

The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law

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* The author would like to thank Ward Ferdinandusse, Jann Kleffner, Hege Elisabeth Kjos, André Nollkaemper, Nwamaka Okany and Fabian Raimondo for comments on earlier drafts of this text. The article was written as part of the research project *Interactions between International Law and National Law*, funded by the Netherlands Organization for Scientific Research.

I. Introduction

In the following article the concept of “direct administration” refers to the governance of a territory by an external entity on the authority of the United Nations Security Council. The “directness” of such an administration relates, in particular, to the directly applicable nature of the decisions of the external entity in the national legal order of the affected entity. Although the external entity usually takes the form of a Special Representative of the United Nations, the article will illustrate that such direct administration is also sometimes undertaken by Member States. It will further illustrate that it is possible to distinguish between fully-fledged administrations and co-administrations, depending on the scope of the direct administration in question. In instances where some form of domestic government continues to exist alongside the United Nations-authorized administration, the latter can be described as a co-administration. The term “fully-fledged administration” is reserved for those instances where the United Nations-authorized administration is the sole governmental authority in a particular territory. The terms “fully-fledged” and “co-administration” are used to indicate the gradual differences in the scope of direct administrations that are authorized by the United Nations. It is not, however, intended to describe the nature (i.e. executive, legal, judicial) of the decisions made by these administrations, as any of these decisions can fall within the mandate of either a fully-fledged or a co-administration.

Security Council-authorized direct and co-administrations emerged in the post Cold War era. Resolutions resulting in such direct administration include those authorizing the United Nations Transitional Authority in Cambodia (UNTAC) in 1992¹; the United Nations Operation in Somalia (UNOSOM II) of 1993²; the institution of the High-Representative for Bosnia-Herzegovina in 1995³; the United Nations Transitional Authority in Eastern Slavonia, Baranja, Western Sirmium

¹ This mandate was endorsed by S/RES/745 (1992) of 28 February 1992, paras 1 et seq. See F.E. Hufnagel, *UN-Friedensoperationen der zweiten Generation. Vom Puffer zur Neuen Treuhand* 1996, 138.

² S/RES/814 (1993) of 26 March 1993.

³ See S/RES/1031 (1995) of 15 December 1995, para. 27; the General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 10, article 5, available at <www.ohr.int>.

(UNTAES);⁴ the United Nations Interim Administration Mission in Kosovo (UNMIK) in 1999;⁵ the United Nations Transitional Administration in East Timor (UNTAET);⁶ and the administration of Iraq by the Coalition Provisional Authority (CPA) in 2003.⁷

Although these particular types of Security Council-authorized administrations only emerged in the post Cold War era, other forms of external direct administration of territories were not uncommon during the twentieth century. One of the most well-known examples concerns the administration of the Saar Territory by the League of Nations after World War I. In accordance with certain responsibilities outlined in the Treaty of Versailles, the League of Nations administered the disputed territory from 1920 to 1935. This administration included legislative competencies, despite the fact that it legally remained under German sovereignty during that time.⁸ Similarly, the League of Nations assumed significant responsibilities with respect to the Free City of Danzig. In this case, however, the League acted mainly as a mediator of disputes between Danzig and Poland and as a guarantor of Danzig's constitution and independence.⁹

After World War II, the Berlin Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany of 5 June 1945¹⁰ attributed to the Allied Powers the supreme

⁴ Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium, S/RES/1037 (1996) of 15 January 1996 and Doc.S/1995/951, Annex. This agreement, which is hereinafter referred to as Basic Agreement entered into force on 22 November 1995; A. Zimmermann/ C. Stahn, "Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the current and future legal status of Kosovo", *Nord. J. Int'l. L.* 70 (2001), 423 et seq. (433).

⁵ S/RES/1244 (1999) of 10 June 1999, paras 1 et seq.

⁶ S/RES/1272 (1999) of 25 October 1999, para. 1 et seq.

⁷ S/RES/1483 (2003) of 22 May 2003, para. 4.

⁸ German authority over the territory was reinstated on 13 January 1925, following the outcome of a referendum in accordance with which the majority of the population favoured reunification with Germany. See Treaty of Peace between the Principal Allied and Associated Powers and Germany ("Treaty of Versailles") of 28 June 1919, Part III, Section IV, Annex, article 19. See also Zimmermann/ Stahn, see note 4, 436.

⁹ Zimmermann/ Stahn, see note 4, 430.

¹⁰ See I. von Münch, *Dokumente des geteilten Deutschland* 1968, 19.

authority over Germany.¹¹ Subsequently, the Potsdam Accords resulted in far-reaching interferences with Germany's system of governance.¹² The United Nations, for its part, were entrusted with governing the former colonial territories of Japan and Italy. Territories such as Eritrea, Italian Somaliland, Libya and the Japanese islands in the Pacific became part of the United Nations trusteeship system, in accordance with which they were administered by individual states such as the United Kingdom and the United States.¹³

The current article will, however, confine itself to certain legal questions raised by the post Cold War direct administrations that were authorized by the Security Council. The first concerns the legal basis for such administrations, as it is not explicitly provided for in the United Nations Charter (the Charter). The relevance of such an examination is reflected by the breadth of the decision-making undertaken by those acting on the authority of the Security Council in these circumstances. For example, it *inter alia*, resulted in regulations ranging from the introduction of the substantive provisions of the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods into domestic law in Kosovo;¹⁴ to extensive banking and telecommunication reform in East Timor;¹⁵ and even to the development of

¹¹ C. Tomuschat, "Yugoslavia's Damaged Sovereignty over the Province of Kosovo, in *State, Sovereignty and International Governance*", in: G.P.H. Kreijen et al. (eds), *State, Sovereignty and International Governance* 2002, 336.

¹² The text of the Potsdam Accords are reprinted in von Münch, see note 10, 32; see also Tomuschat, see note 11, 336.

¹³ Less successful early attempts by the United Nations to engage in direct administration included the administration of Trieste and Palestine, respectively. The multilateral peace treaty with Italy after World War II had authorized the Security Council to approve a provisional regime and appoint a governor to administer the Free Territory of Trieste, but early Cold War rivalries prevented the appointment of a governor. The status of Trieste was eventually resolved in the Memorandum of Understanding between the Governments of Italy, the United Kingdom, the United States and Yugoslavia regarding the Free Territory of Trieste of 5 October 1954, UNTS Vol. 235 No. 3297. The General Assembly's partition plan for Palestine had called for the creation of a *corpus separatum* for Jerusalem under a special international regime administered by the Trusteeship Council, but the Arab states and Israel ultimately rejected the plan. See Doc. T/L.78 (1950); Zimmermann/ Stahn, see note 4, 430 et seq.; Tomuschat, see note 11, 336.

¹⁴ UNMIK/REG/ 2000/68 of 29 December 2000.

¹⁵ UNTAET/REG/2001/30 of 30 November 2001.

a free market economy in Iraq.¹⁶ As these decisions could effectively result in the introduction of comprehensive amendments in all areas of law, the question as to their legal basis becomes pertinent.

The second question to be addressed concerns the implications of the direct (co-) administrations for the national legal order. By authorizing the external entity to adopt directly applicable binding decisions, the Security Council deviated from the traditional public international law principle that leaves the implementation to domestic legal systems to determine the implementation of international obligations – including those stemming from the Security Council.¹⁷ Academic literature has thus far paid scant attention to this development. It has hardly explored the legal basis for this deviation (a question closely related to the first main question to be addressed in this article), nor has it paid any attention to the problems arising from the possible inalterability of directly applicable decisions, due to their overriding character. The question arises whether the superior legal framework within which Chapter VII authorized (co-) administrations function would prevent their decisions from subsequently being amended by the domestic governments in the post-administration phase without the consent of the Security Council.

Sections III. and IV. explore the legal basis for territorial administrations by the United Nations or Member States acting on its behalf. This includes a distinction between the implied and customary powers of the United Nations, as well as the potential role of automatic succession to treaties and the law of occupation as a basis for direct (co-) administration.¹⁸ Subsequently Section V. examines some of the implications of

¹⁶ As concretized, inter alia, by the extensive modernization of the banking system and the licensing of commercial telecommunications services and equipment. See CPA/ORD/7 June 2003/12; CPA/ORD/19 September 2003/40, including Annex A; CPA/ORD/8 June 2003/11.

¹⁷ Zimmermann/ Stahn, see note 4, 441.

¹⁸ The article does not deal with the question whether the Security Council could adopt coercive measures against non-Member States. This question nonetheless may arise, given the fact that East Timor was not a member of the United Nations at the time S/RES/1272 was adopted, whilst the status of the Federal Republic of Yugoslavia (FRY) at the time of the adoption of S/RES/1244 remains disputed until this day. For an explanation why the Security Council had the competence to adopt Chapter VII measures in the specific instances of East Timor and the former FRY, see E. De Wet, *The Chapter VII Powers of the United Nations Security Council*, 2004, 236 et seq. and 318 et seq. For a detailed analysis on the issue of state succession

the direct (co-) administrations of territories for the domestic legal order. It explores, in particular, if and to what extent the Security Council-authorized administrations may directly penetrate the domestic order, as well as whether the directly applicable decisions resulting from such penetration would be of an “inalterable” nature.

II. United Nations-Authorized Administrations in the Post Cold War Era

At the outset of this section, mention should be made of the United Nations Transition Assistance Group (UNTAG) of 1988.¹⁹ Although UNTAG did not amount to a system of direct (co-) administration, it did pave the way for such administrations. In this instance, the mandate did not yet include direct execution of governmental functions, as it was directed at supervision and guidance of the South African administration in Namibia.²⁰ In the area of legislation, UNTAG’s role was limited to advising and monitoring the South African Administrator-General on the removal of discriminatory legislation that could influence the holding of free and fair elections.²¹ It further oversaw the repatriation of refugees and the release of political prisoners and detainees, in order to facilitate their participation in the electoral process.²² The Executive branch remained under the direct control of the South African authority, since UNTAG’s role was restricted to the monitoring of the police. UNTAG had no mandate in relation to the judiciary which remained under the complete control of the South African authority.²³ On the one hand, UNTAG’s mandate still followed the traditional

and its consequences for the former Yugoslav republics, see A. Zimmermann, *Staatennachfolge in völkerrechtliche Verträge*, 2000, 599 et seq.

¹⁹ Although the Security Council already authorized its creation in S/RES/435 (1978) of 29 September 1978, its actual establishment was prevented by the lack of cooperation by South Africa until 1988.

²⁰ Hufnagel, see note 1, 65.

²¹ Hufnagel, see note 1, 67. This advisory power ultimately led to the removal of 56 discriminatory laws.

²² Hufnagel, see note 1, 69; C. Stahn, “International Territorial Administration in the former Yugoslavia: Origins, Developments and Challenges ahead”, *ZaöRV* 61 (2001), 108 et seq. (125 et seq.).

²³ Hufnagel, see note 1, 65.

model according to which the manner of implementation of international obligations were left to the domestic authorities. On the other hand, it triggered a process of involvement of the United Nations in the day-to-day administrations of territories which were to result in direct (co-) administration in the years to come.

The first instance of direct United Nations administration in the post Cold War era was that of the UNTAC in Cambodia.²⁴ As it existed alongside a domestic government possessing autonomous decision-making power in certain areas, the United Nations involvement in Cambodia could be described as a co-administration. The same applies to UNOSOM II²⁵ and the institution of the High-Representative for Bosnia-Herzegovina.²⁶ UNTAES in Eastern Slavonia, UNMIK in Kosovo and UNTAET in East Timor can be categorized as fully-fledged direct administrations, due to the almost all-encompassing role of the United Nations in these territories, especially during the first year of their presence. The civil administration of Iraq by the United States and the United Kingdom (the CPA), whilst also of a fully-fledged and direct nature, was unique to the extent that it thus far constitutes the only instance where the Security Council delegated the direct administration of a territory to two Member States, as opposed to placing such administration under the authority of the United Nations itself. In addition, it simultaneously followed an occupation of the territory affected, which was not the case with the other instances of United Nations-authorized administration discussed here.

1. The Direct Co-Administration of Territories by the United Nations

During UNTAC's involvement in Cambodia, a Cambodian administration that was headed by a Supreme National Council (SNC) and representing all the main parties to the Cambodian civil conflict, continued to exist. The SNC formed a *sui generis* body which was, in particular, responsible, for exercising legislative power.²⁷ At the same time, the

²⁴ See note 1.

²⁵ See note 2.

²⁶ See note 3.

²⁷ See the Agreement on a Comprehensive Political Settlement of the Cambodian Conflict of 30 October 1990 (Doc. S/23177 of 30 October 1991). This document is hereinafter referred to as the Paris Agreement.

SNC transferred powers of civil administration to the United Nations in order to enable the latter to create a neutral political environment in which elections could be held.²⁸

These powers of civil administration, *inter alia*, included the ability to take direct governmental action in certain areas.²⁹ The Special Representative of the Secretary-General, who was responsible for the day to day management of UNTAC, had the power to adopt binding executive directives in the areas of foreign relations, defence, financial policy, internal security and information.³⁰ UNTAC also had extensive legislative powers with respect to the regulation of the elections.³¹ Although this right was exercised in consultation with the SNC, UNTAC had a true legislative power in this respect, as it could revoke existing legislation which could undermine the purpose of the peace agreement. This effectively facilitated the revoking of legislation in virtually all areas of the civil administration.³² The direct exercise of governmental power also extended to the judicial branch. UNTAC had the power to initiate investigations into human rights violations on its own initiative, as well as investigate complaints of human rights violations submitted by third parties. At the end of the investigation it could give a binding decision.³³ A comparable investigative power existed with respect to the civil administration in general. On the basis of this investigative power, UNTAC also initiated criminal prosecution in relation to serious violations of human rights.³⁴

²⁸ Paris Agreement, see above, Annex 1, Section A, para. 1.

²⁹ See Paris Agreement, see note 27, Annex 1, Section B, paras 2 et seq., which regulated the extent to which the Special Representative exercised indirect governance in the form of supervision and control over the remaining sections of the Cambodian administration, including the police force.

³⁰ Paris Agreement, see note 27, Annex 1, Section B, paras 1 and 5 (b). Hufnagel, see note 1, 117; Zimmermann/ Stahn, see note 4, 433; Stahn, see note 22, 126.

³¹ Paris Agreement, see note 27, Annex 1, Section D, para. 3 (a).

³² Paris Agreement, *ibid.*, Annex 1, Section D, para. 3 (b); Hufnagel, see note 1, 132; Stahn, see note 22, 126.

³³ Hufnagel, see note 1, 129.

³⁴ Paris Agreement, see note 27, Annex 1, Section B, para. 6. To the extent that differences of opinion (“issues”) arose between the Special Representative and the SNC in relation to the implementation of the Paris Agreement, it prescribed a mechanism for their resolution. In essence, the Special Representative had to respect unanimous recommendations of the SNC or – where no unanimity was possible – those made by its Chairperson. Direct

With the establishment of UNOSOM II, the Security Council authorized an ambitious program of assistance for the people of Somalia, which included elements of direct (co-) administration. UNOSOM II was authorized to promote and advance broad participation by all sectors of Somali society, and the re-establishment of national and regional institutions and civil administration in the entire country. It also had to create conditions under which the Somali civil society could have a role at every level, in the process of reconciliation and in the formulation and realization of rehabilitation and reconstruction programs.³⁵ Although a so-called Transitional National Council (TNC) was formally vested with the administrative and legislative authority in Somalia,³⁶ UNOSOM II assumed these functions until the creation of the TNC, over one year after the conclusion of the agreement.³⁷ In this context, it directly adopted administrative measures to create an independent judiciary and a functioning prison system.³⁸ The Special Representative of the Secretary-General further promulgated the former Somali Penal Code of 1962 as the criminal law in force in Somalia, while adding special *habeas corpus* guarantees derived from international human rights instruments.³⁹ UNOSOM II also directly executed judicial powers by establishing a human rights office for investigating serious

action by the Special Representative was limited to instances where the SNC was unable to act, despite the intervention of the Chairperson. In addition, the Special Representative could overrule any decisions that were not in accordance with the purposes of the Paris Agreement, i.e. where they threatened the impartiality of the elections. However, the Special Representative was not at liberty to replace a decision overruled by him on his own. This was only possible if and to the extent that the SNC was unable to take a decision itself. See also Paris Agreement, see note 27, Annex 1, Section A, paras 2 (a) to 2 (e); S.R. Ratner, "The Cambodia Settlement Agreements", *AJIL* 87 (1993), 1 et seq. (10, 13 et seq.); Hufnagel, see note 1, 109, 130.

³⁵ S/RES/814 (1993) of 26 March 1993, paras 4 (c) and (g).

³⁶ Doc. S/1994/12, para. 14.

³⁷ Stahn, see note 22, 127.

³⁸ Doc. S/26317 (1993) Annex 1, paras 29 et seq.

³⁹ Doc. S/26317 (1993) Annex 1, paras 25-29, 31, 36; C. Stahn, "The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis", *Max Planck UNYB* 5 (2001), 105 et seq. (131); Hufnagel, see note 1, 184.

violations of the law of armed conflict and by initiating criminal prosecutions of such violations.⁴⁰

The final example of United Nations (co-) administration is that of Bosnia-Herzegovina, where the Security Council authorized the High Representative of the Secretary-General to function alongside the federal government for the purpose of monitoring the implementation of the Dayton Peace Agreement.⁴¹ The High Representative exercises direct governmental power to the extent that he can remove from office those public officials who violate legal commitments contained in the Dayton Peace Agreement. He may further impose interim legislation in situations where Bosnia-Herzegovina's national institutions failed to do so.⁴² It is also worth mentioning that the Constitution of Bosnia-Herzegovina, which constituted Annex 4 to the Dayton Peace Agreement, was enacted in the national law by the Security Council itself, through its endorsement of Resolution 1031 (1995).⁴³

⁴⁰ See S/RES/814 (1993) of 26 March 1993, paras 4 and 13. Despite its modest successes in reconstructing the Somali judicial and penal systems, UNOSOM II did not achieve the major goals of disarmament and repatriation of refugees. Neither was the recreation of the Somali state accomplished. After a series of Somali attacks on UNOSOM II forces all international forces departed from the country in 1995, leaving no recognized authority in place. See Hufnagel, see note 1, 181 et seq.; Stahn, see note 39, 128.

⁴¹ See S/RES/1031 (1995) of 15 December 1995, para. 27; the General Framework Agreement for Peace in Bosnia and Herzegovina, see note 3, Annex 10, article 5.

⁴² Conclusions of the Peace Implementation Conference in Bonn of 10 December 1997, para. XI 2 (a) to XI 2 (c), available at <www.ohr.int>. See also S/RES/1144 (1997) of 19 December 1997, para. 2; Stahn, see 22, 112.

⁴³ See also Stahn, see note 22, 136; T.D. Grant, "Internationally Guaranteed Constitutive Order: Cyprus and Bosnia as Predicates for a new Non-Traditional Actor in the Society of States", *Transnat'l L. & Contemp. Probs* (1998), 1 et seq. (20-21, 37-38). The Constitution itself requires further incorporation of international law into the structure and laws of that federal state. Among other provisions, it calls for respect for human rights and fundamental freedoms, and in particular for enforcement of the provisions of a series of regional and international human rights instruments.

2. The Direct Administration of Territories by the United Nations

The first instance of a fully-fledged United Nations administration in the post Cold War Era concerned UNTAES.⁴⁴ The region was the last remaining part of the Serb controlled Republika Srpska Krajina (RSK), which during the war in Croatia used to control one third of Croatia's territory. After the war, the RSK ceased to exist and UNTAES was created in order to provide for a peaceful reintegration of the territory into Croatia. The mandate of UNTAES effectively granted it complete governmental control over the territory.⁴⁵ However, the mandate was explicitly limited to two years, after which Croatia resumed full control over the area.⁴⁶

This model of full-scale United Nations governmental control was followed in Kosovo and East Timor, respectively. Although S/RES/1244 (1999) of 10 June 1999 explicitly determined that Kosovo remained a part of the territory of the Federal Republic of Yugoslavia (FRY),⁴⁷ the resolution left the FRY with very little effective authority over the area. The Yugoslav military, police and paramilitary forces were required to withdraw from the territory,⁴⁸ as they were replaced

⁴⁴ For an overview of situations in which the United Nations has administered territories on a different legal basis (i.e. outside of Chapter VII of the Charter), see Stahn, see note 22, 107 et seq.; R. Wilde, "From Danzig to East Timor and Beyond: The Role of International Territorial Administration", *AJIL* 95 (2001), 583 et seq.

⁴⁵ See Basic Agreement, see note 4, 23, paras 3-4. The military component consisted of the supervision and facilitation of the demilitarisation as agreed to by the parties; the monitoring of the voluntary and safe return of refugees and displaced persons to their home of origin; and contribution to the maintenance of peace and security in the region. The civilian component included the establishment and training of a temporary police force; the undertaking of tasks relating to civil administration and public services; the facilitating of the return of refugees and the organising and conducting of elections. See also S/RES/1037 (1996) of 15 January 1996, paras 10-11.

⁴⁶ Basic Agreement, see note 4, para. 1; see also Zimmermann/ Stahn, see note 4, 433.

⁴⁷ The preamble of S/RES/1244 of 10 June 1999, explicitly affirmed the sovereignty and territorial integrity of the Federal Republic of Yugoslavia. See also S/RES/1160 of 31 March 1998, para. 13, and S/RES/1199 of 23 September 1998, para. 7.

⁴⁸ S/RES/1244 (1999) of 10 June 1999, Annex 2, para. 2.

by an international security presence under NATO command.⁴⁹ In addition, the civil administration has been transferred to an international civil presence (UNMIK), that functions under the control of a Special Representative of the Secretary-General.⁵⁰ Both the civil and military mandates were authorized for an unlimited period of time.⁵¹

Since this included the transfer of the legislative and executive authority, as well as the administration of the judiciary, it effectively placed the complete system of governance in Kosovo under the auspices of the United Nations.⁵² For example, the Special Representative can change, repeal or suspend existing laws which are incompatible with the mandate, aims or purposes of UNMIK.⁵³ He is also entitled to issue new legislative acts in the form of regulations, which remain in force until repealed by UNMIK or superseded by rules subsequently issued by the future political institutions of Kosovo.⁵⁴ In addition, he can appoint any persons to perform functions in the civil administration of Kosovo, including the judiciary, and may remove them from office.⁵⁵

At this point it should be mentioned that Resolution 1244 anticipated the diminishing of this extensive role of the Special Representative and UNMIK over time, as it foresaw the progressive transfer of administrative responsibilities to local (democratically elected) institutions for self-government.⁵⁶ In practice, the most significant development in this regard concerned the promulgation of the Constitutional Framework for Provisional Self-Government in Kosovo on 15 May 2001 (hereinafter the Constitutional Framework).⁵⁷ It provided for the transfer of legislative powers to the Kosovo Assembly (Parliament) in areas such as economic and financial policy, fiscal and budgetary issues, education, culture, health, environmental protection, transport and agriculture.⁵⁸ At the same time, the Special Representative retains author-

⁴⁹ S/RES/1244, see above, para. 7 and Annex 2, para. 4.

⁵⁰ S/RES/1244, see note 48, para. 6.

⁵¹ S/RES/1244, see note 48, para. 19.

⁵² S/RES/1244, see note 48, paras 10-11. See also Zimmermann/ Stahn, see note 4, 442-443; Stahn, see note 22, 134 et seq.

⁵³ Doc. S/1999/779, 39.

⁵⁴ UNMIK/REG/1/1999 of 25 July 1999, Sec. 4.

⁵⁵ *Ibid.*, at s 1(2); Stahn, see note 22, 112.

⁵⁶ S/RES/1244, see note 48, paras 11(d) and 11 (f). See also De Wet, see note 18, 331-332.

⁵⁷ UNMIK/REG/2001/9 of 15 May 2001.

⁵⁸ Constitutional Framework, see note 57, Ch. 5.1.

ity over key areas such as the maintenance of law and order, the supervision of local municipal administration and the supreme authority in judicial affairs.⁵⁹ In addition, he retains the power to overrule laws adopted by the Kosovo Assembly.⁶⁰ However, despite this comprehensive power for direct intervention in the administration of Kosovo, it is fair to conclude that with the progressive transfer of governmental power to the local institutions, the United Nations administration of Kosovo would increasingly resemble a direct (co-) administration, rather than a fully-fledged direct administration.

A similar situation prevailed in East Timor where UNTAET was established,⁶¹ in the aftermath of the territory's referendum on independence. UNTAET, which was headed by a Special Representative of the Secretary-General,⁶² included a military and civil component and was endowed with overall responsibility for the administration of East Timor. This included the power to exercise all legislative and executive authority, as well as the administration of justice.⁶³ Subsequently, the Special Representative adopted a variety of far-reaching laws regulating, inter alia, the establishment of a national consultative council,⁶⁴ a judicial service commission,⁶⁵ a central fiscal authority⁶⁶ and a national defence force.⁶⁷

When East Timor gained independence on 20 May 2002, UNTAET was replaced by the so-called United Nations Mission of Support in East

⁵⁹ Constitutional Framework, see note 57, Chs 6 and 8.1.

⁶⁰ Constitutional Framework, see note 57, Ch. 9.1.44; *De Wet*, see note 18, 332.

⁶¹ See note 6.

⁶² *Ibid.*, para. 6.

⁶³ *Ibid.*, paras 1 and 6, which explicitly stated that the Special Representative will have the power to enact new laws and regulations and to amend, suspend or repeal existing ones. East Timor formally remained on the list of non-self-governing territories, but with UNTAET as the administering power. See <www.un.org/Depts/dpi/decolonization>; Stahn, see note 39, 115; see also M. Ruffert, "The Administration of Kosovo and East-Timor by the International Community", *ICLQ* 50 (2001), 613 et seq. (623).

⁶⁴ UNTAET/REG/1999/2 of 2 December 1999, ss 1 et seq. This and other regulations adopted by the Special Representative are available at <www.un.org/peace/etimor/untaetR/UntaetR.htm>.

⁶⁵ UNTAET/REG/1999/3 of 3 December 1999, ss 1 et seq.

⁶⁶ UNTAET/REG/2000/1 of 14 January 2000, ss 1 et seq.

⁶⁷ UNTAET/REG/2001/1 of 31 January 2001, ss 2 et seq.

Timor (UNMISSET).⁶⁸ In essence, this new mandate transformed the United Nations presence from a full-scale governmental authority into a (co-) administration. Although UNMISSET functions alongside a Timorese government, it still wields considerable power over those areas of the civil administration that are critical to the viability and political stability of East Timor.⁶⁹ This includes direct decision-making power with regard to the financial and central services; the internal systems in the Council of Ministers, the Chief Minister's office and various ministries; essential services such as water and sanitation and the judicial system.⁷⁰ UNMISSET also remains responsible for interim law enforcement and public security; assistance in developing the East Timor Police Service (ETPS); and contributing to the maintenance of the new country's external and internal security.⁷¹

3. The Direct Administration of Territories by United Nations Member States

Following the invasion of Iraq in March 2003 and the ousting of the *Ba'ath* regime, the Security Council-authorized the United States and the United Kingdom (the CPA) to promote the welfare of the Iraqi people through the "effective administration of the territory."⁷² In addition, it authorized the Special Representative of the Secretary-General to work intensively with the CPA in a variety of areas related to civil administration. These included activities for the restoration and establishment of national and local institutions for representative governance; the reconstruction of key infrastructure; the rebuilding of the civilian police and legal and judicial reform.⁷³

⁶⁸ S/RES/1410 (2002) of 17 May 2002, para. 1.

⁶⁹ S/RES/1410, see above, para. 2 (a).

⁷⁰ Doc. S/2002/432, para. 70.

⁷¹ Doc. S/2002/432, paras 79 et seq, and para. 2 (b) and 2 (c)

⁷² See S/RES/1483 (2003) of 22 May 2003, para. 4. For a more reticent opinion see T. Maruhn, "Konfliktfolgenbewältigung statt Legalisierung", *Ver-einte Nationen* 51 (2003), 113 et seq. (117), who regards the language of S/RES/1483 as too inexplicit to authorize the extensive rebuilding and democratisation of Iraq by the CPA. See also T. Bruha, "Iraq-Krieg und Ver-einte Nationen", *AVR* 41 (2003), 295 et seq. (311).

⁷³ S/RES/1483, see above, para. 8.

Despite the role foreseen for the Special Representative in relation to the civil administration of Iraq, the role of the United Nations did not amount to a full-scale direct administration (or even a direct (co-) administration) comparable to that in Kosovo or East Timor. Instead, the direct full-scale civil administration was carried out by (two) Member States, on behalf of the United Nations.⁷⁴ The Security Council thus effectively delegated the power of civil administration to two Member States,⁷⁵ whilst merely reserving a coordinating role for the United Nations through the Special Representative. In practice the direct administration was carried out by the CPA Administrator who issued directly applicable Regulations and Orders affecting all aspects of civil administration.⁷⁶ In delegating the civil administration of Iraq in this manner, the Security Council attributed a dual role to the CPA, namely that of an administrator and occupier. This follows from the fact that the preamble of S/RES/1483 explicitly refers to the United Kingdom and the United States as occupying powers. The implications of this dual role for the administrative powers of the CPA are further explored below.

A progressive transfer of governmental power to local institutions was foreseen in Resolution 1483.⁷⁷ This resulted in the formation of an interim administration in the form of a Governing Council that represented a variety of religious and ethnic groups. The Governing Council, which came together for the first time on 13 July 2003, had the power to appoint and dismiss ministers, adopt a budget, as well as initiate the process of the drafting of a constitution.⁷⁸ At the same time all issues of national security remained with the CPA, which also had a veto power against all decisions of the Governing Council.⁷⁹ However, as there were indications of progressive transfer of administrative functions to local institutions, it seemed that the CPA administration in Iraq increasingly took on the character of a direct (co-) administration.⁸⁰

⁷⁴ See also F.L. Kirgis, "Security Council Resolution 1483 on the Rebuilding of Iraq", *ASIL Insights* (2003), available at <www.asil.org/insights.htm>.

⁷⁵ As was also suggested by Pakistan in Doc. S/PV.4761 of 22 May 2003, 11.

⁷⁶ A full list of Regulations and Orders are available at <www.cpa-iraq.org>.

⁷⁷ S/RES/1483, see note 72, paras 1 et seq. See also S/RES/1511 (2003) of 16 October 2003, paras 1 et seq.

⁷⁸ See De Wet, see note 18, 335-336.

⁷⁹ De Wet, *ibid.*

⁸⁰ See, for example, the transfer of the Iraqi Civil Defence Corps to the Iraqi Ministry of Defence by CPA/ORD/22 April 2004/73.

This process continued until 30 June 2004, when the CPA transferred full sovereignty to the Iraqi Interim Government in accordance with S/RES/1546 of 8 June 2004.⁸¹ The transfer of sovereignty simultaneously resulted in the end of the occupation and the termination of the CPA.⁸² Although this Chapter VII resolution further determined that the United Nations Assistance Mission for Iraq (UNAMI) together with the United Nations Special Representative were to play a “leading role” in the political reconstruction of Iraq, this role is of an indirect nature. Instead of adopting any directly applicable decisions itself, these bodies “assist” and “advise” the Iraqi Interim Government on issues ranging from the holding of elections to reconstruction and development and the protection of human rights. It thus seems that the role of UNAMI would resemble the model of supervision and monitoring which was characteristic of the United Nations Transition Assistance Group (UNTAG), rather than that of a direct (co-) administration.⁸³

III. Legal Basis for Direct (Co-) Administrations

1. The Nature of the Implied and Customary Powers of the United Nations

At the outset, it is important to point out that the trusteeship system provided for in Chapter XII of the Charter could not have served as a legal basis for the Security Council action in any of the above mentioned territories, even though the type of administration provided for by UNMIK, UNTAET and UNMISSET in particular may closely resemble the trusteeship system, as will be illustrated below.⁸⁴ Chapter XII limits the applicability of the trusteeship system to three different categories of territories, namely those formerly held as mandates under the mandates system of the League of Nations, territories detached from enemy states as a result of World War II, and territories voluntarily placed under the trusteeship system by states responsible for their

⁸¹ S/RES/1546 (2004) of 8 June 2004, para. 1.

⁸² S/RES/1546, see above, para. 4. In paras 9 and 10 the security mandate of the multi-national force established under S/RES/1511 was nonetheless extended until 31 December 2005. See also France in Doc. S/PV.4987, 7.

⁸³ S/RES/1546, see note 81, para. 7.

⁸⁴ See also Zimmermann/ Stahn, see note 4, 436-437.

administration.⁸⁵ As none of these categories apply to UNMIK, any attempt of the Security Council to place it within the mandate system would most likely directly contravene an express Charter provision.⁸⁶ Similarly, the Security Council could also not bestow the status of a trust territory in terms of Chapter XII on East-Timor. Even though East-Timor was listed as a non-self governing territory under Portuguese control in 1960, no agreement was ever concluded by means of which it was to be placed within the trusteeship system.⁸⁷

At the same time, however, this does not have to mean that the Charter does not provide any other legal basis for placing territories under United Nations (co-) administration, or (as in the case of Iraq) under the temporary administration of (a) Member State(s). The inclusion of Chapter XII in the Charter does not imply that this constitutes a conclusive set of rules precluding the exercise of administrative authority in any other form.⁸⁸ The Charter articles relating to the trusteeship system were drafted in a very particular context, namely that of de-colonization. Therefore one should be careful to draw conclusions from these articles for any other form of civil administration outside the colonial context. It was not the purpose of this section of the Charter to regulate United Nations civil administration in an exhaustive fashion, but merely to regulate the process of de-colonization.⁸⁹

Since no other Charter article explicitly refers to the civil administration of territories by the United Nations or its Member States, the

⁸⁵ See Article 77 (1) of the Charter.

⁸⁶ In addition, Article 78 explicitly determines that the trusteeship system shall not apply to territories which have become members of the United Nations, as this would not be consistent with the principle of sovereign equality. As the FRY has been a member of the United Nations (at least) since 1 November 2000, its territory could not be subjected to the trusteeship system. See also Zimmermann/ Stahn, see note 4, 436; Stahn, see note 22, 119.

⁸⁷ The agreement between Indonesia and Portugal of 5 May 1999 (Doc. S/1999/513), which provided for the voluntary transfer of authority in East Timor to the United Nations during the transitional period towards independence, did provide a legal basis for subsequent Security Council action in the territory. It did not, however, amount to a trusteeship agreement in terms of Article 77 (1)(c) of the Charter. See also Ruffert, see note 63, 621; R.E. Gordon, "Some Legal Problems with Trusteeship", *Cornell Int'l L. J.* 28 (1995), 301 et seq. (311-312).

⁸⁸ Stahn, see note 22, 130.

⁸⁹ Hufnagel, see note 1, 304.

most likely alternative basis for authorizing such administration is to be found in the so-called implied or customary powers of the (organs of the) United Nations. The implied powers of the United Nations were already recognized in the *Reparations for Injuries* Advisory Opinion of 1949⁹⁰ which recognizes that international organizations would not be able to fulfil their functions efficiently in a rapidly changing world, if their powers were limited to those explicitly attributed to them at the time of their creation.⁹¹ In accordance with this doctrine, which is also referred to as the doctrine of inherent or incidental powers,⁹² the organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.⁹³

Apart from explicit and implied powers, an organization also possesses customary powers. During the life of the organization, Member States may consent to new powers by accepting these powers in practice. A well-known example is the power of the Security Council to take decisions on non-procedural matters notwithstanding abstentions by one or more of its permanent members.⁹⁴ Although this interpretation does not strictly correspond to the wording of Article 27 (3) of the Charter⁹⁵, the ICJ declared that it has consistently been followed by the Security Council and has been accepted by Member States in practice.⁹⁶

⁹⁰ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174 et seq.

⁹¹ The essence of implied powers as applied today in international organizations can be found in *McCulloch v. Maryland* 17 US (4 Wheat) 316 (1819). Both for federal states and for international organisations the principle applies that it was impossible for the framers of the constitutions to specify prospectively all the means by which a certain power had to be exercised. See also N. Blokker, "Beyond 'Dili': On the Powers and Practice of International Organizations", in: Kreijen, see note 11, 304.

⁹² See, inter alia, *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal and Jurisdiction, Case No IT-94-1-T, 2 October 1995, Appeals Chamber, paras 18 to 21, available at <www.icty.org>.

⁹³ *Reparations for Injuries*, see note 90, 182.

⁹⁴ Blokker, see note 91, 307.

⁹⁵ Article 27 (3) of the Charter reads as follows: "Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members ...".

⁹⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution*

The essential difference between implied and customary powers is that the latter is acknowledged as a new power that post-dates the organization's constitution. Implied powers, on the other hand, concern the translation of an already existing, explicit constitutional power into present day circumstances.⁹⁷ A term is being read into the organization's statute not in order to add to what was agreed to in the constitutive document, but in order to give effect to what was explicitly agreed to in the constitutive treaty under changed circumstances. Customary powers, which are more directly linked to practice, do not need such an inter-temporal translation, nor do they have to be linked to an explicit constitutional (treaty) provision.⁹⁸

In practice the difference between implied and customary powers can sometimes be difficult to detect, as both categories rely on the practice of the organization in question as proof of their existence. For example, in the *Nuclear Weapons (WHO)* Advisory Opinion, the ICJ had to determine whether the WHO was competent to address the issue of the legality of the use of nuclear weapons. Having concluded that this competence was not explicitly provided for in the WHO's constitution, the Court further concluded that the power was not implied either. It determined that such competence could not be deemed a necessary implication of the constitution of the WHO in the light of the purposes assigned to it by its Member States.⁹⁹ In reaching this conclusion, the ICJ considered the WHO practice as an element of treaty interpretation in accordance with article 31 (3)(b) of the 1969 Vienna Convention on the Law of Treaties,¹⁰⁰ for the purpose of examining whether there were explicit or implied powers in this field.¹⁰¹ However, the ICJ could

276 (1970), Advisory Opinion, ICJ Reports 1971, 16 et seq. Hereinafter referred to as *Namibia* opinion. See also Blokker, see note 91, 318.

⁹⁷ Blokker, see note 91, 307.

⁹⁸ Blokker, see note 91, 307-308.

⁹⁹ WHO Opinion, para. 19; Blokker, see note 91, 309.

¹⁰⁰ UNTS Vol. No. 1155 No. 18232; article 31 (3)(b) determines that there shall be taken into account, together with the context: "Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

¹⁰¹ Blokker, see note 91, 309, criticized the fact that the ICJ's approach, as the concept of subsequent practice as a canon of interpretation laid down in the Vienna Convention, refers to the views of the *states* party to a particular treaty, and not to the views of the *organisation*. In this sense, article 31 (3)(b) of the Vienna Convention seems to be incorrect as a foundation on which practice of the *organisation* may rest. This criticism is not convinc-

equally have argued that the WHO does not possess customary powers in the field of nuclear activity, given the absence of long-standing WHO practice in this field.

The need for a general acceptance of the practice of the organization by its broader membership – whether regarded as a manifestation of a customary power, or implied power – is important in an organization such as the United Nations, which lacks a centralized system of judicial review and where each organ is primarily responsible for interpreting its own functions as outlined in the Charter.¹⁰² At first glance the requirement of “general acceptance” seems a difficult barrier to overcome for a non-representative organ such as the Security Council.¹⁰³ However, in practice the threshold determining that consensus has been reached is not so high. For example, when accepting the Security Council’s interpretation of Article 27 (3) of the Charter, the ICJ *inter alia* referred to the fact that South Africa had never before objected to the voting procedure exercised by the Council. It would therefore be estopped from questioning its validity at the time it raised this issue.¹⁰⁴

ing. Since the organisation is based on a treaty, it seems logical that the subsequent view of the membership at large regarding the practice of the organisation should be decisive in determining whether a particular power was implied or not. The only other option would be to consider as decisive the views of the particular organ that is claiming the implied power, which would lead to a circular argument. See also M.J. Herdegen, *Die Befugnisse des UN-Sicherheitsrates: aufgeklärter Absolutismus im Völkerrecht?* 1998, 112; J.A. Frowein, “The Internal and External Effects of Resolutions by International Organizations”, *ZaöRV* 49 (1989), 778 et seq. (790).

¹⁰² J. Herbst, *Rechtsbindung des UN-Sicherheitsrates*, 1999, 314; Pollux, “The Interpretation of the Charter”, *BYIL* 23 (1946), 54 et seq. (57). See also M.C. Wood, “The interpretation of Security Council Resolutions”, *Max Planck UNYB* 2 (1998), 73 et seq. (82).

¹⁰³ Compare Herdegen, see note 101, 113. He stated that the more the interpretation of the Security Council deviates from the wording of the Charter or a generally accepted interpretation by Member States, the more important the acceptance of the Security Council’s practice by the other principal organs of the United Nations and Member States will become. See also G. Nolte, “The Limits of the Security Council’s Powers and its Functions in the International Legal System: Some Reflections”, in: M. Byers (ed.), *The Role of Law in International Politics*, 2000, 325. Compare also A. Stein, *Der Sicherheitsrat der Vereinten Nationen und die Rule of Law*, 1999, 70 et seq.

¹⁰⁴ *Namibia* Opinion, see note 96, 22-23; see also Herbst, see note 102, 314.

In essence, the ICJ effectively concluded that the consent of Member States to specific Security Council resolutions is presumed on the basis of their general consent to give effect to the decisions of the Security Council, as formulated in Article 25 of the Charter. As a result, the *onus* would rest on Member States to voice their objection to a particular practice at an early stage in order not to be prevented from doing so by the principle of estoppel or acquiescence.¹⁰⁵ This approach would be a logical consequence of the presumption of legality that is attached to Security Council and General Assembly resolutions¹⁰⁶, for the purpose of ensuring the efficient functioning of the organization in the interest of international peace and security.

An instance in which an objection to a particular practice was indeed raised, concerned the development of peace-keeping measures, which later became known as Chapter VI½ measures, during the early years of the organization. Several Member States of the United Nations, lead by France and the Soviet Union, persistently questioned the competence of the General Assembly to authorize peace-keeping missions in instances where the Security Council was prevented from doing so by the veto.¹⁰⁷ At that point in time it was therefore difficult to argue that such a customary or implied power indeed existed. Even after the ICJ determined that the implied powers of the General Assembly to au-

¹⁰⁵ Herbst, see note 102, 313. But see B. Lorinser, *Bindende Resolutionen des Sicherheitsrats*, 1996, 44, who claimed that there was disagreement as to the extent to which the Security Council interpretation had to be accepted by the Members, since it was not clear what “generally acceptable” meant. See also Stein, see note 103, 108-110 for a more cautious approach.

¹⁰⁶ See *Certain Expenses of the United Nations*, Advisory Opinion, ICJ Reports 1962, 151 et seq. (168); Frowein, see note 101, 781. See also Lorinser, see note 105, 142; B. Martenczuk, *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrats. Die Überprüfung nichtmilitärischer Zwangsmassnahmen durch den internationalen Gerichtshof*, 1996, 539.

¹⁰⁷ See A/RES/377 (V) of 3 November 1950. Its essential feature is an assertion of a right on the part of the General Assembly to act to maintain international peace and security when the Security Council, because of the veto, is unable to do so. The General Assembly can then recommend to the Members to take collective action. It may meet in an emergency special session within twenty-four hours of a request by the Security Council, on the vote of any nine members thereof, or of a request from a majority of the Members of the United Nations. See A. Chayes et al. (eds), *International Legal Process*, 1968, 36; F. Seyersted, *United Nations Forces in the Law of Peace and War*, 1966, 42; B. Sloan, *United Nations General Assembly Resolutions in Our Changing World*, 1991, 25.

thorize peace-keeping missions followed from its explicit competence in Article 14 of the Charter to make recommendations in the area of international peace and security,¹⁰⁸ the matter remained controversial. In fact, it is likely that this controversy would remain to this day, given the fact that the General Assembly has never again attempted to authorize Chapter VI½ peace-keeping missions. The position is different, however, with respect to such measures authorized by the Security Council. Chapter VI½ peace-keeping operations have, over the years, become a well-settled Security Council practice and by now it would be clear that even if such a power were not implied by the Charter, it had developed as a matter of custom through the well-accepted practice of the organisation.¹⁰⁹

2. Implied and Customary Powers as a Basis for the (Co-) Administration of Territories?

If one now turns to the civil (co-) administrations of territories, it seems fair to conclude that the international community has accepted civil (co-) administrations as a legitimate measure for conflict resolution.¹¹⁰ This is reflected by the fact that the Security Council resolutions authorizing these administrations were – with the exception of the CPA in Iraq – all endorsed by General Assembly resolutions. The General Assembly resolutions either expressed such support expressly, or more indirectly by recognizing the expenses of these administrations as “expenses of the organisation”.¹¹¹ This applies to instances where the (co-) administration was authorized in the absence of a Chapter VII authorization (Namibia and Cambodia), as well as those which were adopted in accordance with Chapter VII of the Charter (Somalia, Eastern Slavonia, Bosnia-Herzegovina, Kosovo and East-Timor).

¹⁰⁸ *Certain Expenses* Opinion, see note 106, 163 et seq. The ICJ indicated that this implied power found its limitation in the explicit Charter determinations which reserved coercive (non-consensual) action to the Security Council. The General Assembly could only adopt peace-keeping measures to the extent that the countries affected consented thereto, the measures were neutral (not directed against a state) and force could only be used in self-defence.

¹⁰⁹ Hufnagel, see note 1, 292.

¹¹⁰ Hufnagel, see note 1, 212.

¹¹¹ See note 126 below.

Although there is strong support for the fact that the context in which S/RES/435 (1978) of 29 September 1978 on Namibia was adopted, constituted a threat to the peace,¹¹² UNTAG was not established in terms of Chapter VII. This is reflected by the absence of any reference to Chapter VII in Resolution 435, as well as its preambular reference to the correspondence in which South Africa¹¹³ and the South-West African Peoples' Organization (SWAPO)¹¹⁴ in principle consented to the plan which the Contact Group presented for Namibian independence. At that point in time, however, there was no real intention to cooperate on the part of the South African government, which persistently refused to implement Resolution 435.¹¹⁵ Although the Security Council threatened South Africa with Chapter VII action in reaction to its obstructive behaviour,¹¹⁶ no Chapter VII measures were adopted and UNTAG was only established when the South African authorities consented to cooperate with the United Nations in 1988.¹¹⁷ The eventual establishment of UNTAG was supported by the broad membership of the United Nations, as is reflected by the Security Council and General Assembly resolutions.¹¹⁸

Similarly, the history of S/RES/745 (1992) of 28 February 1992 reflects that the establishment of the Transitional Authority in Cambodia (UNTAC) was aimed at restoring international peace and security in the Indo-Chinese region.¹¹⁹ However, the resolution did not contain any reference to Chapter VII. Instead, it emphasized the consent of the conflicting parties to the creation of UNTAC. For example, it refers to

¹¹² After the termination of South Africa's mandate over Namibia, S/RES/385 (1976) of 30 January 1976 described its continued presence in the territory as an illegal occupation, whilst A/RES/43/26 of 17 November 1988 referred to it as a threat to international peace and security. Hufnagel, see note 1, 52.

¹¹³ Doc. S/12836 (1978); Doc. S/12853 (1978); Doc. S/12854 (1978).

¹¹⁴ Doc. S/12853.

¹¹⁵ Hufnagel, see note 1, 51.

¹¹⁶ S/RES/439 (1978) of 13 November 1978, para. 6.

¹¹⁷ See also Hufnagel, see note 1, 52.

¹¹⁸ See e.g. S/RES/623 (1988) of 23 November 1988, paras 1-2. A/RES/43/232 of 1 March 1989.

¹¹⁹ This is underscored by the position taken by the different country representatives in the debate that followed the unanimous adoption of the above-mentioned resolution. See France in Doc. S/PV.3057 (1992), 12; Russia, *ibid.*, 23; Austria, *ibid.*, 27; Hungary, *ibid.*, 30; India, *ibid.*, 33. See also Hufnagel, see note 1, 102; Ratner, see note 34, 9.

the Paris Agreement¹²⁰ in which the main parties involved in the conflict explicitly consented to the UNTAC mission in paragraph 2.¹²¹ Also in this instance the United Nations mandate met with broad support within the organization as a whole.¹²²

In essence therefore, the United Nations co-administrations in Namibia and Cambodia followed the same model as in the case of classic peace-keeping, namely that of consensus-based mandates. Since this action has been widely accepted by the membership of the United Nations, it is justified to describe the power of the Security Council to establish a (co-) administration with the consent of the affected territory as a customary (Chapter VI½) power. The traditional notion of peace-keeping was expanded through practice to include also the exercise of governmental powers as a means for conflict resolution. Some authors submit that the consensual (co-) administration of a territory can be based on the implied powers of the Security Council in Article 39 of the Charter, in conjunction with the power to create a subsidiary organ for that purpose (Article 29), or to entrust certain functions to the Secretary-General (Article 98).¹²³ However, given the consensual nature of the measures, it would not seem conceptually accurate to regard an article placed in Chapter VII (i.e. Article 39) as the basis for the Security Council's powers. It seems more sound to regard consensual (co-) administration as a customary power (i.e. Chapter VI½ power) that developed in practice.

The remaining United Nations-authorized mandates for (co-) administration were all of a coercive nature. In the case of Somalia, S/RES/814 (1993) of 26 March 1993 created UNOSOM II under Chap-

¹²⁰ See note 27.

¹²¹ The importance of this consent was also reflected in the Security Council debates. For example, the Ecuadorian representative stressed that the United Nations presence in Cambodia derives essentially from the express consent of the Cambodian people and all its political components. If this condition had not been met, there could not have been an UNTAC. See Doc. S/PV.3057 (1992), 39. See also France, *ibid.*, 13; Venezuela, *ibid.*, 29. See also Ratner, see note 34, 9. Hufnagel, see note 1, 98.

¹²² See e.g. S/RES/745 (1992) of 28 February 1992; A/RES/46/18 of 20 November 1991.

¹²³ Stahn, see note 39, 140. Compare also M. Bothe/ T. Marauhn, "UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council Mandated Trusteeship Administration", in: C. Tomuschat (ed.), *Kosovo and the International Community*, 2001, 217 et seq.

ter VII, as a measure for maintaining international peace and security.¹²⁴ Similarly, the Chapter VII mandate authorizing the mandate of the High Representative for Bosnia-Herzegovina was authorized in S/RES/1031 whilst the Chapter VII civil administrations for Eastern Slavonia, Kosovo and East Timor were authorized in S/RES/1037, 1244 and 1272, respectively. The fact that the Security Council was able to muster support for all of these mandates within the brief time-span of six years, that the (former) mandates for Somalia, Bosnia-Herzegovina and East-Timor have been extended on several occasions,¹²⁵ as well as the fact that these missions have all been endorsed by General Assembly resolutions are clear indications that the international community supports this type of civil administration as a legitimate measure for the maintenance or restoration of international peace and security.¹²⁶

As far as the civil administration of Iraq is concerned, the matter is more ambiguous. On the one hand, the persistent calls for stronger United Nations supervision and administration in the wake of the adoption of S/RES/1483 suggests that this Chapter VII delegation of a civil administration was not accepted by the international community at

¹²⁴ That the situation in Somalia constituted a threat to the international peace was already constituted in S/RES/733 (1992) of 23 January 1992 and S/RES/794 (1992) of 3 December 1992.

¹²⁵ For Somalia see: S/RES/878 (1993) of 29 October 1993, para. 1; S/RES/886 (1993) of 18 November 1993, para. 3; S/RES/923 (1994) of 31 May 1994, para. 2; S/RES/946 (1994) 30 September 1994, para. 1; S/RES/953 (1994) of 31 October 1994, para. 1. For Bosnia-Herzegovina see: S/RES/1088 (1996) of 12 December 1996, para. 18; S/RES/1174 (1998) of 15 June 1998, para. 10; S/RES/1247 (1999) of 18 June 1999, para. 10; S/RES/1305 (2000) of 21 June 2000, para. 10; S/RES/1357 (2001) of 21 June 2001, para. 10; S/RES/1423 (2002) of 12 July 2002, para. 10; S/RES/1491 (2003) of 11 July 2003, para. 10. For East-Timor see: S/RES/1338 (2001) of 21 January 2001, para. 2; S/RES/1392 (2002) of 31 January 2002, para. 2; S/RES/1410 (2002) of 17 May 2002, para. 1; S/RES/1480 (2003) of 19 May 2003, para. 1. Given the open-ended nature of the mandate for civil administration in Kosovo in S/RES/1244 (1999) of 10 June 1999, para. 19. No similar resolutions were adopted in that instance.

¹²⁶ For Eastern Slavonia, Baranja and Western Sirmium: A/RES/51/153 of 13 June 1997; Kosovo: A/RES/53/241 of 28 July 1999 and A/RES/54/245 of 23 December 1999; East Timor: A/RES/54/246 of 23 December 1999; Somalia: A/RES/47/41 B of 15 April 1993; Bosnia-Herzegovina: A/RES/51/203 of 17 December 1996; See also Bothe/ Marauhn, see note 123, 230. See Stahn, see note 22, 130; Zimmermann/ Stahn, see note 4, 438; see also Ruffert, see note 63, 620-621.

large.¹²⁷ This is also reflected by the fact that the General Assembly never explicitly expressed support for the CPA and that this form of civil administration was short-lived, since it ceased with the transfer of sovereignty to the Iraqi Interim Government on 30 June 2004.¹²⁸ At the same time, however, the unanimous adoption of S/RES/1511 (2003) of 16 October 2003 – which, *inter alia*, reaffirmed the position of the current administration of Iraq by the CPA¹²⁹ – and the lack of any outright rejection of the CPA by Member States can be an indication of the acquiescence by the international community in this form of civil administration. Certainly, as time passes, it will become increasingly difficult for Member States to raise arguments about the illegality of the CPA as authorized by resolutions 1483 and 1511, as they could be estopped from doing so for failure of having raised any objections earlier.

In those instances in which the international community has accepted Chapter VII-based civil (co-) administrations as a mechanism for maintaining and restoring international peace and security, the competence of the Security Council to authorize these measures would also stem from its customary powers, like in the case of Chapter VI½ (co-) administrations. There is some authority for a conclusion that such administrations could further be based on the implied powers of the Security Council, flowing from its explicit power to adopt binding (coercive) non-military measures in Article 41 of the Charter.¹³⁰ The existence of such an implied power of a binding nature was affirmed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case. It regarded the power of the Security Council to create an *ad hoc* criminal tribunal under Chapter VII of the Charter as an implied power flowing from its explicit powers to adopt coercive non-military measures for the restoration of international peace and security in Article 41 of the Charter.¹³¹ If one were willing to accept the creation of an *ad hoc* criminal tribunal as an Article

¹²⁷ See e.g. Germany and France in Doc. S/PV./488, 4. See also Bruha, see note 72, 311.

¹²⁸ S/RES/1546 (2004) of 8 June 2004, 2.

¹²⁹ See S/RES/1511 (2003) of 16 October 2003, para. 1

¹³⁰ Bothe/ Marauhn, see note 123, 230.

¹³¹ *Tadić* Decision, see note 92, paras 27 et seq. The same issue also arose with respect to the ICTR in *The Prosecutor v. Kanyabashi*, Decision on the Defence Motion on Jurisdiction, Case No. ICTR-96-15-T of 18 June 1997, Trial Chamber, at paras 17, available at <www.icttr.org>. See also F.L. Kirgis, "The Security Council's First Fifty Years", *AJIL* 89 (1995), 506 et seq. (522); Nolte, see note 103, 315-326.

41 related implied power, it would seem consistent to draw the same conclusion for a (co-) administration created under Chapter VII of the Charter.¹³² The acceptance of such a (co-) administration by the international community in practice could thus either be regarded as support for a customary power to authorize binding (co-) administrations, or as support for the fact that the Security Council has an implied power to do so under Article 41 of the Charter. Since one is dealing with binding Security Council measures, one would not be confronted with the same conceptual difficulties as in the case of consensual measures when resorting to articles placed in Chapter VII as a basis for Security Council powers.

The different legal bases provided by Chapter VI½ and Chapter VII, respectively, illustrate that one has to distinguish between the acceptance of the individual states (or territories) affected by the (co-) administration and that of the membership in general, when considering whether the United Nations is acting in accordance with an implied or customary power. Since the creation of the very first peace-keeping missions it is well-established that the consent of the affected states is one of the corner-stones of Chapter VI½ peace-keeping.¹³³ At the same time, this consent did not provide conclusive evidence of an implied or customary power of the United Nations to authorize the peace-keeping measures in question. It is only where the measures are also accepted by the broader membership of the organization that such acceptance would constitute evidence of an implied or customary power. In the case of a Chapter VII measure, the potential lack of consent of the states affected by the measures does not pose a legal barrier to Security Coun-

¹³² It is unlikely that Article 40 of the Charter could serve as a basis of the implied powers in this instance. The provisional measures foreseen by this article are intended as “cooling-off” measures such as cease-fires, without prejudice to the rights, claims or positions of the parties concerned. Given the highly complex and frequently protracted nature of direct administrations, as well as the fact that they have extensive consequences for the rights and claims of the parties concerned, it seems unlikely that they would fit the mould of the measures foreseen by Article 40. See also *Tadić* Decision, see note 92, para. 34. Cf. A. Orakhelashvili, “The Legal Basis of the United Nations Peace-Keeping Operations”, *Va. J. Int’l. L.* 43 (2003), 485 et seq. (495 et seq.).

¹³³ *Certain Expenses* Opinion, see note 106, 184.

cil action.¹³⁴ However, where the Security Council – as in the case of the direct administration of territories – authorized measures which were at the time perceived to be a (still) unidentified implied power or even a new customary power, the acceptance of these measures by the broader membership of the organization would be necessary to affirm that the Security Council is not acting *ultra vires*.

In essence therefore, the consent of the state(s) affected by the measures in question is a threshold requirement for all those measures aimed at conflict resolution which are undertaken outside Chapter VII. At the same time, the broader consent of the organization remains necessary for all such measures – including those undertaken under Chapter VII – in order for them to qualify as implied or customary powers of the Security Council, whatever the case may be.

IV. Additional Legal Bases for the Direct Administrations of Territories

1. Automatic Succession of Human Rights Treaties?

At this point it is necessary to mention that some authors have also explored additional legal bases for the direct administration of territories, including the phenomena of functional succession to human rights treaties. Some argue that human rights obligations, in particular, contain a general duty for all entities that take over public authority in a territory bound by human rights provisions, to maintain the level of human rights protection for the inhabitants previously provided.¹³⁵ Therefore United Nations (co-) administrations would be bound as a *de facto* successor to human rights treaties, to the extent that they effectively exercise control over civil affairs. A similar argument would also apply to a United Nations-authorized administration such as the one in Iraq, where the United States and the United Kingdom have *de facto* (if only temporarily) succeeded as the territorial sovereign.

¹³⁴ Although consent on the part of the affected state may frequently be present in practice, it is not a legal requirement. See Tomuschat, see note 11, 339.

¹³⁵ T.H. Irmscher, “Legal Framework for the Activities of UNMIK”, *GYIL* 44 (2001), 353 et seq. (371); Human Rights Committee, General Comment No. 26; Doc. A/53/40, Annex VII, para. 4, available at <www.unhchr.ch>.

The essence of this argument seems to be that no formal succession is needed to trigger the automatic succession to human rights treaties. Instead, the *de facto* control over the territory, combined with the nature of human rights obligations, would imply automatic succession of the human rights treaty obligations in question.¹³⁶ This, in turn, would oblige the acting administration to adopt all necessary legislation and other measures in the domestic legal order for ensuring that the human rights in question are respected, protected and fulfilled.¹³⁷ This argument would thus imply that the obligations flowing from the human rights treaties simultaneously provide the acting administration with the legal competence to engage in acts of governance in as far as this is required to give effect to the human rights obligations in question.

This argument is not convincing. First, there is the technical question of whether the United Nations could be the successor to any treaty to which the United Nations and Member States are bound as subjects of public international law. Second, there is virtually no practice supporting automatic succession of human rights treaties by states – let alone by international organizations.¹³⁸ Any automatic human rights obligations attached to a United Nations-authorized administration would rather seem to flow from customary international law, to which the United Nations is bound as a subject of public international law.¹³⁹ However, since the United Nations-authorized administrations have adopted domestically applicable measures that extend far beyond what

¹³⁶ Since individuals and not states are the beneficiaries of these rights, they would be entitled to maintain them, regardless of whether control over the territory passes into the hands of another state or entity. See J. Cerone, “Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo”, *EJIL* 12 (2003), 469 et seq. (474); Stahn, see note 22, 139.

¹³⁷ *Irmscher*, see note 135, 371, who refers to *Vallaj v. Special Adjudicator*, High Court, Queens Bench Division, 21 December 2000, unreported (Westlaw: 2000 WL 1881268), para. 29. The English Court held that since UNMIK/KFOR have lawful authority in and over Kosovo, and have had all the powers and functions of the state transferred to them, they are in a position to provide protection to the inhabitants. However, this conclusion does not depend on whether there was functional succession of human rights treaties. It would equally follow from the trusteeship like character of the United Nations administration in Kosovo which, in turn, has its legal basis in Chapter VII of the Charter.

¹³⁸ See extensively A. Rasulov, “Revisiting State Succession to Humanitarian Treaties: Is there a Case of Automaticity?”, *EJIL* 14 (2003), 141 et seq.

¹³⁹ Stahn, see note 22, 139.

is required by customary human rights law, this body of law does not suffice in providing a legal basis for the whole spectrum of measures adopted by these administrations. Customary human rights law would, at most, provide an additional basis for domestic measures that are aimed at ensuring respect, protection and fulfilment of customary human rights.¹⁴⁰

2. The Law of Occupation?

a. The (In) Applicability of the Law of Occupation to United Nations-Authorized Forces

Similar objections can be raised against the law of occupation, as laid down in the Regulations annexed to the Convention (IV) respecting the Laws and Customs of War on Land of 1907 (the Hague Regulations) and the substantive provisions of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949, as basis for a comprehensive direct administration of territories by the United Nations or those acting under its authorization.¹⁴¹ In accordance with these instruments, the law of occupation applies from the outset of any armed conflict or occupation and, in the case of an occupied territory,¹⁴² continues to apply beyond the general close of military operations.

The period after which the law of occupation ceases to apply, depends upon the nature of the occupation. Where the occupation is carried out under the terms of the instrument which brought hostilities to a close, such as an armistice or capitulation, the law of occupation ceases after one year.¹⁴³ However, in a situation where the occupation has taken place without a declaration of war and without hostilities, the

¹⁴⁰ For the argument that Article 1 (3) and Article 2 (2) of the Charter indeed obliges United Nations (authorized) administrations to give effect to the core content of the human rights standards contained in the International Bill of Rights, see De Wet, see note 18, 319 et seq.

¹⁴¹ As is suggested by Cerone, see note 136, 484.

¹⁴² See article 6 of the Fourth Geneva Convention, Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, available at <www.icrc.org>.

¹⁴³ Fourth Geneva Convention, see above, article 6; Cerone, see note 136, 484; Stahn, see note 22, 140.

law of occupation continues to apply fully for the duration of the occupation.¹⁴⁴

The question now becomes whether the presence of United Nations-authorized forces in a territory could constitute an occupation – in particular if one keeps in mind that the mere penetration of a patrol into enemy territory without any intention of staying there, is sufficient to trigger the law of occupation.¹⁴⁵ As far as Chapter VI½ (co-) administrations are concerned, it seems clear that the law of occupation would be out of place. It would not be in accordance with the consensual nature of the administration, and practice indicates that United Nations peace-keeping forces are not subject to the law of occupation. Instead, they derive their authority from the status of forces' agreements with the receiving state.¹⁴⁶ In relation to Chapter VII authorized forces, some authors support the view that these forces are subject to the law of occupation, at least to the extent that it constitutes customary law. The measures undertaken by these forces are inherently coercive and in those instances where consent is granted by the affected territory, it frequently is procured under the threat to use force.¹⁴⁷ According to this

¹⁴⁴ There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. J.J. Paust, "The US as Occupying Power over Portions of Iraq and Relevant Responsibilities under the Laws of War", *ASIL Insights* (2003), available at <www.asil.org/insights>; Cerone, see note 136, 484.

¹⁴⁵ Cerone, *ibid.*

¹⁴⁶ See Irmscher, see note 135, 380, 382-383. The situation might be different, however, where a territory consents to the military presence of (an) individual state(s). In those instances, the law of occupation could still apply. Article 2 of the Fourth Geneva Convention, see note 142, would be broad enough to cover agreed occupations. There also is state practice supporting this position. E.g., the French Supreme Commander of the Allied troops at the end of World War I explicitly ordered that the regulations annexed to the Convention (IV) respecting the Laws and Customs of War on Land (the Hague Regulations) of 1907 would regulate the armistice of 11 November 1918, which provided for the occupation of the Rhineland. This decision was supported by the German *Reichsgericht* in its early jurisprudence. See Decision of 23 February 1920, *Entscheidungen des Reichsgerichtes in Strafsachen* (RGSt), Vol. 54, 139. See also the *Ruocco v. Fiore*, Corte Costituzionale, *Annual Digest* 14 (1947), 248; *Genel and Bussi v. Steiner*, *ILR* 19 (1952), 613-614.

¹⁴⁷ This was notably the case in Kosovo, where the consent of the FRY was not of a voluntary nature. In East-Timor the situation was more complicated. While the consent of the *de facto* Indonesian government was pro-

line of argument, the question would thus not be whether the law of occupation was triggered, but what type of occupation would be at stake.

For example, if KFOR were seen as a mere continuation of the NATO force that launched the bombing campaign in March 1999, then it would be engaged in an occupation by hostile forces during or subsequent to hostilities. The customary law of occupation would then continue to apply for one year following the close of military operations.¹⁴⁸ If KFOR were viewed as a new, independent entity deployed in Kosovo following the passage of S/RES/1244 (1999) of 10 June 1999, then it might constitute an occupation meeting with no armed resistance, as a result of which the customary law of occupation would apply for the duration of the KFOR presence on the territory.¹⁴⁹ Similar questions would arise in the case of East-Timor, where the military component of UNTAET was, to some extent, an extension of the Australian led forces which were authorized to intervene in the territory by S/RES/1264 (1999) of 15 September 1999.¹⁵⁰ Also in the case of UNOSOM II, there was some overlap in the military composition of this force with that of UNITAF.¹⁵¹ In the case of Iraq, where S/RES/1483 explicitly referred to the military presence as “occupying powers” in the preamble of the resolution, it would seem clear that the continued occupation following the adoption of this resolution was a mere extension of the occupation resulting from the preceding hostilities.¹⁵²

cured under the threat of force, the consent of the *de jure* administrator (Portugal) to UNTAET was of a voluntary nature. See Cerone, see note 136, 484; Irmscher, see note 135, 380 et seq.

¹⁴⁸ Cerone, see note 136, 485.

¹⁴⁹ Cerone, *ibid.*

¹⁵⁰ S/RES/1264 (1999) of 15 September 1999, para. 3; S/RES/1272 (1999) of 25 October 1999, para. 9 determined, *inter alia*, that the multi-national force deployed pursuant to S/RES/1264 (1999) of 15 September 1999 had to be replaced by the military component of UNTAET as soon as possible.

¹⁵¹ S/RES/814 (1993) of 26 March 1993, para. 14 provided for a phased transition of UNITAF to UNOSOM II. Note that in this particular instance, the Australian troops participating in UNITAF and UNOSOM II considered themselves bound by the law of occupation, whilst the United States took the opposite view. See Irmscher, see note 135, 383.

¹⁵² The preamble calls upon the occupying powers to comply fully with the obligations on occupying forces under “applicable international law”, which includes the Fourth Geneva Convention, see note 142, and the Hague Regulations, see note 146. See Kirgis, see note 74. Note that

However, such equation of a United Nations-authorized presence in a territory with an occupation meets with several practical and conceptual problems. First, one has to consider the fact that the United Nations itself does not regard itself as bound by any of the 1949 Geneva Conventions.¹⁵³ It has supported this position with the argument that some of the obligations contained therein can only be discharged by the exercise of judicial and administrative powers which the organisation does not possess. This includes, in particular, the authority to exercise criminal jurisdiction over members of the forces who act in violation of international humanitarian law.¹⁵⁴ This factor, combined with the settled practice of troop – contributing states to take primary and direct responsibility for international humanitarian law violations committed by their contingents,¹⁵⁵ have been used to substantiate the position that the international humanitarian law obligations of contributing states would relieve the United Nations from any obligations in this regard.¹⁵⁶

Elsewhere this author has argued that the United Nations' own position cannot be understood as meaning that it is not bound by the norms of the 1949 Geneva Convention at all and that a United Nations-authorized military presence would remain bound by the core content of these Conventions in all circumstances, as concretised in particular by common article 3.¹⁵⁷ However, at the same time one has to acknowledge that the United Nations cannot be bound to international humanitarian law in the same manner as states and that the Security Council may authorise some deviation from these norms if the circumstances so require. This follows not only from the nature of some of the obliga-

S/RES/1511 (2003) of 16 October 2003 reaffirmed S/RES/1483 (2003) of 22 May 2003, in the preamble.

¹⁵³ Legal Opinion of the Secretariat of the United Nations, "Question of the Possible Accession of Intergovernmental Organisations to the Geneva Conventions for the Protection of War Victims", *United Nations Juridical Yearbook* (1972), 153. Hereinafter referred to as Legal Opinion; M. Zwanenburg, "The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations", *International Peacekeeping* 5 (1999), 133 et seq. (134).

¹⁵⁴ Legal Opinion, see above.

¹⁵⁵ See e.g. UNMIK/REG/2000/47 of 18 Augustus 2000, Sec. 2.4. This regulation subjected the KFOR personnel to the exclusive criminal jurisdiction of their respective sending states. Cerone, see note 136, 486.

¹⁵⁶ R.D. Glick, "Lip Service to the Law of War: Humanitarian Law and United Nations Armed Forces", *Mich. J. Int'l L.* 17 (1995), 53 et seq.

¹⁵⁷ See *De Wet*, see note 18, 204 et seq.

tions at stake (e.g. those concerning the exercise of criminal jurisdiction), but also from the special role of the United Nations – and the Security Council in particular – in maintaining and restoring international peace and security.

For example, it has been suggested that a Security Council-authorized operation, including a military offensive in terms of Chapter VII of the Charter, would constitute an act of law enforcement on behalf of the entire international community and would therefore not possess the character of war. Consequently, the United Nations could not be regarded as a belligerent for the purposes of international humanitarian law.¹⁵⁸ This argument is closely linked to the notion that the need for impartiality during a United Nations-authorized operation would prevent it from becoming a party to an armed conflict.¹⁵⁹ These factors may explain why neither the United Nations, nor the states involved in the NATO operations in Bosnia-Herzegovina, regarded themselves as parties to an armed conflict, despite the NATO air attacks during 1994 and 1995 and UNPROFOR's increasingly severe bouts of fighting with the Bosnian Serbs.¹⁶⁰

Moreover, in the context of international armed conflicts the matter is complicated by the Convention on the Safety of United Nations and Associated Personnel of 9 December 1994,¹⁶¹ which treats the terms of this convention and those of the law of international armed conflict as mutually exclusive regimes. The Safety Convention, which criminalizes attacks on United Nations and associated personnel, applies to all operations established by the Security Council and conducted under United Nations authority and control.¹⁶² The only exception concerns a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter, in which any of the personnel of a United Nations force are engaged as combatants against organized armed forces and for which the law of international armed

¹⁵⁸ C. Greenwood, "International Humanitarian Law and United Nations Military Operations", *Yearbook of Humanitarian Law* 1 (1998), 3 et seq. (14).

¹⁵⁹ Zwanenburg, see note 153, 134; see also Glick, see note 156, 70.

¹⁶⁰ Greenwood, see note 158, 24; E.T. Bloom, "Protection of Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel", *AJIL* 89 (1995), 625.

¹⁶¹ Doc. A/49/742 (1994). Hereinafter referred to as the Safety Convention. It has entered into force on 15 January 1999.

¹⁶² Safety Convention, see above, article 1 (c)(i); Bloom, see note 160, 622-623.

conflict applies.¹⁶³ This means that the threshold for the application of the law of international armed conflict becomes the ceiling for the application of the Safety Convention.¹⁶⁴

The Safety Convention has been regarded as an important and necessary step in increasing the protection afforded to peacekeepers. Therefore it is to be expected that the United Nations and those states which contribute large numbers of personnel to United Nations-authorized operations will be extremely reluctant to accept that United Nations forces have become parties to an international armed conflict and thereby forfeited the protection granted by the Safety Convention.¹⁶⁵ It is most likely that only those Chapter VII operations under unified command and control which relate to conflicts with a clear international character, such as Korea and the first Gulf War would be excluded from the scope of the Safety Convention. Chapter VII operations under national command and control conducted in a context of an internal armed conflict, such as those undertaken in Somalia, Rwanda, Haiti and possibly even the NATO operations in Bosnia-Herzegovina and Kosovo, would still fall under the protective regime of the Safety Convention.¹⁶⁶ This conclusion is supported by the fact that article 1 of the Safety Convention covers operations under United Nations "authority and control",¹⁶⁷ which is broad enough to include the latter type of operations.¹⁶⁸

As a result, it would seem conceptually unconvincing to regard the United Nations-authorized military presence in the territories discussed in this article as an occupying force. The only exception in this

¹⁶³ Safety Convention, see note 161, article 2 (2); Greenwood, see note 158, 25.

¹⁶⁴ Greenwood, see note 158, 25; see also id. "Protection of Peacekeepers: The Legal Regime", *Duke J. Comp. & Int'l L.* 7 (1996), 185 et seq. (199 et seq.); Bloom, see note 160, 625 et seq.

¹⁶⁵ Greenwood, see note 158, 25; see also Bloom, see note 160, 624.

¹⁶⁶ D. Shraga, "The United Nations as an Actor Bound by International Humanitarian Law", 317 et seq., in: L. Condorelli, *Les Nations Unies et le Droit International Humanitaire*, 1986.

¹⁶⁷ As opposed to "command and control".

¹⁶⁸ See Shraga, see note 166, 76; Greenwood, see note 158, 25. In Somalia, for example, the United Nations and the United States characterized their involvement in the conflict against rebel groups and dissident factions as internal. Although the Safety Convention was not yet in force at the time, the example illustrates that the submission that any third-party intervention in an internal conflict would internationalise the conflict, would not be consistent with United Nations practice.

regard concerns the CPA in Iraq, which was explicitly described as an occupying power in the preambles of S/RES/1483 and 1511.¹⁶⁹ One should keep in mind, however, that with the adoption of Resolution 1483 the Security Council for the first time authorized a situation in which both the civil administration and the military command in Iraq remained concentrated in the hands of the very same countries that – according to the vast majority of international authors¹⁷⁰ – had illegally invaded and occupied Iraq only months before. Seen from this perspective, the continued civil and military control of the CPA in Iraq still retained some character of an occupation in the post 1483 Resolution phase.

b. The Unsuitability of the Law of Occupation as a Legal Basis for Direct (Co-) Administrations

However, despite this fact, it would be inaccurate to regard the law of occupation as the legal basis of the subsequent direct administration in Iraq. Similarly, it would be inaccurate to regard the law of occupation as the legal basis for any of the other (co-) administrations discussed above. For even if one were prepared to regard all the above-mentioned situations as fully-fledged occupations to which the customary law of occupation applied,¹⁷¹ the direct administrations that resulted from them were accompanied by Chapter VII Security Council resolutions

¹⁶⁹ See note 152.

¹⁷⁰ For an extensive discussion of the illegality of the invasion see De Wet, see note 18, 284 et seq.

¹⁷¹ The norms which have acquired customary status and therefore bind an international organization such as the United Nations, include the substantive norms of the four 1949 Geneva Conventions, the Hague Regulations, as well as certain parts of the two Additional Protocols to the 1949 Geneva Conventions. See Doc. S/25704 (1993), para. 35; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 66 et seq. (257 et seq.); Greenwood, see note 158, 16-17. See also the conclusions of the *Institut de Droit International*, Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which the United Nations Forces may be Engaged, *Annuaire de l'Institut de Droit International* 54 II (1971), 465 et seq.; P. Benvenuti, "Le Respect du Droit International Humanitaire par les Forces des Nations Unies: La Circulaire du Secrétaire Général", *RGDIP* 105 (2001), 355 et seq. (360); L. Conforti, "La Compatibilité des Sanctions du Conseil de Sécurité avec le Droit International Humanitaire – Commentaire", in: V. Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, 2001, 236-237.

which explicitly authorized the effective administration of the territory in question. Thus, the presence of military forces and their functional inter-twining with the civil administrations¹⁷² were not only the result of a mere factual event – a military invasion – but was also based on the Charter framework.¹⁷³ In accordance with the overriding character of this framework, the Security Council can deviate from the law of occupation.¹⁷⁴ In the context of direct (co-) administrations of territories, this, *inter alia*, implies that the Security Council can invest the *de facto* administration in question with extensive governmental powers, as a measure for the restoration of international peace and security.

Powers granted in this fashion would be more extensive than those provided for under the law of occupation, which is primarily aimed at limiting the *de facto* powers of the occupying power.¹⁷⁵ This results from the fact that the laws of occupation seek to regulate the conflict between the military interests of the occupying power, the humanitarian needs of the population and the prohibition to take measures which would pre-empt the final disposition of the territory at the end of the conflict.¹⁷⁶ Although the occupying power is obliged to act for the benefit of the population, it has to administrate the territory in accordance with the existing law, unless absolutely prevented from doing so.¹⁷⁷ The legislative competencies of the occupying power are therefore limited. Its power is generally not entitled to suspend or repeal existing laws or to introduce permanent changes in the constitutional and institutional framework of the occupied territory. The only exception is where such change is required for the “legitimate needs” of the occupation such as the security of the armed forces or the functioning of the administration.¹⁷⁸

On the one hand, the concept of “legitimate needs” may open the door to a broad interpretation of the powers of the occupying power. However, if one wants to remain true to the letter and spirit of the rule

¹⁷² In all of these instances the safety and efficient functioning of the civil administrations were dependent on their protection by the military forces. In addition, the military forces themselves frequently engaged in civilian tasks, such as ordinary policing.

¹⁷³ Irmscher, see note 135, 379.

¹⁷⁴ Irmscher, see note 135, 383.

¹⁷⁵ Irmscher, see note 135, 377; Maruhn, see note 72, 115.

¹⁷⁶ Stahn, see note 22, 141.

¹⁷⁷ The Hague Regulations, see note 146, article 43; Stahn, see note 22, 141.

¹⁷⁸ Stahn, see note 22, 141.

that the occupying power has to respect the laws in force unless absolutely prevented, such a broad interpretation would seem out of place.¹⁷⁹ This does not deny that the obligations to restore and maintain public order and civil life and to meet the basic needs of the population would imply a duty to provide a capable administration.¹⁸⁰ This includes, inter alia, the establishment of new laws and structures needed for the effective administration of justice.¹⁸¹ It is questionable, however, whether capable administration would include the privatisation of formerly state-owned companies, as envisaged in a report of the Secretary-General in relation to Kosovo.¹⁸² Similarly, it is unlikely that the “legitimate needs” clause would facilitate an overall reform and modernization of all areas of law.¹⁸³ For example, UNMIK Regulation 2000/68 effectively introduced the substantial provisions of the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods into domestic law. Even though the creation of the best conditions for a viable market-based economy may be commendable, this in itself would not suffice to explain why UNMIK was absolutely prevented from applying the existing civil code.¹⁸⁴ Similar questions arise in the case of Iraq and East Timor, respectively. For example, it is unlikely that UNTAET’s extensive regulation of the banking and telecommunication sectors in East Timor,¹⁸⁵ or the CPA’s

¹⁷⁹ See Irmscher, see note 135, 389. The guarantee of continuity in the laws is the most salient sign of the continuing sovereignty of the regular government, in that it freezes the *status quo ante bellum*.

¹⁸⁰ Article 43 of the Hague Regulations, note 146. See also *Christian Society for the Holy Places v. Minister of Defence and Others*, ILR 52 (1979) 514-515.

¹⁸¹ Fourth Geneva Convention, note 142, article 203; Irmscher, see note 135, 388. If the court system has collapsed because of closure and lack of personnel, an occupant can set up new courts and swear in new judges. See Marauhn, see note 72, 115.

¹⁸² Doc. S/2000/1196, paras 82-83. According to article 55 of the Hague Regulations, see note 146, public immovable property shall only be administered and used in accordance with the rules of “usufructuary” use, but the capital or substance must be safeguarded. See also Irmscher, see note 135, 389.

¹⁸³ Irmscher, see note 135, 391.

¹⁸⁴ Irmscher, see note 135, 393.

¹⁸⁵ See e.g. UNTAET/REG/2000/8 of 25 February 2000; UNTAET/REG/2001/15 of 21 July 2001; UNTAET/REG/2001/30 of 30 November 2001.

commitment to the development of a free market economy in Iraq,¹⁸⁶ could be justifiable as absolutely necessary under the law of occupation.

In essence therefore, it is unlikely that the customary law of occupation suffices in providing a legal basis for the whole spectrum of measures adopted by these administrations. As in the case of customary human rights law, it would merely provide an additional basis for domestically applicable measures that provide for minimum humanitarian standards that have to be respected at all times.¹⁸⁷ The explicit reference to the members of the CPA in Iraq as occupying powers in the relevant Security Council resolutions would thus reaffirm the CPA's core humanitarian obligations towards the civilian population. But the true legal basis for the extensive regulatory actions of the CPA and other United Nations-authorized administrations is to be found in the implied and customary powers of the Security Council to authorize civil administrations under the Charter framework.¹⁸⁸

V. The Implications of the (Co-) Administrations for the Domestic Legal Order

1. The Dual Character of Directly Applicable Decisions

In relation to both Chapter VI^{1/2} and Chapter VII (co-) administrations, the nature of the administrations closely resembles that of trusteeships, despite the fact that they have a different legal basis than the classic trusteeship systems under Chapter XII of the Charter. Like in the case of a trusteeship, the United Nations-authorized civil administrations were directed at territories which lack the capacity to function independently.¹⁸⁹ The territories in question lacked in particular the core elements of a stable administration and were unable and/or unwilling to prevent ongoing wide spread and systematic human rights violations.¹⁹⁰

¹⁸⁶ As concretised, *inter alia*, by the extensive modernization of the banking system and the licensing of commercial telecommunication services and equipment. See CPA/ORD/7 June 2003/12; CPA/ORD/19 September 2003/40, including Annex A; CPA/ORD/8 June 2003/11.

¹⁸⁷ Irscher, see note 135, 395; Stahn, see note 22, 140-141.

¹⁸⁸ Irscher, see note 135, 394.

¹⁸⁹ This remains so, despite the fact that they were formally independent states, as opposed to colonized territories.

¹⁹⁰ Hufnagel, see note 1, 214.

By assisting these territories in protecting individuals and minority rights and in the development of democratic, representative and accountable government structures, the civil administrations serve the rights of the inhabitants of the administered territories, as well as the collective security interests of the international community.¹⁹¹

Furthermore, civil (co-) administrations and trusteeships alike are of a limited (albeit in practice sometimes protracted) duration, as they are intended to enable the affected territory to become self-governing.¹⁹² In the case of Chapter VII authorized (co-) administrations, this is partly reflected by the time-limit attached to some of the (former) mandates,¹⁹³ and partly by the explicit commitment to this effect in the respective Security Council resolutions – including those resolutions which authorized the open-ended civil administrations in Kosovo and initially also in Iraq.¹⁹⁴ In the case of Chapter VI½ (co-) administrations, the limited nature is inherent in the fact that the existence and duration of the mandate is dependent on the consent of the recognized governing authority of the territory affected.

A further implication of the dual purpose of trusteeship-like administrations is that the representatives of the international administrations act in a dual capacity. On the one hand, they act on the authority of the United Nations, which constitutes an international authority. At the same time, they also complement or even replace the national institutions, as they adopt decisions with direct effect in the national legal

¹⁹¹ Bothe/ Marauhn, see note 123, 220. The institution of a trust implies the holding of rights and powers by a person (the trustee) for or on behalf of another person (the trustor) in order to accomplish the specific purposes which are the heart of the mission of the trustee and the establishment of the trust. While there may be cases in which it is difficult to identify the trustor and while there may even be cases involving several trustors, this does not affect the underlying concept as such. Stahn, see note 39, 141; Hufnagel, see note 1, 213.

¹⁹² Hufnagel, see note 1, 215.

¹⁹³ See note 125.

¹⁹⁴ See e.g. Kosovo: S/RES/1244 (1995) of 10 June 1995, paras 11 (d) and 11 (f); Iraq: S/RES/1483 (2003) of 22 May 2003, paras 8 (c) and 9 and S/RES/ 1511 (2003) of 16 October 2003, paras 1 and 15; East Timor: S/RES/1272 (1999) of 25 October 1999, para. 8 and S/RES/1410 (2002) of 17 May 2002, para. 8. In the case of Bosnia-Herzegovina this limited duration is reflected by the Mission Implementation Plan of the Office of the High Representative of 30 January 2003, available at <www.ohr.int>.

order.¹⁹⁵ The Special Representatives of the Secretary-General (and the CPA-Administrator in the case of Iraq) may therefore be described as a provisional substitute of the domestic governmental institutions, to the extent that the latter are incapable of executing governmental functions.¹⁹⁶ The legal acts adopted or executed in this fashion would also possess a dual character. In the instance where the civil (co-) administration is exercised directly by the United Nations, they belong to the legal order of the United Nations as they are enacted by subsidiary organs of the Security Council within the meaning of Article 29 of the Charter. In the case of Iraq, they would have a more *sui generis* international character, for, although authorized by the United Nations, the CPA-Administrator was neither a subsidiary organ of the Security Council, nor was he subjected to the direct authority of the United Nations in any other fashion.

In addition, the legal acts in all the above instances automatically form part of the domestic legal order of the territory affected.¹⁹⁷ This means that the customary or implied powers of the Security Council following from Article 41 of the Charter (in the case of a Chapter VII administration), or the customary powers of the organization combined with the consent of the state affected (in the case of a Chapter VI½ mandate), effectively opened the legal order of the administered territory to the direct application of decisions by United Nations representatives.¹⁹⁸ One could also describe this process as the provisional transfer of sovereignty of the territory to the United Nations or other entities such as the CPA-Administrator on the basis of the Security Council's implied or customary powers.¹⁹⁹

Surprisingly, this revolutionary development provoked little if any reaction from Member States. One might have suspected that such a clear deviation from the public international law principle that leaves the implementation of international obligations to domestic authorities would have provoked some resistance from Member States. Most pertinently the question arises whether the implied and/or customary pow-

¹⁹⁵ This dual character was also acknowledged by the Constitutional Court of Bosnia-Herzegovina. See *Request for Evaluation of Constitutionality of the Law on State Border Service*, Decision, No. U 9/00, 3 November 2000, available at <www.ustavnisud.ba>.

¹⁹⁶ Stahn, see note 39, 148.

¹⁹⁷ Bothe/ Marauhn, see note 123, 230; Stahn, see note 39, 146.

¹⁹⁸ Bothe/ Marauhn, see note 123, 155; Stahn, *ibid.*

¹⁹⁹ Bothe/ Marauhn, see note 123, 155.

ers of the Security Council would indeed include the competence to penetrate the domestic legal order in the fashion described above and, if so, under what circumstances. On the one hand, the lack of protest by Member States suggests their silent acceptance of the Security Council's competence to invest the Special Representatives and CPA-Administrator with the power to directly penetrate the domestic legal order. Therefore, even if the power to do so was not implied initially, it would by now exist as a matter of custom. On the other hand, it remains to be seen whether Member States would be willing to accept the expansion of such a competence outside the very special context of a direct (co-) administration which has to act in a trusteeship-like fashion in a territory lacking (stable) governmental structures.

For example, in the field of economic sanctions, the Security Council has on several occasions adopted measures that were very specifically targeted at particular groups or individuals whose actions were regarded as a threat to international peace and security.²⁰⁰ However, even in those instances where the Security Council Sanctions Committee itself identified the individuals who were to be targeted by very specific measures, such as the freezing of assets of persons suspected to be involved in international terrorism,²⁰¹ the Security Council did not invest this subsidiary organ with the power to implement these measures. More specifically, it did not invest the Sanctions Committee with the authority to directly implement these measures in territories which were regarded as unwilling or unable to give effect to these measures. This self-restraint on the part of the Security Council may be an indication that it lacks the competence to directly penetrate the domestic orders of Member States outside the context of direct (co)-administrations.

2. The Potential Inalterability of Directly Applicable Decisions

A further important implication of direct (co)-administrations for the respective domestic legal orders is that the latter are opened in a fashion that gives automatic precedence to the United Nations-authorized regulations if and to the extent that they deviate from the previously

²⁰⁰ See De Wet, see note 18, 252 et seq.

²⁰¹ S/RES/1267 (1999) of 1267 of 15 October 1999, para. 4 (b) et seq.; S/RES/1333 (2000) of 19 December 2000, para. 8 (c); S/RES/1390 (2002) of 28 January 2002, para. 2 (a), 5 (a).

applicable domestic law. The more comprehensive the scope of the United Nations-authorized administration, the more extensive the impact of such supremacy will be. For example, in the case of Kosovo and East Timor, the pre-existing laws in force in the territories before the establishment of UNMIK and UNTAET, respectively, were declared applicable only in as far as they did not conflict with the United Nations regulations and internationally recognized human rights standards defined by the transitional administrations.²⁰² Similarly, in the case of Iraq, the Regulations and Orders issued by the CPA were binding measures that took precedence over all other laws and publications to the extent that such laws and publications were inconsistent with the Regulations or Orders.²⁰³

With Chapter VII authorized administrations, this precedence can become problematic in relation to the future amendment of decisions taken by a United Nations-authorized (co-) administration. The superior legal framework within which these administrations function, raises the question whether regulations adopted by them could subsequently be amended or abrogated by the national government in the post-administration phase without the consent of the Security Council. A pertinent example is the Constitution of Bosnia-Herzegovina, which was directly enacted by the Security Council through the adoption of S/RES/1031. Since the Constitution contains an amendment clause, it gives the impression that the Security Council had also authorized the amendment of this document in the post co-administration phase of Bosnia-Herzegovina. In accordance with this clause, the Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.²⁰⁴

²⁰² See UNMIK/REG/1999/ of 25 July 1999, sec. 2; UNMIK/REG/1999/24 of 15 November 1999, secs 1.2 and 1.3; UNMIK/REG/2000/59 of 27 October 2000; UNTAET/REG/1999/1 of 27 November 1999, sec. 3.1; Stahn, see 39, 145. Compare M. Bothe/ T. Maruhn, "The United Nations in Kosovo and East Timor – Problems of a Trusteeship Administration, *International Peace-Keeping* 6 (2000), 152 et seq. (155). They seem to argue that there is a presumption of continuity of the pre-existing law in case of trusteeship-like administrations. However, if this were the case, it would only hold true if and to the extent that the pre-existing law is compatible with the United Nations regulations.

²⁰³ CPA/REG/16 May 2003/01, at s 3(1), available at <www.cpa-iraq.org>.

²⁰⁴ Grant, see note 43, 41.

However, a closer scrutiny of the Constitution places a question mark over the scope of Security Council's consent to the subsequent amendment of the Constitution. Although the Constitution does not specify inalterable articles, it does provide that no amendment may eliminate any of the human rights and freedoms referred to in article II.²⁰⁵ This seems to be a clear indication that any future amendment of article II would require explicit Security Council authorization. Moreover, one could argue that such authorization would also be required for any constitutional amendment that would indirectly limit or prevent the exercise of the rights contained in article II. For example, it could be argued that any amendment to the constitutional autonomy granted to the different entities within Bosnia-Herzegovina would prevent the members of the three constituent peoples to be free from discrimination.²⁰⁶ This, in turn, would imply that the rights and freedoms guaranteed in article II of the Constitution could not be separated from the structure of the Constitution itself, as a result of which effectively no Constitutional amendment could be undertaken without Security Council consent.

It is highly doubtful, however, if such a drastic measure was contemplated by the Security Council. It is hard to see how such open-ended control could be reconcilable with the principle of limited duration that underpins the United Nations trusteeship – like (co-) administrations.²⁰⁷ This conclusion is also supported by the fact that in the case of Kosovo, East Timor and during Iraq no such open-ended control was foreseen. In these instances the respective international administrations have provided for the future amendment of regulations issued by them in the post administration era. They determined that the respective regulations shall remain in force until repealed by the international transitional administrations themselves, or superseded by such rules as are issued by the institutions established under a political settlement for Kosovo, or upon the transfer of UNTAET and the Authority's administrative and public service functions to the democratic institutions of East Timor and Iraq, respectively.²⁰⁸

²⁰⁵ Article X of Annex 4, General Framework Agreement, see note 3.

²⁰⁶ Grant, see note 43, 42-43.

²⁰⁷ It is also questionable whether such open-ended control would be reconcilable with the right to self-determination, which poses a limitation to Security Council powers. See extensively De Wet, see note 18, 326 et seq.

²⁰⁸ UNMIK/REG/1999/1 of 25 July 1999, Sec. 4; UNTAET/REG 1999/1 of 27 November 1999, Sec. 4; CPA/REG/ of 16 May 2003/01, s. 3 (1). In the

In the case of a Chapter VI½ (co-) administration, the problem of “inalterability” of (directly applicable) regulations adopted by the international administration is unlikely to arise, given its consensual nature and the fact that these regulations do not have the superior quality inherent to those measure taken in terms of Chapter VII of the Charter. At the same time, however, other problems may arise in relation to conclusion and the subsequent amendment of agreements pertaining to Chapter VI½ (co-) administrations. The first problem arises where the (co-) administration is intended for a territory where there is no effective government and where different parties of the conflict claim to be the representative of state authority. Apart from the difficulty in determining the true representative of the people,²⁰⁹ there is also the question whether such groups could enter into an international agreement. Whilst recognized liberation movements possess partial international legal personality for this purpose, the situation is less clear in the case of other armed groups.²¹⁰ The case of Cambodia provides authority for the fact that the international community seems to recognize the partial international legal personality of such groups. For example, article 3 of the Paris Agreement, which determined that the SNC was the unique, legitimate body and source of authority in which the sovereignty, independence and unity of Cambodia was enshrined throughout the transitional period, was subsequently endorsed in S/RES/669 (1990) of 24 September 1990.²¹¹

case of Iraq, it is unlikely that any amendment would already be introduced by the Interim Government. In accordance with the Law for the Administration of Iraq in the Transitional Period (TAL), the Interim Government’s tasks are essentially limited to leading the country to free elections, the drafting of a permanent constitution and the formation of an Iraqi government pursuant to the permanent constitution. The TAL and CPA documents are available at available at <www.cpa-iraq.org>.

²⁰⁹ See Gordon, see note 87, 318 who claims that only the direct consent of the population, e.g. by means of a referendum, would constitute the consent needed for a trusteeship-like administration. Anything less would contravene their right to self-determination.

²¹⁰ Hufnagel, see note 1, 99-100, 294-95; Ratner, see note 34, 10.

²¹¹ See also A/RES/46/18 of 20 November 1991; Hufnagel, see note 1, 100; Ratner, see note 34, 10. But see the *Prosecutor v. Morris Kallon & Brimma Bazzy Kamara*, Special Court for Sierra Leone, Appeals Chamber, Case No. SCSL-2004-15-AR72(E) and Case No. SCSL-2004-16-AR72(E) of 13 March 2004, para. 39. The Court was not willing to accept the international character of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone of 7 July 1999, despite

However, once this recognition has been given, the legality of the decision-making powers of the (co-) administration would become highly questionable when the “authoritative body” as a whole withdraws its consent to the administration. Similar problems could arise where internal disputes within the “authoritative body” lead to the withdrawal of one or more of the constituting parties from this body. The question then arises to what extent the change in the composition of the “authoritative body” would affect its position as sovereign authority, and whether it would (still) have the competence to enforce or amend the original agreement regulating the “domestic powers” of the different parties participating in the (co-) administration. Given the fact that most agreements of this kind tend to be of a rather fragile nature, the chances of the disintegration of the consent of some of the parties and the (co-) administration in general would be quite significant. For this reason it would, from the point of legal certainty, be preferable to adopt systems of (co-) administration under Chapter VII of the Charter, as the consent of the parties to the conflict does not pose a legal requirement for the creation of the (co-) administration. For the reasons outlined above, it would nonetheless be important that the Chapter VII authorized administration provides clarity as to the future domestic amendment of regulations and other legislation enacted within this superior legal framework.

VI. Conclusion

The dynamic character of the implied and customary powers of the United Nations combined with the presumption of legality attached to Security Council and General Assembly resolutions have led to a significant expansion of the powers of the United Nations in relation to the civil administration of territories. Whereas it was hardly contemplated half a century ago that the United Nations would increasingly be engaging in the direct governance of territories beyond the legal boundaries of the trusteeship system, its power to do so is now widely accepted by its membership. This acceptance would include the power of the Security Council to open up the national legal orders of the affected territories in a manner that facilitates the application of binding

the fact that it was co-signed by the United Nations. It regarded the Lomé Agreement as a municipal agreement, with the role of the United Nations as that of a moral guarantor that was not a party to the treaty itself.

measures adopted by the United Nations authority in a direct and overriding manner. As illustrated above, the most convincing bases for these powers of civil administration would be the customary powers in the case of Chapter VI½ (co-) administrations and customary or implied powers in the case of Chapter VII (co-) administrations. Moreover, the case of Iraq illustrates that the international community might even accept the delegation of such direct governance of a territory by the United Nations to certain Member States, although explicit acceptance of this form of governance by the international community is still lacking.

Although the maintenance of international peace and security may necessitate the involvement of the United Nations in the direct administration of territories, the above analysis also reveals several problems which may arise as a result of such administration. The first concerns the almost immediacy with which the legality of the measures for civil (co-) administrations is recognized, due to the presumption of legality attached to decisions by (subsidiary) organs of the United Nations and the absence of a system of centralized judicial review within the organisation. In the absence of protest by a significant number of Member States at a very early stage after the adoption of the measures for civil (co-) administration, the legality of these measures becomes very difficult to dispute. This applies both to the initial Security Council decision to authorize the direct civil administration, and the subsequent measures (e.g. Regulations and Orders) adopted in the context of a specific civil administration. This may have the unfortunate result that the international community finds itself confronted by and ill prepared to deal with a form of international governance that not only suffers from a lack of political legitimacy, but may also be of questionable legality – especially if one considers that the potential implications of the measures for civil administration are rarely thoroughly contemplated at the time of their adoption.

This risk would be particularly acute in instances where a civil administration authorized on the basis of Chapter VII of the United Nations does not sufficiently provide for a procedure regulating the amendment of its own legislation in the post-administration phase. As indicated, the amendment clause in the Constitution of Bosnia-Herzegovina – which was directly introduced within the domestic legal system by the Security Council itself – is open to an interpretation which would require the consent of the Security Council with respect to every future constitutional amendment. Given the fact that such consent could be prevented by a single veto of a permanent Security Coun-

cil member, the people of Bosnia-Herzegovina may be prevented from any constitutional reform for years to come – a situation which is highly unlikely to be reconcilable with principles of democratic governance envisaged by S/RES/1031 itself. Moreover, in situations where a legislative amendment procedure in the post-administration phase has been provided for, such a procedure risks remaining a dead-letter if the civil administration in question is of an open-ended nature. In situations such as Kosovo the absence of a time-limit to the respective civil administration may result in its indeterminate protraction against the will of the local population and the international community at large, if a Security Council resolution aimed at its termination is blocked by the veto of one of its permanent members.

At first sight one might think that these problems resulting from Chapter VII authorized civil administrations could be resolved by resorting to Chapter VI½ as a basis for civil administration. As the creation and continuation of such an administration, as well as the continued applicability of the legislation introduced by it, depend on the consent of the domestic government of the territory in question, the above-mentioned problems arising from the excessive protraction of the civil administration or the inalterability of its legislation would not arise. However, experience has shown that civil administrations which exclusively rely on the consent of the domestic government are bound to fail where the stability of the domestic government is under threat, such as in war-torn areas where the composition of the domestic government is determined by highly fragile peace-agreements. As this is almost certainly to be the case in those territories in which the United Nations engages in civil administrations, the chances of a Chapter VI½-type of civil administration engaging in any effective administration at all, remains questionable.

The situation is further complicated in situations where there is no clearly identifiable domestic government and where different parties to the conflict claim to be the representative of the state authority. Apart from the difficulty in determining the true representative of the people, one still needs to clarify if and to what extent armed groups that are a party to a conflict would possess the necessary legal personality to engage in an international agreement with the United Nations concerning the civil administration of the particular territory. It is exactly because of these difficulties with consensus-based forms of international governance that civil administrations based on Chapter VII of the Charter prove to be necessary at times. Since under this Chapter the consensus of (those claiming to represent) the domestic government is neither a

legal requirement for authorizing the civil administration itself, nor for the adoption of specific items of legislation, the United Nations would not be confronted with similar legal problems when engaging in the direct administration of the territory. From a legal standpoint, a Chapter VII (authorized) civil administration would thus be in a position to overcome legal impasses between the local parties through binding decision-making where this is required for the general welfare of the population.

In essence therefore, there is no blueprint formula for guaranteeing a successful civil administration of a territory by the United Nations or Member States on its behalf. On the one hand, the ability of the civil administration to take binding measures on the basis of Chapter VII of the Charter within a respective territory may be necessitated by the political realities of the situation. At the same time, the actual support of the local authorities and civil population for these measures will ultimately determine their political success. The exact nature and scope of the civil administration will be determined by the particular circumstances of the case. However, if the United Nations is indeed to honour the trusteeship-type nature of these administrations, i.e. the furthering of the welfare of the civil population in the administered territory in a fashion that enables sustainable self-government, it needs to reflect more clearly on the long-term implications of the extensive powers exercised in the course of such an administration.

In order to achieve this aim, it would be advisable to consider the creation of a standing committee responsible for the overseeing of United Nations-authorized civil administrations. This body, which could be created as a subsidiary organ of the Security Council, could coordinate and examine existing information on the legal and practical problems that have thus far arisen in the various United Nations-authorized civil administrations around the globe.²¹² By systematizing and analyzing past experience in this regard, the standing committee may succeed in developing some general guidelines for future civil administrations, whether of a Chapter VI½ or Chapter VII nature. After all, given the large number of states facing severe political instability or even bordering on the brink of total collapse, it is fair to assume that the United Nations will continue to engage in the civil administration of territories in years to come. By providing a more systematic and coher-

²¹² See the letter of the Dutch Ministers of Foreign Affairs and Development Cooperation to the Dutch Parliament of 1 June 2004 (*Tweede Kamer, vergaderjaar 2003-2004*, 24 832, nr. 5, 5).

ent framework in which United Nations-authorized administrations have to operate, the standing committee would also provide a modest measure of control in an area where the increased involvement of the United Nations carries with it the risk of the unbridled expansion of the organisation's implied and customary powers into all aspects of civilian life.