Developments

Conflicting Rules of Recognition: UN Security Council Resolution 1244 or the Constitution of the Republic of Kosovo

By Robert Muharremi[*]

A. Background

Kosovo's declaration of independence in 2008 and the United Nation's claim that UN Security Council Resolution 1244 (1999) ("Resolution 1244") remains in effect have resulted in the unique case of two competing legal systems, both of which claim legitimacy and supremacy in Kosovo. While Kosovar authorities claim to exercise exclusive and sovereign authority over Kosovo based on the Constitution of the Republic of Kosovo, the UN, acting through the United Nations Interim Administration Mission in Kosovo ("UNMIK"), maintains that Resolution 1244 vests administrative authority over Kosovo in the Special Representative of the Secretary-General ("SRSG"). This conflict is best exemplified in a number of judgments rendered by the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters ("Special Chamber") and the Constitutional Court of the Republic of Kosovo.[1] The purpose of this Article is to illustrate the problems that have emerged in the process of the creation of a new legal system in Kosovo and the emergence of a new rule of recognition[2] which is reflected in conflicting judgments of the Special Chamber and the Constitutional Court.

The above judgments of the Special Chamber must be seen in the political and legal context of the complications that emerged as a result of Kosovo's declaration of independence while Resolution 1244 remained in effect. Privatization began in Kosovo in 2002 under the authority of the UN Interim Administration Mission in Kosovo ("UNMIK"). In 1999, Kosovo was placed under the administration of the UNMIK, which was established by the UN Security Council to provide an interim administration for Kosovo.[3] The UNMIK

[*] Dr. Muharremi lectures Public International Law and European Union Law at the European School of law and Governance in Pristina, Kosovo. Email: Robert.muharremi@gmail.com.

[1] *See* Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, No. ASC-09-0089 (Feb. 4, 2010); Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters, Nos. SCC-08-0227, SCC-08-0226 (Dec.27, 2012); Constitutional Court of the Republic of Kosovo, No. KI 25/10 (Mar. 31, 2011).

[2] *See* H.L.A. HART, THE CONCEPT OF LAW 98 (1961).

[3] S.C. Res. 1244, para. 10, U.N. Doc. S/RES/1244 (June 10, 1999).

https://doi.org/10.1017/S207183220001909X Published online by Cambridge University Press

was responsible for establishing and overseeing the development of provisional democratic self-governing institutions for Kosovo, while Kosovo's political status remained open and subject to a political process to be facilitated by the UN.[4] The administrative authority over Kosovo was vested in and exercised by the Special Representative of the Secretary-General ("SRSG").[5] The UNMIK was also responsible for administering all state and socially owned movable and immovable property.[6]

Socially owned property was different from state owned property as it reflected a special legal concept developed in Yugoslavia based on communist ideas of collective ownership. The concept was created out of nationalized and other state property,[7] to be administered by enterprises deemed to be independent of the state and self-managed by its employees—also known as socially owned enterprises (SOEs).[8] Although most of these SOEs were privatized by Serbia during the 1990s, Kosovo's Albanian population opposed their privatization because Albanians were generally excluded from meaningful participation in the privatization process.[9] Then, the UNMIK determined that the law applicable in Kosovo would be those legal acts which were issued by the SRSG (i.e. regulations and administrative directions) and the law in force in Kosovo on 22 March 1989. Based on this determination of the applicable law, former Yugoslav laws governing socially owned property re-emerged, however, as legally valid, and privatization acts undertaken during the 1990s became legally challengeable.[10]

In 2002, UNMIK established the Kosovo Trust Agency ("KTA") as an independent body responsible for administering socially owned enterprises within the powers of the SRSG under Resolution 1244.[11] At the same time, UNMIK also established the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters ("Special Chamber") which had jurisdiction over legal challenges to the privatization related

[4] *See id*. at paras. 11(e), 11(f).

[5] *See* UNMIK Regulation No. 1999/1, amended by UNMIK Regulation No. 2000/54, § 1.

[6] *See* UNMIK Regulation No. 2000/54, § 3.

[7] *See* M.E. Coronna, *The Concept of Social Property and the Rights of the Foreign Investor in Yugoslavia*, 11 REV. SOCIALIST L. 227, 230 (1985).

[8] *See* Karim Medjad, *The Fate of the Yugoslav Model: A Case Against Legal Conformity*, 52 AM. J. COMP. L. 287, 290 (2004).

[9] *See* Rita Augestad Knudsen, *Privatization in Kosovo: The International Project 1999-2008*, NORWEGIAN INST. INT'L AFF. 29 (2010).

[10] *See* Robert Muharremi, *The Role of the United Nations and the European Union in the Privatization of Kosovo's Socially Owned Enterprises*, 14 GERMAN L.J. 889, 898 (2013).

[11] *See* UNMIK Regulation No. 2002/12, § 1.

decisions of the KTA as well as creditor or ownership claims brought against an SOE.[12] Given the high level of control exercised by UNMIK over both institutions, the KTA and the Special Chamber would qualify as subsidiary bodies of the Security Council established under Resolution 1244.[13]

In 2007, the Secretary General submitted to the Security Council the "Comprehensive Proposal for the Kosovo Status Settlement" ("Settlement Proposal"), which proposed internationally supervised independence for Kosovo.[14] Because the Settlement Proposal was not endorsed by the Security Council, Kosovo declared independence and adopted a new constitution in 2008, which Serbia opposed. The Constitution incorporated the Settlement Proposal giving it precedence over all legal acts of Kosovo, including the Constitution itself.[15] The Settlement Proposal provided that KTA would continue exercising trusteeship over SOEs and their assets. The Settlement Proposal also authorized the International Civilian Representative, who was appointed by the International Steering Group which supervised Kosovo's compliance with the Settlement Proposal, to appoint representatives in KTA's Board of Directors and other key positions.[16]

Acting under the new Constitution in 2008, the Assembly of Kosovo adopted a new Law on the Privatization Agency of Kosovo, which repealed previous UNMIK regulations on the KTA and which terminated the existence of the KTA.[17] The newly established Privatization Agency of Kosovo ("PAK") was to be KTA's legal successor and no role was given for UNMIK in PAK.[18] The UN's response to Kosovo's declaration of independence was that Resolution 1244 would remain in force until repealed by the Security Council and the SRSG would continue holding all executive and legislative powers with respect to Kosovo.[19] The UNMIK did not recognize the newly adopted Law on the Privatization Agency of Kosovo and instead insisted on the former UNMIK Regulation, which established the KTA, remaining in force.[20] The UNMIK disapproved of any attempts by the Privatization Agency of Kosovo to

[12] *See* UNMIK Regulation No. 2002/13, § 4.

[13] *See* Muharremi, *supra* note 10, at 903, 909.

[14] *See* U.N. Secretary-General, *Letter Dated 26 March 26, 2007 Addressed to the President of the Security Council*, U.N. Doc. S/2007/168/Add.1 (Mar. 26, 2007) [hereinafter Settlement Proposal].

[15] *See* CONSTITUTION OF THE REPUBLIC OF KOSOVO, June 15, 2008, art. 143.

[16] *See* Settlement Proposal, *supra* note 14, at Annex VII, art. 2, 4.

[17] *See* Law No. 04/L-034 on the Privatization Agency of Kosovo, art. 1 (2011).

[18] *See Id*.

[19] *See* U.N. Secretary-General, *Report of the United Nations Interim Administration Mission in Kosovo*, para. 4, U.N. Doc. S/2008/354 (June 12, 2008).

[20] *See* Constitutional Court of the Republic of Kosovo, Case No. KI 25/10, at 20 (Mar. 31, 2011).

replace the KTA and asserted that the KTA continued to exist as a legal entity represented by the UNMIK in judicial proceedings.[21]

The Special Chamber followed the UNMIK's arguments. In a judgment dated 4 February 2010 it ruled that it would not accept the Law on the Privatization Agency of Kosovo as applicable law.[22] The Special Chamber further held that the KTA would be the entity authorized to implement the privatization of SOEs while the Privatization Agency of Kosovo would act only factually, and not legally, as the successor of the KTA.[23] The Constitutional Court of Kosovo quashed the Special Chamber's judgment and ruled that by not applying the Law on the Privatization Agency of Kosovo, the Special Chamber had failed to ensure the uniform application of the laws of the Republic of Kosovo as required by Article 102 of the Constitution.[24]

As a consequence of this judgment, 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.[25] The new law determined the Special Chamber was an integral part of the Kosovo judiciary and thus rejected its possible status as a subsidiary body of the Security Council.[26] It also changed the composition of the Special Chamber, which was now composed of twenty judges, twelve of them being Kosovo citizens, and eight of them being international judges.[27] The UNMIK's reaction to the enactment of the new law on the Special Chamber was negative. Their key concern was that international oversight of the privatization and liquidation processes, which was previously assured by a majority of international judges appointed by the EU Rule of Law Mission in Kosovo ("EULEX"), was being curtailed by the new law, and international judicial oversight would be limited to an appeals panel.[28]

---

[21] *See id*. at 21.

[22] *See* Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, No. ASC-09-0089, 3 (Feb. 4, 2010).

[23] *See id*.

[24] *See* Constitutional Court of the Republic of Kosovo, Case No. KI 25/10, at 53 (Mar. 31, 2011).

[25] *See* Law No. 04/L-033 On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters, OFFICIAL GAZETTE OF THE REPUBLIC OF KOSOVO No. 20 (Sept. 22, 2011).

[26] *See id.* at art. 2.

[27] *See id*. at art. 3.1.

[28] *See* U.N. Secretary-General, *Report on the United Nations Interim Administration Mission in Kosovo*, para. 31, U.N. Doc. S/2012/72 (Jan. 31, 2008).

The status of EULEX judges appointed to judicial functions in Kosovo courts was, and remains, ambiguous. Pursuant to the Settlement Proposal, the International Civilian Representative was not only mandated to supervise Kosovo during the period of supervised independence but also to be the Special Representative of the European Union in Kosovo. In this capacity he would direct the European Security and Defence Policy Mission, which would exercise powers in the area of rule of law and the judiciary.[29] Since the Settlement Proposal was, however, not adopted by the Security Council, the European Union was required to deploy its rule of law mission—renamed as the EU Rule of Law Mission in Kosovo ("EULEX")—within the framework provided by Resolution 1244 and under the overall authority of the UN.[30] Instead of being appointed to judicial functions in Kosovar courts in accordance with the Settlement Proposal, EULEX judges were appointed under the authority of the SRSG and consistent with applicable law under Resolution 1244.[31]

The international supervision of Kosovo's independence ended on 10 September 2012[32] which was preceded by amendments to the Constitution that removed all provisions referring to the Settlement Proposal and the International Civilian Representative.[33] In an 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,[34] the President of Kosovo referred 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.[35] This approach established that the appointment of EULEX judges to functions within Kosovo's judiciary was based on the sovereign consent of Kosovo and not on Resolution 1244. It may be, however,

[29] *See* Settlement Proposal, *supra* note 14, at Annex IX, 2.3.

[30] *See* U.N. Secretary-General, *Report on the United Nations Interim Administration Mission in Kosovo*, para. 8, U.N. Doc. S/2008/354 (June 12, 2008); *see also* U.N. Secretary-General, *Report on the United Nations Interim Administration Mission in Kosovo*, para. 2, U.N. Doc. S/2011/675 (Oct. 31, 2011); U.N. President of the S.C., Statement Dated Nov. 26, 2008, U.N. Doc. S/PRST/2008/44 (Nov. 26, 2008).

[31] *See* U.N. Secretary-General, *Report on the United Nations Interim Administration Mission in Kosovo*, para. 13, U.N. Doc. S/2009/149 (Mar. 17, 2009).

[32] *See* INTERNATIONAL STEERING GROUP FOR KOSOVO, COMMUNIQUÉ OF THE SIXTEENTH AND FINAL MEETING (Sept. 10, 2012).

[33] *See* Amendments to the Constitution of the Republic of Kosovo Regarding the Ending of International Supervision of Independence of Kosovo, OFFICIAL GAZETTE OF THE REPUBLIC OF KOSOVO (Sept. 7, 2012).

[34] *See* 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, OFFICIAL GAZETTE OF THE REPUBLIC OF KOSOVO No. 25 (Sept. 7, 2012).

[35] *See id*.

https://doi.org/10.1017/S207183220001909X Published online by Cambridge University Press

questionable whether that exchange of letters amounts to an international agreement and a proper delegation of authority to EULEX from powers of the Republic of Kosovo when such a delegation was not based on Resolution 1244. As a matter of fact, the UNMIK continues to operate in Kosovo based on Resolution 1244, and EULEX, despite the exchange of letters between the President of Kosovo and the High Representative, also continues to exercise its functions within the framework established by Resolution 1244.[36]

B. The Special Chamber's Ruling on the Socially Owned Enterprise "Iliria"

In a 27 December 2012 judgment, the trial panel of the Special Chamber dismissed a claim which the Socially Owned Enterprise ("SOE") "Iliria" filed against the Orthodox Monastery of Deçan, the Municipality of Deçan, and the Republic of Serbia.[37] "Iliria" was a Hotel Tourist Enterprise which was under the administrative authority of the Privatization Agency of Kosovo. In 1993 Sloga, an SOE, entered into a donation contract with the Monastery of Deçan. Sloga transferred, as a gift and without compensation, certain immovable property in the Municipality of Deçan.[38] The Republic of Serbia subsequently validated the transaction by entering into a donation contract with the Monastery of Deçan concerning the same immovable property.[39]

In 2000, Iliria, which at the time of the entry into the donation contract was an independent legal entity organized under the umbrella of Sloga, filed a claim before the Municipal Court in Deçan requesting the annulment of both the donation contract concluded between Sloga and the Monastery of Deçan and of the donation contract concluded between the Republic of Serbia and the Monastery of Deçan. Iliria also asked the court to confirm that it was the lawful owner of the property which was the object of the two donation contracts.[40]

In 2002, the Municipal Court in Deçan issued a judgment determining that the donation contracts were not valid because they were concluded in violation of the Kosovar Law on the Transfer of Immovable Property of 1988 and that the contracts were concluded at a time when Kosovo was subject to repressive measures by the Republic of Serbia.[41] The

[36] *See* U.N. Secretary-General*, Report on the United Nations Interim Administration Mission in Kosovo*, para. 2, U.N. Doc. S/2013/444 (July 26, 2013).

[37] *See* Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters, No. SCC-08-0227 (Dec. 27, 2012).

[38] *See id*. at 1.

[39] *See id*.

[40] *See id*.

[41] *See id*. at 2.

https://doi.org/10.1017/S207183220001909X Published online by Cambridge University Press

Municipal Court also affirmed that the disputed properties donated pursuant to the contracts were never property of the Monastery of Deçan. The Republic of Serbia appealed the judgment to the District Court of Peja, which remanded the case to the Municipal Court of Deçan primarily for procedural reasons, such as improper service of court documents and non-compliance with statutory timelines.[42]

While the case was pending before the Municipal Court of Deçan in 2008, upon a request made by the Kosovo Trust Agency ("KTA"), the Special Chamber removed the case from the jurisdiction of the Municipal Court of Deçan and transferred it under its own jurisdiction.[43] At the first hearing before the Special Chamber in November 2008, Iliria challenged the fact that the UNMIK Office of Legal Affairs still claimed to be Iliria's legal representative.[44]

In March 2009, the Trial Panel decided that the UNMIK Office of Legal Affairs had legal standing in this case as it represented the Kosovo Trust Agency ("KTA") and that it had the sole right to represent the interests of SOEs before the Special Chamber.[45] The trial panel allowed Iliria to be represented by its own advisors unless and until KTA, represented by the UNMIK, decided to exercise its administrative authority over Iliria.[46] This Decision was appealed by the Privatization Agency of Kosovo ("PAK") before the Appellate Panel of the Special Chamber.[47]

In July 2010, the appellate panel of the Special Chamber rendered a judgment on the PAK's appeal of the March 2009 trial panel decision. The appellate panel upheld the Trial Panel's ruling that the UNMIK Office of Legal Affairs had the sole legal standing on behalf of the SOE.[48] The Appellate Panel's reasoning was based on the argument that UNMIK Regulation No. 2002/12 (KTA Regulation), as amended, was promulgated by the SRSG pursuant to the authority given to him UNSC 1244 (1999) and that UNMIK Regulations could only be repealed or amended by the SRSG as the legislator himself, by way of another regulation.[49] The KTA Regulation, as amended, remained untouched by the SRSG and was therefore still

[42] *See id*. at 3.

[43] *See id*.

[44] *See id.*

[45] *See id*. at 4.

[46] *See id*.

[47] *See id*.

[48] *See* Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, No. ASC-09-0025 (July 24, 2010).

[49] *Id*. at 11.

in force, as was UNSC 1244 (1999). According to the Trial Panel, the Law No. 03/L-067 on the Privatization Agency of Kosovo (PAK Law) adopted by the Assembly of Kosovo, which was not promulgated by the SRSG, could not repeal or replace the KTA Regulation. In particular, it could not extinguish the legal existence of the KTA as an agency with full juridical personality as outlined in the KTA Regulation.[50] The PAK was therefore not established on the basis of the law applicable in Kosovo in accordance with UNSC 1244. In particular, Article 1 of the PAK Law, which provided that the PAK was to be established as the successor to the KTA, could not be considered applicable law under UNSC 1244, and the PAK could therefore not be treated as the KTA's legal successor.[51] In support of its line of argument, the Trial Panel made reference to the jurisprudence of the Appellate Panel of the Special Chamber which had taken the factual "appearance" of the PAK into consideration, and had ruled on several occasions as follows:

> The KTA, established in November 2002 by UNMIK Regulation 2002/12, as amended, ceased its operations in June 2008. Its activities, including the representations of socially owned enterprises (SOEs) before the Special Chamber, were then factually taken over by the PAK. Taking into account the factual situation on the ground in Kosovo with the KTA not any more exercising its duties and powers as defined in the KTA Regulation, as amended, further taking into account that there is an imminent need for SOE's being duly represented before the Special Chamber, and considering that as a basic principle legal systems following the rule of law do not allow for legal vacuums, the representation of SOE's by the PAK for the time being will be accepted.
>
> In situations when the KTA did not take up the representation of SOE's, the PAK was allowed to overcome the legal vacuum of the factual absence of the KTA as the due representative. In the case at hand, however, the KTA has explicitly taken the decision to represent the SOE's involved, making use of its powers as defined in the KTA Regulation. In such a situation there is no legal vacuum to fill, and no space for any representation by PAK. The PAK can only take up the representation of a SOE before the Special Chamber, if

[50] *See id.*

[51] *See Id.*

https://doi.org/10.1017/S207183220001909X Published online by Cambridge University Press

> the KTA does not exercise its very right to do so, or if the KTA is legally not entitled to.
>
> UNSC 1244 authorizes the SRSG to establish an international civil presence in Kosovo, among other tasked with the support of the reconstruction of key infrastructure and other economic reconstruction in Kosovo, with Chapter 8 of UNMIK Regulation 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo reserving the authority to administer public, state and socially-owned property in accordance with the relevant UNMIK legislation in force, to the SRSG in cooperation with the Provisional Institutions of Self-Government. In fulfilling these obligations, the SRSG established the KTA. Therefore, the Appellate Panel follows the KTA's (UNMIK's) argumentation that the rights and responsibilities the KTA was vested with still rest with the SRSG. He may take them up especially when the KTA is not in a position any more to exercise its rights and responsibilities, due to the factual lack of any remaining staff.[52]

In line with the Appellate Panel's arguments, the Trial Panel affirmed the Appellate Panel's confirmation that the authority of the KTA and the Office of the Legal Affairs of UNMIK to represent Iliria was subject to res judicata and therefore a final and binding decision.[53] The Trial Panel stated that the final decisions of the Appellate Panel were binding not only on the parties but also on all courts in Kosovo unless a newly adopted law amends the decisions of the Appellate Panel.[54] The legal principles of res judicata—predictability and certainty—require that the final decisions cannot be challenged, unless an extraordinary remedy is available.[55] According to the Trial Panel, there was no evidence or notification that any party or third person claiming to have an interest in this case had challenged the constitutionality of the decisions of the Appellate Panel or applied for extraordinary remedies.[56]

---

[52] *Id*. at 11–12.

[53] *See* Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters, Nos. SCC-08-0227, SCC-08-0226, at 8 (Dec.27, 2012).

[54] *See id*.

[55] *See id*.

[56] *See id*.

https://doi.org/10.1017/S207183220001909X Published online by Cambridge University Press

The Trial Panel recalled that at the time when the Appellate Panel rendered its decision, both the Law on the Privatization Agency of Kosovo and the Constitution of the Republic of Kosovo had come into force.[57] What was then the Constitution, in Article 143, referred to the role and effect of the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007 ("Settlement Proposal").[58] According to the Appellate Panel, it was a very well-known fact that the Comprehensive Proposal vested the administrative authority over SOEs in the KTA.[59] The fact that the Constitution in force would not make any further reference to the Comprehensive Proposal was not relevant. All the submissions of the parties and their statements on their settlement were made at a time when such reference to the Settlement Proposal was still reflected in the Constitution as the highest norm.[60]

In the meantime, the UNMIK Office of Legal Affairs filed a submission with the Trial Panel agreeing to a settlement. The UNMIK agreed that they would not challenge the ownership rights of Monastery of Deçan with respect to the immovable property included in the donation contracts located within a Special Zoning Area established by the UNMIK around the Monastery of Deçan. Also, it would waive, on behalf of Iliria, any property right claim that it may have in relation to such property.[61] At a hearing held subsequently before the Trial Panel, the representative of the UNMIK/KTA and the representative of the Monastery agreed on the Settlement. The Trial Panel accepted the settlement as lawfully concluded between KTA/UNMIK and the Monastery of Deçan and dismissed the SOE's claim as ungrounded.[62]

C. Assessment of the Court's Arguments

The decisions of the Special Chamber's Trial Panel and Appellate Panel are legally questionable in at least two critical aspects. First, the Trial Panel referred to the judgment of the Appellate Panel, confirming the authority of the KTA and the UNMIK's Office of Legal Affairs to represent SOEs as res judicata, and as binding on all courts in Kosovo. But the Trial Panel completely ignored the judgment of the Constitutional Court of Kosovo of 2011, which declared the representation of SOE's by the KTA and the UNMIK to be unconstitutional.[63] In February 2010, the Appellate Panel of the Special Chamber ruled that

[57] *See id*.

[58] *See id*.

[59] *See id*.

[60] *See id*.

[61] *See id*. at 6.

[62] *See id*.

[63] *See* Constitutional Court of the Republic of Kosovo, Case No. KI 25/10, para. 20 (Mar. 31, 2011).

https://doi.org/10.1017/S207183220001909X Published online by Cambridge University Press

KTA should be the agency dealing with the privatization of SOEs and that the Special Chamber would not accept the PAK Law as applicable law in Kosovo.[64] The Constitutional Court concluded that the Appellate Panel of the Special Chamber would not recognize and apply the laws lawfully adopted by the Assembly and that the Special Chamber simply continued to ignore the existence of Kosovo as an independent State and its legislation emanating from its Assembly.[65] The Constitutional Court held that as the KTA Regulation was repealed by the PAK Law, and that the Special Chamber, by not applying the PAK Law, had not ensured the uniform application of the law, as required by both the Constitution and the Settlement Proposal.[66]

Assuming that the Special Chamber was a court of Kosovo, it would have been required to adjudicate based on the Constitution and the law.[67] Further, the Constitutional Court of Kosovo is the final authority for the interpretation of the Constitution.[68] The decisions of the Constitutional Court are binding on the judiciary and on all persons and institutions of the Republic of Kosovo.[69] As such, the Trial Panel would have been required to adjudicate the case in a manner that ensured compliance with the Constitution, as interpreted by the Constitutional Court. This means that the Special Chamber should have followed the Constitutional Court's ruling on the legal status of PAK and on the applicability of the PAK Law. As a result, it should have declined the argument that KTA and the UNMIK were still authorized to represent SOEs. But, as already stated, the Special Chamber completely ignored the judgment of the Constitutional Court and applied the Appellate Panel's legal reasoning that was contrary to the Constitutional Court's ruling on the applicability of the KTA Regulation and the legal status of KTA.

Second, the Trial Panel's argument that the Settlement Proposal vested the administrative authority over SOEs in the KTA requires further analysis. The Settlement Proposal explicitly provided that the trusteeship for SOEs and their assets would be exercised by the KTA, as set forth in the UNMIK Regulation establishing the KTA.[70] However, the Settlement Proposal also required the UNMIK to amend the KTA Regulation during a transition period in order to ensure compliance with the Settlement Proposal.[71] The Settlement Proposal

[64] *See id*. at para. 24.

[65] *See id*. at para. 53.

[66] *See id*. at paras. 59–60.

[67] *See* CONSTITUTION OF THE REPUBLIC OF KOSOVO, June 15, 2008, art. 102.3.

[68] *See id*. at art. 112.1.

[69] *See id*. at art. 116.1.

[70] *See* Settlement Proposal, *supra* note 14, at annex VII, art. 2.

[71] *See id*.

provided for a transition period of 120 days from the entry into effect of the Settlement Proposal during which the UNMIK would continue exercising its mandate in accordance with relevant UN Security Council resolutions.[72] During the transition period, applicable laws would remain in effect to the extent not inconsistent with the Settlement Proposal, while the Assembly of Kosovo, in consultation with the International Civilian Representative, would formally approve the necessary legislation to fully implement the terms of the Settlement Proposal.[73]

At the end of the transition period, the UNMIK's mandate would expire and all executive and legislative authority vested in the UNMIK would be transferred *en bloc* to Kosovar authorities.[74] The provision in the Settlement Proposal, referred to by the Trial Panel, vesting authority over SOEs in the KTA must be read and interpreted in the context of these transitional arrangements, the purpose of which was to ensure an orderly transfer of authority from the UNMIK to Kosovo with the UNMIK eventually being divested of all legislative and executive authority at the end of the process. A literal interpretation of the provision, without consideration of its normative context and purpose, leads to the incorrect conclusion that the Settlement Proposal has vested the authority over SOEs in KTA operating under the authority of the UNMIK. Instead, the Settlement Proposal prescribed a process which would place the KTA under the authority of Kosovar institutions. Under this process, the KTA would continue exercising authority over SOEs, but it would be under the authority of the Republic of Kosovo following completion of the transition period, at the end of which the UNMIK would no longer have any legislative or executive function in Kosovo.

Because the Settlement Proposal was not endorsed by the UN Security Council and the UN maintained the position that Resolution 1244 continued to be in effect, the UNMIK did not amend the KTA Regulation as required by the Status Settlement, and the UNMIK never acknowledged a transfer of authority to the Republic of Kosovo. Instead, UNMIK continued exercising executive functions although it had no authority to exercise such functions under the Constitution of the Republic of Kosovo. In response to this situation the Assembly of Kosovo passed the Law on the Privatization Agency of Kosovo. They did so in order to follow the mandate that they comply with the Settlement Proposal.[75] The Constitutional Court confirmed that the Law on the Privatization Agency repealed the KTA Regulation and that, therefore, relevant UNMIK Regulations and Administrative Instructions only continued to apply to the extent that they conformed to the Law on the

[72] *See id*. at art. 15.1(a).

[73] *See id*. at art. 15.1(b), 15.1(e).

[74] *See id*. at art. 15.1(g).

[75] *See* Law No. 03/L-067 on the Privatization Agency of Kosovo (2008).

Privatization Agency.[76] Thus, the Trial Panel's reference to and interpretation of the Settlement Proposal in regard of the legal status of the KTA is manifestly inconsistent with the Constitutional Court's interpretation of the Settlement Proposal and of the Constitution.

D. Concluding Observations

The present case and the different interpretations concerning the role and authority of the UNMIK in post-independence Kosovo could serve as an instructive modern example of the creation of a new legal system, termed by Hart as the "embryology of legal systems."[77] At the heart of this process lies the emergence of a new rule of recognition. According to Hart, a legal system consists of a combination of primary rules of obligation and secondary rules of recognition, change, and adjudication.[78] The rule of recognition is critical for identifying primary rules of obligations and it also determines if a rule has legal validity. As Hart states, to say that a given rule is valid is to recognize it passing all the tests provided by the rule of recognition and so as a rule of the system.[79] Wherever such rule of recognition is accepted, both private persons and public officials are provided with authoritative criteria for identifying primary rules of obligation.[80]

A rule of recognition can take many different forms including a written constitution, an enactment by a legislature, and judicial precedents.[81] Since the rule of recognition is the ultimate rule which determines the criteria for identifying the legal validity of other subordinate rules, the concept of legal validity cannot apply to the rule of recognition.[82] Instead, a rule of recognition exists as a matter of fact because it is accepted as providing the criteria for determining the legal validity of other rules and because private persons and public officials apply the rule of recognition in practice to identify the law.[83] For a legal system to exist, there are two minimum necessary and sufficient conditions. First, the primary rules of obligations, which are identified according to the rule of recognition, must be generally obeyed. Second, there must be a unified or shared official acceptance of the

[76] *See* Constitutional Court of the Republic of Kosovo, Case No. KI 25/10, at 59 (Mar. 31, 2011).

[77] H.L.A. HART, THE CONCEPT OF LAW 120 (1961).

[78] *See id*. at 98.

[79] *See id*. at 103.

[80] *See id*. at 100.

[81] *See id*. at 101.

[82] *See id*. at 108–09.

[83] *See id*. at 110.

https://doi.org/10.1017/S207183220001909X Published online by Cambridge University Press

rule of recognition, which contains the system's criteria of legal validity.[84] The conflict between the Special Chamber and the Constitutional Court exemplifies the problems that emerge when there is no unified or shared acceptance of the rule of recognition when a new legal system is in the process of being established.

Following Kosovo's declaration of independence, there emerged a difference of opinion between the UNMIK and the authorities of the Republic of Kosovo about the rule of recognition applicable in Kosovo, as reflected in the conflicting judgments of the Special Chamber and the Constitutional Court.[85] While before independence the rule of recognition was Resolution 1244, after independence the Constitution of the Republic of Kosovo, including the Settlement Proposal, emerged as a new rule of recognition. Neither the Constitution nor the Settlement Proposal recognized the UNMIK's competence to legislate and to exercise public authority in Kosovo under Resolution 1244. In Hart's words, Kosovo's legal system established a "local root" in that the rule of recognition. For example, the Constitution and the Settlement Proposal, which specify the ultimate criteria of legal validity, no longer refer to Resolution 1244. The new rule of recognition rests on the fact that it is accepted and used as such a rule in the judicial and other official operations of a local system whose rules are generally obeyed.[86] This applies to Kosovar judges and officials who accepted the Constitution and the Settlement Proposal as the rule of recognition in Kosovo. On the other hand, for the Special Chamber, and especially the EULEX judges in the Appellate Panel, it seems that the rule of recognition is still Resolution 1244 and not the Constitution of the Republic of Kosovo.

Therefore, there might be two legal systems in existence in Kosovo: One, applied by the UNMIK/EULEX with Resolution 1244 as its rule of recognition, which is still dominant in the Special Chamber, and the other applied by the authorities of the Republic of Kosovo with the Constitution as its rule of recognition. Deliberately ignoring the Constitution of the Republic of Kosovo and claiming that a UNMIK Regulation could not be repealed by a law adopted by the Assembly of the Republic of Kosovo is a direct attack on the new legal order established by the Constitution. The Constitutional Court of Kosovo seems to be aware of this, as it explicitly remarked that the Special Chamber continued to ignore the existence of Kosovo as an independent State and the legislation emanating from its Assembly.[87] The Trial Panel's judgment may therefore not be merely a manifest misinterpretation of the law, but may reflect a more fundamental rejection of the Constitution of the Republic of Kosovo as the relevant rule of recognition. As long as Resolution 1244 continues to be effective and EULEX operates under the UN's umbrella,

[84] *See id*. at 115–17.

[85] *See supra* note 1.

[86] *See* HART, *supra* note 2, at 120.

[87] *See* Constitutional Court of the Republic of Kosovo, No. KI 25/10, 11 (Mar. 31, 2011).

https://doi.org/10.1017/S207183220001909X Published online by Cambridge University Press

the dualism between Resolution 1244 and the Constitution of the Republic of Kosovo will likely continue.

https://doi.org/10.1017/S207183220001909X Published online by Cambridge University Press