Midwifing a New State: The United Nations in East Timor

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I. “A Laboratory for ‘Nation-Building’”¹

East Timor (officially: Timor-Leste), located at the eastern end of the Indonesian archipelago to the northwest of Australia, is the most recent member of the United Nations,² and the youngest state to date. The territory occupies an area of only ca. 15,000 square kilometres, its population amounts to approximately 925,000 people. Despite its small size and population, it represents one of the most intriguing cases of “state-building” under the authority of the United Nations, not least because, in hindsight, it is overwhelmingly considered a successful mission.

The United Nations Transitional Administration in East Timor (UNTAET), which forms the centrepiece of the present work, is often cited in line with the United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium (UNTAES) and the United Nations Interim Administration Mission in Kosovo (UNMIK). This is easily explicable considering the close resemblances of the legal instru-

² Timor-Leste was admitted by the General Assembly as the 191st Member State of the United Nations on 27 September 2002.
ments establishing these institutions. However, UNTAET holds a special position among the instances where the UN has administered territories.

First, East Timor is a case of “delayed decolonisation”. As the intervention by Indonesia prevented the local population from exercising its right of self-determination to end colonial rule by Portugal, the case of East Timor raises specific questions of self-determination. Second, East Timor is particularly noteworthy as it is the most radical “state-building” exercise the United Nations has engaged in to date, in the most literal sense of the word, as the United Nations acted as midwife for a new state.

Seen through the perspective of past United Nations activities, UNTAET faced unprecedented tasks in terms of intensity and extent. Even though the exercise of governmental powers by the United Nations under Chapter VII had already been discussed at the San Francisco Conference, and both the League of Nations and the United Nations had, to varying degrees, administered territories before, UNTAET, as well as UNMIK, are essentially to be seen as the result of a “re-definition” or even a “self-invention” of the United Nations, in particular its tasks in the realm of post-conflict support for states after the demise of communism and the break of the deadlock in the Security Council. This is most apparent in Secretary-General Boutros Boutros-Ghali’s “Agenda for Peace”, the first policy-setting UN document after the end of the Cold War, introducing a new category of UN activity under the heading of “post-conflict peacebuilding”.

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6 See R. Wilde, “From Danzig to East Timor and Beyond: The Role of International Territorial Administration”, AJIL 95 (2001), 583 et seq.
UNTAET, along with UNMIK, could be seen as a new generation of peacekeeping. Its endeavours seem bold if one bears in mind the general scepticism Article 2 (7) of the Charter seems to express towards UN activity within states, in particular in relation to their political system, as well as the notoriously limited resources available to the organisation. UNTAET is, perhaps, the purest articulation of this new-won self-confidence, given that the United Nations exercised full and effective sovereignty over a territory for more than two years. At the same time, it may come to represent the high water mark of UN activities in the field of “state-building”. Another, more recent, UN policy-setting document, the Brahimi Report seems sceptical whether “the UN should be in this business at all” in the future. Apparently, this scepticism has proved accurate. The UN’s engagement in Afghanistan, for various reasons, has been marked by a so-called “light-footprint-approach”, i.e. by methods of “state-building” far less intrusive than the powers wielded by UNTAET.

It has been pointed out that East Timor’s small size and uncontroversial future (i.e. independence), as well as the absence of any relevant internal conflict at the time of UN administration, made it a relatively

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10 The term “sovereignty” may be out of place for UN administrations of territory, as it is historically associated with the patrimony of states with definable sovereigns, see I. Brownlie, *Principles of Public International Law*, 6th edition, 2003, 108. However, whatever terminology is used, the powers exercised by UNTAET resemble very closely those of a territorial sovereign.


13 See the contribution of E. Afsah and A. Guhr in this Volume.
simple case of territorial administration. One may add that the population of East Timor was and is rather homogenous and not divided by ethnic and social tensions as in Kosovo. Furthermore, it generally welcomed the involvement of the United Nations as the guarantor for independence, peace and security, and the reconstruction of the infrastructure. Still, calling East Timor an “easy” case is a rather optimistic, or maybe rash, judgement: East Timor (after the INTERFET intervention) may have been a straightforward task in terms of peace-keeping, but in terms of UNTAET’s actual mission, (re)construction of a territory, capacity building, and the preparation for independence, in short: “state-building”, it was probably as difficult as it gets. For instance, East Timor had no experience with democracy, or even self-rule. Thus, even though superficially the parameters on the whole seemed propitious, UNTAET had to face, and retrospectively still faces, serious criticism regarding the implementation of its mandate.

The present paper will start with a short historical outline (II.). It will then describe and discuss the various forms of UN engagement in East Timor up to the state’s independence, starting with the conclusion of the agreements of 5 May 1999 and the establishment of the United Nations Mission in East Timor (UNAMET) (III.), the International Force in East Timor (INTERFET) (IV.), and UNTAET (V.). It will then analyse the preparations for independence and the first steps of the independent Timor-Leste, including the role of the United Nations Mission of Support in East Timor (UNMISET) and the United Nations Office in Timor-Leste (UNOTIL) (VI.), before offering some concluding remarks (VII.).

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14 Chesterman, see note 11, 60: “[T]he certainty as to the political outcome was also key to the political success of the … ambitious state-building exercise in East Timor.”
15 Compare Traub, see note 1, 81.
17 Traub, see note 1, 88.
18 Traub, see note 1, 75; T. Hohe, “The Clash of Paradigms: International Administration and Local Political Legitimacy in East Timor”, Contemporary Southeast Asia 24 (2002), 569 et seq.
II. Decolonisation, Interrupted: The Historical Background

The first Portuguese traders arrived in East Timor in the early 16th century, attracted by the islands most precious resource, sandalwood. The Dutch, who had established colonies in Java and Sumatra, claimed the Western half of Timor. In 1859/1860, the two colonial powers formally divided the island between the Dutch in the West and the Portuguese in the East (including the enclave of Oecussi in West Timor). During World War II, despite Portugal’s neutrality, Japan invaded East Timor in February 1942, occupying it until September 1945. Approximately 50,000 Timorese lost their lives as a result of the occupation. After World War II, Indonesia gained its independence from the Netherlands. In 1949, West Timor became part of Indonesia, whereas East Timor remained under Portuguese rule.

In Resolution 1542 (XV) of 15 December 1960, the UN General Assembly designated East Timor the status of a Non-Self-Governing Territory under Chapter XI of the UN Charter and referred to Portugal as the administering power, an appraisal reiterated in Resolution 3485 (XXX) of 12 December 1975. Portugal, however, between 1955 (the time of its UN membership) and 1974, was more than unwilling to accept the obligations following from Article 73 of the Charter.

The situation changed when, in 1974, the Portuguese Armed Forces (AFM) overthrew the Caetano regime in Portugal. The new government accepted its duties under Chapter XI and favoured progressive autonomy for the colonies, acknowledging the population of East Timor’s right to self-determination. News of the change soon sifted through to East Timor. At that time, an estimated number of 688,000 people inhabited the territory, 97 per cent of them indigenous East

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19 For the colonial history of East Timor compare M. Schlicher, Portugal in Ost-Timor, eine kritische Untersuchung zur portugiesischen Kolonialgeschichte in Ost-Timor (1850-1912), 1996.
20 Compare Schlicher, see note 19, Chapter 4 (107-128).
Several political parties were formed. The most important ones were the Timorese Democratic Union (União Democrática Timorense, UDT) and the Timorese Social Democratic Association (Associação Social Democrática Timor, ASDT). While the UDT favoured an extended transitional period of federation with Portugal, the ASDT preferred independence. Finally, the Timorese Popular Democratic Association, or Apodeti, had as its goal the autonomous integration of East Timor into the Republic of Indonesia. In late 1974, the ASDT changed its name to Fretilin (Frente Revolucionária do Timor Leste Independente), or Revolutionary Front for an Independent East Timor. With the change of name came a change in policy: “ASDT was formed to defend the idea of the right to independence: Fretilin was formed to fight for independence.”

Their different visions for the future, as well as the fight over political power in East Timor between the two parties led to a civil war between the UDT and Fretilin, the latter emerging victorious with the help of its armed wing, Falintil (Forças Armadas de Liberatação Nacional de Timor Leste). On 28 November 1975, Fretilin declared independence and proclaimed the “Democratic Republic of East Timor”. The hope for an independent East Timor ended only a few days later, on 7 December 1975, when Indonesia, following an “invitation” by the UDT which hoped to regain control, invaded East Timor. After a General Assembly resolution had condemned the action of Indonesia, the UN Security Council, though not acting under Chapter VII of the Charter, followed suit by stressing the “inalienable right of the people of East Timor to self-determination and independence”, demanding an immediate withdrawal of all Indonesian troops from the territory.

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23 Benvenisti, see note 4, 154.
spite of the international condemnation of its actions, Indonesia proceeded to annex the territory and declared East Timor its 27th province on 17 July 1976. The Security Council reiterated its call for withdrawal once more in April 1976, again not using its Chapter VII powers. After this resolution, for a period of 23 years, i.e. until May 1999, the UN Security Council did not deal with the question of East Timor. The General Assembly proved more persevering and kept up its protest until 1983. Since then, an item on the “Question of East Timor” was included on the agenda of every session of the General Assembly. However, its consideration was regularly deferred on the recommendation of the General Committee. The reasons for the waning of interest of the international community in the future of East Timor may be found in the strategic importance of Indonesia.

While the UN organs withheld recognition of the incorporation of East Timor into Indonesia, and East Timor remained on the list of self-governing territories, with the agreement of Portugal as the Administering Power, Australia was the only state to recognise Indonesia’s claim to East Timor, first de facto, then de jure. In 1991, Australia and Indonesia concluded the “Timor-Gap-Treaty” which designates East Timor as an Indonesian province. The conclusion of the treaty spurred protest from Portugal, which subsequently took the case to the ICJ. The Court did not decide on the merits of the case, holding that it lacked jurisdiction, as Indonesia as an indispensable third party had not joined the proceedings.

The resistance by the East Timorese population was constant, but changed in shape from military opposition, led by Falintil until the mid-1980s to a broader civilian resistance movement, joined by many

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30 Benvenisti, see note 4, 157.
34 ICJ, see note 29, 90 et seq.
young East Timorese,\footnote{See D. Kingsbury, “East Timor to 1999”, in: id. (ed.), Guns and ballot boxes, 2000, 17 et seq. (23).} from the beginning of the 1990s.\footnote{See M. Schlicher/ A. Flor, “Osttimor – Konfliktlösung durch die Vereinten Nationen”, Die Friedenswarte 78 (2003), 251 et seq. (256).} Despite repressions by the Indonesian authorities, public protests increased. One of those public displays of resistance caught the world’s attention most, though sadly for its blood toll: the massacre at Santa Cruz cemetery on 12 November 1991, where Indonesian military opened fire on protesters at close range, killing more than 270 people.\footnote{Kingsbury, see note 35, 24.} It was this massacre that brought the political conflict in East Timor back on the public agenda. However, it was only when Bishop Carlos Belo and José Ramos Horta were awarded the Nobel Peace Prize in 1996 for their work towards a just and peaceful solution to the conflict in East Timor that international policy towards Indonesia became more and more critical, even though as long as Suharto was in power, little changed on the ground.\footnote{Schlicher/ Flor, see note 36, 258.}

In 1997, the Council for Timorese Resistance (CNRT) was established by leaders of the UDT and Fretilin as an umbrella organisation of groups that opposed Indonesian integration.\footnote{Kingsbury, see note 35, 25.} Indonesia’s urgent need for international assistance by the International Monetary Fund (IMF) caused by the Asian financial crisis of 1997 enabled the international community to exert pressure on Indonesia.\footnote{J. Cotton, “Against the Grain: The East Timor Intervention”, Survival 43 (2001), 127 et seq. (133).}

Thus, the question of the status of East Timor was raised again when Bacharuddin J. Habibie followed Suharto as Indonesian President in 1998 and signalled his willingness to discuss the future status of East Timor. An agreement between Indonesia and Portugal, with endorsement by the United Nations, was concluded on 5 May 1999, in which the East Timorese people were finally given the opportunity to vote on their political future in a free, UN-monitored election. The two options available were “special autonomy” within Indonesia or independence.\footnote{Agreement between the Republic of Indonesia and the Portuguese Republic on the question of East Timor, Annex I to the Report of the Secretary-General on the Question of East Timor, Doc. A/53/951 – S/1999/513 of 5 May 1999. The question put to the people of East Timor was “Do you ac-
The security arrangements for the referendum were left to the Indonesian military.\textsuperscript{42} In a second agreement, also concluded on 5 May 1999, Indonesia, Portugal and the United Nations specified the modalities for the popular consultation.\textsuperscript{43} To organise and supervise the vote, the Security Council established UNAMET on 11 June 1999.\textsuperscript{44}

Initially planned for 8 August, the referendum eventually took place on 30 August 1999. With an overall turnout of 98 per cent, 78.5 per cent of the votes were cast in favour of independence.

Whereas the unrest before the vote was sporadic and controllable,\textsuperscript{45} violence escalated following the public announcement of the result of the popular vote. Pro-Indonesian militia, apparently supported by parts of the Indonesian military, engaged in a scorched earth campaign. Several hundred East Timorese men and women were killed,\textsuperscript{46} and virtually the entire remaining population fled.\textsuperscript{47} According to UN reports, a quarter of the population (about 200,000 people) fled or was displaced to West Timor,\textsuperscript{48} and as many as 500,000 fled to the mountains or sought refuge in church institutions. Militias moved from town to town, looting and burning most of the houses; hence most of the infrastructure, up to 75 per cent, including most buildings in the capital, Dili, were destroyed.

The Security Council reacted within a matter of weeks and, following negotiations on which nation would lead an international military force to pacify the situation,\textsuperscript{49} passed Security Council Resolution 1264 except the proposed special autonomy for East Timor within the unitary state of the Republic of Indonesia? or, “Do you reject the proposed special autonomy for East Timor, leading to East Timor’s separation from Indonesia?”

\textsuperscript{42} Article 3 of the Agreement.
\textsuperscript{43} Agreement regarding the modalities for the popular consultation of the East Timorese through a direct ballot; East Timor popular consultation, Annexes II and III to the Report of the Secretary-General on the Question of East Timor, see note 41.
\textsuperscript{44} S/RES/1246 (1999) of 11 June 1999.
\textsuperscript{45} Chesterman, see note 11, 60.
\textsuperscript{46} J. Chopra, “The UN’s Kingdom of East Timor”, \textit{Survival} 42 (2000), 27 et seq.
\textsuperscript{47} Traub, see note 1, 78.
\textsuperscript{49} See below under IV.
on 15 September 1999. The Council determined that the situation amounted to a threat to peace and security and authorised the establishment of a multinational force, which was subsequently set up under Australian lead under the name of INTERFET. The deployment of troops in East Timor began on 20 September 1999. With a strength of ultimately 11,500 troops, INTERFET was successful in putting an end to the assaults. The formal recognition of the result of the popular consultation by the Indonesian People’s Consultative Assembly on 19 October 1999 contributed to the territory’s pacification.

On 25 October 1999, Security Council Resolution 1272 established the United Nations Transitional Administration in East Timor (UNTAET), “endowed with overall responsibility for the administration of East Timor”. UNTAET not only comprised civil components, but also had a military branch with a strength of up to 8,950 troops. On 28 February 2000, the hand-over of command from INTERFET to UNTAET was completed. The Secretary-General, Kofi Annan, appointed Sergio Vieira de Mello from Brazil, formerly head of UNMIK, as his Special Representative and Transitional Administrator.

The preparations for independence began with the election of a Constituent Assembly on 30 August 2001. It was the first democratically elected representative body in the history of East Timor with the primary task to draft a constitution for an independent and democratic East Timor. In April 2002, Xanana Gusmão was elected first president with an 82.7 per cent majority of the total votes cast.

After several centuries of Portuguese colonial rule, 24 years of Indonesian occupation and two and a half years of administration by the United Nations, East Timor gained its independence on 20 May 2002. At the same date, UNTAET ceased to exist and was replaced by UNMISET, which remained in East Timor until May 2005 when UNOTIL started operating.

III. From UNAMET to INTERFET: The Referendum on Independence

On 7 May 1999, the Security Council welcomed the agreements of 5 May 1999, noted the Secretary-General’s concerns regarding the security situation, and expressed its intention to make a prompt decision regarding the establishment of a UN mission as soon as the Secretary-General had outlined the details in a report, which he did on 22 May. UNAMET was eventually established by Security Council Resolution 1246 on 11 June 1999. In case of a vote in favour of independence, it was planned to have UNAMET followed by a successor mission, UNAMET II, pending the acceptance of the vote by the Indonesian parliament, which would prepare a larger UN presence. For spring 2000, the UN envisaged to establish a transitional authority (UNAMET III) controlling the gradual withdrawal of Indonesia’s military units and administrative apparatus.

The popular consultation was conducted under difficult logistical conditions. Many outside observers feared that the window for a peaceful transition opened by President Habibie may close at any time, given that the consultation more or less coincided with the elections in Indonesia. Time was consequently of the essence. On the other hand, the tight timeframe proved problematic regarding the tasks to be performed.

Apart from operating under a strict schedule, the gravest concerns UNAMET had to face concerned the security situation. Many outside observers predicted a landslide vote in favour of independence from Indonesia. It was equally anticipated that this outcome might spark violence from the side of pro-Indonesian groups or the Indonesian army itself. At the same time, the Indonesian authorities apparently trusted that the outcome would be in favour of a union with Indonesia. On the other hand, the Indonesian government apparently did not control

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56 See Schlcher/ Flor, see note 36, 261.
58 Chesterman, see note 11, 61; Traub, see note 1, 76.
the Indonesian Army (TNI), which seemed reluctant to release East Timor into independence peacefully and then leave.59

Accordingly, in the spring of 1999, UN Secretary-General Kofi Annan requested Jakarta to disarm the pro-Indonesian militias operating in East Timor and permit foreign troops to supervise the voting process.60 Indonesia refused, and the United Nations accepted the apparently inevitable, sending only 300 unarmed police officers to assist UNAMET.

The United Nations was nevertheless aware of the risk posed by putting the security arrangements solely in the hands of the Indonesian authorities. For instance, in the agreement between Indonesia, Portugal and the United Nations concerning the popular consultation, the “absolute neutrality” of the Indonesian Armed Forces and the Indonesian Police were marked as essential to the holding of a free and fair ballot in East Timor.61 Nevertheless, in spite of all warning signs, the UN Secretariat was unable to prepare for post-referendum contingencies, such as violent incidents.62 The paramount reason for this inaction may be seen in the constraints put on the United Nations which forestalled any open planning for independence in the delicate political climate.63

The vote itself proceeded surprisingly peacefully. The announcement of the result, however, triggered the outbreak of violence, making all planning for UNAMET successor missions and an orderly transfer of power obsolete. On 14 September 1999, the UNAMET compound was closed and its members evacuated to Australia, save 12 people who awaited the arrival of an international force.64

IV. From INTERFET to UNTAET

After intense pressure from the international community, and following discussions at a serendipitously timed APEC summit,65 President Habibie requested the United Nations for assistance to restore peace...
and security in East Timor, specifically mentioning a Chapter VII mandate. In a letter dated 14 September 1999 to the Secretary-General, the Australian Foreign Minister informed the Secretary-General that Australia would be willing to accept the leadership of a multinational force in East Timor and “was prepared to make a substantial contribution to the force itself”.

The reasons for Australia’s willingness to take the lead were multifaceted: first, the domestic political discussion put pressure on the Prime Minister to take action in the neighbouring region; second, a refugee crisis was looming; finally, a certain feeling of responsibility for the fate of East Timor due to past activities and policies on the side of Australia may have played a role. Ironically, Australia, the only state that had recognised Indonesia’s claim to East Timor, now volunteered to “act in defence” of the right to self-determination of the territory’s population.

As mentioned, Indonesia had requested the establishment of a multinational force on 12 September 1999, as was noted in the Preamble to Security Council Resolution 1264. It has been suggested that this consent was given far from voluntarily but rather came about as a result of intensive pressure from the international community. It is questionable whether this is of more than political relevance. Consent is a requirement of traditional peacekeeping missions. Given that Indonesia was illegally occupying East Timor, it is doubtful whether its consent would have been required; as a practical matter, it certainly was necessary. However, the Security Council determined that the situation in East Timor amounted to a threat to peace and security and expressly authorised states participating in the multinational force to “take all
necessary measures to fulfil [the] mandate. The Security Council, under the legal avenue it chose to take did not have to rely on Indonesia’s consent, nor did the consent given alter the unilateral nature of the resolution. The legality of Security Council Resolution 1264 consequently does not depend on the free consent of Indonesia, but rather on the elements necessary to authorise peace-enforcement missions by individual states under Chapter VII of the Charter, most importantly, a threat to the peace.

It is interesting, also for the analysis of UNTAET’s legal basis, to ask what exactly constituted the threat to the peace referred to in Security Council Resolution 1264. First, and most obvious, this threat was to be seen in the ongoing humanitarian catastrophe in East Timor (i.e. the reports of “systematic, widespread and flagrant violations of international humanitarian and human rights law” and the “large scale displacement and relocation of East-Timorese civilians”). Second, the language of the resolution suggests that the interference with the exercise of the right to self-determination by the East Timorese was of equal importance: the Security Council expressed “its welcome for the successful conduct of the popular consultation of the East Timorese people of 30 August 1999” and took “note of its outcome, which it regards as an accurate reflection of the views of the East Timorese people”.

According to operative paragraph 3 of the resolution, INTERFET had the following tasks: “[T]o restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations.” INTERFET began deployment to East Timor on 20 September 1999. It was the first time that Australia acted as a lead nation within a coalition

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74 S/RES/1264 see note 70, para. 3.
76 See under V. 3.
77 It is commonly accepted that purely humanitarian issues, including grave violations of human rights, can amount to threats to international peace and security. Compare only J. Frowein/ N. Krisch, “Article 39”, in: Simma, see note 5, MN 19-21.
78 Preambular para. 3, emphasis added. Compare Rothert, see note 26, 277.
for a peace operation.\textsuperscript{79} While the Association of Southeast Asian Nations (ASEAN) hesitated to take the leadership role for resolving the regional conflict due to its traditional reluctance to intervene in what it considered "internal affairs" of its members,\textsuperscript{80} individual member states of ASEAN contributed significantly to the intervention force once it was mandated by the Security Council: the Thai military component, consisting of 1,580 soldiers, formed the second-largest element; other support came from the Philippines, Singapore and Malaysia.\textsuperscript{81}

In theory, even after the military intervention, the maintenance of law and order (internal security), a task later on specifically conferred on UNTAET,\textsuperscript{82} still lay in the hands of the Indonesian police and military forces. However, this was illusive, as the Indonesian military and police forces had withdrawn from the territory. The lead nation, Australia, consequently interpreted the mandate to restore peace and security as implying the authority to arrest individuals accused of having committed serious offences.\textsuperscript{83} The basis for such authority was seen in Security Council Resolution 1264, paragraph 1, which emphasized the responsibility of individuals committing violations of international humanitarian law and demanding that they be brought to justice.\textsuperscript{84}

INTERFET’s intervention brought about substantial security of the territory.\textsuperscript{85} The demands of security were hence superseded by calls for political and economic development in preparation for independence.\textsuperscript{86} With the territory pacified, the United Nations proceeded to the task assigned to it under the 5 May agreements, i.e. the administration of the

\textsuperscript{83} First periodic report on the operations of the multinational force in East Timor, Doc. S/1999/1025 of 4 October 1999, Appendix, para. 23; Chesterman, see note 11, 113.
\textsuperscript{84} Chesterman, see note 11, 117.
\textsuperscript{86} Chesterman, see note 11, 64.
territory and the initiation of a process of transition towards independence.

V. The United Nations’ Kingdom of East Timor?
Transitional Administration under UNTAET

1. Preparations Leading up to UNTAET

As mentioned, the idea of an international administration for East Timor under the control of the United Nations was not born after the military intervention by INTERFET, and thus not an immediate reaction to the violence devastating the region after result of the popular consultation was made public. In fact, it had already been conceived in the agreement setting out the details of the popular consultation that, in case of a vote rejecting the autonomy arrangement with Indonesia:

“the Governments of Indonesia and Portugal and the Secretary-General shall agree on arrangements for a peaceful and orderly transfer of authority in East Timor to the United Nations. The Secretary-General shall (...) initiate the procedure enabling East Timor to begin a process of transition towards independence.”

Clearly, the view of the contracting parties was that for lack of local capacity after the withdrawal of the Indonesian authorities, a period of United Nations administration was necessary until the East Timorese people were in a position to take governance of their territory into their own hands. In the light of the fact that the agreement stated that “authority”, in general and without any restriction, was to be transferred to the United Nations, critics of the intensity or intrusiveness of the transitional administration must concede that the degree of powers bestowed on UNTAET was not the result of an autocratic decision of the Security Council.

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Consequently, the Security Council, already in the resolution mandating INTERFET, invited the Secretary-General “to plan and prepare for a United Nations transitional administration in East Timor, incorporating a United Nations peacekeeping operation” for the time after the intervention and pacification of the territory.90 The time pressure now on the United Nations allowed for only the most cursory planning,91 even though the United Nations had anticipated an outcome favouring independence and should have started planning for the hand-over of power to the United Nations well in advance. Again, the lack of preparation may be explained by the sensitivity of the issue of independence, in particular with regard to the Indonesian position.92 The Secretary-General delivered his report setting out the basic structures and mission of UNTAET on 4 October 1999.93 It was to have three main components or pillars: a governance and public administration component; a humanitarian assistance and emergency rehabilitation component; and a military component.94

The Security Council eventually established UNTAET with resolution 1272 on 25 October 1999. The mandate was extended twice until East Timor’s independence in May 2002.95 Even though it was initially referred to as a “peace-keeping operation”,96 it was established under Chapter VII of the UN Charter, one reason being that it took over the military duties from INTERFET and as such had to be authorised to use “all necessary measures” to fulfil its mandate.97

During the planning phase leading up to the establishment of UNTAET, East Timorese representatives were not involved,98 even though such involvement clearly would have been desirable already at that stage to “support capacity building for self-government”, one of

96 S/RES/1264, see note 70, para. 11.
97 S/RES/1272 see note 50, para. 3.
98 Chopra, see note 46, 32; id., see note 55, 990.
the main objectives of the transitional administration.\textsuperscript{99} The reason for this omission may be found in the logic of the political process around the 5 May agreements. The negotiations leading to the agreements had not involved East Timorese leaders directly, which was probably a political necessity, as the decision to include East Timorese in the talks may have rendered the negotiations impossible due to Indonesian concerns.\textsuperscript{100} A detailed proposal for a joint Timorese-UN administration of the territory prepared by Timorese leaders was handed over to UNAMET in mid-October 1999, but never forwarded to the Security Council.\textsuperscript{101}

Even though Indonesia gave its consent to the establishment of the international administration of East Timor, it is argued, similarly to the discussion on INTERFET, that this consent was “reduced” to a great extent due to military pressure.\textsuperscript{102} Even though this pressure was certainly real, Indonesia’s consent had already been given in advance in the 5 May agreements. Nevertheless, possibly anticipating such criticism, Security Council Resolution 1272, in contrast to Security Council Resolution 1264, did not refer to any consent by Indonesia to the establishment of UNTAET, beyond a general reference to the importance of cooperation between Indonesia, Portugal and UNTAET in the implementation of the resolution.\textsuperscript{103}

In contrast to the UN missions in Bosnia and Kosovo, the political endpoint of the transitional administration was never in doubt, given that a clear majority of the East Timorese population had decided in favour of independence in a process that had been agreed by all relevant parties. Even if the goal was clear, the manner in which it was to be reached proved problematic and disputed.

\textsuperscript{99} S/RES/1272, see note 50, para. 2 (e).
\textsuperscript{100} See A. Suhrke, “Peacekeepers as Nation-builders: Dilemmas of the UN in East Timor”, International Peacekeeping 8 (2001), 1 et seq. (4).
\textsuperscript{101} Steele, see note 25, 79.
\textsuperscript{103} Gray, see note 8, 231.

In the discussion on the legality of a territorial administration such as UNTAET, one has to differentiate between the legality of the establishment of the territorial administration by the Security Council (in the present case S/RES/1272), on the one hand, and the issue of the lawfulness of the actions performed by the territorial administration on the other, including the legal limits imposed on the administration as a matter of international law. The first question, addressed in this section, essentially pertains to the competence of the Security Council as an organ of the United Nations to institute a territorial administration, in particular one vested with such wide-sweeping powers as UNTAET. The second issue will be analysed in the following section.

In older literature, the view has been put forward that the Charter does not permit the Security Council to exercise direct administrative authority in a territory in any form. However, as observed earlier, the exercise of such powers by the United Nations under Chapter VII of the Charter has been discussed at as early a stage as the San Francisco Conference. Likewise, the practice of the Security Council points in a different direction. Thus, recent academic comments in their majority disagree with the narrow interpretation advocated by Kelsen. In particular, it is argued that Chapters XII and XIII of the Charter do not conclusively regulate the powers of the Security Council in the area of territorial administration, thus preventing administration under Chapter VII. A historical and teleological interpretation of those chapters leads to the result that they apply only in the (immediate) post-colonial context and cannot have been intended to regulate United Nations powers conclusively in terms of territorial administration outside this narrow scope of applicability.

Thus, today, only few voices would doubt the competence of the Security Council to administer a territory on a temporary basis, and its

105 See above at note 5.
power to delegate this authority to the Secretary-General,\textsuperscript{108} even though no obvious legal basis for such action of the Security Council is to be found in the UN Charter.\textsuperscript{109} The international community seems to have accepted territorial administration as a legitimate means to resolve conflicts,\textsuperscript{110} allowing the conclusion that the UN members have acquiesced in including this form of undertaking within the ambit of competences of the Council under Chapter VII of the Charter.\textsuperscript{111}

The exact legal basis for the establishment of territorial administrations by the Security Council is still disputed among the academic community, several options being discussed. A legal basis may be sought in explicit provisions of Chapter VII of the UN Charter.\textsuperscript{112} Thus, a territorial administration may be based on Article 41,\textsuperscript{113} as a “measure not involving the use of armed force” if, and to the extent that, this instrumentality is necessary to maintain or restore international peace and security. Article 42 could serve as a legal basis for the


\textsuperscript{111} See article 31 (3)(b) Vienna Convention on the Law of Treaties.

\textsuperscript{112} Even though UNTAET was established with the consent of Indonesia (see under V.1.), this did not hinder the Security Council from using its Chapter VII powers. For a different approach see de Wet, see note 110, 314, who argues that, “given the consensual nature of the measures, it would not seem conceptually accurate to regard an article placed in Chapter VII ... as the basis for the Security Council’s powers”.

\textsuperscript{113} Bothe/ Marauhn, see note 102, 232; B. Kondoch, “The United Nations Administration of East Timor”, \textit{Journal of Conflict and Security Law} 6 (2001), 245 et seq. (256-257); M.J. Matheson, “United Nations Governance of Postconflict Societies”, \textit{AJIL} 95 (2001), 76 et seq. (83); Kondoch, see note 8, 25.
military component of the administration. 114 These articles may be seen in conjunction with the power of the Security Council to establish subsidiary organs (Article 29 of the Charter) and to delegate certain powers to the Secretary-General (Article 98 of the Charter).

Another way to arrive at the legality of the establishment of international administrations is by looking at implied powers of the Security Council as basis for the resolution. 115 Given that UNTAET was established under Chapter VII, providing it with a mandate independent from the consent of the parties concerned, the basis may be an implied power derived from the Security Council’s authority to take non-military measures and actions involving the use of force for the maintenance or restoration of international peace and security.

In all viable scenarios under Chapter VII, the Security Council has to determine the existence of a threat to the peace. In the case at hand, the Council determined that “the continuing situation in East Timor” constituted a threat to peace and security. 116 By this it unquestionably referred to the persisting humanitarian crisis in East Timor. In addition, it must be taken to relate to the interference, direct and indirect, with the exercise of the right to self-determination by Indonesia, which already qualified for the “threat to the peace” on which the resolution establishing INTERFET was based. 117 Thus, even though the initial threat to the peace was tackled by way of military intervention (INTERFET), the Security Council could legally establish a territorial administration to guarantee a peaceful future for the territory, as further steps seemed necessary to re-establish peace. 118

114 Frowein/ Krisch, see note 5, MN 21. In the case of UNTAET, see Security Council Resolution 1272, see note 50, operative para. 3 (c).
115 Ruffert, see note 71, 620; de Wet, see note 107, 315.
116 S/RES/1272, see note 50, preambular para. 16.
117 As to the significance of self-determination for S/RES/1244, see note 3 and in relation to Kosovo and UNMIK compare Tomuschat, see note 75, 341, as well as J. Friedrich, in this Volume.
118 See Frowein, see note 109, 44.
3. Powers of UNTAET and Limits thereto under International Law

a. The Status of East Timor from the Establishment of UNTAET to Independence

Before the establishment of UNTAET on 25 October 1999, East Timor was a non-self-governing territory within the meaning of Article 73 of the UN Charter.\(^{119}\) Even though Indonesia claimed title to the territory and exercised *de facto* control, its claim to title was unfounded as it was based on forceful annexation of the territory;\(^{120}\) was only recognised by one single state, Australia, and continuously rejected by the United Nations. Thus, Portugal, as the administering power that had not abandoned its title to East Timor,\(^{121}\) still held the *de jure* title over the territory of East Timor.

While it is common ground that UNTAET exercised not only elements of, but virtually the entire range of sovereign powers over East Timor,\(^{122}\) the precise legal position of East Timor in the time between 25 October 1999 and 20 May 2002 is a matter of considerable debate.

It could be argued that East Timor in that phase was part of Portugal, but came under (exclusive) international administration and juris-

119 ICJ, see note 29, para. 31; Rothert, see note 26, 268. For an extensive analysis see O. Franz, *Osttimor und das Recht auf Selbstbestimmung*, 2004, 155-176.


121 See Kreß, see note 120, 430-431.

122 Chesterman, see note 11, 2; Chopra, see note 46, 29. Symbolically, this exercise of sovereignty is illustrated by UNTAET occupying the “Governor’s House” in Dili, and Sergio Vieira de Mello, the Transitional Administrator, working in the same office that once was occupied by the Indonesian governor, see Traub, see note 1, 74.
diction, similar to the situation in Kosovo, where the Federal Republic of Yugoslavia kept (albeit only formal) sovereignty over the territory.\footnote{See the contribution of J. Friedrich, in this Volume.} A second option would be a “hybrid”, \textit{sui generis} structure between a non-state territorial entity, and a state, given that East Timor has been characterised a state-in-waiting.\footnote{See R. Wilde, “The Complex Role of the Legal Adviser When International Organizations Administer Territory”, \textit{ASIL Proc.} 95 (2001), 251 et seq. (252); \textit{id.}, “International territorial administration and human rights”, in: White/ Klaasen, see note 8, 149 et seq. (168). See also S.D. Krasner, “The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law”, \textit{Mich. J. Int’l L.} 25 (2003–2004), 1075 et seq., who introduces the concept of “shared sovereignty”.} It may also be considered that, with S/RES/1272, East Timor became an independent, fully-fledged state under UN administration. International legal scholars have also argued that said resolution, in conjunction with Indonesia’s consent to the establishment of UNTAET, constitutes a “limited transfer of sovereign powers over the territory, a transaction short of a cession”.\footnote{M. Bothe/ T. Marauhn, “The United Nations in Kosovo and East Timor, Problems of a Trusteeship Administration”, \textit{International Peacekeeping} 6 (2000), 152 et seq. (155).} The question is who actually transferred sovereignty (Indonesia clearly did not), and whether “cession” is the correct term, given that the United Nations is not capable of acquiring title to a territory.\footnote{Brownlie, see note 10, 167; C. Stahn, “The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis”, \textit{Max Planck UNYB} 5 (2001), 105 et seq. (144).}

It is clear that East Timor was not part of Indonesia, either before or after 25 October 1999.\footnote{See Tomuschat, see note 75, 338.} It also does not seem correct to say that Portugal’s \textit{de jure} title subsisted after S/RES/1272,\footnote{But see Morrow/ White, see note 16, 5.} given that the United Nations replaced Portugal as administering power over East Timor. Interestingly, East Timor remained on the list of non-self-governing territories, with UNTAET as the administering power.\footnote{Stahn, see note 128, 115.} Furthermore, international law does not offer rules for a “hybrid” construction somewhere between a state and an internationalised territory. Neither can East Timor, during the time of UN administration, be described as a modern form of “protectorate”, at least not with its traditional conno-
tations, nor as a trust territory within the meaning of Article 75 of the UN Charter, given that a trusteeship agreement as envisaged under Article 77 (1) UN Charter was never concluded.

Also, one can also safely say that East Timor did not immediately become an independent state after the UN administration was established. First, East Timor did not claim independence; second, the 5 May agreement on the question of East Timor between Portugal and Indonesia (see note 43 above), in its article 6, foresaw a gradual transition toward independence. Third, no state recognised East Timor as an independent state before May 2002.

In the light of these considerations, it seems reasonable to argue that the establishment of a direct and comprehensive administration under international law through the United Nations, de facto exercising exclusive territorial sovereignty, led to the “de-stateification” and consequently to an internationalisation of the territory. Territorial sovereignty or title to territory at that time was not held or acquired by any entity, least of all the United Nations. This in turn means that East Timor formed neither part of Portugal nor Indonesia. The fact that S/RES/1272 also recognises the “sovereignty and territorial integrity of Indonesia” only means that Indonesia had a droit de regard concerning the UN administration in East Timor, nothing more.

It should be added that the characterisation of East Timor as an “internationalised territory” does not automatically determine the powers, and, perhaps more importantly, the limits thereto, of the international entity administering the territory. Those are to be deduced from international law as applicable to international organisations, and from the instrument(s) that on the one hand “internationalised” the territory, and


131 See Ruffert, see note 71, 629.


133 Stahn, see note 129, 121.

134 S/RES/1272, see note 50, preambular para. 12.

135 Bothe/ Marauhn, see note 125, 155.
on the other hand installed its international administration, i.e. Security Council Resolution 1272.

b. The Powers Vested in UNTAET

Resolution 1272 was drafted much more clearly in terms of the exact authority of the transitional administration in East Timor than was the case in Kosovo. Operative paragraph 1 provides that UNTAET “will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice”. In the context of Kosovo, it was not the Security Council resolution establishing the mission, but rather UNMIK’s first regulation that endowed the Special Representative of the Secretary-General with these powers.

Paragraph 6 makes the Transitional Administrator responsible for all aspects of the United Nations work in East Timor and specifically gives him or her “the power to enact new laws and regulations and to amend,

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136 The relevant passage of S/RES/1244 (1999) of 10 June 1999, establishing UNMIK, reads: “10. The Security Council ... Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.” An even less concrete vesting of authority is contained in S/RES/1031 (1995) of 15 December 1995 for the High Representative in Bosnia-Herzegovina: “26. The Security Council ... Endorses the establishment of a High Representative, following the request of the parties, who, in accordance with Annex 10 on the civilian implementation of the [Dayton] Peace Agreement, will monitor the implementation of the Peace Agreement and mobilize and, as appropriate, give guidance to, and coordinate the activities of, the civilian organizations and agencies involved, ...” Later in the Resolution, the High Representative was given authority to interpret and define his powers himself: “27. Confirms that the High Representative is the final authority in theatre regarding interpretation of Annex 10 on the civilian implementation of the Peace Agreement;”.

137 UNMIK/REG/1999/1, sec. 1.1: “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 of the Secretary-General.”
suspend or repeal existing ones”. On the other hand, UNTAET/REG/1999/1 clarifies that all powers vested in UNTAET (as a whole) are exercised by the Transitional Administrator, i.e. not only the legislative power expressly mentioned in the underlying Security Council resolution. The respective competences may be characterised as follows:

**Legislative and administrative power**: the legislative instruments enacted by the Special Representative were international in character, and thus belonged to the sphere of international law. However, they had direct effect in the territory of East Timor by virtue of S/RES/1272. In the light of the internationalisation of the territory it does not seem to be correct to say that this direct applicability results from a transfer of sovereign or governmental powers over the territory. It is equally questionable whether it is helpful to characterise those acts as “dual” in character, both belonging to the international and domestic legal sphere. As has been argued, East Timor constituted an “internationalised” territory. International law, concretised by the legislative and executive acts performed by the Transitional Administrator, thus applied directly in the territory. Hence, law in East Timor during UNTAET’s mandate applied as a matter of international law.

The legislative and administrative power was exercised through regulations and directives. While the regulations were defined to be legislative acts, directives had a more administrative character and were subordinate to regulations in that they specified the implementation of regulations. Interestingly, all draft legislation was forwarded to UN Headquarters in New York for approval prior to promulgation.

**Judicial power**: in addition to its competencies in the legislative and administrative sphere, UNTAET had been given full responsibility for the administration of justice. In March 2000, the Transitional Administrator fully delegated this authority in Regulation No. 2000/11, which

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138 As they are promulgated by a subsidiary organ of the Security Council (Article 29 of the Charter); Bothe/ Marauhn, see note 102; Stahn, see note 129, 146.
139 de Wet, see note 110, 331.
140 Compare Wolfrum, see note 132.
141 Even though, in fact, a mixture of norms of domestic and international origin existed, see under 6. a. cc.
142 UNTAET/REG/1999/1, sec. 6.1.
143 Morrow/ White, see note 16, 27.
provided that “[j]udicial authority in East Timor shall be exclusively vested in courts that are established by law ...”144

External relations power: the Secretary-General’s report of 4 October 1999 anticipated the need to represent the nascent state externally and to conduct international negotiations. It made specific reference to UNTAET’s competence to “conclude such international agreements with States and international organizations as may be necessary for the carrying out of the functions of UNTAET in East Timor.”145 In fact, it was necessary to negotiate with Indonesia on border relations, access to East Timor’s Oecussi enclave in West Timor, as well as compensation for damages incurred during the violence of the pro-Indonesian militia after the referendum. Likewise, a Memorandum of Understanding with Australia was negotiated on the issue of delimiting interests in the exploitation of resources in the Timor Sea. This so-called “Timor Sea Arrangement” specified that East Timor will have a 90 per cent share in the oil and gas production in a Joint Petroleum Development Area (JPDA).146 Furthermore, UNTAET also negotiated and concluded the Trust Fund for the East Timor Grant Agreement.

c. Restrictions on UNTAET’s Powers

The exercise by UNTAET of all powers traditionally attributed to a state (legislative, executive and judicial powers) provokes the question of the legal framework within which these powers are exercised, in particular the limits to their exercise. While the absolutist state knew a sovereign legibus absolutus, modern theory and practice has introduced restrictions on the exercise of powers by the sovereign, both internally and internationally. The question of control of UNTAET’s powers is made all the more significant as it is obvious from its mandate that the powers exercised are in no way separated. Thus, the system lacked checks and balances between different branches of “government”, ensuring that organs would not overstep their respective competencies in the political process.

145 Doc. S/1999/1024, see note 93, para. 35.
146 See N. Bugalski, “Beneath the sea: Determining a maritime boundary between Australia and East Timor”, Alternative Law Journal 29 (2004), 290 et seq. Upon East Timor’s independence, the governments of East Timor and Australia concluded the Timor Sea Treaty that contained the same terms and provisions as the Memorandum of Understanding.
In looking for limits to UNTAET’s powers, one may first think of the direct applicability of international law as a result of the internationalisation of the territory. However, before considering general international law, it is important to first look at the instrument bringing about the internationalisation of the territory concerned. This instrument, be it an international agreement or, as in the case at hand, a Security Council resolution under Chapter VII of the Charter, specifies the applicability of international law in the territory and thus serves as a surrogate constitution. In determining limits of UNTAET’s power, one must first turn to the legal instrument establishing the interim administration, i.e. S/RES/1272.

Other limitations may derive from norms and principles contained in the UN Charter and other instruments, as well as customary international law. Territorial administration standing in the tradition of the Trusteeship System, Chapters XI, XII and XIII might possibly be applicable. Furthermore, the right to self-determination plays a crucial role in the context of East Timor and may have implications for the control of UNTAET’s powers. Without asserting to give a comprehensive account of all arguments presented, the present section deals with each issue in turn.

**aa. UNTAET’s Mandate**

The first obvious limitation to UNTAET’s powers under the mandate provided by the Security Council is the time-frame: the initial period of international administration was to last until 31 January 2001. It was later extended until 31 January 2002, and finally to 20 May 2002.

Second, given that UNTAET was established under Chapter VII of the UN Charter, and that under these provisions the Security Council has the authority to take measures “to maintain or restore international peace and security”, this may have as a consequence that the exercise of (legislative, executive, or judicial) power by UNTAET would have to show a link to the maintenance or restoration of peace. In other words, one could argue that legislative measures that do not stand in relation with this goal are acts *ultra vires*. If this were true, and it is not explicitly reflected in the language of S/RES/1272, a difficult question

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147 See under V. 3. a.
148 See Wolfrum, “Internationalization”, see note 132, 1395.
149 S/RES/1272, see note 50, para. 17.
150 de Hoogh, see note 71, 31.
would be the exact demarcation between measures sufficiently closely related to the maintenance and restoration of peace and those not. One may think of justifying those acts that arguably go beyond the immediate context of peace-restoration by the consent of the parties concerned, i.e. Portugal and Indonesia, in the administration of the territory by the United Nations.151

**bb. Human Rights**

The issue of whether UNTAET was bound to comply with human rights standards, and if so, with which in particular, is not easily answered.152 Conceptually speaking, the difficulty complicating the discussion is that human rights law has traditionally been conceived in terms of state responsibility, or, in case of most serious human rights abuses, as individual responsibility, but not as one that could apply to an international organisation or its sub-units.153 However, if an international organisation actually exercises functions which would normally be performed by a state, and which directly affect individuals, the question of its human rights obligations seems obvious. In fact, the United Nations has emulated “state behaviour” in East Timor not only nominally, but also practically, hence (maybe understandably) making the same mistakes.154

As obvious as the need for human rights standards is, UNTAET’s mandate as spelt out in S/RES/1272 contained only “discrete” refer-

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151 de Hoogh, see note 71, 32.
152 A different, yet related issue is in how far states as members of an international organisation remain accountable for acts of that organisation where they attribute or delegate power to it; as a general rule, it may be said that they cannot be “absolved” from their responsibility by such an act of attribution of powers, see, for instance, ECHR, *Waite and Kennedy v. Germany*, Application No. 26083/94, Judgment of 18 February 1999, para. 67; C. Walter, “Grundrechtsschutz gegen Hoheitsakte internationaler Organisationen”, *Archiv des öffentlichen Rechts* 129 (2004), 40 et seq. (54 et seq.).
ences to human rights obligations of the administration.\textsuperscript{155} The Report of the Secretary-General of 4 October 1999, referred to in operative paragraph 3 of resolution 1272, specifies that UNTAET will have as its objective “to ensure the establishment and maintenance of the rule of law and to promote and protect human rights”.\textsuperscript{156} Equally, the Report envisaged that the Special Representative “will facilitate the creation of an independent East Timorese human rights institution, whose functions will include the investigation of alleged violations of human rights”.\textsuperscript{157} It is not entirely clear, though, whether this institution was intended to control UNTAET’s actions, let alone that the jurisdiction of such institution or its level of scrutiny were stipulated.\textsuperscript{158} Given that the references in the instruments mentioned are at best cursory, it is difficult to argue that they clearly establish UNTAET’s submission to human rights standards.\textsuperscript{159}

\textsuperscript{155} Compare also S/RES/1244, see note 3, para. 11 (j), establishing UNMIK, provides that “the main responsibilities of the international civil presence will include … protecting and promoting human rights”. It is doubtful whether this already constitutes a strict obligation of UNMIK to act in accordance with human rights law, see T.H. Irmscher, “The Legal Framework for the Activities of the United Nations Interim Administration in Kosovo: The Charter, Human Rights, and the Law of Occupation”, \textit{GYIL} 44 (2001), 353 et seq. (366); Bothe/ Marauhn, see note 102, 237; S. Hobe/ J. Griebel, “Privatisierungsmaßnahmen der UNMIK im Kosovo – Mögliche Rechtmaßigkeitsgrenzen im Resolutionsmandat und im allgemeinen Völkerrecht”, in: J. Bröhmer et al. (eds), \textit{Internationale Gemeinschaft und Menschenrechte, Festschrift für Georg Ress zum 70. Geburtstag}, 2005, 141 et seq. (145).

S/RES/1272 does not even go that far. It only specifies UNTAET’s mandate to include the development of an “independent East Timorese human rights institution” (para. 8), and stresses the importance to recruit UNTAET personnel with appropriate training in human rights (para. 15). Rightly critical as to this difference in the treatment of human rights issues between Kosovo and East Timor: A. Devereux, “Searching for clarity: a case study of UNTAET’s application of international human rights norms”, in: White/ Klaasen, see note 8, 293 et seq. (298 et seq.).

\textsuperscript{156} Para. 29 (h); see also Stahn, see note 129, 162.

\textsuperscript{157} Para. 42.


\textsuperscript{159} But see Stahn, see note 129, 162-3.
Regulation No. 1999/1, rightly described as a constitutional document, provided in section 2 that “all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards”. Moreover, one specific rule, the prohibition against discrimination, was explicitly named as applicable. Even though it does not unequivocally state whether legislative or executive acts by UNTAET had to be in accordance with human rights standards, this provision must be regarded as a binding “self-commitment”, extending the obligation to respect human rights norms to the transitional administration itself, given that it undeniably exercised public authority by enacting regulations or directives, or performing any other duty. That members of the administration perceived to be bound by human rights standards by virtue of Regulation No. 1999/1 confirms this interpretation. However, to take Regulation No. 1999/1 as the only source of human rights obligations of UNTAET is somewhat unsatisfactory, given that it can be argued that later instruments having the same status could easily derogate from those obligations.

In addition, the obligation to respect human rights may follow from the fact that the Security Council, acting under Chapter VII, is itself bound to respect them. If so, as a logical consequence UNTAET would be equally bound as it was established by a UN Security Council Resolution, according to the principle that no organ can delegate more authority or powers than it has itself (nemo plus iuris transferre potest quam ipse habet), or, put differently, that, by delegating authority, an organ automatically also passes on the limits on such authority. The same is true if one considers the vesting of legislative and judicial pow-

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161 Stahn, see note 129, 158.


164 See Strohmeyer, see note 160. Strohmeyer served as Acting Principal Legal Adviser and later as Deputy Principal Legal Adviser to UNTAET.

165 Devereux, see note 155, 301.
ers in UNTAET an attribution, rather than a delegation, of powers by the Security Council,\textsuperscript{166} as the Council in both cases acts under Chapter VII of the Charter and consequently is subject to the same limitations.

While the United Nations itself is not party to human rights instruments and thus cannot be directly bound by their provisions, international organisations are subject to the rules of general international law, i.e. customary international law and general principles of law,\textsuperscript{167} in particular rules of customary law including those relating to the protection of fundamental human rights.\textsuperscript{168} However, in relation to Chapter VII measures of the Security Council, this general statement needs some further specification and qualification.

Most legal scholars would nowadays agree that the Security Council, even if it acts under Chapter VII of the Charter, does not operate above the law.\textsuperscript{169} As an organ of an international organisation, its powers only reach as far as they are conferred on it by or implied in the Charter.\textsuperscript{170} As the powers conferred on the Security Council are very broad, the difficult question is how to determine the exact limits of its authority. According to Article 24 (2) of the Charter, the Council is bound to respect the purposes and principles of the UN. However, these are merely guidelines, rather than concrete limits for Security Council action.\textsuperscript{171} In particular, from its wording and negotiating history, Article 1 (1) UN Charter confines the obligation to strictly observe general international law to the peaceful settlement of disputes, rather than extending it to collective measures for the prevention and

\textsuperscript{166} de Hoogh, see note 71, 32.


\textsuperscript{168} P. Sands/ P. Klein, \textit{Bowett’s Law of International Institutions}, 5th edition, 458; Reinisch, see note 162, 136; Kondoch, see note 8, 36; D. Shelton, \textit{Remedies in international human rights law}, 2nd ed., 2005, 156.


\textsuperscript{170} J. Frowein/ N. Krisch, “Introduction to Chapter VII”, in: Simma, see note 5, MN 25.

\textsuperscript{171} Frowein/ Krisch, see note 170, MN 26 and 28.
removal of threats to peace, i.e. the substance of Chapter VII measures. Thus, the Security Council has some margin of appreciation or discretion with regard to the observance of human rights when acting to restore peace and security. Even though the Security Council has some “room for manoeuvre” most commentators point out that it may not “undermine the essence of ... basic human rights”, is bound to respect the “core content of fundamental human rights norms”, or may not act in “complete disregard” of those rules. That said, a definite limitation are those human rights that constitute ius cogens. This interpretation leaves the Security Council both the right and the responsibility to strike a balance between humanitarian and human rights concerns and the objective of maintaining international peace and security. In this balancing exercise, it is limited by the above principles.

This theoretical framework seems reasonable. However, it does not give an answer to the question of what happens when the Security Council does not engage in balancing exercises, at least not explicitly, and essentially leaves the question unaddressed. It seems that UNTAET is such a case, considering that the fundamental documents do not take position on UNTAET’s human rights obligations. How should this lacuna be filled? Do we suppose that the Security Council wanted to give UNTAET only the minimum core principles of human rights on the way? Or do we, following an interpretation in accordance with the principles of in dubio pro libertate and good faith, say that UNTAET, even though established under Chapter VII of the Charter, had to comply fully with all human rights norms that the United Na-

173 de Wet, see note 107, 193.
174 Frowein/Krisch, see note 170, MN 28.
175 As to the interpretation of Security Council resolutions see M.C. Wood, “The Interpretation of Security Council Resolutions”, Max Planck UNYB 2 (1998), 73 et seq. (in particular 88 et seq.); Compare also Frowein/Krisch, see note 170, MN 34-35, who contend that Security Council resolutions should be interpreted narrowly, in the sense that limitations of the sovereignty of states against which enforcement action is taken by the Council should not lightly be assumed. The same reasoning seems to apply to limitations of, or deviations from, human rights law, as well as other areas of international law, e.g. international environmental law. In other words, in the absence of clear evidence to the contrary, it should at all times be presumed that the Security Council, in exercising its powers under Chapter VII, wanted to abide by international law rather than abrogate it.
tions itself as an international organisation is subject to? It seems that
the latter approach is clearly preferable, for various reasons: first, it
would be counterintuitive and indeed bizarre to suppose that the Secu-
rity Council wanted to implicitly derogate from the corpus of human
rights norms, given that such derogation normally has to be effected by
express declaration.\textsuperscript{176} Second, if the exercise of authority is to be based
on the rule of law, accountability is the direct counterpart of exercising
power. Third, from a more practical perspective, the mandate to estab-
lish an independent human rights institution\textsuperscript{177} – even though it cannot
be a basis in and of itself to argue that UNTAET was given human
rights standards to abide by \textit{qua} resolution 1272 – would seem to make
it difficult to argue that the institution tasked with establishing this
mechanism was intended to be bound only by minimum core standards
of human rights.

Another possible reasoning is to borrow from the theory of the
automatic succession in human rights treaties.\textsuperscript{178} An argument against
this view could be that UNTAET never acquired formal title to the ter-
ritory of East Timor in the same sense as a state would to a territory, in
which case state succession rules apply. In contrast, the territory of East
Timor did not even constitute a state at the time of UNTAET’s opera-
tion, but was internationalised. It hence seems difficult to say that the
United Nations acted as a “state agent”, as the Office of the High Rep-
resentative or the United Nations did and still do in Bosnia-
Herzegovina and in Kosovo, respectively.\textsuperscript{179} But, one may say that, as
UNTAET \textit{de facto} exercised the functions of a territorial sovereign, it
was obliged to respect and enforce human rights obligations in confor-
mity with what could be called “functional succession”.\textsuperscript{180}

\textsuperscript{176} If effected by states: see article 4 (3) ICCPR.
\textsuperscript{177} S/RES/1272, see note 50, para. 8.
\textsuperscript{178} Stahn, see note 129, 163; J. Cerone, “Minding the Gap: Outlining KFOR
Accountability in Post-Conflict Kosovo”, \textit{EJIL} 12 (2001), 469 et seq. (474);
Irmscher, see note 155, 371.
\textsuperscript{179} Compare Wilde, see note 124, 256.
\textsuperscript{180} Irmscher, see note 155, 372; Human Rights Committee, General Comment
Covenant belong to the people living in the territory of the State party. The
Human Rights Committee has consistently taken the view, as evidenced by
its long-standing practice, that once the people are accorded the protection
of the rights under the Covenant, such protection devolves with territory
and continues to belong to them, notwithstanding change in government of
the State party, including dismemberment in more than one State or State
It is thus beyond doubt that UNTAET was bound to respect universally applicable international human rights law. Effective human rights protection, however, essentially depends on the question of whether they could be effectively enforced, a question to be analysed at a later stage.

**cc. Analogy to the Trusteeship System**

In Chapters XII and XIII, the UN Charter established an International Trusteeship System and a Trusteeship Council with the mandate to monitor so-called “trust territories”. These were those territories as were placed under the trusteeship system by way of a trusteeship agreement (Article 77 (1)). Interestingly, the authority administrating a trust territory (the “administering authority”) could be one or more states, or the United Nations itself.

While the international administration of East Timor surely shows close parallels to the concept of trusteeship, it is questionable whether the rules applicable in the trusteeship system applied to UNTAET. The UN Trusteeship System effectively ended with the independence of Palau in 1994, even though there have been calls to revive and reinvigorate the Trusteeship System for future “state-building” exercises under the aegis of the United Nations.

At the outset, it has to be noted that UNTAET’s authority was not established by way of a trusteeship agreement in accordance with Article 77. Neither could it have been, given that East Timor does not fall into any of the categories enumerated in Article 77.

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181 The term “universally applicable” is meant to refer to those standards valid on the international, rather than regional, level, see Hobe/Griebel, see note 155, 146.

182 See under V. 4.

183 Article 81 UN Charter.

184 See Kondoch, see note 113, 258.


Even though Chapter XII was thus not directly applicable, one may think of an analogous application of the norms and principles contained therein.\textsuperscript{187} It has been observed that the standards set out in Chapter XII are intended to find a balance between the interests of the population and the objective of effectively maintaining international peace, in particular Article 76.\textsuperscript{188} Given that the balancing exercise in Chapter VII - authorised territorial administration is the same as in the case of a territory placed under the trusteeship system, it seems reasonable to think of an application by analogy.


The applicability of the international law of occupation depends on factual rather than legal requirements: its main prerequisite is the \textit{de facto} submission of a territory and its population under the effective authority of external military forces.\textsuperscript{189} It is irrelevant whether the occupation results from an armed conflict.\textsuperscript{190} However, the law of occupation does not extend to situations where the sovereign of that territory has agreed to the presence of foreign troops.\textsuperscript{191} While article 6 Geneva Convention IV contains a limitation of the applicability of the law of occupation to one year, article 3 (b) AP I extends their pertinence to the actual duration of the occupation.

As with human rights treaties, the United Nations, and consequently UNTAET, are, or rather were, not bound by the treaties estab-
lishing the law of occupation. Yet, many of their provisions reflect only customary international law, including those determining its applicability. Whether the law of occupation constitutes the appropriate means of solving the problems arising from administration of territory by the United Nations in general, and UNTAET in particular, is doubtful. First, both Portugal and Indonesia gave their consent to the establishment of UNTAET, both in the 5 May agreements and immediately before the establishment of the mission, the absence of (free) consent being one criterion for the applicability of the law of occupation. Second, UNTAET was created by way of a binding Chapter VII Security Council resolution, which arguably is not comparable to the classic situation of occupation against the will of the sovereign. Thus, better arguments strive for not applying the law of occupation to UNTAET, at least not directly.

One may consider applying the law of occupation by way of analogy. This would require that the object and purpose of the rules con-

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192 Compare Bothe, see note 72, MN 125. The relevant norms are contained in Section III of the Hague Regulations (only applicable to belligerent occupation); Part III, Section III of Geneva Convention IV as complemented by Additional Protocol I (Ipsen, see note 187, 1258-1260 (K. Ipsen)). As to international humanitarian law obligations other than the law of occupation of the UN see the Secretary-General’s Bulletin on the Observance by United Nations forces of international humanitarian law, Doc. ST/SGB/1999/13 of 6 August 1999 and D. Shraga, “UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage”, AJIL 95 (2000), 406 et seq.


195 See C. Greenwood, “International Humanitarian Law and United Nations Military Operations”, Yearbook of International Humanitarian Law 1 (1998), 3 et seq. (28), who argues that the law of belligerent occupation would apply to the UN until the Security Council used its Chapter VII powers to impose a different legal regime as part of the measures necessary for the maintenance of peace and security.

196 This has been argued by several scholars. One must be aware, however, that this would amount to an application of customary international law by analogy, an approach at least not undisputed under international law: Ipsen,
cerned support such conclusion by analogy. In a nutshell, the underlying rationale of the law of occupation is as follows: where the legitimate sovereign is prevented from exercising power, but at the same time its sovereignty persists and is only suspended, a foreign power that acquires temporary authority over the territory as a whole or in part is obliged to abide by certain fundamental rules regarding the status of the territory and the protection of civilians. These rules can be summarised by two main principles: respect for the rights of the population and maintenance of the status quo of the territory concerned.197

It is obvious that on the one hand, the temporary nature of the administration, the need for the protection of civilians and the suspension of sovereignty is comparable to the situation of international administration of territories by the United Nations. On the other hand, the obligation to preserve the status quo of the territory, in particular to abide by the laws in force in the territory and to refrain from changing them, flies in the face of the mandate of UNTAET, given that, first, it had plenary powers to amend laws and promulgate new legislation, and, second, that it was to prepare the territory of East Timor for independence. Especially the rules contained in articles 47 and 64 Geneva Convention IV, as well as article 43 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land are at obvious odds with UNTAET’s mandate. In addition, whereas the classical situation of occupation is characterised by a conflict of interests (i.e. between the foreign military power(s) and the population of the occupied territory), the international administration of territories by the United Nations is a relationship of co-operation.198 It is thus doubtful whether the object and purpose of the rules constituting the body of the law of occupation supports their applicability to United Nations administrations of territories.199


197 Vité, see note 191, 14.


199 For a different view see in particular: Benvenisti, see note 4, Preface to the Paperback Edition, xvi; Irmscher, see note 155, 374 et seq.
ee. The Right to Self-Determination

The right to self-determination appears to be as ubiquitous in international legal discourse as its exact contents and implications remain nebulous. It is recognised in article 1 of both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), and features prominently among the purposes of the United Nations (Article 1 (2) of the UN Charter). The principle is customary international law.\(^\text{200}\) As it has the status of *ius cogens*,\(^\text{201}\) and the character of an *erga omnes* obligation,\(^\text{202}\) it forms a direct limitation of powers of the Security Council, also when acting under Chapter VII,\(^\text{203}\) and, according to the above, hence was binding on UNTAET.

Modern treatises by and large differentiate between the right to internal and external self-determination. Whereas the former essentially gives populations the right to regulate their political, economic, social and cultural affairs within an existing state-structure, for instance relating to cultural affairs, in a limited form of self-government, the latter mainly plays a role in the context of decolonisation, which is a special concretisation of the right of self determination.\(^\text{204}\) The right to external self-determination is universally accepted in the context of decolonisation.

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\(^\text{202}\) ICJ, see note 29, para. 29.


\(^\text{204}\) See K. Doehring, “Self-Determination” in: Simma et al. (eds), see note 5, MN 17. It may also become relevant where a people’s right to exercise internal self-determination is blocked permanently, see Supreme Court of Canada, *Reference Re Secession of Québec*, 25 August 1998, reprinted in *ILM* 37 (1998), 126 et seq., at para. 134.
Given that East Timor is a case of what has been named here “delayed decolonisation”, the applicability of the right of self-determination for the people of East Timor should be uncontroversial. East Timor had been entitled to the right of external self-determination ever since it was listed as a non-self governing territory, a situation not changed by Indonesia’s illegal occupation in 1976. East Timor’s independence is thus appropriately cited as the most recent example for the exercise of the right.

It is thus surprising that S/RES/1272 does not explicitly mention the term “self-determination”; it was, however, mentioned in the preamble of the agreement between Indonesia and Portugal providing for the popular consultation. All in all, it is inevitable to conclude that not only did the right of self-determination apply to East Timor, but the transitional administration was the essential instrument for implementing this right. While its applicability to the situation of East Timor is thus beyond doubt, its consequences for the administration of the territory are less clear. Some cautious proposals may be made: first and foremost, UNTAET was bound to prepare East Timor for independence from Indonesia. It could thus not have decided to arrange for an autonomous status of the territory within Indonesia. Second, it follows from the duty to respect the right to self-determination by the Security Council that Chapter VII-mandated missions such as UNTAET do not allow the United Nations to impose a particular form of government upon the population of a territory or a state against the will of the people concerned. Thus, not only was UNTAET under an obligation to consult with and progressively involve the East Timorese people on the future structure of an independent East Timor, it was also required to

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206 de Wet, see note 107, 332-333.

207 R. McCorquodale, “The Individual and the International Legal System” in: Evans, see note 9, 299 et seq. (316).

208 Preambular para. 6.

209 Bothe/ Marauhn, see note 102, 238.

210 Kondoch, see note 113, 260.
implement these views.\textsuperscript{211} These ramifications of the right to self-determination seemed to be difficult to reconcile, both in theory and practice, with the role and powers of the Transitional Administrator.\textsuperscript{212} Third, the right to self-determination implied a duty (on both states and the United Nations) to assist the entity entitled to self-determination, i.e. the population of East Timor, to achieve this self-determination.\textsuperscript{213} It thus imposed on UNTAET the duty to protect and promote the territorial integrity, resources and future sustainable development of the state-in-waiting.

\textit{ff. The Right to Democratic Governance}

The “liberal revolution” following the demise of communism at the end of the 1980s and beginning of the 1990s also influenced international legal doctrine. Against the background of the writings of political philosophers such as Fukuyama,\textsuperscript{214} international legal scholars revised their discipline’s traditional impartiality on the subject of political systems.\textsuperscript{215} Prominent scholars argued that a “right to democratic governance” was emerging under international law.\textsuperscript{216} Its content may roughly be characterised as “the right of people to be consulted and to participate in the process by which political values are reconciled and choices are made”.\textsuperscript{217}

How does this right relate to the more traditional right to self-determination? One may say that the right to self-determination is inherently “democratic”, as it envisages a right of a people to freely de-

\textsuperscript{211} Compare de Wet, see note 107, 329.
\textsuperscript{212} See infra, at 5.
\textsuperscript{215} Compare the discussion in S. Marks, \textit{The Riddle of all Constitutions - International Law, Democracy and the Critique of Ideology}, 2000, 37 et seq.
\textsuperscript{217} Id., 46.
termine its future status. In scholarly discussion, however, the principle of self-determination and the right to democratic governance seem inextricably connected and for present purposes may be treated as having the same implications. It is clear that the application of the right to democratic governance to the case of UNTAET raises even more pointedly the question of UNTAET’s lack of democratic legitimacy and the participation of the local population.

4. Accountability: The Control of UNTAET’s Powers

It seems almost trite to say that, to be effective and not only theoretical, individual rights have to be enforced and enforceable. In addition, it is clear that where an entity wields almost unfettered power to govern a territory and its people, the potential for abuse of that power is imminent. Especially in the absence of an institutionalised system of checks and balances, and lacking a clear separation of powers, control mechanisms to prevent abuse by international organisations administering a territory are mandatory. The problem was formulated by the ICJ in the *Effects of Awards of Compensation Made by the UN Administrative Tribunal*, dating back to 1954. The Court opined that it would “hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation

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218 See J. Kokott, “Souveräne Gleichheit und Demokratie im Völkerrecht”, *ZaöRV* 64 (2004), 517 et seq. (527): “One pillar of an imperative of democracy in international law is the recognition of a right to self-determination not limited to the post-colonial context.” (Translation by the author).

219 On the difficulty of defining “democracy” as an international legal term see Kokott, see note 218, 527.

220 Compare J. Crawford, “Democracy and the body of international law”, in: *Fox/Roth*, see note 216, 91 et seq. (94); Wolfrum see note 110, 73.

221 Compare infra at V.

222 See Chopra, see note 55, 981.

of the UN to promote this aim” not to afford “judicial or arbitral remedy”. If one substitutes UN with UNTAET, the problem becomes all the more clear.

a. Internal Control Mechanisms

In relation to the observance of human rights norms by UNTAET, the jurisdiction of the East Timorese courts over UNTAET’s legislative and administrative acts was not clearly established. A special procedure for the review of the conformity of UNTAET regulations or directives, or other administrative actions, with human rights standards was not introduced. Unlike UNMIK, UNTAET did not promulgate rules which defined the privileges and immunities of its staff. In the absence of such specification, the general rules contained in the Convention on the Privileges and Immunities of the United Nations were applied. Thus, UNTAET officials enjoyed immunity from proceedings in local courts, which was waived only exceptionally if individual staff members were allegedly involved in serious human rights violations or other serious crimes.

Plans for the institution of an ombudsperson started being made by the transitional administration in winter 2000. However, a draft regulation proposed by UNTAET’s Human Rights Unit which would have authorised the ombudsperson to rescind administrative decisions that violated international human rights law did not meet with the approval of the Transitional Administrator. Nevertheless, an ombudsperson was eventually appointed around May 2001. Lacking a specific mandate...
by way of a regulation, or a formally established independent office, it remained largely ineffective.\textsuperscript{231} It engaged in some formal inquiries but was more limited in scope than the ombudsperson in Kosovo, lacking a mandate to investigate human rights and the institutional support of an organisation like the OSCE. Instead, it operated under restrictive terms of reference.\textsuperscript{232} Non-governmental organisations, such as Amnesty International, criticised the ineffectiveness of the institution, in particular the lack of a legislative framework.\textsuperscript{233}

To a limited extent, remedial action was possible in the form of filing complaints against the transitional administration with UNTAET’s Human Rights Unit,\textsuperscript{234} even though the procedure was never formalised and its effectiveness in terms of individual legal protection seems to have been minimal. This unit, whose exact position, functions and reporting lines remained largely unclear throughout UNTAET’s operation,\textsuperscript{235} was inter alia assigned the task of advising the Cabinet on the drafting of legislation with a view to ensuring that the legislation adopted complied with international human rights standards.\textsuperscript{236} With the establishment of the First Transitional Government,\textsuperscript{237} it remained with the Office of the Special Representative, rather than being incorporated into one of the newly formed ministries. In April 2001, a technical cooperation agreement was concluded between the High Commissioner for Human Rights (UNHCR) and the Special Representative. In terms of compliance with human rights standards by UNTAET, the agreement envisaged that the East Timorese and international staff of UNTAET’s Human Rights Unit would receive training in human

\textsuperscript{231} Chesterman, see note 11, 149-150.
\textsuperscript{232} Rawski, see note 228, 116, fn. 67. Compare Devereux, see note 155, 315, who states the terms of reference as being to monitor the fairness and legality of UNTAET’s implementation of its public administration and governance mandate and to take up complaints regarding UNTAET and its activities.
\textsuperscript{234} Chesterman, see note 11, 150.
\textsuperscript{235} Conflict Security & Development Group, King’s College London, see note 22, para. 325.
\textsuperscript{237} See infra at V. 5. c.
rights, that the UNHCHR would provide legal advice and assistance on draft legislation to ensure conformity with human rights standards, and would generally promote compliance with the principles of international human rights instruments.\textsuperscript{238} All things considered, one may say that the focus of the Human Rights Unit was that of capacity building and training, rather than providing a remedial process for the acts of UNTAET itself, a fact caused not least by its unclear strategy and function which left open the question whether it was to be part of the government and assist in capacity-building or whether it was to externally monitor UNTAET.\textsuperscript{239}

Finally, a possible control mechanism was the Timorese Office of the Inspector General. Formally established in November 2000, it exercised general oversight over the trust fund established by the World Bank.\textsuperscript{240} It was created following a demand by CNRT that the use of funds from the World Bank-administered Trust Fund for East Timor (TFET) be verified by an independent body.\textsuperscript{241} However, the Inspector General’s mandate was only temporary and informal.\textsuperscript{242}

**b. External Control Mechanisms**

One international mechanism that might have contributed to the control of UNTAET’s use of its powers may be the obligation to report to the Security Council. It was obliged to report once every six months,\textsuperscript{243} though UNTAET on the whole reported more frequently. One may justifiably have doubts about the effectiveness of a reporting system as a control mechanism in general, and in the context of territorial administration in particular. In the case of UNTAET at least, this mechanism seems to have been rather ineffective, not least because reports seem to have been mostly taken at face value,\textsuperscript{244} and not surprisingly so, given


\textsuperscript{239} Conflict Security & Development Group, King’s College London, see note 22, para. 327.

\textsuperscript{240} Chesterman, see note 11, 8.

\textsuperscript{241} Chesterman, see note 11, 150.

\textsuperscript{242} See the reports delivered by the Inspector General at <www.gov.east-timor.org/old/oig> (last visited on 13 December 2004).

\textsuperscript{243} S/RES/1272, see note 50, para. 18.

\textsuperscript{244} Chesterman, see note 11, 151.
that the Security Council can hardly be expected to keep a critical (and independent) eye on UNTAET as it was involved in its creation.\footnote{Wilde, see note 153, 457; O. Korhonen, “International Governance in Post-Conflict Situations”, \textit{LJIL} 14 (2001), 495 et seq. (501).} In addition, the reports delivered were not too critical as concerns the human rights performance.\footnote{Mégret/Hoffmann, see note 154, 337.} It is interesting to compare this situation to reports prepared under the trusteeship system, which have been under much closer scrutiny by the Trusteeship Council.

It has been rightly pointed out that the most obvious and convenient forum to address human rights breaches would seem to be international human rights organs.\footnote{Reinisch, see note 162, 139.} Indeed the UNHCHR issued several reports on the situation of human rights in East Timor during the international administration of the territory.\footnote{Report of the High Commissioner for Human Rights on the situation of human rights in East Timor, see note 236; The situation in East Timor during its transition to independence, Human rights questions: Report of the United Nations High Commissioner for Human Rights, see note 238; Report of the United Nations High Commissioner for Human Rights on the situation of human rights in East Timor, Doc. E/CN.4/2002/39 of 1 March 2002.} However, those reports said little on the protection of individual human rights against acts of the transitional administration and concentrated rather on capacity building issues.

The scrutiny by non-governmental organisations was critical, but necessarily remained on a rather general level. On the whole, there was no comprehensive international monitoring mechanism compensating for the lack of “internal” procedures to ensure respect for human rights.\footnote{See de Wet, see note 107, 325.}

c. Evaluation

Efforts by the transitional administration to ensure compliance with human rights and to guarantee the right to a remedy for the individual seem half-hearted and lacked consistency, especially if compared with the ombudsperson system in Kosovo. It can be noted positively that the Transitional Administrator guaranteed regular review of pre-trial detention, as well as a \textit{habeas corpus} procedure for challenging unlawful ar-
rest or detention. Additionally, some regulations provided for judicial review of executive decisions taken by UNTAET organs on the basis of these regulations in local courts. In such proceedings, the local court would apply the same substantive rules as would be applicable in the procedures for (internal) administrative matters.

However, on the whole, protection against acts of the transitional administration was hardly adequate to ensure compliance with international human rights standards. This inadequacy becomes even more painful as there is no justification for immunity of the United Nations when the organisation itself acts as government. In addition, the reasons why the scope of accountability was limited (e.g. the existence of a situation of "public emergency") was never made explicit. The lack of remedial possibilities and the far-reaching immunity of UNTAET personnel make it difficult to assess in how far the transitional administration actually complied with human rights standards for lack of documentation, e.g. in the form of court records.

It is thus apparent that, were an undertaking like UNTAET repeated, mechanisms for judicial review of the actions of a territorial administration would have to be improved, both on the internal level, i.e. the means available to the population concerned must be strengthened, as well as externally, meaning the oversight exercised by supervisory international bodies would have to be more consistent and critical. A reactivation of the Trusteeship Council, however, seems as im-

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250 UNTAET/REG/2000/30 of 25 September 2000 (Transitional Rules of Criminal Procedure), section 20.9: “The Investigating Judge shall review the detention of a suspect every thirty (30) days and issue orders for the further detention, substitute restrictive measures or for the release of the suspect”, and section 47 (Habeas Corpus, Procedure), in particular 47.3: “The Dili District Court has jurisdiction to decide any petition filed pursuant to the present Section. Any person acting on behalf of the arrested person or detainee and, if necessary, assisted by a legal representative, may file a petition for habeas corpus before any court in East Timor.”


252 See de Wet, see note 107, 325, at fn. 82.


254 See de Wet, see note 107, 323.

255 Frowein/ Krisch, see note 5, MN 22.
probable as undesirable, given its inextricable connection with the colonial past.  

5. A Modern Form of Colonialism? The Question of Local Participation

The mandate of UNTAET to prepare East Timor for independence and democratic governance on the one hand, and, on the other, the means and procedures by which this goal was to be accomplished, i.e. first and foremost the concentration of all powers in the hands of the Transitional Administrator, stood in palpable disparity. It is fair to say that the legal set-up of UNTAET indeed resembled the system of an absolutist monarchy, with the Transitional Administrator uniting all powers of government in his hands. Many practitioners working for the administration, as well as academic commentators, have hence raised the question of how the aim of preparing a territory for a democratic self-governance and instilling awareness for the need of a democratic society and a government based on the rule of law can be achieved if the agent of the international community governs with “benevolent autocracy”, or avails itself of “neo-colonialist” instruments.

The dangers of international administration organised in this fashion are clear: “Curtailment of autonomous decision-making, paternalism, degradation of an entire population to mere objects of intransparent decisions which will never be entirely free from self-interest, [and] ultimately the obstruction of learning processes”. One might add that

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258 Chesterman, see note 11, 127; Traub, see note 1, 75. For an especially sceptical account of UNTAET’s approach to East Timorese participation, see Chopra, see note 55, 979 et seq.

259 See Kreilkamp, see note 89, 620.

260 Oeter, see note 130, 427 (translation by the author).
the lack of accountability of international actors, and the absence of mechanisms through which this accountability may have been enforced, exacerbate accusations of despotism.\textsuperscript{261}

On the other hand, one has to be aware of the problems involved in encouraging participation: the political system present in the territory either has to be accepted and integrated in the state-building exercise as it is; or the political system needs to be intervened in and adapted to the vision of a newly constructed political system.\textsuperscript{262} If the first approach is adopted, critics will disapprove of unfairly favouring one particular organisation not necessarily representative of the population and (unavoidably) without democratic legitimacy. When opting for the second approach, allegations of neo-colonialism and interventionism are looming.

This underlying schism is also apparent in the case of East Timor: the Indonesian withdrawal had left East Timor with little or no professional middle class, given that during the time of Indonesian occupation, most middle-level and senior public servants were Indonesian and left the territory after Indonesia’s withdrawal.\textsuperscript{263} Participation exercises concentrated on the CNRT as the only identifiable coherent political entity in East Timor.\textsuperscript{264} At the same time, as an umbrella organisation of all resistance groups, it was deeply divided.

The guidelines given to UNTAET by the Security Council were of little help in resolving the problem. By vesting all authority with the transitional administration, S/RES/1272 did not, save in general terms, create an environment conducive to the involvement of the population in the decision making process. It contained only a vague and ambiguous reference to the involvement of the East Timorese people in the transitional administration:

"8. [The Security Council] [s]tresses the need for UNTAET to consult and cooperate closely with the East Timorese people in order to carry out its mandate effectively with a view to the development of local democratic institutions, including an independent East Timorese human rights institution, and the transfer to these institutions of its administrative and public service functions."

\textsuperscript{261} Compare Wilde, see note 153, 458.
\textsuperscript{262} Compare Chopra, see note 55, 997.
\textsuperscript{263} Conflict Security & Development Group, King’s College London, see note 22, para. 160.
\textsuperscript{264} Traub, see note 1, 87; Chesterman, see note 11, 135.
Even though this recognition of the need for consultation and cooperation was more far-reaching than that included in the Security Council resolutions establishing the UN missions in Eastern Slavonia and Kosovo, the very general reference to consultation requirements did not change the overall position that UNTAET held all power in its hands. Likewise, the failure to specify the meaning of “consult and cooperate closely” in the resolution gave UNTAET a wide discretion in the interpretation of this particular aspect of its mandate.265

The reserved stance on involvement of the local population is already apparent in the Secretary-General’s Report of 4 October 1999. Participation of the population in the work of UNTAET was not seen as a necessity implied in the principle of self-determination and hence binding on UNTAET as a matter of international law, but rather as a question of efficacy in terms of capacity-building. Accordingly, the report clearly perceived the process as a noncommittal consultation, rather than co-decision-making that would be gradually intensified until power was completely devolved:

“The effectiveness of UNTAET will rest on its ability to perform its duties in close consultation and cooperation with the people of East Timor, as it will have to exercise its authority on their behalf. In this context, the establishment of a permanent dialogue with representatives of the East Timorese people will be essential. Pending the holding of elections, the Special Representative will establish advisory bodies at all levels to ensure the participation of East Timorese in the governance and administration of the territory.”266

Only in terms of participation within UNTAET’s structures, under the supervision and authority of the Transitional Administrator, the Report mentioned that:

“[i]n all elements of the functioning of the governance and public administration elements of UNTAET, the United Nations will work on the basis of the principles of participation and capacity-building. This will involve assigning East Timorese to positions within the transitional administrative structures to be established ...”267

It is thus not surprising that participation of local actors within the administration started off somewhat unhurriedly: as has been pointed

265 Chesterman, see note 11, 137.
266 Para. 30.
267 Doc. S/1999/1024, see note 94, para. 47.
out above, East Timorese representatives were not involved during the planning phase before or immediately after the passing of S/RES/1272 in October 1999. Likewise, in the early stages of UNTAET’s operation, there seems to have been little or no participation of East Timorese in the work of the newly established transitional administration, despite the commitment to the “principles of participation and capacity-building”. Only support staff was recruited locally.

This may have been caused by different circumstances: first, planning and recruitment for UNTAET within the UN was not proceeding at the necessary pace regarding the composition and responsibilities of the transitional administration and the manner in which it would work with the East Timorese population. Second, an internal dispute within the United Nations slowed the process: the UN Department of Political Affairs had been in charge of overseeing the 5 May agreements and the subsequent popular consultation. The Department of Peacekeeping Operations took over with the deployment of INTERFET. Now, after the military intervention, a turf war commenced between the two departments, ultimately leaving the Department of Peacekeeping, which had little experience in East Timor and, in contrast to the Department of Political Affairs, virtually no local expertise or contacts, in charge of UNTAET. Third, the inherent necessities of the political process after the 5 May agreements apparently required the East Timorese resistance movement to keep a low profile in the governing structures of the transitional administration in deference to Indonesian sensibilities. Thus, even though the CNRT had requested that the East Timorese resistance movement be involved to a significant degree in the structure of the transitional administration, these proposals were essentially disregarded. Fourth, the United Nations was faced with

268 At V. 1.
270 Suhrke, see note 100, 10.
273 Suhrke, see note 100, 5.
274 Suhrke, see note 100, 9.
the difficult situation of not wanting to unduly influence the political process in East Timor by according too much influence to a resistance group that was not democratically legitimised and would have been given clear preference over other groups if used as the only channel for East Timorese participation.275

Approximately two months after the establishment of the transitional administration, the Transitional Administrator set up the first formal institution for implementing the dialogue requirement contained in the Security Council mandate. All things considered, one may distinguish between three phases of increasing participation by East Timorese elites, the fourth, as a logical consequence, being independence.276

It is important to note from the outset that this process can by no means be characterised as one of gradual delegation of power. The Transitional Administrator, save in the field of the administration of justice, did not gradually hand over more and more legislative and executive competencies to East Timorese institutions. Rather, he concentrated on creating structures and institutions with purely consultative functions. However, these institutions over time increasingly resembled those of a state, clearly with a view to preparing East Timor for self-government, and the procedures for consultation became more formalised and effective. They remained purely consultative nonetheless.277

a. Phase 1: The National Consultative Council

Following negotiations between UNTAET and the Timorese resistance, the transitional administration installed a non-elected body, the National Consultative Council (NCC),278 in December 1999, with the task of advising the Transitional Administrator on “on all matters related to the exercise of the Transitional Administrator’s executive and legislative

275 See Conflict Security & Development Group, King’s College London, see note 22, paras. 170 and 293.

276 See under VI.

277 This is at odds with the request expressed in S/RES/1338 (2001) of 31 January 2001, the resolution extending UNTAET’s mandate for the first time, to “delegate progressively further authority within the East Timor Transitional Administration (ETTA) to the East Timorese people until authority is fully transferred to the government of an independent State of East Timor,” (at para. 3).

functions”. It consisted of 15 members, four from UNTAET, including the Transitional Administrator who chaired the NCC. 11 members were to be East Timorese. The distribution of seats within the East Timorese group was intended to reflect the major political actors and elites in East Timor: seven representatives of the CNRT, three of other political groups outside the CNRT, and one representative of the Roman Catholic Church in East Timor. It seems that the three seats reserved for the “opposition” were never really filled, as they represented the pro-integration movement which had no political support in East Timor. New political parties which could have potentially challenged the views of the CNRT were not involved. Village and sub-district councils complemented the structure on the local level.

The regulation describes the NCC as “the primary mechanism through which the representatives of the people of East Timor shall actively participate in the decision making process ... and through which the views, concerns, traditions and interests of the East Timorese people will be represented”. Its functions were purely advisory, the final authority remaining with the Transitional Administrator.

b. Phase 2: The First Transitional Government: The National Council and the Cabinet

The second phase was first of all characterised by a change in name: on 14 July 2000, the NCC was dissolved and replaced by two bodies: the National Council (NC) and a Cabinet were established and, together with the Transitional Administrator, collectively referred to as the First Transitional Government, implying that institutions for a new state were created.

279 UNTAET/REG/1999/2, para. 1.1.
280 UNTAET/REG/1999/2, para. 2.6.
281 Critics have argued that these elites were essentially self appointed rather than representative: Chopra, see note 55, 999.
282 Chopra, see note 55, 990.
284 UNTAET/REG/1999/2, para. 1.2.
285 See UNTAET/REG/1999/2, para 1.3: “[The National Consultative Council] shall in no way prejudice the final authority of the Transitional Administrator in exercising the responsibilities vested in UNTAET ... .”.
287 Ingram, see note 257, 86.
The NC consisted of 33, later 36 members. Its members were all East Timorese, though appointed by the Special Representative. The NC had the competence to initiate, modify and recommend draft regulations, as well as to amend existing regulations. Though the Transitional Administrator formally retained final decision making authority, apparently none of the proposals made by the NC was vetoed by the Transitional Administrator. While the NCC had been concerned with both executive and legislative matters, the NC was established as the “forum for all legislative matters related to the exercise of the legislative authority of the Transitional Administrator”, the reason for this cutback in powers being that the executive branch was now given to the Cabinet. The mechanism for choosing the members of the NC was widely criticised by NGOs.

The nine-member “Cabinet of the Transitional Government in East Timor”, a body comprising both East Timorese leaders and international experts, replaced the third pillar of UNTAET, Governance and Public Administration (GPA). It headed the East Timor Transitional Administration (ETTA), and was designed to serve as a basis for a post-independence governmental structure. Of the nine posts initially established, four were reserved for East Timorese (Internal Administration, Infrastructure, Economic Affairs, and Social Affairs) and four to international experts (Police and Emergency Services, Political Affairs, Justice, and Finance); the Transitional Administrator served as the chair. As opposed to the NC, which was tasked with legislative functions, the Cabinet was entrusted with executive tasks. It will be noticed that the portfolios do not comprise the range of functions normally performed by a government. Cabinet members exercised broad discretion over the policy in their respective portfolios; major decisions were taken collectively.

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289 UNTAET/REG/2000/24, sec. 2.1 (a).
290 Chesterman, see note 11, 151; but see Ingram, see note 257, 87, who suggests that there were a few instances of disapproval by the Transitional Administrator.
291 Section 1.1.
292 Ingram, see note 257, 87.
294 Morrow/ White, see note 16, 6.
295 Ingram, see note 257, 90.
296 Ingram, see note 257, 87.
In October 2000, the NC was enlarged to 36 members and José Ramos-Horta was appointed cabinet member for Foreign Affairs, bringing the number of portfolios held by East Timorese up to five.297

c. Phase 3: The Second Transitional Government

In September 2001, the NC and Cabinet were supplanted by a Second Transitional Government,298 consisting of a Council of Ministers and an elected Constituent Assembly299 in an effort to lay the essential foundations for the political institutions of an independent East Timor.300

The Council of Ministers was led by a Chief Minister and had as task the supervision of the East Timor Public Administration (ETPA),301 which replaced ETTA. All members were appointed by the Transitional Administrator “after appropriate consultation with the elected representatives of the people of East Timor”,302 and were accountable to him.303 The Council had the power to recommend draft regulations and directives, and was to give advice to the Transitional Administrator on matters referred to it by the Administrator.304 All decisions taken by it, however, were subject to the review and approval of the Transitional Administrator, without which they had no legally binding effect.305 An additional safeguard for the absolute final decision-making power in relation to legislative and executive authority was provided in section 13 of Regulation No. 2001/28.306


299 UNTAET/REG/2001/2.

300 Ingram, see note 257, 87.

301 UNTAET/REG/2001/28, sec. 3.1 (b).

302 UNTAET/REG/2001/28, sec. 1.3.

303 UNTAET/REG/2001/28, sec. 1.5.

304 UNTAET/REG/2001/28, sec. 3.1 (c)-(e).

305 UNTAET/REG/2001/28, sec. 5.6.

The Constituent Assembly was the first democratically elected representative body in the history of East Timor with the primary task of drafting a constitution for an independent and democratic East Timor; it was largely dominated by Fretilin.307

d. Evaluation: The “Interventionist” and “Optimist” Approaches

Some UNTAET officials later criticised the early efforts to consult with the East Timorese population as “confused at best”, and lacking in clear strategy and concept.308 Others have argued that UNTAET seemed to compete directly with the East Timorese over roles in and control over the state-building process.309 “Capacity building” was perceived to necessarily begin with low-level education and involvement, disregarding the need to involve more senior levels of the East Timor elite. On the other hand, the strategy of gradual delegation of executive and legislative authority has also received praise, even though problems are acknowledged.310 However, even when the local population was increasingly allowed to participate in the governance of the territory, the instruments providing for such involvement never left a doubt that the final decision-making authority under UNTAET remained with the Transitional Administrator.

In the discussion on the appropriate (in political terms) and indispensable (in legal terms) level of the involvement of the local population, one can – with a certain generalisation – identify two broader competing approaches: the first, which one may somewhat pointedly classify as “interventionist”, more or less readily accepts that local participation in transitional administrations must be very limited for practical and political reasons, at least for a – more or less extended – initial period of “temporary imperialism”.311 Arguing that it is precisely the task of a transitional administration to fulfil (traditional state) functions that the local population cannot discharge for lack of capacity, it accepts that “[i]nternational engagement will sometimes abrogate the most basic rights to self-governance on a temporary basis”312 and that interna-
tional administrations are necessarily unaccountable to a large extent. If the local population had the political, military and economic means to provide for their security and economic development, there would be no need to create an international transitional administration in the first place. Consequently, “[c]ontemporary transitional administrations might benefit from being more, not less, colonial – even as that relationship is regarded as a temporary if necessary evil.” The rationale of intervention by the international community is not only to stop wars or assist in the rebuilding of state structures and institutions, but to “get foreign countries to do what the international community wants them to do”, i.e. to accept liberal, democratic and humanitarian values. “Ownership” of institutions by the local population, demanded in most critical assessments of transitional administrations, would only be the end, not the means of a transitional administration. International “peace-builders” are “state-builders”; they “serve as surrogate governing authorities for as long as it takes to implement the liberalizing reforms that the peace-builders themselves prescribe for war-shattered states”.

The second approach, called “optimist” here, is based on the legal analysis that the population in question has the right to self-determination. If this is taken seriously, transitional administrations by law have to enable the local population to participate meaningfully in the process of rebuilding their community. Moreover, it is argued that such participation from an early stage is also a prerequisite for a successful state-building exercise in terms of capacity-building and the legitimacy of institutions established by the administration. The important structural decisions, if they were to be accepted in an independent and politically self-reliant state, have to be made by the local popu-

313 Caplan, *International Governance*, see note 253, 199.
314 Chesterman, see note 11, 143.
315 Chesterman, see note 11, 47.
318 Chesterman, see note 11, 144.
319 Paris, see note 317, 206.
320 de Wet, see note 107, 329.
321 Compare Kreilkamp, see note 89 et seq. and Chopra, see note 55, 994 et seq.
It is thus essential that individuals employed by transitional administrations do not develop a “colonialist personal attitude”. The dangers of an undiluted “interventionist” approach are illustrated by the perception that the governed East Timorese population itself had of UNTAET. Some of the people staffing UNTAET have been somewhat cynically characterised as a “kind of A-team of international technocrats”, who did not care for the cultural context they were operating in. Moreover, the only gradual delegation of powers has been intensely criticised by the East Timorese society. The establishment of the NCC did little to satisfy East Timorese demands for participation in the decision-making process. As a high UNTAET official remarked: “[t]he Timorese thought they had little choice but to ratify whatever was put in front of them. They were essentially told ‘If you don’t do this, there’ll be dire consequences with no money to follow’.” Furthermore, the NCC’s procedure was criticised as too secretive, its composition as unrepresentative. The next step in East Timorese participation, the NC, was equally perceived as paying lip-service to the commitment of involving the local population and UNTAET accused of having established it only to give apparent legitimacy to its autocratic rule. Along the same lines, the Timorese Cabinet members complained of being:

“used as a justification for the delays and the confusion in a process which is outside our control. The East Timorese Cabinet members are caricatures of ministers in a government of a banana republic. They have no power, no duties, no resources to function adequately.”

This perception may have been exacerbated by the language barrier: most international staff did not have the requisite language skills to communicate with the local population in their mother tongue. Conse-

322 Morrow/ White, see note 16, 45.
323 Traub, see note 1, 82.
324 See Steele, see note 25, 84.
325 P. Galbraith, quoted in Steele, see note 25, 79.
326 See Bongjorno, see note 158, 657.
328 Quoted in Chesterman, see note 11, 140.
quently, by far the largest amount of the paperwork produced was in English, even until independence.329

Practical reasons may, however, indeed demand that the outside interveners, at least in the initial stages of the process, take all authority in their hands. Thus, in East Timor following the 1999 turmoil, the local workforce which could have provided UNTAET with skilled civil servants was scattered. Most civil servants in a senior position had been Indonesian or East Timorese affiliated to them, and had left the territory.330 One may thus come to the conclusion that, while not intended to be colonial, the relationship between international administrations and the local population is “inherently colonial” in character.331

What is needed in situations like East Timor seems to be a balancing effort between practical considerations and the overarching principle of self-determination. The right to self-determination has to be given effect wherever possible. Consultation is not only a matter of legitimacy, but also legality. On the other hand, it would be illusionary to try to integrate the population into the administration of the territory where no qualified people exist to discharge the duties at hand. Still, it seems clear that, if the transformation process that the transitional administration is to help initiate, organise, and steer towards a successful outcome, is to have a lasting effect, it is crucial that the local population have a stake in the creation of the structures of the new political community.332 Participation is vital for the ultimate success of the mission, i.e. a viable state structure, government and political community, and moreover is indispensable for the successful day-to-day administration of the territory under territorial administration.

However, as already indicated, transitional administrations face a problem in properly identifying persons who could legitimately speak for the “people” entitled to self-determination. Different factions normally exist within a social entity, with differing views for the future of their community. In the case of UNTAET, the territorial administration from the very beginning of operations had perceived the CNRT as the channel through which consultation with the East Timorese people could be implemented. The difficulties of this approach were identified by the Transitional Administrator:

329 Ingram, see note 257, 89.
330 Ingram, see note 257, 88.
331 Ignatieff, see note 311, 95.
332 Chesterman, see note 11, 143; Paris, see note 317, 210.
“The more powers conferred on local representatives, the closer power is to the people and thus the more legitimate the nature of the administration. But conferring power on non-elected local representatives can also have the undesired effect of furthering a particular party.”

A one-sided approach thus could work against the ideal of involvement of the population, i.e. to accurately reflect the will of the governed population, and could lead to a change in the political landscape. This would arguably have been at odds with the duty to assist the East Timorese to exercise their right to self-determination.

6. Administration of Justice and Judicial Post-Conflict Management

a. Reconstruction in the Justice Sector: Starting from a Tabula Rasa

The “CIA World Factbook” proclaims that East Timor’s legal system today is in essence a “UN-drafted legal system based on Indonesian law.” In many areas, this is true: section 165 of the East Timorese Constitution provides that “[l]aws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or the principles contained therein.” Given that the transitional administration has embarked on extensive legislative projects during its governance of the territory, many fields of law continue to be regulated, at least in part, by virtue of that constitutional provision.

UNTAET was faced with the task of building a judicial system virtually from scratch, as the court system, for practical purposes, had

ceased to function since judges, prosecutors and other legal specialists had left the territory. Thus, there were no East Timorese judges or prosecutors in East Timor on which UNTAET could have relied in building the East Timorese judiciary. In its efforts to reconstruct the system, it had to tackle three main issues: (1) the lack of qualified jurists; (2) the lack of infrastructure; and (3) the uncertainty about the applicable law. Its mandate included the “administration of the judiciary” and thereby tasked it not only with (re)constructing the judiciary of East Timor, but also with exercising the functions of the judiciary until a functioning judicial system was put in place. The complexity of the task due to these inauspicious circumstances was exacerbated by the only limited planning on justice issues.

**aa. Lack of Qualified Personnel**

Under Indonesian rule, no person from East Timor had been appointed as judge or prosecutor. To supervise the reconstruction effort, and to avoid allegations that the independence of the judiciary was compromised, the Transitional Administrator established a Transitional Judicial Service Commission with three East Timorese and two international members. It was chaired by an East Timorese member of “high moral standing”, and had the additional task of drafting codes of ethics for judges and prosecutors and serving as a disciplinary body reviewing complaints of misconduct. The search for qualified local lawyers was implemented by dropping leaflets from INTERFET planes.

On 7 January 2000, the first judges, prosecutors and public defenders of the District Court of Dili were appointed by the Transitional Administrator on recommendation of the Transitional Judicial Service Commission for an initial period of two years. None of these ap-

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336 Doc. S/1999/1024, see note 94, para. 33; compare also Conflict Security & Development Group, King’s College London, see note 22, para. 217.
337 See Conflict Security & Development Group, King’s College London, see note 22, para. 222.
338 Chesterman, see note 11, 170.
339 UNTAET Regulation 1999/3 of 3 December 1999, article 2.
341 Strohmeyer, see note 160, 263.
342 Linton, see note 163, 133.
pointees had previous experience in the area he or she had to work in. Interestingly, these appointments were effected before laws were in place defining their competencies and functions.\(^{343}\) This peculiarity made it necessary to retroactively “validate” some of the decisions taken by judges.\(^{344}\)

**bb. Lack of Infrastructure and Court System**

As a result of the post-ballot violence, virtually the entire judicial infrastructure, including most court buildings, judicial archives, records and legal literature had been destroyed.\(^{345}\) The fundamental legislative instrument for the reorganisation of the judicial system in East Timor is Regulation No. 2000/11.\(^{346}\) Most importantly, it vested *exclusive* judicial authority in the courts of East Timor, signalling that the Transitional Administrator delegated his judicial competence, while retaining the (legislative) authority to change the organisation and jurisdiction of courts. UNTAET established a civil law court system with eight (later: four) district courts and one Court of Appeal with its seat in Dili.\(^{347}\) The judges in the District Court of the capital, Dili, were to have jurisdiction throughout the entire territory of East Timor.\(^{348}\) A Public Prosecution Service was established in June 2000.\(^{349}\)

**cc. Uncertainty Concerning the Applicable Law**

In general, one may argue that the internationalisation of a territory, along with the creation of an international administration does not necessarily entail abrogation of all laws applicable before the intervention

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\(^{344}\) Linton, see note 163, 134.


\(^{348}\) UNTAET/REG/2000/11, sec. 7.3.

by the international community. Borrowing from the “rule of continuity” known from the law of occupation, it may be reasonable to argue that, as a matter of international law, all norms continue to apply in an internationalised territory until changed or abolished. It was the conscious decision of UNTAET to follow this principle, with certain exceptions.

As a matter of fact, other options were hardly attractive. The (re)enactment of Portuguese law as applicable until the occupation in 1975 was impractical and would have led to legal uncertainty, given that most East Timorese were familiar only with Indonesian law. Thus, the transitional administration determined by its first regulation that the laws applied in East Timor prior to 25 October 1999 (the date of the passing of Security Council Resolution 1272) shall apply under three conditions: (1) that they conformed to international human rights standards contained in instruments as specified in section 2 of the Regulations; (2) that they were not incompatible with the fulfilment of the mandate of UNTAET; and (3) that they were not replaced by this first or subsequent UNTAET Regulations, or subsequent legislation of democratically established institutions of East Timor. Several Indonesian laws were expressly identified and declared not applicable in East Timor as conflicting with the standards set out in section 2. In addition, capital punishment was abolished.

Thus, at least in theory, UN-originated law and domestic law complemented each other. In reality, however, UNTAET’s own legislation often turned out to be politically unenforceable (e.g. the regulations concerning offensive weapons and electoral offences). Some of the (still) applicable Indonesian law was equally problematic for political reasons and faced legitimacy and acceptance problems. In addition, Indonesian law in general was often marginalised by UNTAET itself.

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350 See article 64 Geneva Convention IV.
351 For this approach see Bothe/ Marauhn, see note 125, 154.
352 See already Doc. S/1999/1024, see note 94, para. 32.
353 Morrow/ White, see note 16, 7; Strohmeyer, see note 160, 267.
354 UNTAET/REG/1999/1, sec. 3.
355 UNTAET/REG/1999/1, sec. 3.2.
356 UNTAET/REG/1999/1, sec. 3.3.
358 Goldstone, see note 91, 91 and 93.
for practical reasons: developing its own regulations helped avoiding the problem of familiarising oneself with the Indonesian law and of assessing the conformity of such law with the applicable international human rights standards.359 This would have been a time-consuming exercise for which neither human resources nor legal expertise was present to a sufficient degree, and that was consequently never tackled.360 As a consequence, UNTAET was not in a position to strategically pick those parts from Indonesian law which would contribute to stabilising the situation as this law was well understood by East Timorese judges, lawyers and the police. This uncertainty regarding the applicable law did not make things easier for the newly appointed East Timorese judges and prosecutors.361

On the other hand, legislating “from scratch” in many areas of law proved to be practically impossible.362 In response to these problems, calls have been made to the effect that “model codes” should be developed and applied in UN peace operations, enabling the interveners to quickly react to situations where the existing law is problematic in terms of human rights.363 As attractive as this may seem at first sight, it is questionable whether a standard code concocted from ingredients taken from different legal systems would do justice to a territory with its particular legal and cultural traditions. Moreover, proposals for such model codes have mostly focused on criminal law and procedure. However, the problems described extend to all areas of law.

b. Coming to Terms with the Past: Post-Conflict Justice

While the International Commission of Inquiry on East Timor had called for the establishment of an international human rights tribunal

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359 Strohmeyer, see note 345, 59.
360 Morrow/White, see note 16, 9; Linton, see note 163, 137; Conflict Security & Development Group, King’s College London, see note 22, para. 226. Apparently, some efforts were made to systematically evaluate Indonesian law with a view to identifying those parts not compatible with human rights law, compare Strohmeyer, see note 160, 267.
362 Cf. Morrow/White, see note 16, 11.
for the judging of past crimes,\textsuperscript{364} it soon became clear that Indonesia
would not support such an institution and refused co-operation.\textsuperscript{365}
Prosecution of persons accused of serious crimes, therefore, remained
part of the domestic process both on the Indonesian and the East
Timorese side.\textsuperscript{366}

Accordingly, Regulation 2000/11 of 6 March 2000 that concerned
the functioning and organisation of the courts in East Timor during the
transitional period vested exclusive jurisdiction over genocide, crimes
against humanity, war crimes, and torture, as well as murder and sexual
offences committed between 1 January 1999 and 25 October 1999 in the
Dili District Court and the Court of Appeal in Dili.\textsuperscript{367} The cases con-
cerned were heard by mixed panels (commonly referred to as “special
panels”) composed of both East Timorese and international judges.\textsuperscript{368}
The exact procedure to be followed in the investigation, prosecution
and trial, as well as the precise definition of the crimes to be investi-
gated, were set out in Regulation 2000/15.\textsuperscript{369} Thus, a Panel at the Dili
District Court consisted of two international and one East Timorese
judge.\textsuperscript{370} A Panel in the Court of Appeal normally had the same set-up;
in cases of special importance or gravity, a panel of five judges com-
posed of three international and two East Timorese judges could be es-
tablished.\textsuperscript{371} The Panels started hearing cases in January 2001, and since
May 2002 have continued their work as part of the judicial system of
the independent Timor-Leste.

The prosecution of those cases was entrusted to a newly established
Deputy General Prosecutor for Serious Crimes, the principal official in

\textsuperscript{364} United Nations Office of the High Commissioner for Human Rights, see
note 48, para.153.
\textsuperscript{365} Chesterman, see note 11, 170.
\textsuperscript{366} As to Indonesia’s efforts to deal with these crimes, compare Othman, see
note 343, 103 et seq. and S. de Bertodano, “East Timor: Trials and Tribula-
tions”, in: C.P.R. Romano/ A. Nollkaemper/ J.K. Kleffner, \textit{International-
ized Criminal Courts and Tribunals}, 2004, 79 et seq. (92 et seq.); S. Linton,
“Unravelling the First Three Trials at Indonesia’s Ad Hoc Court for Hu-
man Rights Violations in East Timor”, \textit{LJIL} 17 (2004), 303 et seq.
\textsuperscript{367} UNTAET/REG/2000/11, sec. 10.
\textsuperscript{368} UNTAET/REG/2000/11, sec. 10.3.
Against Humanity, An analysis of UNTAET Regulation 15/2000”, \textit{Crimi-
nal Law Forum} 13 (2002), 1 et seq. and Kreß, see note 120.
\textsuperscript{370} UNTAET/REG/2000/15, sec. 22.1.
\textsuperscript{371} UNTAET/REG/2000/15, sec. 22.2.
charge of the Department of Prosecution of Serious Crimes. The Deputy General Prosecutor headed a Serious Crime Investigation Unit (SCIU), comprising criminal investigators, crime analysts and forensic experts.

Sadly, the operation of the Special Panels, as well as the Court of Appeal, has been marred since their inception, mostly by lack of resources, failure to make appointment of judges and by lack of cooperation by Indonesia. The outcome of the trials to date has thus not received unqualified praise.

As stated, the applicable law was and is far from clear. In addition to the uncertainties caused by the failure of Regulation 1999/1 to explicitly identify the applicable law, the case law of the Court of Appeal did not help to ease the problem. An extremely problematic decision in 2003 held that Indonesian law, which continues to be in force by way of section 165 of the Constitution and Regulation 1999/1, was not applicable. According to the Court’s reasoning, this statement was not limited to the case at hand, but concerned the applicability of Indonesian law in East Timor in general. Instead, Portuguese law was applied. Even more important, the Court held that Regulation 2000/15, defining the jurisdiction over international crimes, could not be applied to acts performed before this Regulation was enacted as a consequence of the principle *nullum crimen sine lege*, enshrined in section 31 of the Constitution.

To make matters worse, international cooperation in terms of funding and appointment of judges was far from satisfactory: until July 2003, the panels were seriously understaffed, never allowing for more than one trial panel to sit at once. At the beginning of 2003, there was

373 Othmann, see note 361, 464.
375 de Bertodano, see note 366, 80.
377 Steele, see note 25, 81; de Bertodano, see note 366, 87; Othman, see note 361, 463.
only a single panel operating; by early April, the departure of one of the international judges even prohibited this panel from continuing its work, until three more international judges were appointed in April 2003.

To complement the judicial mechanisms, a Commission for Reception, Truth and Reconciliation was established. It linked the need for reconciliation with the need for reconstruction, in an effort to induce refugees in West Timor to return. Its objective is “to promote national reconciliation and healing following the years of political conflict in East Timor, and in particular, following the atrocities committed in 1999” by “establishing the truth regarding the commission of human rights violations”. The Commission had the competence to establish so-called “Community Reconciliation Processes” that barred civil liability and prosecution for crimes not judged as “serious”, such as theft, minor assault, arson and property damage. No provision for granting an amnesty exceeding this limited “immunity” is made. The General Prosecutor and the Serious Crimes Panels, though, retained exclusive jurisdiction for serious crimes.

Under this process, a person responsible for criminal or non-criminal acts committed within the context of the political conflict in East Timor between 25 April 1975 and 25 October 1999 may exempt him- or herself from court proceedings. The person, called “Deponent” initiates the process with a written statement to the Commission comprising inter alia a full description of the facts, an admission of responsibility, and a request to participate in a Community Reconciliation Process. Following a public hearing, the Commission proposes an “act of reconciliation”, which the Deponent has to accept; a Commu-

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379 Chesterman, see note 11, 158.
382 UNTAET/REG/2001/10, Schedule 1; Linton, see note 163, 148.
383 See B.S. Lyons, “Getting Untrapped, Struggling for Truths: The Commission for Reception, Truth and Reconciliation (CAVR) in East Timor”, in: Romano, see note e 366, 100 et seq. (108).
384 UNTAET/REG/2001/10, sec. 22.2.
The Commission, at the time of writing in the last months of its operation, is preparing a final report expected to be delivered to the President of Timor-Leste before 7 July 2005.

Maybe prompted by the unsatisfactory progress of the process of post-conflict reconciliation and justice, the Secretary-General decided to set up a Commission of Experts with the task of conducting “a thorough assessment” of the “processes involving the Ad Hoc Human Rights Tribunal in Jakarta ... and the Serious Crimes Unit and the Special Panels for serious crimes in Dili”. In addition, Indonesia and East Timor agreed on the establishment of a joint Truth and Friendship Commission to deal with human rights abuses perpetrated in 1999 and other bilateral issues.

VI. Independence and Continuing State-Building

1. Preparations for Independence: The Constituent Assembly and the Drafting of the Constitution

UNTAET’s mandate did not explicitly include the initiation of a constitution-making process; neither are constitutions generally speaking a necessary prerequisite for a country’s independence. However, the Report of the Secretary-General of 4 October 1999 enumerated among UNTAET’s objectives “to assist the East Timorese in the development of a constitution”. Furthermore, it was a generally held conviction in UNTAET that a hand-over of power to the East Timorese would only be possible after a constitutional framework was in place to steer the first steps of the newly independent state. After playing with the idea of entrusting the drafting of the future constitution of East Timor to a

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386 See UNTAET/REG/2001/20, secs 27.7 and 27.8.
387 UNTAET/REG/2001/20, sec. 28.
389 Id., para. 7.
390 Para 29 (e).
391 Morrow/ White, see note 16, 33, fn. 139.
committee appointed by the Transitional Administrator, it was decided that an elected body should be in charge after CNRT and the National Council had expressed their support for an election of the members. In addition to the fact that elections have been described as the preferred mechanism for handing over power from an “undemocratic” international administration to a democratic and locally legitimate government, they, at least in theory, may be a means to include local actors in a state-building and peace-building effort, gaining their support for the desired change in governmental structure and system.

A regulation concerning the election of the Constituent Assembly, scheduled for 30 August, was promulgated on 16 March 2001 that formed the basis for the preparation of the electoral roll. It went hand in hand with the passing of a regulation on electoral offences, a directive providing for the procedure to follow in consulting with the East Timorese people on the contents of the future constitution, as well as the establishment of an Independent Electoral Commission entrusted with preparing and conducting the elections. In addition, the Constituent Assembly replaced the NC; unlike its predecessor, it did not have the power to initiate Regulations.

On the same day as the promulgation of UNTAET/REG/2001/2, civil registration of all residents began and by 23 June 737,811 people had registered. On 30 August 2001, two years after the Popular Consultation, more than 91 per cent of East Timor’s eligible voters elected an 88-member Constituent Assembly tasked with writing and adopting a new Constitution and establishing the framework for future elections and a transition to full independence.

Out of the members of the Constituent Assembly, 75 were elected on a nation-wide basis by proportional representation. The election proceeded from the basis of closed party lists. Thirteen seats were given to directly elected candidates from the 13 electoral districts. In an effort at “electoral engineering”, the fact that the large majority of seats was elected by proportional representation was intended to reduce the

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392 See Morrow/ White, see note 16, 34.
393 Chesterman, see note 11, 205-206.
394 UNTAET/REG/2001/2.
likelihood of Fretilin winning a large majority, not seen as healthy for an emerging democracy. Female candidates were not given special treatment, be it that a party list had to include a particular number of women, or that a particular number of seats was reserved for women. Sixteen political parties, five national independent candidates and 11 district independent candidates took part in the elections. As expected, Fretilin emerged as the clear winner of the elections, gaining 55 out of 88 seats. Sixty votes were necessary for the adoption of the final document.

The original timetable envisaged 90 days for the drafting of the Constitution; this was later extended by three months. Thirteen constitutional commissions were established by a directive – ironically, the draft regulation intended to set up the commissions was the only one to be refused approval by the National Council to conduct popular consultations, which were implemented by holding several public meetings throughout East Timor.

The role of UNTAET in the actual drafting process does not seem to have been disproportionately meddling. It was a conscious decision to leave the discussion on the future shape of the East Timorese governmental system to the people. The transitional administration warranted that the infrastructure of the Assembly was adequate and included properly qualified international advisers to follow the drafting process. If UNTAET deemed it necessary and appropriate, it made comments on procedural or substantive issues. To this end, UNTAET utilised the consultative mechanisms of the Constituent Assembly, which had been originally intended to enable the East Timorese public to provide the Assembly with input.

398 See Chesterman, see note 11, 216.
399 See Chesterman, see note 11, 217.
400 C. Valenzuela, “Towards Elections” in: Azimi/ Chang, see note 257, 179 et seq.
401 Conflict Security & Development Group, King’s College London, see note 22, para. 317.
403 See Morrow/ White, see note 16, 40.
404 Morrow/ White, see note 16, 36.
405 Morrow/ White, see note 16, 41. See also Devereux, see note 155, 310.
The final draft of the Constitution was put to vote on 22 March 2002. Of the 88 votes, 73 were cast in favour, 14 against, with 1 abstention.\footnote{Morrow/White, see note 16, fn. 155.}

2. First (presidential) Elections and Independence of East Timor

On 14 April 2002, Xanana Gusmão was elected first president of East Timor with an overwhelming majority of 82.7 per cent. On 20 May 2002, East Timor gained its independence. At the same time, the Constituent Assembly was transformed into East Timor’s first parliament. In a controversial move, the Constituent Assembly decided to insert a provision into the Constitution providing that “[t]he Constitutional Assembly shall be transformed into a National Parliament with the entering into force of the Constitution of the Republic.”\footnote{Section 167(1). See the criticism of Saldanha/Magno, see note 327, 165.} This provision was sanctioned by UNTAET/REG/2001/2 which provided that “[t]he Constituent Assembly shall become the legislature of an independent East Timor, if so provided in the Constitution”. This transformation seems problematic judged by democratic standards, as the legislature-in-waiting defined the scope of its own (future) powers. However, even though Fretilin had clearly won the elections to the Constituent Assembly, they did not have the two-thirds majority required to amend the constitution.\footnote{Section 155 of the Constitution.}

The state building efforts of UNTAET continue to shape the new political system: apart from Section 165 of the Constitution, which extends the applicability of UNTAET Regulations to the period after independence, the Constitution determines that the judicial system established by the transitional administration shall remain operational until replaced by new East Timorese institutions.\footnote{Section 163 (2).}
3. UNMISET and UNOTIL

On 20 May 2002, with East Timor’s independence, UNMISET replaced UNTAET. As already alluded to in Security Council Resolution 1338, Security Council Resolution 1410 establishing the follow-up mission recognised that:

“the emerging institutions in East Timor remain fragile and that in the period immediately after independence assistance will be required to ensure sustained momentum in the development and strengthening of East Timor’s infrastructure, public administration, law enforcement and defence capacities”.

The mission was established for an initial period of 12 months. Its mandate was originally threefold: to provide assistance to core administrative structures critical to the viability and political stability of East Timor; to provide interim law enforcement and public security and to assist in developing the East Timor Police Service (ETPS); and contribute to the maintenance of the new country’s external and internal security. This new mission marked the transition from a “territorial administration” to what could be called a “co-administration” of territories.

UNMISET was headed by a Special Representative of the Secretary-General and consisted of three components: (a) a civilian component; (b) a civilian police component; and (c) a military component. With a view to giving it a “robust mandate”, UNMISET received a Chapter VII authorisation to “take the necessary actions, for the duration of its mandate, to fulfil its mandate”. This authorisation was given without the explicit determination of a threat to the peace in the resolution. The mandate entailed that the Special Representative still had considerable influence and decision-making power with respect to several core administrative functions, e.g. financial and central services; internal systems of the Council of Ministers; the Chief Minister’s office and various other ministries; essential services such as water and sanitation and the judicial system.

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412 S/RES/1410, see note 410, preambular para. 6.
413 See de Wet, see note 110, 304.
414 S/RES/1410, see note 410, para. 6.
415 See Doc. S/2002/432, paras 69 and 70; de Wet, see note 107, 312.
UNMISET’s mandate was extended by Security Council Resolution 1543 (2004)\textsuperscript{416} for another six months, with a view to subsequently extending it for a further and final period of another six months until 20 May 2005. This happened with Security Council Resolution 1573 (2004).\textsuperscript{417} The latter two resolutions rearranged the mission’s mandate as follows: (i) support for the public administration and justice system of East Timor and for justice in the area of serious crimes; (ii) support to the development of law enforcement in East Timor; and (iii) support for the security and stability of East Timor.

Despite the significant reduction in powers as compared to UNTAET, UNMISET still played a decisive role in East Timor. The feeling of being under colonial “rule” apparently persisted.\textsuperscript{418}

On 20 May 2005, UNMISET’s mandate finally expired.\textsuperscript{419} As a one-year follow-on special political mission, the Security Council established UNOTIL, which will remain in Timor-Leste until 20 May 2006.\textsuperscript{420} Its mandate is to support the development of critical state-institutions and the police, as well as to provide training in the observance of democratic governance and human rights.

VII. “An Exercise in Adapting Ideals to Painful Realities”\textsuperscript{421} Evaluation and Concluding Remarks

In East Timor, the United Nations completed the process of decolonisation, a task abandoned by Portugal and interrupted by Indonesia.\textsuperscript{422} Besides being a case of “delayed decolonisation”, East Timor is unique in terms of premises and shape of United Nations involvement. For this reason, it is rather difficult to compare East Timor with other instances of United Nations administration or involvement in post-conflict reconstruction, for instance in Iraq. There, the role of the United Nations

\begin{itemize}
\item \textsuperscript{416} 14 May 2004.
\item \textsuperscript{417} 16 November 2004.
\item \textsuperscript{418} K. Ishizuka, “Peacekeeping in East Timor: The Experience of UNMISET”, \textit{International Peacekeeping} 10 (2003), 44 et seq. (54).
\item \textsuperscript{420} S/RES/1599 (2005) of 28 April 2005.
\item \textsuperscript{421} Traub, see note 1, 82.
\item \textsuperscript{422} Chesterman, see note 11, 239.
\end{itemize}
is limited at best, and political will to expand United Nations engagement seems modest within the Iraqi government, the Coalition and the United Nations itself, given the security situation.

The political premises that UNTAET was starting from were favourable. First, one may say that UNTAET enjoyed unique legitimacy, as it was given the mandate to administer East Timor by the two states that legally or factually could claim title to the territory, by the international community in the form of a Chapter VII resolution, and, last but not least, by the population itself that had voted for “regime change” in East Timor. Second, East Timor was not split by ethnic divides or internal conflict at the time of UN administration. East Timor was free of serious internal conflict, and the United Nations enjoyed broad support from the East Timorese population and leadership. No other UN mission in a post-conflict and state-building context could rely on factors so advantageous. On the other hand, the task of reconstruction was daunting: the United Nations was not able to rely on existing local administrative structures; many local records, administrative systems and management structures had been destroyed, disrupted or displaced during the post-referendum violence, so that public administration had to be built from scratch.

Commentators overwhelmingly regard the work of UNTAET as a success. Some critics add that UNTAET indeed was a success, but only for the United Nations, and not for the East Timorese. As a matter of fact, the statistical data is sobering: sixty percent of adults are illiterate. Over 40 per cent of children are moderately or severely underweight. Infant mortality rates are estimated at 8.8 per cent.

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423 See Wolfrum, see note 110, 71.
424 Conflict Security & Development Group, King’s College London, see note 22, para. 160.
425 Compare Conflict Security & Development Group, King’s College London, see note 22, para. 163.
426 See only Chesterman, see note 11, 174; Morrow/ White, see note 16, 44; Steele, see note 25, 86.
per cent of the population live below the poverty line.\textsuperscript{428} The first UNDP National Human Development Report found that Timor-Leste is officially Asia’s poorest country,\textsuperscript{429} with a GNI per capita of 430 US\$ and a GDP of only 360 million US\$ for the year 2003.\textsuperscript{430} According to World Bank estimates, at the end of 2003, unemployment among urban males was at least 20 per cent, surpassing 40 per cent among those aged between 15 and 24. The economy contracted by about three per cent in 2003.\textsuperscript{431} As the international presence was further reduced, reconstruction projects were executed at a slower pace than expected, and substantial flood damage to the crops (following a delayed 2002 rainy season) lowered agricultural production. Further economic problems have been created by the downsizing of the United Nations presence in the country. “Dili appeared to be a wholly owned subsidiary of the international development community”.\textsuperscript{432} East Timor will evidently have to rely on outside help for many years or decades to come.

In the light of these facts, do we have to conclude that UNTAET has given birth to a failed state?\textsuperscript{433} The answer is a clear “no”. East Timor’s economic problems were neither caused by the United Nations nor could they have been solved by it in the short period of time available to it. Academic commentators run the risk of asking too much both of the local population in post-conflict territories, and the United Nations as a “state-builder”. The building of a sustainable institutional infrastructure takes time.\textsuperscript{434} One must have legitimate doubts whether it is “possible, in a few short years, to found institutions and infuse a set


\textsuperscript{431} S. Donnan, “Complications follow the painful birth of East Timor: Despite growing stability, the world’s newest country is still facing long-term challenges”, Financial Times of 4 December 2003, 12.

\textsuperscript{432} Traub, see note 1, 84.

\textsuperscript{433} See Chopra, see note 55, 999.

\textsuperscript{434} Compare Conflict Security & Development Group, King’s College London, see note 22, para. 210.
of values and habits that normally accrete over generations." More-
over, even though, as an international lawyer, it is intriguing to look at
the legal framework governing missions such as UNTAET, and to dis-
cuss rules governing the implementation of its mandate, at the end of
the day, one has to humbly admit that carrying out the functions ex-
pected from UNTAET was extremely difficult and sometimes did not
allow for paying respect to the lofty ideals and rules even if the good-
will was there. The broad powers granted to UNTAET did not auto-
matically entail the capacity to exercise them. Responding to criti-
cism, the Transitional Administrator for both Kosovo and East Timor,
the late Sergio Vieira de Mello, thus “criticised the critics”:

“In recent years, a small industry has grown up around conferences
and academic papers on governance and post-conflict peace build-
ing. The lessons of the seminars and papers seem very remote when
one actually has to practice governance.”

This may be true in particular with respect to the observance of hu-
man rights by transitional administrations. As Strohmeyer remarks, “it
should be clear that in complex emergencies such as ... East Timor the
international community must balance the necessity of implementing
human rights guarantees against the enormity and multiplicity of chal-
lenges facing a mission”.

While these explanations by insiders are certainly valid, and without
attempting to belittle the enormous task that UNTAET was faced with,
there are, however, a few principles that may enhance the legitimacy
and success of future UN engagement in “state-building” efforts if re-
peated with the intensity of UNTAET:

1. First, it is essential that the “balancing process” between individ-
ual rights and practical exigencies be made transparent. The transitional
administration has to state openly which international guarantees it
cannot fulfil due to practical constraints in an incontestably exceptional
situation.

2. Second, a clear accountability regime has to be installed and to be
available and effective to prevent the perception among the local popu-

435 Traub, see note 1, 75.
436 Conflicts Security & Development Group, King’s College London, see note 22, para. 291.
437 de Mello, see note 333.
438 Strohmeyer, see note 340, 121.
lation that territorial administration by international actors is a “paternalistic, imperialist” undertaking.\footnote{See Wilde, see note 153, 460.}

3. Third, the same transparency and openness needs to be applied with respect to the question of involvement of the local population: on the one hand, the mechanisms with which such participation is to be effected need to be made clear; on the other hand, the time-table for a gradual handing over of power must equally be explained.

4. Finally, it is crucial that the international commitment is well planned, and, also in financial terms, strong and sustainable. In the context of East Timor, this may mean that the UN’s business will not be finished after UNMISET’s mandate finally ends in May 2005.

The Secretary-General, in his latest progress report of 18 February 2005, emphasised that a “premature termination of the tasks ... may jeopardize [the truly remarkable] achievements as well as the significant investment that the international community has made in Timor-Leste since 1999”. Building a state takes time: \textit{Roma non fu fatta in un giorno}.\footnote{See Wilde, see note 153, 460.}