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Karim Medjad

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THE ORPHAN PROTECTORATES

Karim Medjad¹
Conservatoire National des Arts et Métiers–Lirsa
Paris, France

Abstract Since antiquity, protectorates have pervaded international relations in many guises and for a variety of purposes.

At one extreme of the spectrum, the classic protectorate involves a puppet government closely monitored by a foreign power. This classic variant goes back to ancient Egypt and remains as current as ever, from Abkhazia and Crimea to Monaco and now, a chunk of Syria.

At the other extreme, a new breed has appeared at the end of the twentieth century, in the aftermath of the collapse of the former Yugoslavia. In this neo-protectorate, the protector is an international coalition of some sort, and its local representative a collective, ad hoc international administration. Just as in the most primitive forms however, the role of the local populations remains negligible, whereas the protector continues to enjoy exorbitant powers and a lack of

¹ Professor of International Law. Former senior legal expert in Bosnia and Herzegovina and Kosovo.

accountability altogether. In short, neo-protectorates are a legal utopia where democracy is expected to function without the people, thanks to a new recipe where media scrutiny and a multinational team of technocrats are expected to make up for the missing ingredient.

For this reason, some might argue that in essence, the protectorate has never changed. Empirical evidence shows the contrary, however: in a number of cases, the era of imperial powers competing to take over protectorates is over. Neo-protectorates, whether in Afghanistan, Iraq or Libya are orphan protectorates, that is, protectorates without a protector.

The purpose of this paper is to show that such protectorates are now at best reluctantly governed by default by a risk-averse international administration and that a timeless model is potentially compromised by a growing shortage of would-be protectors.

“According to some sources, the U.S. has no protectorate whatsoever; according to others, the entire world has received the Black Dot of American Imperialism... “[P]rotectorate” can mean anything from insular areas to every nation-state on the globe. It merely depends on the motive of the one defining the term.”

Anonymous speaker, address at the annual meeting of the American Society of International Law, 1999

1.- Introducción

On February 17th, 2008, the proclamation of independence of Kosovo brought this highly controversial protectorate to a new level, leading Vojislav Kostunica, the then Prime Minister of Serbia to declare:

Now it is more than clear that the cruel destruction of Serbia in the NATO bombing had only one real goal, and this is to turn the province of Kosovo into the first NATO State in the world.²

More than a decade later, little has changed in Kosovo. The government remains monitored by the international community,³ whereas as in Russian dolls, another protectorate has appeared from within, for the protection of the Serbs - now the threatened ethnic minority - requires an international presence in the Northwestern region. And just as the Albanian minority in the previous episode, the Serb minority is now urged to refrain from making separatist claims that may disturb the protector's action.⁴

Since antiquity, protectorates have pervaded international relations in many guises and for a variety of purposes, ranging from predatory to benevolent. They go back to the trusteeships that ancient Egypt used to establish as early as 1,500 BC to govern its remote vassals with a minimum of resources, and their success never faded since.

² *Serbia lashes Kosovo as 'NATO state*, ABC News (March 25, 2008, 9:39AM) <http://www.abc.net.au/news/2008-03-25/serbia-lashes-kosovo-as-nato-state/1082168>

³ The European Union Rule of Law Mission in Kosovo (EULEX) is currently assuming the international presence in Kosovo (*see* <http://www.eulex-kosovo.eu/en/info/whatisEulex.php>). EULEX is the successor of the UN interim Mission In Kosovo (UNMIK) established pursuant to U.N. SCOR 1244 (1999), *available* *at* http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1244%281999%29.

⁴ On February 2012, as a gesture of defy against Serbia and the European Union, a referendum was organized in Kosovo's Northern region, resulting in 99.7% of the voters declining to accept the legitimacy of Kosovo's ethnic Albanian-led state. *See e.g.* Gordon Fairclough, *Kosovo Serbs Say 'No' in Symbolic Vote on Government*, *WSJ*, February 17, 2012, at <http://online.wsj.com/article/SB10001424052970204059804577226893183771230.html>

At one extreme of the spectrum, the classic protectorate involves a puppet government closely monitored by a foreign power *e.g.* in the late 19th or early 20th century, the French protectorates of Tunisia and Morocco, or the British protectorates of Mesopotamia and Palestine. This classic form still exists nowadays, *e.g.* in North Ossetia, Abkhazia, Nagorno-Karabakh or Transnistria, to name a few.

At the other extreme, a new variant has appeared in the Balkans at the end of the twentieth century. In this neo-protectorate, the protector is the UN or an international coalition of some sort, and its local representative is a collective, *ad hoc* international territorial administration, whose mission is to build or rebuild a self-sustainable democratic society and then leave.

This collective and benevolent form of protectorate is not exactly new. It was first experimented in West Germany after World War II by the Western actors of the winning coalition to rebuild the country and establish new institutions, but thereafter, the cold war left virtually no possibility to exploit its potential elsewhere. It is only decades later, after the Soviet Union had disappeared, that this model could be rekindled in Bosnia and Kosovo, on the occasion of the disintegration of Yugoslavia.

In such neo protectorates, the collective nature of the protector announces a mode of governance that is hardly compatible with a traditional colonial agenda, to the point that the label “protectorate” may seem inappropriate. Yet, as in the ancient forms, the local population remains a negligible stakeholder, whereas the protector and its local representatives continue to enjoy exorbitant powers and a lack of accountability altogether.

In effect, neo protectorates are Kafkaesque bureaucracies established on the assumption that a democracy can function without the people, thanks to a recipe where media scrutiny and collective decision-making are expected to make up for the missing ingredient.

Although inspired by efficiency considerations, this legal utopia is a source of paralysis, for local administrations are increasingly wary of being held liable for their actions and favor cosmetic measures where in-depth reforms are required.

Based on empirical findings made in the course of various missions conducted on the field, notably in the former Yugoslavia, and in light of recent judicial developments, this essay argues that in essence, the protectorate has never changed. The attitude of the protector has, however, for whether in Afghanistan, Iraq or Libya, neo-protectorates are now reluctantly governed by an administration whose risk-aversion might ultimately compromise the model.

The first part discusses the ambiguity of the notion of “protectorate” and its evolution.

The second part presents its main variants, from antiquity to modern times.

The third part argues that in practice, the most archaic features of the basic model have been remarkably resilient to date.

The fourth part turns to the main change, that is, the growing cautiousness of the protectors in spite of a liability that remains as elusive as ever, and discusses its practical consequences for the protectorates to come.

2.- Notion(s) of protectorate

A. *The original definition*

In the realm of international relations, the protectorate is an institution that appeared as early as 1,500 BC, although the term was not used until the end of the nineteenth century.⁵

Its initial legal meaning was reasonably precise: a protectorate was a treaty pursuant to which a dose of sovereignty was being exchanged against a dose of protection, *i.e.*

[A] relationship in which one state surrenders part of its sovereignty to another. The subordinate state is called a protectorate. The term covers a great variety of relations, but typically the protected state gives up all or part of its control over foreign affairs while retaining a large measure of independence in internal matters.⁶

The notions of state and treaty must be understood here in a loose sense, as treaties establishing a protectorate flourished long before the Westphalian state took shape.

⁵ As late as the mid-nineteenth century, the term protectorate was only used in reference to the Commonwealth of England, Scotland and Ireland governed by Cromwell, Lord Protector between 1653 and 1659. *See e.g.* GEORGE CORNEWALL LEWIS, *ESSAY ON THE GOVERNMENT OF DEPENDENCIES* 156 (1841) *available at* <https://archive.org/stream/essayongovernmen00lewiuoft#page/156/mode/2up/search/protectorate>.

⁶ THE COLUMBIA ELECTRONIC ENCYCLOPEDIA (6th ed. 2012), *available at* <http://www.infoplease.com/encyclopedia/society/protectorate-international-law.html#ixzz2oIUvtNQa>.

Every major empire, whether Egyptian, Macedonian, Roman or Ottoman to name a few, grew out of a network of such treaties.⁷ For centuries, weak powers routinely pledged allegiance to stronger ones in order to be shielded from their predators - among which, their protectors themselves. In return, the latter could levy a tax and mobilize troops in times of war.

In general, the vassal's consent was purely theoretical, notably in Europe where treaties of protectorates were often a first territorial step on the way to the establishment of larger states. But there were also instances where weak powers owed their longevity to the ability of their Prince to swing from a protector to another. Monaco for example, presently linked to France by a Treaty of July 1918,⁸ has been alternatively in Italian, French and even Spanish hands since the fourteenth century.⁹ Similarly, the protectorate of Andorra is currently administered jointly by Spain and France pursuant to a complex arrangement dating back to the thirteenth century.¹⁰

Irrespective of the reality of the consent of the vassal, a protectorate required a treaty, a precondition that became increasingly burdensome, as the emergence of the modern nation-state drastically reduced the number of local potentates with an adequate legal capacity.

⁷ See generally ÉDOUARD PHILIPPE ENGELHARDT, LES PROTECTORATS ANCIENS ET MODERNES, ETUDE HISTORIQUE ET JURIDIQUE 5 (1896) available at <http://gallica.bnf.fr/ark:/12148/bpt6k95873f>.

⁸ This treaty was formally noted in Article 436 of the Treaty of Versailles of 1919.

⁹ ENGELHARDT, *supra* note 6 at 94-101. There was only a short interruption during which Monaco became temporarily a French province, from 1793 to 1814.

¹⁰ *Id.* at. 125-132.

The protectorate of Krakow, established by the 1815 Treaty of Vienna and jointly exercised by Russia, Austria and Prussia is an example of this constraint: to ensure that the city of Krakow would have the legal capacity to adhere to such treaty, it was simultaneously granted its independence, which lasted until 1846, that is, until its annexation by Austria.¹¹

B. The blurring of the notion

Outside Europe, the legal requirement of a treaty amounted to a double bind, for it was forcing imperial powers to recognize sovereign rights to “uncivilized nations” for the sole purpose of accommodating their colonial appetites. France’s official recognition of the Kingdom of Tahiti in 1842 finds its explanation in such precondition, that resulted in the first treaty in French diplomacy containing the term “protectorate”.¹²

Clearly, the legal notion had to evolve and it did so in the nineteenth century in two different directions.

Where trade was the central objective, that is, in Asia and in some parts of the Muslim world, treaties - so-called “unequal treaties”- continued to be signed with local counterparts in order to avoid an

¹¹ See SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 81 (1996). In its article VI, the Final Act of the Congress of Vienna of June 9, 1815 provides: *"the town of Cracow, with its territory, is declared to be for ever a free, independent and strictly neutral city, under the protection of Russia, Austria and Prussia."* Available at <http://www.dipublico.com.ar/english/final-act-of-the-congress-of-viennageneral-treaty-1815/>

¹² FRANTZ. DESPAGNET, ESSAI SUR LES PROTECTORATS, ETUDE DE DROIT INTERNATIONAL 183 (1896).

unfair competition among Western powers. Such treaties typically included three components: a unilateral most-favored nation clause, a lack of tariff autonomy for non-Western parties and a so-called consular jurisdiction for Westerners.¹³

Where natural resources were the main motive, that is, in Africa, treaties did not disappear either, but the local counterparts did. The Berlin Conference on West Africa of 1885 gave to the European imperial powers an occasion to officialise this legal innovation:

Any Power which henceforth takes possession of a tract of land on the coasts of the African continent... [or] which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.¹⁴

The bilateralism that used to be at the core of the traditional protectorate was over: the « colonial protectorate » was born. It would be later perfected by the mandate system established by the Treaty of Versailles of 1919, although the term “protectorate” would then be banned - a political choice that further blurred the notion.

Everything was possible at the outset with such an imprecise status, and under this name, the most diverse experiments have been conducted, stretching between two extremes: assimilation and independence. But one does not witness a gradual progression, a

¹³ Kal Raustiala, *Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law* 19 (2008) UCLA School of Law Research Paper No. 08-34 available at <http://ssrn.com/abstract=1291343>.

¹⁴ General Act of the Berlin Conference on West Africa, 26 February 1885, article. 34, available at <http://africanhistory.about.com/od/eracolonialism/l/bl-BerlinAct1885.htm>

harmonious curve that starts from assimilation and continues towards independence; the evolution has, in fact, followed a sinuous march that cannot be easily followed for, sometimes unconsciously, and often deliberately, the real direction has been masked and disguised to make it unrecognisable for the non-expert.¹⁵

This accumulation of meanings, compounded by a parallel blurring of the notion of “em*pire” explains that nowadays, the former US Secretary Zbigniew Brzezinski can call Western Europe a protectorate of the United States,¹⁶ or the French essayist Olivier Todd compare NATO to the antique League of Delos, where Athens provided a military protection to weaker cities in exchange for a financial contribution.¹⁷

Unsurprisingly, the development of new forms of international presence in the aftermath of the collapse of Yugoslavia has rekindled this old semantic debate. Some authors now warn that an indistinctive use of the term “protectorate” might blur important legal and institutional differences among the various peace-building approaches followed by the international community.¹⁸ In contrast, others suggest

¹⁵ « *Tout était possible à l'origine en partant d'un statut aussi imprécis, et sous ce vocable, les expériences les plus diverses ont été tentées ; elles oscillent entre deux pôles opposés : l'assimilation et l'indépendance. Mais on ne constate pas un déroulement progressif, une courbe harmonieuse qui part de l'assimilation pour s'orienter vers l'indépendance ; l'évolution a suivi une [...] marche sinieuse [qui] n'est d'ailleurs pas facile à suivre car, par inconscience parfois, par calcul souvent, la véritable direction s'est trouvée maquillée et déguisée jusqu'à la rendre méconnaissable pour le non-initié.* » MAURICE FLORY, LA NOTION DE PROTECTORAT ET SON EVOLUTION EN AFRIQUE DU NORD, 3 (1955).

¹⁶ ZBIGNIEW BRZEZINSKI, THE GRAND CHESSBOARD - AMERICAN PRIMACY AND ITS GEOSTRATEGIC IMPERATIVES 57 (1997).

¹⁷ EMMANUEL TODD, APRES L'EMPIRE, 75-77 (2002).

¹⁸ See e.g. Victor D. Bojkov, *Democracy in Bosnia and Herzegovina: Post 1995 Political system and its Functioning*, 4 S. Eur. Pol., 41, 53-57 (2003).

that the term “protectorate” is now banned from official discourses not so much because it is irrelevant than because of its negative connotations, due to a contemporary use in reference to the imperial history of the Western world.¹⁹

Most agree, however, that in many cases, references to a “protectorate” or a “trusteeship”

... are made only provocatively, without much examination; alternatively, they are used axiomatically, assuming a connection between [international territorial administration] and colonialism by way of a prelude to a detailed analysis of the nature of the powers being exercised in a particular project, without having first engaged in a detailed consideration of how and to what extent the colonial analogy holds water.²⁰

These attempts to restore some boundaries to the notion of protectorate have some merits. Regarding the models of peace-building in particular, it seems justified that the “lightest” forms of international presence be called otherwise when limited in scope and time, especially if the local authorities themselves are at involved in such initiative.

In contrast, insofar as the international administration in place acts as a ruler rather than a broker, a more refined taxonomy does not seem justified, let alone a specific terminology.

¹⁹ In that sense, see Alexandro Yannis, *The creation and politics of international Protectorates in the Balkans: bridge over troubled waters*, 5 J. Int'l Rel. & Dev., 258, 262 (2002).

²⁰ RALPH WILDE, INTERNATIONAL TERRITORIAL ADMINISTRATION: HOW TRUSTEESHIP AND THE CIVILIZING MISSION NEVER WENT AWAY, 292 (2008).

Thus, for the purpose of this essay, a protectorate will be “a relationship of protection and partial control assumed by a superior power over a dependent country or region”.²¹

3.- Thirty-five centuries in a nutshell

Just as there is an art of war, there is an art of protectorate, with its primitives, its moderns and its major schools: Egyptian, Greek, Roman, Ottoman, Napoleonic... Over time, recipes have been inherited, adapted and perfected to serve different purposes in different places, but the main ingredients have not changed.

Only two variants were developed prior to the emergence of the neo-protectorate. The most ancient, the “buffer protectorate” was invented in ancient Egypt to preserve a vast empire with a minimum of resources. The second, the “colonial protectorate”, appeared in the middle of the nineteenth century to prepare and accompany the expansion of the main European powers.

A. *The original: the buffer protectorate*

At the origin of the protectorate system was Egypt’s greatest conqueror, the Pharaoh Thutmose III, whose reign lasted more than fifty years at the dawn of the New Empire.²² The fortifications erected by his predecessors - so-called “Prince wall” - had failed to protect the

²¹ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), available at <http://www.answers.com/topic/protectorate>.

²² Also known as Thutmosis III, he was the sixth Pharaoh of the Eighteen Dynasty. His reign lasted from 1479 BC to 1425 BC. See generally DAVID O’CONNOR & ERIC H. CLINE, THUTMOSE III: A NEW BIOGRAPHY (2006).

previous Empire, and Thutmose III had learned the lesson: territorial depth was far better a protection than a wall. After seventeen military campaigns, his Empire – the largest ever in Ancient Egypt – stretched from Northern Syria - the nexus of the major commercial roads to Asia and the Mediterranean - to Nubia (the current Sudan) – the main source of natural resources. Whilst the latter eventually became an Egyptian Province, the myriad of state-cities composing the Northeastern Syrian-Palestinian corridor were allowed to keep their respective rulers in exchange for a financial tribute and a commitment to fight Egypt's enemies.²³

This minimalistic form of domination, primarily aimed at controlling large buffer zones with minimal resources, is the essence of the original protectorate. Since Ancient Egypt, it has been reproduced by every major empire with no noticeable change other than semantic: in Europe, the Egyptian “margins” have become “*marches*” under the Carolingians, “*sister republics*” under Napoleon, “*Krajina*” under the Habsburgs...

Restless conquerors satisfied themselves with this basic formula. Those with more subtle objectives relied on a more sophisticated variant – another legacy of Egypt's New Empire.

The first – and largest - group encompasses the major antique Empires such as Persia, Macedonia, Rome, Mongolia, as well as more recent ones. Amongst them, the Napoleonic Empire is probably the most emblematic: in its short existence (1804-1814), more battles were won and more territories conquered by Napoleon Bonaparte than by Alexander, Cesar and Attila together. Save a few semantic innovations of his own, Napoleon the 1st did not bring any modification to the

²³ For a comprehensive account, see DONALD B REDFORD, THE WARS IN SYRIA AND PALESTINE OF THUTMOSE III. (2003).

antique formula,²⁴ but he applied it on an unprecedented scale. From his debut as a General until his demise as an Emperor, his victories were systematically followed by a trail of protectorates. By the end of his first campaign of Italy of 1797, France was surrounded by vassal states, on the Western border by the kingdom of Spain and on the Eastern border by a continuous strip stretching from the kingdom of Westphalia to the kingdom of Naples. Once an Emperor, Napoleon kept the same recipe, with no effort to disguise a diplomacy that boiled down to a brutal submission of his defeated opponents. Accordingly, those territories that were not purely and simply annexed were systematically organized in vassal kingdoms, principalities or duchies, to strengthen France's buffer and to secure material and human contributions for future military campaigns. This methodic use of the protectorate culminated in 1806, with the establishment of the Rhine Confederation (*Rheinbund*), formed by sixteen German states that subsequently "elected" Napoleon as their protector, sealing in passing the fate of the Holy Roman Empire.²⁵

A second group of empires relied on a more sophisticated blend of protectorates based on a combination of tight and loose ties. In this heterogeneous group that would later comprise large chunks of the cold war's two blocks, the Ottoman Empire (1299-1923) was the more emblematic.

In essence, the Ottoman Empire was a zone of influence of variable intensity. On the one hand, it encompassed areas of limited or even symbolic allegiance, such as the remote provinces of Tunis and

²⁴ For example, Napoleon was the « arbiter » of his Helvetian protectorate, a new title for a function that was not, since it encompassed exactly the prerogatives that Philip of Macedonia and his son Alexander after him assumed with the Greeks as early as 338 B.C, after the conquest of the cities of Athens and Thebes.

²⁵ EVGUENI TARLE, *NAPOLEON 144-145* (in French, Anonymous trans., Moscow, 1990).

Algiers. Even some closer vassals such as the Romanian principalities of Walachia, Moldavia and (for a while) Transylvania, that had been autonomous since the fifteenth or sixteenth century, were not expected to pay more than a tribute.²⁶ On the other hand, just as Pharaohs did with the children of Nubian and Asian dignitaries, Ottoman sultans used to bring to their court and raise as their own the children of their protectorate's dignitaries, in order to deepen their ties with their most important vassals. The janissaries - the Ottoman army's legendary elite corps established in the fourteenth century - were primarily composed of members of the Christian populations of the Balkans.²⁷

The buffer protectorate described above, whether in a simple or a more subtle version, is a recipe immune from obsolescence. Powers without natural borders such as Russia will always feel the urge to surround themselves with vassal nations, hence for example, the recent "liberation" of Abkhazia and North Ossetia from Georgia, or Donbass from Eastern Ukraine. Equally relevant, albeit less blatant, is the role devoted by Europe to North Africa, whether to contain Southern migration, or even for military purposes, as shown by France's current involvement in Libya and Mali.

B. The deviant variant: the colonial protectorate

Following the Russo-Turkish War of 1877-78, the Congress of Berlin of 1878 entrusted Austria-Hungary to occupy and govern the - then Ottoman - provinces of Bosnia and Herzegovina in order to contain the Russian ambitions in the Balkans. In 1908 however, after thirty years of protectorate, Austria-Hungary formally annexed these provinces. A nationalist outcry followed, resulting *inter alia* in the

²⁶ See generally. JASON GOODWIN, *LORDS OF THE HORIZONS: A HISTORY OF THE OTTOMAN EMPIRE* (1998).

²⁷ See e.g. DAVID NICOLLE, *THE JANISSARIES* 12 (1995).

assassination of the Archduke Franz Ferdinand in Sarajevo in 1914 and the subsequent spiral of military confrontations in Europe.

Almost at the same time, a similar phenomenon was taking place in another continent, as two formerly isolationist nations – Japan and the United States – had decided to become global powers. Upon Japan's victory against Russia in 1905, Japan and the United States agreed not to interfere in their respective zones of influence in Asia, namely Korea for Japan and the Philippine for the US.²⁸ In the following months, the Korean authorities were forced to sign the so-called Eulsa Protective Treaty, making Korea a Japanese protectorate. In a subsequent treaty of 1907, additional prerogatives were relinquished, and in 1910, a third treaty formally acknowledged Korea's annexation by Japan.²⁹

These simultaneous episodes on two continents mark a historic turn. Until then, protectorates were primarily a recipe to organize *ex post* a colonial empire with the defeated enemies. From this time on, they would be routinely used in a symmetric manner, as an *ex ante* phase of colonisation.

Although officialised by the Berlin Conference of 1885 on West Africa, this evolution was double-edged for the colonial powers. Once a legal instrument containing a clear commitment on the part of the local authorities, a protectorate was now an interim status that could indifferently characterize a territory in the process of being conquered and a territory in the process of being liberated. This chronological ambiguity surfaced at the end of World War I, when the winning powers found themselves facing an unexpected wind of local emancipation in the former German and Turkish colonial possessions they were about to share.

²⁸ This secret agreement was informally recorded in the so-called Taft–Katsura Memorandum of July 29 1905.

²⁹ See generally PETER DUUS, *THE ABACUS AND THE SWORD: THE JAPANESE PENETRATION OF KOREA, 1895-1910* (1998).

The treaty of Versailles of 1919 resolved this dilemma, by establishing the so-called “mandates” of the League of Nation. As before, under the mandates the protected people were not be a party to the treaty of protectorate that governed them. But this time they were not ignored, for they were the *object* of such treaty.

The peculiar wording of the article 22 of the Covenant of the League of Nations summarizes altogether the context and the spirit of the mandates:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization...

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations... and... exercised by them as Mandatories on behalf of the League....³⁰

A number of authors have argued that the mandates never became a distinct category in public international law because they only differed in name from mere colonial possessions.³¹ The picture was more nuanced, however: just as the decision of the United States to remain outside of the Mandate system was less inspired by progressive

³⁰ LEAGUE OF NATIONS COVENANT, art 22, para 1 and 2. Available at http://avalon.law.yale.edu/20th_century/leagcov.asp.

³¹ In that sense, see BRIAN DIGRE, *IMPERIALISM'S NEW CLOTHES: THE REPARTITION OF TROPICAL AFRICA 1914-1919* 196-199 (1990).

motives than by a desire to weaken the old European empires,³² the paternalistic tone of the Covenant of the League of Nations was not unequivocally cynical. This ambiguous blend explains why the Mandate system had its anti-colonialist supporters and indeed, the exercise of at least some of the mandates triggered a process that was far more complex and uncontrollable than a mere colonization by a colonizer claiming not to have territorial ambitions.

As noted by Lord Hailey, the British representative at the Permanent Mandates Commission from 1936 to 1939,

Only those who have had experience of the internal working of an official administration, in circumstances where there is no organization of public opinion, can appreciate the strength of the influence which can be exerted by publicity of the nature of that involved in [the League of Nations mandates system] . . . It is not surprising, therefore, that many consider the value of [the system] to lie in the indirect influence of publicity rather than direct influence over policy.³³

France's schizophrenic colonial policy in North Africa between the two World Wars illustrates the pervasiveness of this phenomenon. In Algeria - a French territory since 1830 - the indigenous population had a status of second-class citizens and was treated accordingly by the settlers. In contrast, in the neighbouring Morocco - a French

³² See generally Andrew J. Crozier, *The Establishment of the Mandates System 1919-25: Some Problems Created by the Paris Peace Conference*, 14 J. Contemp. Hist. 483 (1979).

³³ LORD HAILEY, *AN AFRICAN SURVEY: A STUDY OF PROBLEMS ARISING IN AFRICA SOUTH OF THE SAHARA* 219-220 (1938), quoted by Michael D. Callahan, *Review Of Peter A. Dumbuya, Tanganyika Under International Mandate, 1919-1946* (1995), H-Africa, H-NET REVIEWS, December, 1997, at

<http://www.h-net.org/reviews/showrev.cgi?path=7434884366641>

protectorate since 1912 – the Resident General Hubert Lyautey allowed the local elites to retain a significant role in the conduct of the public affairs, even sometimes at the expense of the French settlers.³⁴ Lyautey had been taught colonial administration by the Resident General Lanessan in Indochina at the turn of the twentieth century and in Morocco, he strictly observed his mentor's advice:

In every country there is a social framework. The great error of the Europeans who come as conquerors is to destroy these frameworks... Do not offend local traditions, do not change customs. There is in every society a leadership class, born to govern the affairs of the people, without which one is powerless. Use that class in our best interests.³⁵

Lyantey's peculiar blend of obedience to local traditions and paternalistic guidance was by far the most sophisticated variant of France's colonial policy, making him one of the rare French colonial figures whose memory remains celebrated on both sides of the Mediterranean to date.

In short, the mandate system had positive, albeit unforeseen, collateral effects. This relative progress was symptomatic of the ambiguous agenda of the League of Nations: on the one hand, a shift from plain invasions to more sophisticated forms of domination,³⁶ on the other hand, an official, if not sincere, claim to depart from colonialism, along with an unprecedented degree of transparency.

³⁴ ALAN SCHAM, *LYAUTEY IN MOROCCO* 48-49 (1970).

³⁵ *Id.*, at 7.

³⁶ Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. & POL. 243, 278 (2000).

The colonial protectorate is also a variant that is immune from obsolescence: the annexation of Crimea by Russia is but one of its most recent illustrations.

C. *The therapeutic variant: the neo-protectorate*

When the UN succeeded to the League of Nation at the end of World War II, it inherited the remaining Mandates and established the International Trusteeship System.³⁷ Whilst this system did not fundamentally depart from the mandate system, three historical milestones contributed to a gradual shift towards today's protectorates.

First, the experience of “nation building” in post-war West Germany, which entailed a massive and unprecedented involvement of the allies to administer a country left without a government or an economy. The spectacular recovery of West Germany under this multinational governance proved, among other virtues, that this new

³⁷ UN Charter, art. 77:

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

- a. territories now held under mandate;
- b. territories which may be detached from enemy states as a result of the Second World War; and
- c. territories voluntarily placed under the system by states responsible for their administration.

2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

The 11 territories placed under the Trusteeship System either became independent or voluntarily associated themselves with a State. The Trusteeship system was terminated in 1994 by the Security Council upon the independence of Palau - the last territory – and its admission to the UN.

form of collective monitoring facilitated investment and contributed to contain vested interests.³⁸

Second, the shift from traditional colonialism to neo-colonialism. Starting in the early sixties, a wave of independence precipitated the completion of most mandates, as the world's leading countries gradually realized that territorial occupation was no longer the most efficient means to assert their domination.

Third, the collapse of the Soviet Block in the early 90s and the subsequent series of violent confrontations *within* sovereign states. With the end of the cold war, the door for international military interventions was now broadly open, but the scarcity of candidates willing to assume the responsibility of the territories concerned was calling for a new response.

The end of the civil war in Cambodia offered a first opportunity to test a post-cold war form of intervention. Pursuant to the peace agreement signed in 1992 by the four Cambodian factions,³⁹ the UN Security Council established a Transitional Authority in Cambodia (UNTAC) to administer the country until elections could be organized.⁴⁰ Once its mission accomplished, the UNTAC was dissolved

³⁸ This nation building experience was arguably coincidental, for the famous Morgenthau plan was reserving a very different fate to Germany, should F.D. Roosevelt have survived. *See generally*. MICHAEL R. BESCHLOSS, *THE CONQUERORS: ROOSEVELT, TRUMAN AND THE DESTRUCTION OF HITLER'S GERMANY, 1941-1945* (2002).

³⁹ Agreements on the Comprehensive Political Settlement of the Cambodia Conflict, signed in Paris on 23 October 1991, *available at* http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/agree_comppol_10231991.pdf

⁴⁰ U.N. SCOR 745 (1992). These powers include all ...[A]spects relating to human rights, the organization and conduct of free and fair general elections, military arrangements, civil administration, the maintenance of law and order, the repatriation and resettlement of the

less than two years later. The success of this operation made a strong impression on the international community. This "helping hand" approach⁴¹ was appealing precisely because it was too limited in scope and time to be called a protectorate. It was thus subsequently used - again with success - in Croatia⁴² and Macedonia⁴³ after the collapse of

Cambodian refugees and displaced persons and the rehabilitation of essential Cambodian infrastructure during the transitional period.

UN Department of Public Information, 31 August 1996, *available at* <http://www.un.org/Depts/DPKO/Missions/untac.htm>.

⁴¹ This expression was notably used by the International Crisis Group to describe the approach of the international community towards Bosnia and Herzegovina. *See e.g. "Kosovo: Let's Learn from Bosnia"*, 66 ICG BALKAN REPORT, May 17, 1999 at 2, *available at* <http://www.crisisgroup.org/~media/Files/europe/Kosovo%208.pdf>.

⁴² In Croatia, a UN Transitional Authority (UNTAES) was established in 1996 by the UN Security Council upon the signature of a peace agreement with the Serb separatists of Eastern Slavonia (U.N.SCOR 1037 (1996) *available at* [http://daccess-dds-](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N96/007/55/PDF/N9600755.pdf?OpenElement)

[ny.un.org/doc/UNDOC/GEN/N96/007/55/PDF/N9600755.pdf?OpenElement](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N96/007/55/PDF/N9600755.pdf?OpenElement)). Formally, it resembled Cambodia's UNTAC, but the Cambodian mandate had given "all powers necessary" to the UN, whereas the Croatian authorities had obtained that UNTAES mandate would be limited to a mere mission of supervision and assistance. UNTAES was established for an initial period of 12 months that was subsequently extended for two 6-month additional terms

⁴³ In Macedonia, the Ohrid Framework agreement was signed on August 13, 2001 between the Macedonian government and the Albanian minority to end the threat of secession and to organize a multi-ethnic country. *Available at* <http://www.ucd.ie/ibis/filestore/Ohrid%20Framework%20Agreement.pdf>

This negotiation as well as the subsequent implementation of the agreement involved an intense US and UE brokering. For a critical perspective, *See generally* Blerim Reka, *Ten years from the Ohrid Framework Agreement - Is Macedonia Functioning as a multi-ethnic state?* SEEU, 2011, *available at* http://www.seeu.edu.mk/files/research/projects/OFA_EN_Final.pdf

the former Yugoslavia, as well as in other parts of the world, *e.g.* East Timor.⁴⁴

In more complex instances such as Bosnia and Herzegovina however, this minimalistic approach quickly proved insufficient and, an adjustment leading to the other, the protectorate of the last generation gradually took shape along the lines of the traditional one. A decade later, the helping hand policy had lost its appeal and the dubious outcome of the US-led “light” presence in Iraq or Afghanistan came as further evidence of its inadequacy, leading influent institutions such as the Rand Corporation to conclude that “[t]he case of Germany and Japan set a standard for post-conflict nation-building that has not been matched since”.⁴⁵

On the field, this nostalgia has never materialized however, for lack of potential protectors willing to bear the political and financial implications of a rekindling of the “heavy” model of the immediate post-World War II.

⁴⁴ In 1999, the UN Security Council established the UN Mission in East Timor (UNAMET) to assist local authorities and monitor a public consultation aimed at deciding the final status of East Timor. (U.N. SCOR 1246 (1999) *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/174/13/PDF/N9917413.pdf?OpenElement>. Upon the decision of the population to choose independence over autonomy, UN Security Council established the same year another Mission in East Timor the U.N Transitional Administration in East Timor (UNTAET) to oversee the transition period (U.N. SCOR 1272 (1999). The episode was chaotic but short: Timor-Leste became the 191st UN Member State on 27 September 2002. The UN has maintained a technical assistance in post-independence Timor Leste, however: a UN Mission of Support to East Timor (UNMISSET) from 2002 to 2005 and, since 2005, a United Nations Office in Timor-Leste (UNOTIL). *See e.g.* <http://www.un.org/Depts/dpko/missions/unmisset/background.html>

⁴⁵ James Dobbins, *Nation-Building: The Inescapable Responsibility of the World's Only Superpower*, RAND REVIEW, Summer 2003 at 18.

4.- The advent of an authoritarian bureaucracy

The benevolent spirit and the collective governance of the neo-protectorates announce a spectacular democratic evolution. On the field, however, the local populations remain as insignificant an actor as before, for neo-protectorates tend to turn into authoritarian bureaucracies.

A. The collective governance of the neo-protectorates: practical implications

On occasion, neo-protectorates are used by a given country to assert its regional influence, whether *via* the appointment of one of their national as the local “governor” (*e.g.* an Australian citizen in East Timor) or otherwise (*e.g.* the use of the German Mark as the currency of the Balkan protectorates prior to the establishment of the Euro). Such attempts remain symbolic however: unlike the mandates of the League of Nations, neo-protectorates are not established to satisfy the appetite of an individual power. Not only are they established collectively, they are also governed collectively, by a multinational administration whose composition is meant to signal a truly multilateral – hence un-colonial – presence.

Accordingly, neo-protectorates share some salient traits with international organizations, notably a long and sometimes obscure chain of delegation involving numerous actors whose interests are not necessarily convergent. The problem is particularly acute in UN protectorates, where a specific group of member states with special interest is often formed next to the Security Council to oversee the peace process.⁴⁶

⁴⁶ In Kosovo, for example, a so-called “Contact Group” included non-Security Council members such as Italy and Germany.

When, as in Cambodia or East Timor, it is the former belligerents that appoint the UN Security Council to perform a number of tasks on their behalf, *e.g.* the implementation of a peace process, the situation remains simple. But when, as in Kosovo, the Security Council is self-appointed and decides itself the nature, the extent and the duration of its mandate, its position vis-à-vis the nation or quasi-nation concerned is particularly ambiguous, let alone that of its local representative (so-called “Special” or “High” Representative) and the foreign technocrats that assist him on the field.

Another trait that neo-protectorates share with many international organizations is the unavailability of sanctions to deter their undesired actions. Instead, it is the local administration (in theory, the lowest ranking agent in the chain of delegation) that uses carrots and sticks against its local counterparts (in theory, the principal).⁴⁷ Donner plus d’explications

This collectivization of the protector has been generally welcomed by the literature as a major progress, notably in post-conflict areas.⁴⁸ On the field, however, the virtues of this multinational governance remains to be proven, for its most tangible outcome is a Kafkaesque bureaucracy that hampers the social and economic recovery of the protected populations.

⁴⁷ In Kosovo, UNMIK designed a set of benchmarks intended to measure the progress made by the local provisional institutions in eight areas. Depending on the score, the moment to answer the long-awaited question of Kosovo’s independence would be advanced or delayed by the UN Security Council. See UN Security Council, Press Communiqué CS/2600, December 12, 2003, available at <http://www.unmikonline.org>.

⁴⁸ In that sense, *see e.g.* Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?* 101 Am. J. Int’l L, 99 (2007).

B. From helping hand to iron hand

At the outset, neo-protectorates were arguably more benevolent than the predatory ones, but this original spirit did not last. The interim administrations successively established in the former Yugoslavia show a gradual evolution towards an increasingly authoritarian approach that has culminated in Kosovo.

When in 1995, the international community forced the belligerents to sign the Dayton Peace Accord that put an official end to the war in Bosnia and Herzegovina,⁴⁹ its objective was clearly not to establish a protectorate. In line with Cambodia's UNTAC or Croatia's UNTAES, the tasks listed in the mandate of the High Representative responsible for the civilian implementation of the peace settlement were signaling a non-intrusive approach:⁵⁰

[T]he expectation [was] that the Parties [would] be doing most of the implementing, with the High Representative offering paternalistic guidance when difficulties [would] arise.⁵¹

⁴⁹ General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Accord), 14 December 1995, *available at* <http://www.ucdp.uu.se/gpdatabase/peace/BoH%2019951121.pdf>

⁵⁰ Dayton Peace Accord, annex 10, art. II, para. 1

The High Representative shall:

- a. Monitor the implementation of the peace settlement...
- b. Maintain close contact with the Parties....
- c. Coordinate
- d. Facilitate...
- e. Participate....
- f. Report periodically...
- g. Provide guidance...

⁵¹ ICG BALKAN REPORT *supra* note 40 at 3.

In the Bosnian context however, the High Representative found himself facing local counterparts with a political agenda that sometimes boiled down to a plain obstruction, and it became clear that the helping hand approach was not an adequate response. As a result, the Peace Implementation Council (PIC) responsible for the monitoring of the Dayton Accord decided, in 1997, to amend substantially the terms of the mandate of the High Representative to give him a say, and whenever necessary the last word, on any political decision.⁵²

Officially however, his new prerogatives, known as the “Bonn powers”, were not to be exercised to rule the country but rather, to force the ethnic communities concerned to do so in compliance with the terms of the Dayton Accord. This - widely advertised - nuance has led various authors to conclude that as a consequence, Bosnia and Herzegovina was not a protectorate but rather a “controlled democracy”, *i.e.* a modern variant of the so-called “penetrated” political system established in post WWII Germany.⁵³

Arguably, post-1997 Bosnia and Herzegovina was a “default” protectorate. But it was nonetheless a protectorate, for the control of the country lied ultimately in the hands of the High Representative, with no separation of powers, no check and balance, no appeal and no accountability. Critical observers further argue that at the time, a similar authoritarian regime was already in place in Bosnia, in the Brcko district, a contested northern territory where, pending its adjudication by an arbitral award, the arbitrator had appointed an independent Supervisor with virtually unlimited powers:

⁵² Peace Implementation Council Bonn Conclusions, art. XI(2), 10 December 1997, *available at* www.ohr.int/print/?content_id=5182. Whether the PIC ever had the power to amend so radically the mandate of the High Representative remains an open question, for the logical forum to decide such amendment was the UN Security Council, but the PIC was apparently chosen to avoid a Russian veto..

⁵³ Bojkov, *supra* note 17 at 54.

There was no express limitation on the scope of these powers, the fields in which they could be exercised, the purposes for which they could be used, or the legal instruments with which they had to be consistent.⁵⁴

Was Brcko an inspiring precedent? The fact remains that the Brcko Supervisor had already made himself famous for his autocratic exercise of power when the Peace Implementation Council decided to grant the same prerogatives to the High Representative. And inevitably, a trail of abusive orders followed, causing a chorus of political and academic criticisms.⁵⁵

It is in this context that in 1999, the UN Security Council decided to establish unilaterally the United Nations Interim Administration Mission in Kosovo (UNMIK), after the belligerent had failed to reach a negotiated settlement.

On the paper, the tasks of the Special Representative in Kosovo did not differ significantly from that of the High representative in Bosnia and Herzegovina after 1997.⁵⁶ On the field however, his

⁵⁴ Matthew Parish, *International Officials*, 13 ARIEL (2009) available at <http://ssrn.com/abstract=1651519> at 12.

⁵⁵ See generally DAVID CHANDLER BOSNIA: FAKING DEMOCRACY AFTER DAYTON (2000).

⁵⁶ Pursuant to U.N. SCOR 1244 (1999), art.11, the main responsibilities of the international civil presence include:

- (a) Promoting...
- (b) Performing basic civilian administrative functions...
- (c) Organizing and overseeing the development of provisional institutions...
- (d) Transferring... its administrative responsibilities...
- (e) Facilitating...
- (f) ... overseeing...
- (g) Supporting the reconstruction...

prerogatives were far more important because the NATO bombing of Serbia had left Kosovo disorganized, contrary to Bosnia and Herzegovina where political parties immediately acted as a counter-power when the High Representative took office.

The first section of the first UNMIK Regulation issued in Kosovo leaves no doubt about the spirit that was prevailing at the outset:

All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative...⁵⁷

Military attributions aside, the scope and extent of his powers were simply unprecedented in recent history. At the dawn of the twenty first century, the latest breed of protectorate thus took a shape which was,

[I]n all but name, reminiscent of the League of Nations Mandates.⁵⁸

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- (h) Supporting...humanitarian and disaster relief aid;
 - (i) Maintaining civil law and order...
 - (j) Protecting and promoting human rights...

⁵⁷ UNMIK REG/1999/1 *"on the Authority of the Interim Administration in Kosovo"* (subsequently amended by REG/1999/25 and REG/2000/54), available at

<http://www.unmikonline.org/regulations/unmikgazette/02english/Econtents.htm>.

⁵⁸ *The New Kosovo Protectorate*, 29 ICG Balkan Report, 20 June 1999 at 7, available at

<http://www.crisisgroup.org/~media/Files/europe/Kosovo%209.pdf>.

5.- The evolution of the protector

It is commonplace to describe contemporary international territorial administrations as a new guise for the same old civilizing mission of the dominant powers.⁵⁹ If the protectorate has not significantly evolved, its environment has, however, and with it, the attitude of the protector, whose fear of being held liable has deeply altered its action.

Two independent factors have been instrumental. First, neo protectorates are constantly scrutinized. Unlike in a traditional protectorate – or for that matter in an international organization - a modern protector is in no position to whitewash wrongdoings or edit information.⁶⁰ Second, the sense of exposure that stems from this unparalleled transparency is compounded by a general feeling that the immunity that protectors have enjoyed since antiquity is no longer absolute.

A. *An unprecedented scrutiny*

For they are never a consensual subject in the international community, neo-protectorates are constantly and intently scrutinized. The countries that reluctantly agreed to their principle, *e.g.* Russia in the case of Bosnia and Herzegovina or of Kosovo, want to ensure that the protector does not exceed the scope, if not the duration, of its

⁵⁹ In that sense, *see e.g.* Yannis, *supra* note 18, Wilde, *supra* note 19, Anghie *supra* note 35 and Chandler *supra* note 54.

⁶⁰ Matthew Parish, *An Essay on the Accountability of International Organizations*, 7 Int'l Org. L. Rev., 277 (2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651784 at 13-14 .

mandate.⁶¹ And since the reversibility of every measure decided by the local *ad hoc* administration is the central test of the interim nature of its mission,⁶² it is *de facto* compelled to avoid in-depth reforms, including the most urgent ones.

In Kosovo for example, where UNMIK was in control of virtually every area of life, this paralysis has literally hampered the country's economic recovery. Upon its establishment in 1999, UNMIK abolished all the discriminatory laws passed by the Serb authorities since 1989,⁶³ thereby creating a legal vacuum that needed to be filled urgently.⁶⁴ Due to the meticulous monitoring of each draft text however, UNMIK legislative productivity was so low that several years later, Kosovo was still plagued by legal uncertainty.⁶⁵

The problem culminated with UNMIK inability to address the complex legal question of the so-called social ownership the enterprises inherited from the former Yugoslavia, in what was probably the most arduous privatization process in post socialist economies. For several

⁶¹ In practice the foreign presence typically lasts far longer than what was anticipated at the outset, as in Bosnia and Herzegovina, or in post-independence Kosovo. See Parish, *supra* note 52 at 39-40.

⁶² On this question of reversibility, see Kristen E. Boon, *Legislative Reform in Post-Conflict Zones*, 50 MCGILL L.J. 285 (2005)

⁶³ UNMIK REG/1999/24.

⁶⁴ On matters that were not addressed by a UNMIK Regulation, the default rule was to be found in obsolete laws in force at the time of the former Yugoslavia. In other words, the only texts that were both clearly applicable and adapted to a modern economy were likely to be UNMIK Regulations. See e.g. Wendy S. Betts et al., *The post-conflict transitional administration of Kosovo and the lessons-learned in efforts to establish a judiciary and rule of law*, 22 Mich. J. Int'l L., 371 (2001).

⁶⁵ Even after Kosovo's provisional institutions officially took over in January 1, 2004, UNMIK retained a legislative veto in its capacity of promulgating authority, along with a full control over security, foreign relations, minority rights protection and energy.

years, privatizations were stalled by a number of legal controversies, among which - again - the extent of UNMIK's mandate, whose temporary nature theoretically precluded a permanent modification of property rights in Kosovo.⁶⁶

The outcome has been a rather biased framework for regulating property matters in Kosovo, tailored to allow the launching of a privatization process with a minimum of legal implications for their initiators, at the expense of a consistent socio-economic development program.⁶⁷

The preamble of the subsequent privatization law adopted a decade later in 2008 by the Assembly of the newly independent Kosovo implicitly condemned this attitude:

[T]he economic reconstruction and development of Kosovo and the welfare of its population is of paramount importance and requires the proper administration, privatization and liquidation of socially-owned enterprises in a timely manner...;

[T]he legal uncertainty as to the ownership of such enterprises and assets is greatly impairing investment... and negatively affecting the general economic and social situation of Kosovo...⁶⁸

⁶⁶ For a survey of the legal issues and a legal analysis of the so-called socially-owned enterprises, see Karim Medjad, *The Fate of the Yugoslav Model: A case Against Conformity*, 52 Am. J. Comp. L. 287 (2004).

⁶⁷ Rita Augestad Knudsen, *Privatization in Kosovo: The International Project 1999–2008*, Report, Norwegian Institute of International Affairs (2010) at 93 available at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=121346>

⁶⁸ Law on the Privatization Agency of Kosovo (No. O3/L-067) (http://www.gazetazyrtare.com/e-gov/index.php?option=com_content&task=view&id=154&Itemid=56&lang=en).

In 2009, the total proceeds from privatization amounted to more than 450 million Euros, of which none had been injected into Kosovo's economy for fear of potential claims. Meanwhile, in what remained the poorest country in Europe, more than 600 enterprises employing an estimated 20,000 people and about 150,000 claimants were still awaiting a clarification of their fate.⁶⁹

B. A withering immunity?

Another cause of the lack of reactivity of the protectors is their growing fear of being held liable in spite of their immunity which, depending on the conditions of the intervention, stems from two legal regimes.

In case of unilateral intervention, it is a *de facto* immunity. The applicable legal regime is that of belligerent occupation, as set forth by The Hague Regulations of 1907 and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949.⁷⁰ Far from granting any kind of immunity to the occupying powers, these instruments stress the magnitude of their duties vis-à-vis the occupied population, but they both lack the accountability and the enforcement mechanisms that could give some flesh to these obligations. Moreover, occupiers typically refuse to be labeled as such, whether because their occupation is a disguised annexation, *e.g.* Ethiopia in Eritrea, or because they do not want to fulfill the long list of obligations imposed

⁶⁹ Knudsen, *supra* note 66 at 94, and Diplomat Magazine, September 1 2011 (Feb. 3, 2014, 11:39AM) at http://www.diplomatmagazine.co.uk/index.php?option=com_content&view=article&id=507&Itemid=&ed=22).

⁷⁰ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516; 75 U.N.T.S. 287

upon the occupiers by the Geneva Convention, *e.g.* Israel in the Gaza strip, the West Bank, and the Golan Heights.⁷¹

When the intervention is decided by the UN Security Council,⁷² it is a *de jure* immunity that finds its source in the United Nations Charter⁷³ and the Convention on the Privileges and Immunities of the United Nations.⁷⁴ Where this legal regime is applicable, local populations are purely and simply deprived of any right to seek a compensation for the damages caused by the action - or lack of action - of the local UN administration.

This exorbitant privilege is a historical anomaly:

⁷¹ See *e.g.* Kathleen Cavanaugh, *Rewriting Law: The Case of Israel and the Occupied Territories* in *NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 227 (David Wippman & Matthew Evangelista Eds., 2005).

⁷² This legal regime applies to the protectorates formally established by the UN Security Council pursuant to the chapter VII of the UN charter such as Kosovo, but also to instances such as Bosnia and Herzegovina (a non-UN protectorate but with a High Representative appointed by the UN Security council).

⁷³ UN Charter, art. 105:

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization...

⁷⁴ Convention on the Privileges and Immunities of the U,N, Feb 13, 1946 21 UST 1418, available at <http://www.un.org/en/ethics/pdf/convention.pdf>. Pursuant to its articles V and VI (Sections 18 and 22), officials of the UN in their official capacity *and* Experts (...) in the course of the performance of their mission for the UN shall be accorded "*immunity from legal process of every kind... in respect of words spoken or written and acts done by them*".

[A]s the doctrine of sovereign immunity beat a retreat in the second half of the twentieth century..., international organizations found themselves embracing absolute immunity, just as the states were losing the same privilege.⁷⁵

In the past decades, this blatant legal and political anachronism it has been abundantly criticized in the academic literature,⁷⁶ by human rights organizations,⁷⁷ and even by the media,⁷⁸ but it has been remarkably resilient to date.

Yet, of the numerous attempts to challenge the UN immunity in court, only a Dutch case - *Nuhanović v. the State of the Netherlands* - has accomplished a small step to date, towards questioning the sanctity of the sovereign immunity doctrine - albeit State immunity. In 2013, the Dutch Supreme Court upheld two related decisions that were holding the State of the Netherlands responsible for the execution of three

⁷⁵ Parish, *supra* note 59 at 23.

⁷⁶ See *e.g.* Simon Chesterman “UNaccountable? *The United Nations, Emergency Powers, and the Rule of Law*” 42 Vand. J. Transnat'l. L. 1509 (2009), and Emmanuel Gaillard and Isabelle Pingel-Lenuzza, *International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass*, 51 Int'l & Comp. L.Q, 1, (2002). Symptomatically, the accountability of the occupier is also a central theme of the current debate on the need to replace today's dual legal framework by a unified *jus post bellum* that would encompass the transitional activities carried by all actors, whether acting or not under UN banner. See *e.g.* Kristen E. Boon, *The Future of the Law of Occupation*, 47 Canadian Yearbook of Int'l. L. (2009), available at <http://ssrn.com/abstract=1464443>.

⁷⁷ In addition to the generalist organizations *e.g.* Amnesty international that periodically deal with this issue, there is a specialized NGO, the “Centre for Accountability of International Organisations” (CAIO). See www.caio-ch.org.

⁷⁸ See *e.g.* the outcry after the torture of the Abu Ghraib detainees in Iraq was revealed.

Muslim men during the Srebrenica massacre of 1995.⁷⁹ Introducing the principle of dual responsibility, the court denied the Dutch Army - that had acted as UN peacekeeping force - the right to invoke the UN immunity for its wrongdoings in an instance under the effective control of Dutch officers.⁸⁰ On July 19, 2019, the Dutch Supreme Court eventually concluded to the responsibility of the State of the Netherlands, which it estimated at 10% of the damages incurred by the victims, that is, their chance of survival, had the Dutch army responded in an appropriate manner.⁸¹

The cautiousness of the court, reflected in the narrow scope of its decision has been abundantly criticized by both sides.⁸² Not only did it make clear in *Nuhanović* that it was not the UN immunity *per se* that was challenged, but its systematic extension to any wrongdoing of a national army acting under the UN banner, it also reaffirmed, in parallel rulings, the absolute immunity of the UN in connection with the

⁷⁹ 1st Chamber, Judgment 12/03324, Hasan Nuhanović v.the State of the Netherlands (2013). English version available at <http://opiniojuris.org/2013/09/06/supreme-court-decision-srebrenica-massacre-netherlands-responsible>. This decision confirmed two related decisions of the Hague Court of Appeal of July 5, 2011, Mustafić-Mujić et al v. The Netherlands (2011), and Nuhanović v. The Netherlands (2011)..

⁸⁰ For a discussion of the dual responsibility of the Dutch army as such and as a UN force see e.g. Aleksandar Momirov, *Dutch Courts and Srebrenica: Ascribing Responsibilities and Defining Legally Relevant Relationships* Netherlands Yearbook of Int'l. L. 2012, 233 (2013).

⁸¹ ECLI:NL:HR:2019:1284, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:1284>

⁸² Tom Dannenbaum, *A Disappointing End of the Road for the Mothers of Srebrenica Litigation in the Netherlands*, July 23, 2019, <https://www.ejiltalk.org/a-disappointing-end-of-the-road-for-the-mothers-of-srebrenica-litigation-in-the-netherlands/>

Srebrenica massacres.⁸³ This position was subsequently confirmed by the European Court of Human Rights.⁸⁴

In sharp contrast with the legal reality, however, the scenario of a Pandora's box has long been anticipated and internalized beyond reason on the field. Starting in the early twenty-first century, this excessive self-restraint has been particularly blatant in Kosovo, whose quasi-paralysis under UN administration has been abundantly documented:

Resolution of central economic, legal and political issues... has been delayed [and] Statebuilders' aversion to liability might be the single most important cause..., reflecting the scholarly criticism that although international officials operate with imperial powers in targets, they are wary of being held responsible for the effects of the exercise of these powers.⁸⁵

This mindset explains that although the ruling of the Dutch Supreme Court has limited local - let alone international - consequences, it may nonetheless have far-reaching implications. As repeatedly stressed in defense presented by the representatives of the Dutch government, it may deter not only the Netherlands but other countries from participating in international coalition in the future.⁸⁶

⁸³ Mothers of Srebrenica v The Netherlands and United Nations, Final appeal judgment, LJN: BW1999; ILDC 1760 (NL 2012). English version *available at* <http://www.asser.nl/upload/documents/20120905T111510-Supreme%20Court%20Decision%20English%2013%20April%202012.pdf>

⁸⁴ *Mothers of Srebrenica and others against the Netherlands*, 11 June 2013, ECHR 194 (2013) *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122255>.

⁸⁵ Knudsen, *supra* note 66 at 93.

⁸⁶ See e.g. Lauren Comiteau, *Court Says the Dutch Are to Blame for Srebrenica Deaths*, TIME (Jul. 6, 2011), <http://content.time.com/time/world/article/0,8599,2081634,00.html>.

Thus, at least under its modern, collective guise, it is now possible that for the first time in history, protectorates may no longer be perceived by the dominant powers as a convenient response.

5.- Conclusion

In millennia of existence, protectorates have seldom been officially acknowledged for what they were, and this may explain why their most archaic features could endure, as their name and their system of reference was fluctuating.

For this reason, the essence of the neo-protectorate does not significantly differ from the more ancient variants with which it now co-exists. Arguably, there are nuances, but it is not so much the multilateral nature of the administration in place than the fact that it now operates under an unprecedented scrutiny that deserves some attention, in times when the *raison d'être* of its immunity is more questionable than ever.

Whilst the risk that a protector, especially when acting under the auspices of the UN, may be held liable for its actions – or inaction - remains negligible, this growing concern has deeply affected the governance of the neo-protectorates since the turn of the twenty first century, causing *inter alia* unacceptable delays in contexts of economic emergency.

In the same vein, the urge of the occupier to preserve - or create - a dose of local sovereignty is also symptomatic of a multi-secular legal tradition of infra-territoriality, where the primary function of the local institutions is to insulate the local populations from their actual rulers' legal system, so that “the constitution would not follow the flag”, as the expression goes.⁸⁷ Accordingly, from Kosovo to Afghanistan, modern

⁸⁷ Raustiala, *supra* note 12 at 6.

protectorates continue to be artificially cloaked with a traditional nation-state pedigree, in order to preserve the ancient ritual of inviting them to be among the signatories of the treaty that subdues them.

Protectorates existed thousands of years before the nation-states and they might very well outlast them. In the protectorates to come, it is thus outside, if not against this latter framework that modern legal and institutional responses must be sought to secure what should now matter, that is, the basic democratic standards that are yet to be envisaged.