Cambridge University Press

EULEX judges, the Special Chamber still acknowledges UNMIK and the Kosovo Trust Agency as existing authorities with legal standing in proceedings before the Special Chamber. Evidently, this will very likely not cease to be the case until Resolution 1244 remains in force and EULEX judges operate under an unclear mandate between Resolution 1244 and the Constitution of the Republic of Kosovo.

E. Conclusion

The development of the privatization process with the related legal controversies and problems allows for drawing a number of conclusions. It is evident that the privatization of socially owned enterprises in Kosovo is insofar unique as it is the only privatization process in which the United Nations and the European Union were directly involved both at legislative and at implementing level. It also shows that the scope of an administration of a territory under Chapter VII of the United Nations Charter goes much beyond of what is considered a typical peacekeeping or interim administration mission. Despite initial hesitation, the UN accepted that privatization of socially owned assets would be covered by Resolution 1244 and thus Chapter VII of the United Nations Charter. The legal safeguards which were required by the United Nations, including the establishment of an international court, i.e. the Special Chamber, as a prerequisite for endorsing privatization, indicate rule of law standards that may be considered as necessary by the United Nations for any territorial administration, where property rights may be affected. Anyway, the acceptance of privatization to be included in the mandate of UNMIK was not a decision based on principle but the result of negotiations between the United Nations and the European Union. It is a further example of the scope of Chapter VII of the United Nations Charter being interpreted based on negotiations between the stakeholders involved.

It is also evident that the privatization process was entirely driven by international actors, most notably the United Nations and the European Union. The role of the Kosovo authorities, at least throughout the design phase and most of the implementation phase, was limited to that of an observer and recipient of a service provided by UNMIK. True democratic legitimacy and local ownership of the privatization process was never a guiding principle for UNMIK. Lack of standards about the level of legal protection for those international officials who were involved in the administration of the privatization process led to solutions which were satisfactory for the United Nations and the European Union in terms of being shielded from eventual liability. But these solutions were achieved at the expense of reduced legal protection for those individuals whose property rights were directly affected by the privatization process. It may be questioned if an internationally led interim administration should focus primarily on protection itself from any possible liability or whether it should focus instead on rule of law and legal protection for its de-facto subjects, i.e. the citizens of the territory which is being administered.

The privatization process in Kosovo is also a unique example of the development of parallel legal systems, both claiming exclusive legitimacy under international law. For the United Nations Resolution 1244 is still in force and a valid rule which vests exclusive executive and legislative authority over Kosovo. Its point of reference is the United Nations Charter which is the legal basis for Resolution 1244. On the other hand, the Republic of Kosovo claims legitimacy and exclusive jurisdiction over Kosovo as an original subject of international law, i.e. a state, for which the United Nations Charter may be of limited applicability, due to the fact that Kosovo is not a member of the United Nations. The privatization process was, and still remains, the battlefield between these two legal systems and this struggle will continue until Resolution 1244 remains in force. The European Union is caught between both legal systems. Its EULEX mission clearly operates under Resolution 1244, but, on the other hand, the European Union tries to attain legality and legitimacy also from the Republic of Kosovo, which has not been recognized by a number of member states of the European Union. The means to achieving this balance between the United Nations and the Republic of Kosovo are legally dubious instruments, such as the exchange of letters between the President of Kosovo and the High Representative, and the result is legal ambiguity of the status of EULEX judges serving in Kosovo's judiciary. Neither the United Nations nor the European Union were prepared for dealing with a situation where Resolution 1244 remains in force but Kosovo, the object of the United Nation's interim administration, declares independence and begins exercising sovereign powers outside Resolution 1244.

The complexity of the legal issues and the uniqueness of the relations between the various international and local stakeholders involved in the privatization process truly give the privatization process in Kosovo the attributes of a "sui generis" privatization, which may shed light on the true legal difficulties, and perhaps not resolvable legal controversies, in providing meaningful interim administration of a territory. It is difficult to imagine that the United Nations and the European Union will ever face another situation like that in Kosovo i.e. that will require them to engage in privatizing some form of collective property. However, the legal institutes and rule of law standards, problems and debates developed in the context of privatization may become reference points for future territorial administration missions, which will have to deal with property rights.