

The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis

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I. Introduction

The United Nations Security Council has entered new ground by placing Kosovo and East Timor under temporary United Nations administration. On 10 June 1999 the Security Council adopted Resolution 1244, authorizing the Secretary-General to establish “an international civil presence in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia”.¹ Only a few months later, on 25 October 1999, the Security Council decided to establish a United Nations Transitional Administration in East Timor, which would be endowed with the “overall responsibility for the administration of East Timor”, including “all legislative and executive authority” and the administration of justice.² Both, the United Nations Interim Administration Mission in Kosovo (UNMIK)³ and the United Nations Transi-

¹ See para. 10 of S/RES/1244 (1999) of 10 June 1999.

² See para. 1 of S/RES/1272 (1999) of 25 October 1999.

³ See generally on the issue of UNMIK J.A. Frowein, “Notstandsverwaltung durch die Vereinten Nationen”, in: *Völkerrecht und Deutsches Recht, Festschrift für W. Rudolf*, 43 et seq.; C. Tomuschat, “Yugoslavia’s Damaged Sovereignty over the Province of Kosovo”, in: *Liber Amicorum Kooijmans* (forthcoming); J. Ringelheim, “The legal status of Kosovo”, in: *Kosovo, 1999–2000, The Intractable Peace*, Working Group, European University Institute, available under <http://www.iue>; C. Stahn, “International Territorial Administration in the former Yugoslavia: Origins, Developments and Challenges Ahead” *ZaöRV* 61 (2001), 107 et seq.; 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.* 2001, forthcoming; M. Ruffert, “The Administration of Kosovo and East Timor by the International Community”, *ICLQ* 50 (2001), 555 et seq.; M. Bothe/ T. Marauhn, “UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council Mandated

tional Administration in East Timor (UNTAET)⁴ were created on the basis of Chapter VII of the United Nations Charter. Moreover, in both cases, the United Nations administrations assumed the exclusive administrative authority over the territories placed under their supervision. The scope and the depth of the mandate, vesting the United Nations with the task of acting fully as an interim government for a war-torn society, marks a novelty in the history of United Nations peace-keeping.⁵

Admittedly, the technique of administering a territory under the auspices of an international authority is a rather traditional instrument of international diplomacy. The Treaty of Versailles⁶ vested the League of Nations with significant governmental responsibilities over the Saar Territory⁷ and the Free City of Danzig.⁸ Moreover, in 1945, the United

Trusteeship Administration", in: *Kosovo and the International Community* (forthcoming); H. Stromeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and in East Timor", *AJIL* 95 (2001), 46 et seq.; M. J. Matheson, "United Nations Governance of Postconflict Societies", *AJIL* 95 (2001), 76 et seq.; E. Lagrange, "La mission intérimaire des Nations Unies au Kosovo, nouvel essai d'administration directe d'un territoire", *A.F.D.I.* 45 (1999), 335 et seq.; T. García, "La mission d'administration intérimaire des Nations Unies au Kosovo", *RGDIP* 104 (2000), 61 et seq.

- ⁴ See on the issue of UNTAET J. Chopra, "The UN's Kingdom of East Timor", *Survival* 42 (2000), 27 et seq.; S. Linton, "Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor", *Melbourne University Law Review* 25 (2001), 122 et seq.; C. Schreuer, "East Timor and the United Nations", *International Law Forum du droit international* 2 (2000), 18 et seq.; G. Burdeau, "Quelle voie pour le Conseil de sécurité après l'affaire du Kosovo? Le ban d'essai du Timor-Oriental", *ibid.*, 32 et seq.
- ⁵ Cf. on the practice of the United Nations in the area of territorial administration, J. Chopra, *Peace-Maintenance*, 1999, 37 et seq.; S. R. Ratner, *The New UN Peacekeeping*, 1995, 89 et seq.; F.-E. Hufnagel, *UN-Friedensoperationen der zweiten Generation*, 1996.
- ⁶ Treaty of Peace between the Principal Allied and Associated Powers and Germany of 28 June 1919 (Treaty of Versailles), Consolidated Treaty Series, Vol. 225 (1919), 189 et seq.
- ⁷ The mandate of the League of Nations was based on article 49 of the Treaty of Versailles. See generally on the Saar Territory F. Münch, "Saar Territory", in: R. Bernhardt (ed.), *EPIL* IV (2000), 271 et seq.
- ⁸ The relationship between Danzig and the League of Nations was based on article 103 of the Treaty of Versailles. Cf. on the role of the League of Na-

Nations itself was authorized by Article 81 of the Charter to administer territories within the framework of the United Nations Trusteeship System. However, the use of territorial administration as an instrument of conflict resolution for the maintenance of international peace and security marks a new step in the legal practice of the United Nations. In the late 1980s the United Nations started to conduct more and more complex peace-keeping operations, involving the exercise of executive and legislative functions by United Nations organs in war-ravaged territories.⁹ But except in one case, namely the United Nations Transitional Administration in Eastern Slavonia (UNTAES),¹⁰ the United Nations has not been formally charged with the entire responsibility for a territory in these years.

The establishment of the United Nations administrations in Kosovo and East Timor presents the world organization with an unprecedented challenge. In both cases, the United Nations does not only exercise full administrative powers over the territories concerned,¹¹ but it is also in charge of preparing the settlement of the territorial status of the territories.¹² The success of the operations is therefore an important test case

tions with respect to Danzig M. Ydit, *Internationalized Territories*, 1961, 194 et seq. See also on the proposed internationalization of Trieste and Jerusalem, under III. 3.

- ⁹ See in particular the United Nations Transition Group in Namibia, established by S/RES/431 (1978) of 27 July 1978 and the United Nations Transitional Authority in Cambodia provided for under article 6 of the Agreement on a Comprehensive Political Settlement on the Cambodia Conflict of 23 October 1991. For a survey of the practice of the United Nations during that period, see Ratner, see note 5, 117 et seq.; S. K. Han, "Building a peace that lasts: The United Nations and Post-Civil War Peace Building", *N.Y.U. J. Int'l. L. & Pol.* 26 (1994), 837 et seq.
- ¹⁰ See S/RES/1037 (1996) of 15 January 1996. See also the Report of the Secretary-General pursuant to S/RES/1025 (1995) of 30 November 1995, Doc. S/1995/1028 of 13 December 1995, para. 5. On the powers of UNOSOM II in Somalia, see under III. 6.
- ¹¹ See Section 1 of UNMIK Regulation 1999/1 of 25 July 1999 on the Authority of the Interim Administration in Kosovo and Section 1 of the UNTAET Regulation 1999/1 of 27 November 1999 on the Authority of the Transitional Administration in East Timor.
- ¹² See para. 11 (e) of S/RES/1244 ("facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords") and para. 3 of the preamble of S/RES/1272 ("a process of transition under the authority of the United Nations towards independence").

for the capacity of the United Nations to restore peace by shaping the internal governmental system of a territory.

A first comparative analysis shows that both missions work essentially according to the same principles of administration. A United Nations Transitional Administrator, the Special Representative of the Secretary-General is, at least in the first stage of the operation, vested with all-embracing authority, including the exercise of all legislative and executive powers and the administration of the judiciary.¹³ The United Nations Administrator defines the law applicable to the territory enacts new legislation, which he deems necessary for the re-establishment of a functioning governmental system and conducts the external relations of the territory. At the same time, United Nations governance is limited by its transitional and fiduciary character.¹⁴ The United Nations organs are charged with the establishment of national authorities and must gradually devolve their powers to these institutions. Furthermore, the United Nations administration does not act as a new sovereign, but rather as a trustee which exercises powers in the interest and on behalf of the administered population and, eventually, the territorial state.

This new model of conflict management raises a number of important questions under international law, such as the status of the United Nations administered authorities, the authorization of the United Nations administrations under the Charter, the nature of United Nations authority and its limits. This article seeks to examine some of these issues, drawing on the practice of the United Nations between the establishment of the missions and the organization of parliamentary elections, leading to the transfer of broader powers to the domestic authorities.

¹³ See the references in note 11. For a critical account of the powers of UNMIK, see Stahn, *International Territorial Administration*, see note 3, 149 et seq. See also the critical remarks by Chopra with respect to UNTAET: "The organisational and juridical status of the UN in East Timor is comparable with that of a pre-constitutional monarch in a sovereign kingdom.", Chopra, see note 4, 29.

¹⁴ For a detailed discussion of the concept of trusteeship within the context of international territorial administration, see Bothe/ Marauhn, see note 3, sub. I and IV and Stahn, *International Territorial Administration*, see note 3, 132 et seq., 137 et seq.

II. The Territorial Status of the Administered Territories

Disputes about various forms of self-government and self-determination have been at the origin of both, the establishment of UNMIK and the creation of UNTAET.

1. The Legal Background of the Establishment of UNMIK and UNTAET

The link between the creation of a United Nations Administration and the strife for an adequate territorial status reflecting the will of the people is particularly striking in the case of East Timor, which is rooted in the context of decolonization.

a. East Timor

The territory was recognized as a non-self-governing territory under Portuguese administration until its armed occupation by Indonesia. Portugal had initially commenced steps in preparation for the decolonization of East Timor and the realization of its people's right to self-determination in 1974.¹⁵ However, following a period of civil disorder with conflicting statements of the East Timorese political parties with respect to the future of the territory, ranging from declarations of independence¹⁶ to calls for integration with Indonesia,¹⁷ Indonesian armed forces invaded the territory on 7 December 1975. East Timor was for-

¹⁵ In July 1974 Portugal officially recognized the right to self-determination of all Portuguese in its constitution. See Constitutional Law No. 7/74, July 1974, article 2, reproduced in: H. Krieger (ed.), *Cambridge International Documents Series: East Timor and the International Community: Basic Documents*, 1997, 34.

¹⁶ The Democratic Union of East Timor (UDT) and the Revolutionary Front for an Independent East Timor (FRETILIN) supported independence. FRETILIN declared the independence of East Timor on 28 November 1975. See P. Lawrence, "East Timor", in: R. Bernhardt (ed.), *EPIL II* (1995), 3 et seq.

¹⁷ The Timorese Democratic People's Union (APODETI) favoured integration with Indonesia. See J. Toole, "A false sense of security: Lessons learned from the United Nations Organization and Conduct Mission in East Timor", *Am. U. L. Rev.* 16 (2000), 199 et seq., (208).

mally incorporated as Indonesia's "27th province" on 17 July 1976.¹⁸ Indonesia continued to govern the territory for almost twenty-five years. But its sovereignty over East Timor remained controversial.¹⁹ The United Nations condemned the Indonesian invasion of 1975 and rejected Indonesia's claim that the people of East Timor had freely chosen integration with Indonesia as one of the options of the realization of self-determination. United Nations Security Council Resolutions 384²⁰ and 389²¹ reaffirmed the United Nation's support for East Timor's right to self-determination and called upon the government of Indonesia to "withdraw without further delay all its forces from the territory". Recognition among United Nations Member States varied. While some states recognized Indonesia's sovereignty over East Timor,²² other states²³ took the view that East Timor continued to be a non-self-governing territory, with Portugal as the administering power. Portugal acknowledged that Indonesia's occupation of East Timor entailed *de facto* limitations on its own powers,²⁴ but insisted continuously on its capacity as administering power. In particular, Portugal carried out several initiatives to solve the problem of East Timor, including the 1995 application to the ICJ,²⁵ in which it tried to challenge the validity of the

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- ¹⁸ The Indonesian parliament approved a bill on the incorporation of East Timor which became effective on 17 July 1976. See R. S. Clark, "East Timor, Indonesia and the International Community", *Temp. Int'l & Comp. L. J.* 14 (2000), 75 et seq., (81) and Linton, see note 4, 126.
- ¹⁹ Cf. Toole, see note 17, 213.
- ²⁰ S/RES/384 (1975) of 22 December 1975, paras 1-2.
- ²¹ S/RES/389 (1976) of 22 April 1976, para. 2.
- ²² These states include Australia, Bangladesh, India, Iran, Iraq, Jordan, Malaysia, Morocco, Oman, the Philippines, Saudi Arabia, Singapore, Surinam and Thailand.
- ²³ The Member States of the European Union, for example, never accepted Indonesia's *de jure* or *de facto* sovereignty over East Timor. See on the position of European states R. Goy, "L'indépendance du Timor Oriental", *A.F.D.I.* 45 (1999), 203 et seq., (212 et seq.).
- ²⁴ For an analysis of the Portuguese position, see M.C. Maffei, "The Case of East Timor before the International Court of Justice - Some Tentative Comments" *EJIL* 4 (1993), 223 et seq.
- ²⁵ See *Case concerning East Timor* (Portugal v. Australia), Advisory Opinion of 30 June 1995, ICJ Reports 1995, 90 et seq. See on this decision T.D. Grant, "East Timor, the U.N. System, and Enforcing Non-Recognition in International Law", *Vand. J. Transnat'l L.* 33 (2000), 273 et seq., (298 et seq.); R. Burchill, "The ICJ Decision on the Case Concerning East Timor: The illegal use of force validated", *Journal of Armed Conflict Law* 2 (1997),

Timor Gap Treaty, concluded between Australia and Indonesia, by claiming the treaty legitimized Indonesia's annexation of East Timor and violated the right of self-determination of the people of East Timor.

However, neither the ICJ, nor the international community finally solved the issue. Instead, Portugal and Indonesia came to a political compromise, which left the issue of the territorial status open.²⁶ In a Tripartite Agreement of 5 May 1999 between Indonesia, Portugal and the United Nations,²⁷ both parties agreed to hold a referendum under United Nations auspices, in which the people of East Timor were to be asked whether they wished to accept autonomy within Indonesia²⁸ or pursue independence. Portugal agreed to remove East Timor from the list of non-self-governing territories, if the people of East Timor voted in favour of the Indonesian autonomy proposal.²⁹ Indonesia, on the other hand, affirmed its responsibility to "take the constitutional steps necessary to terminate its links with East Timor, thus restoring under Indonesian law the status held prior to July 17, 1976", if the people of East Timor voted against a status of autonomy within Indonesia.³⁰ In the latter case, both parties also agreed to make "arrangements for a peaceful and orderly transfer of authority in East Timor to the United Nations", which would be charged with "enabling East Timor to begin a process of transition towards independence."³¹

A key feature of the agreement is that both sides maintained their divergent position concerning the status of East Timor. This is clearly reflected in paras 5 and 6 of the preamble of the agreement, in which the parties note the position of the Government of Indonesia on the one hand, according to which "the proposed special autonomy should be

1 et seq; R. S. Clark, "Obligations of Third States in the Face of Illegality – Ruminations Inspired by the Weeramantry Dissent in the Case Concerning East Timor", in: A. Anghie/ G. Sturgess (ed.), *Legal Visions of the 21st Century: Essays in honour of Judge Christopher Weeramantry*, 1998, 631 et seq.

²⁶ See also Clark, see note 18, 83.

²⁷ Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor of 5 May 1999, Doc. S/1999/513, including Annexes I-III.

²⁸ For a survey of the autonomy proposal, see J.-M. Sorel, "Timor Oriental: Un résumé de l'histoire du droit international", *RGDIP* 104 (2000), 37 et seq., (46 et seq.)

²⁹ See article 5 of the Agreement of 5 May 1999.

³⁰ See article 6 of the Agreement of 5 May 1999.

³¹ Ibid.

implemented only as an end solution to the question of East Timor and with full recognition of Indonesian sovereignty over East Timor”, and acknowledge the position of Portugal on the other hand, according to which “an autonomous regime should be transitional, not requiring recognition of Indonesian sovereignty over East Timor or the removal of East Timor from the list of Non-Self-Governing Territories of the General Assembly, pending a final decision on the status of East Timor by the East Timorese people through an act of self-determination under United Nations auspices.”

The United Nations administered referendum was held on 30 August 1999. Despite intimidation by Indonesian and militia forces, 78 per cent of the voters rejected the autonomy proposal.³² The Security Council regarded the outcome of the popular consultation as “an accurate reflection of the views of the East Timorese people.”³³ Immediately after the vote for independence, pro-Indonesian militias started a violent campaign of terror against the East Timorese population. Notable features of the violence were systematic attacks on the civilian population, including murder, torture, rape and forcible deportations of civilians and widespread plunder.³⁴ The Security Council reacted to the violence on 15 September 1999 by adopting Resolution 1264 (1999), in which the Council determined that the systematic, widespread and flagrant violations of international humanitarian and human rights law constituted a threat to peace and security. Acting under Chapter VII of the Charter, the Security Council authorized the establishment of a multinational force under a unified command structure, which became known as the International Force for East Timor (INTERFET).³⁵ Moreover, on 25 October 1999, shortly after the Indonesian People’s Consultative Assembly had recognized the results of the referendum and repealed the legislation that declared East Timor to be a province of

³² 98 per cent of the registered voters went to the polls. 94,388 (21,5 per cent) voted for autonomy and 344,580 (78,5 per cent) voted against it. See UN Press Release, GA/9691 of 17 December 1999.

³³ See para. 3 of the preamble of S/RES/1264.

³⁴ See Report of the International Commission of Inquiry to the Secretary-General, Doc. A/54/726-S/2000/59 of (2000) of 31 January 2000. See also the Report on the situation of human rights in East Timor, Doc. A/54/660 (1999) of 10 December 1999.

³⁵ See on the legal problems encountered by INTERFET M. Kelly/ T. McCormack/ P. Muggleton/ B. Oswald, “Legal aspects of Australia’s involvement in the International Force for East Timor”, *Int’l Rev. of the Red Cross* 83 (2001), 101 et seq.

Indonesia,³⁶ the Security Council created UNTAET. Following the recommendations of the Secretary-General in his report of 4 October 1999,³⁷ the United Nations administration was vested with a comprehensive civilian mandate, complementing the military mandate previously exercised by INTERFET.

It is important to note that the establishment of UNTAET was not unilaterally imposed by the Security Council. On the contrary, Resolution 1272 must be conceived as a direct implementation of article 6 of the Agreement of 5 May 1999, in which Indonesia and Portugal agreed to transfer the authority over East Timor to the United Nations.³⁸ Legally speaking, one may have doubts whether as an illegal occupying power, Indonesia had any legal standing whatsoever to "cede" authority to the United Nations. One may very well argue that the relations between Indonesia and East Timor have always been international in nature.³⁹ In practice, however, Indonesia was treated by the United Nations as if it had powers over East Timor.⁴⁰ Both parties were asked to reiterate their agreement for the transfer of authority to the United Nations in a meeting of 28 September 1999.⁴¹ Moreover the Resolution stresses the "importance of cooperation" between UNTAET and both Indonesia and Portugal "in the implementation of this resolution", although the report of the Secretary-General of 4 October 1999 had ob-

³⁶ The Indonesian People's Consultative Assembly revoked the law integrating East Timor within the Unitary State of the Republic of Indonesia on 19 October 1999. See para. 39, Doc. A/54/654 of 13 December 1999 "Question of East Timor". See also the reference to that date in para. 4 of the preamble of S/RES/1272.

³⁷ Report of the Secretary-General on the situation in East Timor UN Doc. S/1999/24 of 4 October 1999.

³⁸ See the reference to the Agreements of 5 May 1999 in para. 2 of the preamble of S/RES/1244.

³⁹ Cf. Tomuschat, see note 3, sub. 5.2.

⁴⁰ But see Chopra, see note 4, 29, who notes that when a delegation of Indonesian representatives met UN officials on 20 October 1999 to deliver their acceptance of the August election results, "the Secretary-General's Personal Representative for East Timor, Jamsheed Marker, informed them that no such formality was required since the UN had never recognised the Indonesian occupation as legitimate."

⁴¹ See para. 25 of the Report, see note 37.

viously been more restrictive.⁴² Portugal confirmed on 20 October 1999 that it would relinquish its legal ties to East Timor.⁴³ Accordingly, it is beyond doubt that the United Nations has taken over responsibility over East Timor by way of agreement with the competent authority.

Furthermore, one may argue that UNTAET has become the only lawful administering authority of East Timor after the transfer of powers to the United Nations in accordance with the terms of the Agreement of 5 May 1999. UNTAET's role goes far beyond the mere assistance of a foreign government. It is in fact, at least under the provisional framework created by Resolution 1272, the government of the territory itself. The competencies of the United Nations Transitional Administration include all the classical powers of a state. In addition, other than in the cases of UNMIK or UNTAES, the United Nations administration in East Timor acts independently of any competing territorial sovereign.⁴⁴ Most notably, East Timor has formally remained on the list of non-self-governing territories, but with UNTAET as the administering power.⁴⁵

b. Kosovo

In the case of Kosovo, the link between the establishment of the United Nations administration and a disputed territorial status is less obvious, because Kosovo has remained part of Yugoslavia since the reconstitution of the Yugoslav state after World War II. However, Kosovo en-

⁴² See paras 36 and 37, *ibid.* "UNTAET will also establish a mechanism for consultation with Portugal, *given its special responsibilities*. Consultation will also be organized with Indonesia, as necessary" (emphasis added).

⁴³ See J. Chopra, "Introductory Note to UNTAET Regulation 13 (2000)", *ILM* 39 (2000), 936 et seq. (937): "On 20 October 1999, Lisbon's representative in New York, Ambassador Antonio Monteiro, expressed to UN officials that Portugal would relinquish its legal ties to East Timor and consider UNTAET its successor with the passage of the Security Council mandate." See also Chopra, see note 4, 29.

⁴⁴ Chopra takes the view that "Resolution 1272 ... became the instrument for bestowing sovereignty over East Timor to the UN, even though it did not explicitly use the word." Chopra, see note 4, 29.

⁴⁵ See The United Nations and Decolonization, under <http://www.un.org/Depts/dpi/decolonization>
"The current administering powers are France, New Zealand, the United Kingdom and the United States. East Timor is now administered by the United Nations Transitional Administration in East Timor (UNTAET)."

joyed a privileged status in the Socialist Federal Republic of Yugoslavia (SFRY). Although formally being part of the Republic of Serbia, Kosovo was an autonomous province, vested with a status similar to that of the other six republics of the SFRY under the 1974 Constitution.⁴⁶ This privileged status was systematically abrogated by the institutions of the Republic of Serbia in the late 1980s. The Serbian authorities started to enact discriminatory legislation *vis-à-vis* Kosovo Albanians⁴⁷ and forced the Kosovo Assembly to approve amendments to the Serbian Constitution, reducing Kosovo's autonomy to a level below that of a municipality.⁴⁸ The members of the Kosovo Assembly responded to these acts of repression by drafting a Constitution for an

⁴⁶ For a discussion of Kosovo's legal status under different SFRY constitutions, see J. Marko, "Die staatsrechtliche Entwicklung des Kosovo/a von 1913–1995", in: J. Marko (ed.), *Gordischer Knoten Kosovo/a: Durchschlagen oder entwirren?*, 1999, 15 et seq; E. Pichl, "Kosovo in den jugoslawischen Verfassungssystemen: 1974 bis 1998", in: Marko, *ibid.*, 75 et seq.

⁴⁷ In 1990, the Serbian parliament issued a number of discriminatory decrees suppressing the rights of Kosovo Albanians. The decrees prohibited the sale of property to Albanians, shut down Albanian newspapers and created municipalities reserved to Serbian citizens. Furthermore, the Serbian parliament implemented a Serb-orientated, uniform education programme for all elementary and secondary schools. Cf. on the removal of Kosovo's autonomy rights under the Milošević era, N. Malcolm, *A Short History of Kosovo*, 1998, 343 et seq.; A. J. Bellamy, "Human Wrongs in Kosovo 1974–99", *International Journal of Human Rights, Special Issue: The Kosovo Tragedy: The Human Rights Dimensions*, 2000, 105 et seq.

⁴⁸ Article 110 of the Serbian Constitution of 1990 provided that "the statute is the highest legal act of the autonomous province". The adoption of the statute, however, was made dependent on the prior approval of the Serb National Assembly. The powers of the Assembly of Kosovo were limited to the adoption of "decisions and general enactments in accordance with the [Serbian] Constitution and the law". See article 109 of the 1990 Constitution of Serbia. Furthermore, the amendments transferred both the control over the Kosovar security forces and the Kosovo judicial system to the government of Serbia. See on the key elements of the constitutional changes Bellamy, see note 47, 113. Marko writes: "[The] provisions concerning the legal status of the Autonomous Provinces were a clear violation not only of the Federal constitution's provisions of 1974, but also of the Serb Republic's constitutional amendment XLVII § 2, adopted in 1989 which stated unequivocally that the "position, rights and duties of the autonomous provinces regulated by the federal constitution must not be altered by amendments of the Serbian constitution" See J. Marko, "Kosovo/a – A Gordian Knot?", in: Marko, see note 46, 261 et seq., (265).

independent "Republic of Kosovo", which was approved by an overwhelming majority of the population of Kosovo in a secret referendum.⁴⁹ Following the vote on independence, parliamentary and presidential elections were held, in order to determine the institutions of the newly proclaimed Republic. The leader of the Democratic Union, I. Rugova, was elected president and his party achieved an overwhelming majority in the elections. But the elected parliament was never convened. The Republic of Serbia continued to assume the sole responsibility for the administration and the judiciary in Kosovo, while the Rugova government remained an unofficial, parallel structure of authority in the territory.⁵⁰ Moreover, the "Republic of Kosovo" failed to attract international recognition. The claim of the people of Kosovo to an independent status was not accepted by the international community.⁵¹ All efforts to address the Kosovo crisis focused on restoring autonomy or creating other forms of internal self-determination.

The Interim Agreement for Peace and Self-Government in Kosovo of 23 February 1999 (Rambouillet Agreement),⁵² which was declined by the FRY authorities before the military intervention by NATO, granted Kosovo far-reaching autonomy and self-government, without however relinquishing its territorial bonds to the Republic of Serbia.⁵³ Kosovo would have enjoyed responsibilities equivalent to the powers of the two Republics of the FRY, though formally being part of Serbia. The independence of Kosovo was also rejected by the United Nations Security

⁴⁹ Marko speaks of "a 87 per cent participation rate and an approval by 99 per cent of the voters". Cf. Marko, see above, 265. The electorate was asked to vote on "Kosovo as a sovereign and independent state with the right of constitutive participation in an alliance of sovereign Republics (in Yugoslavia) on the basis of freedom and full equality of the sovereign republics in the alliance".

⁵⁰ Oeter speaks of a "shadow government", see S. Oeter, "Yugoslavia, Dissolution", in: Bernhardt, see note 7, 1563 et seq., (1591 et seq.). See on the parallel structure also R. Caplan, "International Diplomacy and the Crisis in Kosovo", *Int'l Aff.* 74 (1998), 451 et seq.

⁵¹ But see the recognition of Albania, *Keesing's Record of World Events*, 1991, 38513.

⁵² Doc. S/1999/648 of 7 June 1999. Cf. on the agreement M. Weller, "The Rambouillet Conference on Kosovo", *Int'l Aff.* 75 (1999), 211 et seq.

⁵³ See Section I, article I, para. 4 of the Rambouillet Accord. Kosovo's final status, however, was to be decided on the basis of a number of criteria, including *inter alia* "the will of the people". Cf. article I, para. 3 of Chapter 8 of the Rambouillet Accord.

Council. The Council expressly confirmed the sovereignty and territorial integrity of the Federal Republic of Yugoslavia in its Resolution 1160, and indicated that "a solution to the Kosovo problem should be based on the territorial integrity of the Federal Republic of Yugoslavia and should be in accordance with OSCE standards." The same approach is reflected in Resolution 1244, in which the Council authorized the Secretary-General "to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial *autonomy within the Federal Republic of Yugoslavia*" (emphasis added).⁵⁴ At the same time, however, the Security Council refrained from making binding determinations with respect to Kosovo's future status. The Council charged UNMIK with the task of "facilitating a political process", which shall lead "towards the establishment of an *interim* political framework agreement providing for substantial self-government in Kosovo" (emphasis added), "taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia".⁵⁵

2. The Internationalized Status of Kosovo and East Timor

While it would arguably go beyond the powers of the United Nations Security Council to unilaterally determine the future territorial status of a territory and its inhabitants,⁵⁶ one cannot fail to note that both

⁵⁴ See para. 10 of S/RES/1244 (1999) of 10 June 1999.

⁵⁵ See para. 11 of S/RES/1244, its Annex 1 and para. 8 of Annex 2.

⁵⁶ See E. Klein, *Statusverträge im Völkerrecht*, 1980, 107 and 110. See also the Dissenting Opinion of Judge Sir G. Fitzmaurice in the Namibia Case, *Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16 et seq., (294): "Even when acting under Chapter VII of the Charter, the Security Council has no power to abrogate or alter territorial rights ... Even a war-time occupation of a country or territory cannot operate to do that. It must await the peace settlement ... The Security Council might, after making the necessary determinations under Article 39 of the Charter, order the occupation of a country or piece of a territory to restore peace and security, but it could not thereby, or as part of that operation, abrogate or alter territorial rights." For a broader understanding of the powers of the Security Council under Chapter VII, cf. Matheson, see note 3, 85: "[T]here can in fact be situations in which the Security Council would be

Kosovo and East Timor have acquired a special territorial status under United Nations administration. Pending the final settlement of the territorial status, the United Nations has, in both cases, assumed the classical powers of a state within the respective territories. Nevertheless, this does not mean that the United Nations is at the same time the lawful sovereign over the territory. Quite apart from the theoretical question as to whether the concept of sovereignty may be applied to international organizations, its exercise would require an unfettered right of the United Nations to control and to dispose of the territory in question. Such a power, however, would run counter to the mandate of the UN administrations which is located in the context of peace-maintenance and limited to the development of democratic self-governing institutions.⁵⁷ One must rather assume that in the cases of Kosovo and East Timor, sovereignty and administering authority do not coincide.

Several theories may be invoked in order to explain the special status thus created. One may take the position that the establishment of a United Nations administration with exclusive administering authority over a territory creates a situation in which the sovereignty of the former sovereign is in abeyance and suspended until the United Nations has accomplished its task. An alternative argument would be that sovereignty resides in the people who are temporarily deprived of its exercise under United Nations rule.

Technically, the term "internationalized territory" appears to be the most accurate notion, reflecting the current status of Kosovo and East Timor. Although this term covers a broad variety of the territories under international protection, supervision or guarantee, it is more appropriate than the notion of "protectorate", which is traditionally limited to state-to-relations, by which a protected state surrenders at least the conduct of its foreign relations to a protector state, without, however,

justified in directing a permanent change in some aspects of the status, boundaries, political structure, or legal system of a territory within a state, if the Council should determine that doing so is necessary to restore and maintain international peace and security".

⁵⁷ Similarly, the powers of the administrators of non-self-governing territories have been compared "with the powers under civil law of a guardian over a ward." In 1954, some UN Member States observed that one can no more speak of the sovereignty of an administering power over a non-self-governing territory than one can speak of a guardian's ownership of his ward's property. See Doc. A/PV.485 (1954), 146.

being annexed by the latter.⁵⁸ The concept of “internationalized territories”, on the contrary, refers to the exercise of control over a territory by an international organization or a group of states.⁵⁹

The disjunction of sovereignty and exclusive administering authority in both, Kosovo and East Timor, has created an unusual situation. Kosovo has, *de facto*, lost its legal ties to the Federal Republic of Yugoslavia (FRY), although forming part of it. Unless invited by UNMIK, the FRY is pre-empted from exercising public authority in Kosovo. Pending a final settlement of the future status of the territory, UNMIK is, in the words of the Secretary-General, the “the only legitimate authority in Kosovo”.⁶⁰ But UNMIK is not entitled to dispose of the territory, which is arguably the ultimate attribute of sovereignty.⁶¹ The special internationalized legal status of Kosovo, arising from the disjunction of sovereignty and exclusive administering authority, has also been recognized by the Constitutional Framework for Provisional Self-Governance in Kosovo (Constitutional Framework), promulgated by the Special Representative of the Secretary-General as Regulation No. 2001/9 on 15 May 2001.⁶² The drafters of the Constitutional Framework have decided to define Kosovo “as an entity under interim international administration, which, with its people, has *unique* historical, legal, cultural and linguistic attributes” (emphasis added).⁶³ Moreover, the Constitutional Framework contains no reference to the authority of the FRY organs in Kosovo at all. Instead, the document assigns to the Special Representative and KFOR the powers which typically are run

⁵⁸ See G. Hoffmann, “Protectorates”, in: R. Bernhardt (ed.), *EPIL* III (1997), 1153 et seq.

⁵⁹ Cf. Ydit, see note 8, 21: “Internationalised territories are special State entities in which supreme sovereignty is vested in (or *de facto* exercised by) a group of States or in the organised international community”. See also H. Hannum, *Autonomy, Sovereignty and Self-Determination*, 1996, 17.

⁶⁰ See Report of the Secretary-General on the United Nations Interim Administration in Kosovo, Doc. S/1250/1999 of 23 December 1999, para. 35.

⁶¹ It is therefore difficult to assume that “sovereignty over Kosovo” is temporarily vested with the UN. For a different view, see Ringelheim, see note 3.

⁶² See Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, available under <http://www.un.org/peace/kosovo-for> a full account see Stahn, *Constitution without a State*, see note 3.

⁶³ Cf. Chapter 1, para. 1.1. of the Constitutional Framework.

by a federal government, such as foreign affairs, cross-border control, monetary policy, civil aviation, defence and emergency powers.⁶⁴

East Timor, on the other hand, is since the transfer of authority to the United Nations neither part of Indonesia, nor part of Portugal. In fact, its status may be compared to the status of Namibia after the termination of South Africa's Mandate over the territory and the take-over of "direct responsibility" by the United Nations. In that case, the United Nations General Assembly established the United Nations Council for South West Africa, later to be renamed the Council for Namibia "to administer South West Africa until independence" and "to promulgate such laws, decrees and administrative regulations as are necessary for the administration of the Territory until a legislative Assembly is established".⁶⁵ While the United Nations acted as the international administering authority of Namibia, the territory enjoyed an international status *sui generis*.⁶⁶ As opposed to Namibia, however, which remained under the control of South Africa, East Timor is not only *de jure*, but also *de facto* governed by the United Nations. The United Nations administrator formally acts as a head of state of the territory. One of the most impressive illustrations of the United Nations' legal status is the fact that in an exchange of notes constituting an agreement with Australia, UNTAET has assumed all rights and obligations under the Timor Gap Treaty previously exercised by Indonesia. UNTAET acted on behalf of East Timor, limiting its contractual obligations "until the date of independence of East Timor".⁶⁷ Moreover, UNTAET concluded a grant agreement with the World Bank's Inter-

⁶⁴ See Chapter 8, para. 8.1 of the Constitutional Framework.

⁶⁵ See A/RES/2248 (XXII) of 19 May 1967.

⁶⁶ Cf. Klein, see note 56, 304. See *Id.*, "Namibia", in: Bernhardt, see note 58, 485 et seq., (487 et seq.); A. Junius, *Der United Nations Council for Namibia*, 1989, 89; ICJ Reports 1971, 16 et seq., (57 para. 131 "territory having an international status").

⁶⁷ See Exchange of Notes constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) concerning the continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989, entered into force on 10 February 2000, Australian Treaty Series 2000, No. 9.

national Development Association, which designates UNTAET and East Timor as 'recipient'.⁶⁸

One may therefore very well take the position that since the transfer of authority to the United Nations by both Indonesia and Portugal, East Timor constitutes in fact a non-self-governing territory under the full legal authority of the United Nations, which acts as the only legitimate administering power until the independence of the territory. Some confusion may arise from the fact that the Security Council reaffirms "respect for the sovereignty and territorial integrity of Indonesia" in para. 12 of the preamble of Resolution 1272. However, since the United Nations has always refrained from recognizing the legality of the integration of East Timor into Indonesia, this reference cannot be interpreted as a recognition of the sovereignty of Indonesia over East Timor but must be conceived as an affirmation of the obligation of United Nations authorities to respect the existing territorial border between East Timor and West Timor.

III. Historical Precedents

Looking back in history, it is difficult to identify precedents in which the establishment of an international administering authority had such a tremendous impact on the administration of the territory as in the cases of Kosovo and East Timor. In quite a number of cases, the United Nations has been charged with the exercise of administering authority within a model of co-governance and power-sharing with the territory's domestic authorities.⁶⁹ This has even led to situations in which the United Nations assumed the final authority with respect to certain areas of governance and public administration.⁷⁰ But the cases in which in-

⁶⁸ Cf. Chopra, see note 4, 30. Pursuant to the International Development Association-UNTAET Trust Fund for East Timor Grant Agreement, UNTAET established a system of village and sub-district councils for the allocation of development funds. See Regulation No. 2000/13 of 10 March 2000.

⁶⁹ The most recent examples are the United Nations Transitional Authority in Cambodia (UNTAC) and the establishment of the Office of the High Representative (HR) in Bosnia and Herzegovina, endorsed by the Security Council.

⁷⁰ In Cambodia, the United Nations operation was governed by the Paris Agreement on a Comprehensive Political Settlement of the Cambodia Conflict of 23 October 1991, cf. in this respect A. Rapp/ C. Philipp, "Con-

ternational organisations have exercised the sole and exclusive authority over a territory are rare and mostly related to particular historical circumstances.

1. The Administration of the Saar Territory by the League of Nations

An early and very impressive example of a complete take-over of governmental authority by an international organization is the administration of the Saar Territory by the League of Nations between 1920 and 1935. The Treaty of Versailles entrusted the government of the Saar Territory to an "International Governing Commission" representing the League of Nations.⁷¹ The Governing Commission exercised executive and legislative powers, without considering itself bound by the opinion of the local legislative bodies.⁷² It was even authorized "to ensure by such means and under such conditions as it deemed suitable, the protection abroad of the inhabitants of the Saarland."⁷³ Legally, the League of Nations assumed the government of the Saar Territory in the capac-

flicts Cambodia/Kampuchea", in: R. Wolfrum, *United Nations Law Policies and Practice*, 1995, Vol. 1, 200 et seq. Article 3 of the Accord vested sovereignty in a Supreme National Council (SNC) composed of representatives of Cambodian factions. Article 6 then went on to state: "The SNC hereby delegates to the United Nations all powers necessary to ensure the implementation of these Agreements, as described in Annex 1." The Paris Agreement is reproduced in: *ILM* 31 (1992), 180 et seq. For a legal study of the agreements, see S. R. Ratner, "The Cambodia Settlements Agreements", *AJIL* 87 (1993), 1 et seq.; Hufnagel, see note 5, 85 et seq. The High Representative in Bosnia was vested with the "final authority" to interpret the civilian aspects of Annex 10 of the Dayton Peace Agreement. For a full account, cf. Stahn, *International Territorial Administration*, see note 3, 165 et seq. On the particularities of the Bosnian constitutional system, see id., "Die verfassungsrechtliche Pflicht zur Gleichstellung der drei ethnischen Volksgruppen in den bosnischen Teilrepubliken – Neue Hoffnung für das Friedensmodell von Dayton?", *ZaöRV* 60 (2000), 663 et seq.

⁷¹ See Treaty of Versailles, see note 6, 189 et seq., Part. III, Section IV, Annex, Art. 16.

⁷² The only real restriction on the legislative power of the Governing Commission related to mines. See on the practice of the Commission, Ratner, see note 5, 91 et seq.

⁷³ See Treaty of Versailles, see note 6, Part III, Section IV, Annex, article 21.

ity of a trustee.⁷⁴ While Germany remained the official sovereign over the territory,⁷⁵ the League of Nations was charged with its administration and the organization of a referendum on the status of the territory. In its early stages, the Governing Commission focused its activities on the re-establishment of civilian structures and local assemblies, replacing the French military administration. Later, the Commission adopted a number of decrees on issues such as public property, revenue collection or transportation. The mandate of the League of Nations ended in 1935 when the population of the Saar territory voted in a plebiscite of 13 January 1935 in favour of immediate reunification with Germany.

2. The “Free City of Danzig”

A slightly different model of territorial administration was applied in the case of the administration of the “Free City of Danzig”. The city was placed under the protection of the League of Nations by article 102 of the Treaty of Versailles. But the League of Nations did not assume exclusive administrative authority over the territory. Rather, it acted as a “guarantor” of the territory.⁷⁶ Amendments of the Constitution of Danzig were subject to the approval of the Council of the League of Nations.⁷⁷ Moreover, the High Commissioner for the territory of Danzig was entrusted with “the duty of dealing in the first instance with all differences arising between Poland and the Free City of Danzig”.⁷⁸ But the main legislative and executive responsibilities remained within the authority of the local institutions, i.e. the Legislative Assembly (“Volks-

⁷⁴ See also Ydit, see note 8, 224 (“a temporary trusteeship on behalf of the League of Nations”).

⁷⁵ See Treaty of Versailles, Part III, Section IV, Annex, article. 49. Ydit notes that “what really remained for Germany was only the *nudum jus* to the territory itself”, Ydit, see note 8, 45. Some authors therefore took the view that sovereignty was vested with the League of Nations or that there was no sovereignty at all over the Saar Territory.

⁷⁶ Ydit concludes that “the sovereign power – although formally vested in the people (article 3 of the Danzig Constitution) – was shared by Danzig, Poland and the League of Nations”. For a full discussion of the disputed status of Danzig, see *id.*, see note 8, 224–228.

⁷⁷ See arts 47–49 of the Constitution of the Free City of Danzig, in: League of Nations Official Journal, Special Suppl. No. 7, July 1922.

⁷⁸ See article 103 of the Treaty of Versailles.

tag”) and Senate of the “Free City of Danzig”.⁷⁹ The Polish Government was charged with “the conduct of the foreign relations of the Free City of Danzig as well as the diplomatic protection of citizens of that City when abroad”.⁸⁰

3. The Proposed Internationalization of the “Free Territory of Trieste” and the City of Jerusalem

The first attempts to place territories under the administration of the United Nations in the aftermath of World War II proved to be less successful. Despite detailed proposals for the internationalisation of the Territory of Trieste and the City of Jerusalem, both projects were finally not carried out in practice.

The Treaty of Peace with Italy of 10 February 1947⁸¹ placed the “Free Territory of Trieste” under the direct authority of the United Nations Security Council. Trieste was to be governed by the Security Council on the basis of the “Permanent Statute” of the “Free Territory of Trieste”⁸² embodied in Annex VI and VII of the Peace Treaty with Italy. The Statute vested the United Nations administrator (the “Governor of Trieste”⁸³) with broad powers. In fact, the Governor was authorized to intervene in all matters of public interest, by initiating legislation or administrative measures.⁸⁴ Furthermore, the Statute empowered the Governor to veto and actively prevent the execution of

⁷⁹ The Legislative Assembly was the supreme legislative power in all matters. The Senate held the executive authority. Most notably, the Senate represented the City of Danzig in its relations with the League of Nations and Poland and signed international treaties on behalf of Danzig. Ydit, see note 8, 191–193.

⁸⁰ See article 104, para. 6 of the Treaty of Versailles.

⁸¹ Treaty of Peace with Italy, 10 February 1947, UNTS Vol. 49 No. 747.

⁸² The Statute was adopted by the Security Council at its 91th Sess. held on 10 January 1947 by ten votes to one. Australia objected to the adoption of the Statute by arguing that it imposed functions on the Security Council, which the Council was not authorized to assume under the United Nations Charter. See *Repertoire of the Practice of the Security Council, 1946–1954*, 482 et seq.

⁸³ The Governor of Trieste should have been appointed by the Security Council, after consultation with Italy and Yugoslavia.

⁸⁴ See arts 19 and 20 of the Permanent Statute of the Free Territory of Trieste, Annex VII of the Peace Treaty with Italy.

legislative and administrative measures which he deemed contrary to the Constitution of Trieste, the "Permanent Statute" or the responsibilities of the Security Council in Trieste.⁸⁵ Finally, the Governor would have been responsible for the conduct of foreign affairs and the appointment and the removal from office of high governmental officials.⁸⁶ Given the proposed take-over of almost all-embracing authority by the United Nations, the status of Trieste under the Permanent Statute has even been described by one author as that of "a state-like community under the sovereignty of the United Nations".⁸⁷ However, the plan for the administration of Trieste by the Security Council, which would have established an early case of comprehensive United Nations territorial administration, was never implemented, due to the failure to agree on the appointment of an international governor for the territory in the Security Council at the beginning of the "Cold War".⁸⁸

The second territory, which became a candidate for United Nations administration, was the City of Jerusalem. According to the Palestine Partition plan, approved by the United Nation General Assembly in its Resolution 181 of 29 November 1947,⁸⁹ Jerusalem should have been transformed into an internationalized territory under the authority of the United Nations Trusteeship Council, separate from both the Jewish and the Arab state. The Trusteeship Council drafted a "Statute" for the City of Jerusalem,⁹⁰ which conferred broad powers upon a United Nations Governor for Jerusalem. As in the case of Trieste, the Governor would be authorized to initiate and enact legislation without, or contrary to the will of the local Legislative Assembly.⁹¹ At the same time he was to act as the chief administrator, assuming control over the preservation of public order, the conduct of foreign affairs and the protection of holy places.⁹² Furthermore, in his capacity as a United Nations rep-

⁸⁵ See arts 10, 20 and 22 of the Permanent Statute of the Free Territory of Trieste.

⁸⁶ See arts 16, 24 and 27 of the Permanent Statute of the Free Territory of Trieste.

⁸⁷ See H. Kelsen, *The Law of the United Nations*, 1961, 832.

⁸⁸ For a detailed analysis, cf. Ydit, see note 8, 256 et seq.

⁸⁹ A/RES/181 (II) of 29 November 1947.

⁹⁰ Statute for the City of Jerusalem, Draft Prepared by the Trusteeship Council, UN TCOR, 2nd Sess., Third Part, Annex, 4, Doc. T/118/Rev.2 of 21 April 1948.

⁹¹ See arts 15 and 20–24 of the Statute for the City of Jerusalem.

⁹² For a survey of the powers of the Governor, cf. Ydit, see note 8, 288 et seq., 295 et seq.

representative, the Governor was to be exempted from the jurisdiction of the courts of the city or its Legislative Council.⁹³ He should have been appointed by and exclusively accountable to the United Nations Trusteeship Council. The protection abroad of the interests and the citizens of Jerusalem was to be ensured by the Trusteeship Council or the Governor. But the proposed internationalization of Jerusalem was finally not put into practice, because it failed to get a sufficient majority in the General Assembly after the Arab-Israeli war 1948–1949.⁹⁴

4. The United Nations Temporary Executive Authority (UNTEA)

The administration of West Irian (1962–1963)⁹⁵ turned to be the first case in which the United Nations assumed direct and exclusive responsibility over a territory. West Irian was a Non-Self-Governing Territory under Chapter XI of the United Nations Charter, administered by the Netherlands. In an agreement concluded with Indonesia on 5 August 1962,⁹⁶ the Netherlands government agreed to pass sovereignty over the territory to Indonesia, subject to the holding of a referendum on the question of whether the inhabitants of the territory wished to remain or sever their ties with Indonesia.⁹⁷ The act of self-determination was to be carried out under the auspices of the United Nations. At the same time, the United Nations were asked to facilitate the transfer of West Irian from Dutch to Indonesian rule, by establishing an interim United Nations administration in the territory (the United Nations Temporary Executive Authority) “with full authority ... to administer the territory” for a period of six months.⁹⁸ The United Nations administrator

⁹³ See article 12 of the Statute for the City of Jerusalem.

⁹⁴ On the non-implementation of the Statute, see Ydit see note 8, 297 et seq. See also C. Toussaint, *The Trusteeship System of the United Nations*, 1956, 208. The city was divided between Israel and Jordan between 1949 and 1967.

⁹⁵ See on this issue Ratner, see note 5, 109 et seq.; Chopra, see note 5, 44; R. Higgins, *United Nations Peacekeeping 1946–1967*, Documents and Commentary, Vol. 2, 1970, 91 et seq.

⁹⁶ Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian) of 15 August 1962, UNTS Vol. No. 437 No. 6311.

⁹⁷ See article XVIII of the Agreement.

⁹⁸ See article V of the Agreement.

was empowered “to promote new laws and regulations or amend them within the spirit and framework of the Agreement”.⁹⁹ Moreover, he was authorized to appoint governmental officials¹⁰⁰ and to guarantee civil liberties and property rights.¹⁰¹ Although the United Nations administration of West Irian was a short-term operation with a clearly determined mandate, it marked an important precedent within the legal practice of the United Nations in several ways. As later in the case of East Timor,¹⁰² the territory of West Irian was not linked to a state during the period of United Nations administration, but was under the sole responsibility of the United Nations,¹⁰³ because the Netherlands had transferred its powers as administering authority to the United Nations,¹⁰⁴ the authority of which ended only “at the moment of transfer of full administrative control to Indonesia”.¹⁰⁵ Furthermore, the operation constituted an early example of a “non-Trusteeship Council administration of territory” by the United Nations.¹⁰⁶ The mission was

⁹⁹ See article XI of the Agreement

¹⁰⁰ See article IX and XIII of the Agreement.

¹⁰¹ See article XXII of the Agreement.

¹⁰² For a historical comparison, see N. Schrijver, “Some aspects of UN involvement with Indonesia, West Irian and East Timor”, *International Law Forum* 2 (2000), 26 et seq.

¹⁰³ Even the United Nations flag was to be flown during the period of United Nations administration. See article VI, para. 1 of the Agreement.

¹⁰⁴ See article I of the Agreement (“[T]he Netherlands will transfer administration of the territory to a United Nations Temporary Executive Authority (UNTEA) ... The UNTEA will in turn transfer the administration to Indonesia in accordance with article XII”). See also para. 6 b and c of the Memorandum on the Future and Development of Netherlands New Guinea, reprinted in: Higgins, see note 95, 97 (“(b) [T]he Netherlands is prepared to transfer its sovereignty to the people of Netherlands New Guinea; (c) In this connexion, the Netherlands is prepared to agree that its present powers should, to the extent required for the above purpose, be exercised by an organization or international authority, established by and operating under the United Nations, which would be vested with executive powers and which could gradually take over tasks and responsibilities and thus prepare the population for early self-determination under stable conditions.”)

¹⁰⁵ See article XII of the Agreement.

¹⁰⁶ See M. Kelly, *Restoring and Maintaining Order in Complex Peace Operations*, 1999, 100. Higgins speaks of “a sort of trusteeship (though the term “trusteeship” was not explicitly used), until the people of the territory could be prepared for a plebiscite”. See Higgins, see note 95, 95.

conducted under the overall authority of the United Nations General Assembly, which approved the Agreement concluded between the Indonesia and the Netherlands government and authorized the Secretary-General in Resolution 1752 (XVII) of 21 September 1962 "to carry out the tasks entrusted to him in the Agreement".¹⁰⁷

5. The United Nations Council for Namibia

A few years later, the General Assembly again assumed administrative authority over a territory, but this time without the express agreement of the party or parties directly concerned. Following the termination of South Africa's League of Nations Mandate over South West Africa by General Assembly Resolution 2145 (XXI) of 27 October 1966,¹⁰⁸ later recognized by the Security Council in its Resolutions 264 and 269 of 20 March and 12 August 1969 respectively and the by the ICJ,¹⁰⁹ the General Assembly with Resolution 2248 (S-V) of 19 May 1967 created the UN Council for Namibia "[t]o administer South West Africa until independence, with the maximum possible participation of the people of the Territory". The intention of the General Assembly was to place the Council in the position of the full legislative and administrative authority of Namibia. From a legal point of view, this was possible, because the world organization exercised the *de jure* control over Namibia after South Africa had lost its title over the territory.¹¹⁰ However, South Africa's continued presence in Namibia deprived the Council of the possibility to exercise its powers effectively. Most importantly, the Council

¹⁰⁷ See para. 3 of A/RES/1752 (XVII) of 21 September 1962. For a full account, see Higgins, see note 95, 120 et seq.

¹⁰⁸ A/RES/2145 (XXI) of 27 October 1960, adopted by 119 affirmative to 2 negative votes (South Africa, Portugal), with 3 abstentions (United Kingdom, France, Malawi).

¹⁰⁹ See on the practice of the Security Council with respect to Namibia, Klein, see note 66, 487. On the 1971 Advisory Opinion of the ICJ upon request by the Security Council, see ICJ, see note 66, 16. For an analysis of the judgment, see R. Zacklin, "The Problem of Namibia in International Law", *RdC* 171 (1981), 225 et seq., (288 et seq.).

¹¹⁰ See I. Sagay, *The Legal Aspects of the Namibian Dispute*, 1975, 271. See also Klein, see note 66, 487; L. Herman, "The Legal Status of Namibia and the United Nations Council for Namibia", *CYIL* 13 (1975), 306 et seq., (322).

was prevented from exercising any *de facto* authority in the territory.¹¹¹ Accordingly, its legislative and executive activities remained rather limited. The Council for Namibia enacted, *inter alia*, a decree on the exploitation of Namibia's natural resources, the implementation of which encountered serious factual and legal obstacles.¹¹² Moreover, the Council issued travel documents to Namibians in exile.¹¹³ Perhaps the biggest achievement of the Council was the external representation of Namibia. The Council represented Namibia as a full member in the ILO, UNESCO and the FAO. Moreover, it participated in international treaty conferences on behalf of Namibia, including e.g. the United Nations Conference on the Law of the Sea.¹¹⁴

6. UNOSOM II

The first operation in which the United Nations exercised far-reaching administrative responsibilities within the framework of a Chapter VII mandate was the United Nations Operation in Somalia II (UNOSOM II). Based on the assumption that there was no sovereign authority in the country, United Nations Security Council Resolution 814 charged UNOSOM II with a broad mandate, including the reconstruction of the police and justice system, the establishment of regional councils and the maintenance of law and order. UNOSOM II was tasked to "assist the people of Somalia to promote and advance political reconciliation, through broad participation by all sectors of Somali society, and the re-establishment of national and regional institutions and civil administration in the entire country" and to "create conditions under which the Somali civil society may have a role at every level, in the process of reconciliation and in the formulation and realisation of rehabilitation and reconstruction programmes."¹¹⁵

¹¹¹ See R. Dreyer, "The United Nations and Namibia: An Overview (1946–1990)", *International Geneva Yearbook* 1991, Vol. V, 27 et seq., (29 et seq.).

¹¹² See Zacklin, see note 109, 318 et seq. For a discussion of the binding force of the decree and its recognition by national courts, see also H.G. Schermers, "The Namibia Decree in National Courts", *ICLQ* 26 (1977), 81 et seq.; Junius, note 66, 137 et seq.

¹¹³ For a survey of the practice of the Council, see Junius, *ibid.*, 194 et seq.

¹¹⁴ For a survey of the practice of the Council, see Zacklin, see 109, 311 et seq.

¹¹⁵ See S/RES/814 (1993) of 26 March 1993, para. 4 c) and g).

According to the Addis Ababa Agreement, concluded by the leaders of the different Somali political groups on 8 January 1993,¹¹⁶ the so called Transitional National Council (TNC) should exercise the administrative and legislative authority in Somalia.¹¹⁷ But the United Nations assumed these functions until the creation of the TNC, over one year, after the conclusion of the agreement.¹¹⁸ Before the establishment of the TNC, UNITAF (Unified Task Force) and UNOSOM II acted as the provisional governmental authorities in Somalia,¹¹⁹ supported by a national 'consultative body'.¹²⁰ The focus of attention was devoted to the re-establishment of the judicial systems in Somalia. UNOSOM II adopted administrative measures to create an independent judiciary¹²¹ and a functioning prison system.¹²² Moreover, the Secretary-General's Special Representative to Somalia 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.¹²³ Finally, the United Nations assisted in the drafting of a new constitution for Somalia.¹²⁴

However, given the very imprecise mandate of the Security Council which did not make any mention of a legislative mandate for UNOSOM II¹²⁵ and taking into account that the above-mentioned tasks were

¹¹⁶ See article 1 Sec. 4 of the General Agreement signed in Addis Ababa on 8 January 1993, Doc. S/25168 Annex II (1993).

¹¹⁷ See on the Addis Ababa Conference and the General Agreement, Chopra, see note 5, 156.

¹¹⁸ See the Reports of the Secretary-General on the situation in Somalia, Report of 12 November 1993, Doc. S/26738, para. 28 and Report of 6 January 1994, Doc. S/1994/12, para. 14.

¹¹⁹ See Hufnagel, see note 5, 175 and 185. See also Chopra, see note 5, 142: "[I]n the absence of an existing infrastructure ... the UN had effectively the power of a governor-in-trust".

¹²⁰ See Report of the Secretary-General of 12 November 1993, Doc. S/26738, para. 28.

¹²¹ See Report of the Secretary-General of 17 August 1993, Doc. S/26317, Annex I, paras. 29 et seq.

¹²² Cf. Report, see above, paras 42 et seq.

¹²³ Cf. Report, see note 121, paras 29, 31 and 36.

¹²⁴ Cf. Report, see note 121, paras 25-29.

¹²⁵ The Commission of Inquiry established by S/RES/885 (1993) of 16 November 1993 to investigate armed attacks against UNOSOM II noted in its report: "[T]he promulgation of the Somali Penal Code of 1962 as the criminal law in force in Somalia by the Special Representative of the Secre-

only carried out by UNOSOM II whilst awaiting the creation of the TNC, it is questionable whether the operation in Somalia fully qualifies as a case of exclusive administering authority by the United Nations.

7. The United Nations Transitional Administration for Eastern Slavonia (UNTAES)

A more recent, but less well known United Nations operation, vesting an international administrator with extensive powers over a territory is the United Nations Transitional Administration for Eastern Slavonia (UNTAES).¹²⁶ The Basic Agreement signed on 12 November 1995 by the Croatian Government and Serbian political leaders from Croatia¹²⁷ requested the United Nations Security Council to establish a transitional administration for the territories of Eastern Slavonia, Baranja and Western Sirmium, which formed part of the formerly Serb controlled Republika Srpska Krajina and should be reintegrated into Croatia. The parties to the agreement authorized the United Nations administration to “govern the region during the transitional period [of 12 months] in the interests of all persons resident in or returning to the region”.¹²⁸ On 15 January 1996, acting under Chapter VII of the Charter, the Security Council adopted Resolution 1037 creating UNTAES.¹²⁹ The Security Council reaffirmed in its resolution “that the territories of Eastern Slavonia, Baranja and Western Sirmium are integral parts of the Republic of Croatia.”¹³⁰ The purpose of the operation was to “achieve the peaceful reintegration of the region into the Croatian legal and constitutional system”.¹³¹ In order to prepare the local population for the full transfer of authority to Croatian rule, the United Nations transitional

tary-General was capable of being interpreted by the USC/SNA as an overstepping of the UNOSOM II mandate”. See Doc. S/1994/653, 17.

¹²⁶ Its mandate ended on 15 January 1998, when the Croatian Government resumed control over the UNTAES region.

¹²⁷ See Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium, Doc. S/1995/951, Annex, entered into force on 22 November 1995, reproduced in: *ILM* 35 (1996), 184 et seq.

¹²⁸ See para. 1 of the Agreement.

¹²⁹ See S/RES/1037 (1996) of 15 January 1996. See also the Report of the Secretary-General pursuant to S/RES/1025 (1995) of 30 November 1995, Doc. S/1995/1028 of 13 December 1995, para. 5.

¹³⁰ See para. 2 of the preamble of S/RES/1037.

¹³¹ See Report, see note 129, para. 6.

administration had to supervise the demilitarization of the region, to facilitate the return of refugees, to organize local elections and, most notably, to re-establish the normal functioning of all public services in the region.¹³² To that end, the United Nations transitional administrator was endowed with "the overall authority over the civilian and military components of UNTAES".¹³³ The tasks of the transitional administrator were mainly executive in nature. But he was also authorized to restore Croatian law in the territory and to enact regulations the validity of which would expire at the end of the transitional period.¹³⁴

The United Nations administered the territories of Eastern Slavonia, Baranja and Western Sirmium together with advisory transitional councils, composed of local representatives.¹³⁵ Moreover, in order to provide reassurances for the post-UNTAES period, the United Nations administration negotiated several agreements with Croatia providing the people of the region with comprehensive political and institutional guarantees under Croatian rule.¹³⁶

In terms of its objective, UNTAES may be best compared to the United Nations Mission in West Irian. UNTAES was a short-lived, two year project¹³⁷ with a very specific goal, namely the peaceful transfer of Eastern Slavonia from Serb to Croatian control. The United Nations acted as an authority-in-trust, exercising governmental functions on behalf of and for the benefit of Croatia. But the powers of the transitional administrator did not quite reach the level of authority assumed by the United Nations a few years later in the cases of Kosovo and East Timor in which the United Nations Transitional Administrator would exercise all legislative and executive authority, including the administration of justice.

¹³² See paras 10 and 11 of S/RES/1037.

¹³³ See para. 2 of S/RES/1037.

¹³⁴ See para. 17 of the Report, see note 129.

¹³⁵ See para. 14 of the Report, see note 129.

¹³⁶ Among these agreements are: The Agreement by the Croatian Pension Fund on Pension Services of 29 May 1997; the Declaration on Educational Certificates of 11 March 1997; the Declaration on Minority Education Rights of 6 August 1997; the Joint Statement on Reintegration of the Employment System of 11 September 1997; the Organization of Joint Councils of Municipalities of 23 May 1997 and the Declaration on Conditions for Judicial Reintegration of 30 September 1997. See Report of the Secretary-General to the Security Council of 4 December 1997, Doc. S/1997/953.

¹³⁷ The mandate of UNTAES ended on 15 January 1998.

IV. Authorization under the Charter

From a legal point of view, the take-over of direct administrative authority by the United Nations is a highly remarkable development, because the United Nations Charter does not expressly provide for the conduct of the United Nations in an executive capacity such as territorial administration. The only reference to a direct form of territorial administration by the organization itself may be found in the context of the United Nations Trusteeship System. Article 81 of the Charter permits the administering authority to be one or more states or the United Nations itself.¹³⁸ But the United Nations has never exercised this function on a formal basis. The Draft Statute for the City of Jerusalem contained a provision, according to which the responsibility for the administration of the City should be discharged by the Trusteeship Council.¹³⁹ But, as was expressly stated in a subsequent report to the Trusteeship Council, the City was not to be a trust territory, and Chapters XII and XIII of the Charter were not generally applicable.¹⁴⁰ In its following practice, the United Nations never acted itself as an administering authority under the Trusteeship System. Instead, single states have been appointed as administering authorities, with the exception of Nauru

¹³⁸ The idea that the UN itself should become an administering authority was based on the belief that, in some cases, the organization might be more impartial or would have a broader outlook than a single member state. See L. M. Goodrich et al., *Charter of the United Nations, Commentary and Documents*, 1969, 501.

¹³⁹ See article 3 of the Statute for the City of Jerusalem.

¹⁴⁰ The Report of the Working Committee on Jerusalem, established in accordance with a resolution of the Trusteeship Council passed at the 6th Mtg. of its 2nd Sess., on 1 December 1947 (Doc. T/122) contains the following statements: "Although the General Assembly of the United Nations vested the Trusteeship Council with power to define, to constitute and to administer the international regime of the City of Jerusalem, it is obvious that the City is not a trust territory and that the provisions of Chapters XII and XIII of the Charter are not generally applicable to the case. Therefore the Committee tried to avoid any arbitrary resemblance to the Trusteeship system; it considered rather that the legal status of this territory was a new one; Jerusalem would come, as it were, directly under the authority of the United Nations and it would be governed on behalf of the community of nations. Such would be the entirely original sense which might suitably be given to the term: Special International Regime."

where the United Kingdom, Australia and New Zealand became the official administrators.¹⁴¹

1. A Diversity of Views

The question whether the United Nations is authorized to assume direct administering powers outside the context of the Trusteeship System, such as in the above-mentioned cases, has been a subject of legal controversy.¹⁴² In particular H. Kelsen proved to be an early supporter of a restrictive interpretation of the powers under the Charter claiming that "the Organization is not authorized by the Charter to exercise sovereignty over a territory, which has not the legal status of a trust territory".¹⁴³ Moreover, an analysis of statements expressed by state representatives in the context of both the adoption of the "Permanent Statute for the Free Territory of Trieste" and the creation of the Council for Namibia presents a diversified picture of legal views. When discussing the approval of the "Permanent Statute for the Free Territory of Trieste" by the Security Council in 1947, some members of the Council were of the opinion that the Council was not entitled to act as supreme governing body of the territory with the ultimate authority over its functioning, because these functions would have no direct connection with the maintenance of peace and security.¹⁴⁴ In response to these ob-

¹⁴¹ See D. Rauschnig, "On Article 81", in: B. Simma, *Charter of the United Nations*, 1994, 955 et seq., (956).

¹⁴² See Kelsen, see note 87, 832 et seq.; O. Schachter, "The Development of International Law through the Legal Opinions of the United Nations Secretariat", *BYIL* 25 (1948), 95 et seq.; F. Seyersted, "United Nations Forces: Some legal problems", *BYIL* 37 (1961), 451 et seq.

¹⁴³ Cf. Kelsen, see note 87, 651.

¹⁴⁴ See the statements of the Representatives of Australia and Syria on the question of the Statute of the Free Territory of Trieste, *Repertoire of the Practice of the Security Council, 1946-1951*, 482. See also Kelsen, see note 87, 833: "When the Permanent Statute comes into force, the Council has to exercise - partly directly, partly through the Governor - functions usually conferred upon a head of state, which functions have nothing in common with anything the Council has to do under the Charter, except in case the Organisation itself is established as administering authority of a trust territory under Art. 81. This is the only case where the United Nations is authorised by the Charter to exercise rights of sovereignty over a territory, But the Free Territory of Trieste is certainly not a trust territory".

jections, attention was drawn by other representatives either to implicit powers of the Council or to the spirit of the Charter. The Secretary-General held the opinion that the words, "primary responsibility for the maintenance of international peace and security" in Article 24 of the Charter, coupled with the phrase, "acts on their behalf", constitute a sufficiently wide grant of power, because the United Nations members had thereby conferred upon the Council "powers commensurate with its responsibility for the maintenance of peace and security", limited only by the fundamental principles and purposes of the Charter.¹⁴⁵ The Security Council finally took a decision in line with this view and adopted the Permanent Statute.¹⁴⁶

The second case¹⁴⁷ in which the authority of the United Nations to assume governmental authority of a territory became a subject of concern, was the establishment of the United Nations Council for Namibia. General Assembly Resolution 2248 (S-V) of 19 May 1967 establishing the Council for Namibia was adopted by 85 votes to 2 with 30 abstentions. The large number of abstentions underlines the controversial nature of the decision. Many states abstained because they feared that the resolution could not be implemented in practice. But doubts were also expressed with regard to the competence of the General Assembly to confer extensive legislative powers on the Council.¹⁴⁸ In its

¹⁴⁵ See statement made by the Secretary-General on 10 January 1947, *Repertoire of the Practice of the Security Council, 1946–1951*, 483.

¹⁴⁶ See S/RES/16 (1947) of 10 January 1947.

¹⁴⁷ It is surprising that the authority of the United Nations to establish UN-TEA as a subsidiary body of the General Assembly has not been called into question. Higgins notes: "Those nations which explained the reason for the abstention from the vote in favour of the Agreement [between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea] explained their case largely in terms of fears that the Agreement did not sufficiently provide for self-determination by the Papuans. France, who abstained, did not voice any objection to the effect that the General Assembly was unable to authorize the UN to participate in a governmental venture. And, as has been said, the Soviet Union, who might also have been expected to object, voted for the resolution." See Higgins, see note 95, 121.

¹⁴⁸ The representative of Sweden e.g., considered that Resolution 2248 was flawed because "it did not command the broad persuasive support of resolution 2145 (XXI) and possibly was not a firm basis for further United Nations action". See GAOR 5th Special Sess., 1518th Mtg. See on the attitude of governments towards Resolution 2248 also the Report by the Secretary-General "Compliance of Member States with the United Nations Resolutions and Decisions relating to Namibia, taking into account the

1971 advisory opinion in the Namibia Case, the ICJ did not directly address the legal basis of the establishment of the Council for Namibia. The Court merely observed that "Article 24 of the Charter vests in the Security Council the necessary authority to take action such as that taken in the present case."¹⁴⁹ However, some more explicit answers were given in legal doctrine. Some authors took the view that the creation of the Council could be based on a direct¹⁵⁰ or an analogous¹⁵¹ application of Article 81 of the Charter, despite the lack of a trusteeship agreement within the sense of Article 79 of the Charter. Other scholars placed the emphasis on the previous practice adopted by both the League of Nations and the United Nations in the field of territorial administration.¹⁵²

2. Arguments in Favour of a direct United Nations Administering Authority

A number of arguments support the view that the United Nations may generally assume tasks of temporary governance. First, it is not very convincing to argue that the provisions of the United Nations Trusteeship System, namely Arts 77 and 81 of the Charter constitute a conclusive set of rules precluding *e contrario* the exercise of a trusteeship authority in any other form than the United Nations Trusteeship System. Such a restrictive systematic interpretation of the Charter would not be in line with the concept of *implied powers* governing the interpretation of competencies accorded by the Charter.¹⁵³

Advisory Opinion of the International Court of Justice of 21 June 1971", Doc. A/AC.131/37 of 12 March 1975.

¹⁴⁹ See ICJ Reports 1971, 16 et seq., (52).

¹⁵⁰ See Schermers, see note 112, 85.

¹⁵¹ See Klein, see note 56, 303: "Territorial zuständig sind ... die Vereinten Nationen, ... die in analoger Anwendung von Art. 81 SVN zur Administration befugt sind. In Ausübung dieser Befugnis hat die Generalversammlung den 'Council for Namibia' errichtet ...".

¹⁵² For a detailed discussion, see Sagay, see note 110. See also Zacklin, see note 109, 310; Junius, see note 66, 92 et seq.

¹⁵³ See on the concept of implied powers *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Report 1949, 174 et seq., (182) and *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, ICJ Reports 1954, 47 et seq., (56).

Moreover, it can hardly be denied that the United Nations may administer a territory or a state where the express consent to do so has been granted by the authority in control.¹⁵⁴ The protection of sovereignty and the prohibition of interference in the domestic affairs of a state (Article 2 para. 7 of the Charter) cannot be invoked against this form of territorial administration, because sovereign rights are generally disposable.¹⁵⁵ Furthermore, the main purpose of a United Nations territorial administration is precisely to restore an institutional framework in the territory and thus permit the exercise of sovereign powers by the territorial state.

Finally, using its authority under Chapter VII of the Charter, the Security Council may even establish a United Nations administration without the consent of the territory or the state in question.¹⁵⁶ Article 2 para. 7 second sentence of the Charter allows the infringement on "the domestic jurisdiction" of a state even against its will, if the state is subject to measures under Chapter VII. Moreover, the powers of the Security Council under Chapter VII are wider than the powers of the United Nations within the framework the United Nations Trusteeship System. The absolute requirement of a trusteeship agreement with the territorial state, contained in Article 79 of the Charter, can in no way be interpreted as a limitation to unilateral action by the Security Council in the context of maintenance of international peace and security, because the preservation of national sovereignty, which this provision seeks to protect, may be overcome in situations qualifying as a threat to peace.¹⁵⁷ Last but not least, even the drafting history of the Charter may be invoked, in order to establish that measures of territorial administration come within the ambit of Chapter VII.

During the consideration of military enforcement measures at the San Francisco Conference, an amendment presented by the Norwegian delegation, to provide that the Security Council may "take over on behalf of the Organization the administration of any territory of which

¹⁵⁴ See also D. Sarooshi, *The United Nations and the Development of Collective Security*, 1999, 59 et seq.; Klein, see note 56, 110.

¹⁵⁵ In its *Wimbledon* ruling, the PCIJ stated in 1923 that the voluntary surrender of sovereign rights by way of an international agreement is not unlawful *per se*, but rather a legitimate act by which the contracting state makes use of its sovereign powers. See PCIJ, *Case of the S.S. Wimbledon*, Ser. A, Vol. 1 (1923–1927), 25.

¹⁵⁶ See also Sarooshi, see note 154, 62; Ratner, see note 70, 9.

¹⁵⁷ See also Hufnagel, see note 5, 304.

the continued administration by the state in possession is found to constitute a threat to the peace", was withdrawn, after it had been indicated that such a reference to a particular procedure could be interpreted as restrictive and of such nature as to limit the field of application of measures at the disposition of the Council.¹⁵⁸

3. The Different Legal Foundations in the Charter

Technically, several provisions of the Charter may be invoked in order to justify the establishment of UN territorial administrations outside the context of the Trusteeship System. In most cases, such as in Kosovo or East Timor, a measure will be taken in response to a "threat to the peace" within Article 39 of the UN Charter which has been interpreted broadly so as to encompass situations of civil strife and grave violations of human rights.¹⁵⁹ Should the Security Council authorize the establishment of a territorial authority under these circumstances, a number of different situations must be distinguished. If the United Nations administering authority is established with the consent of the state concerned, it would seem that a legal basis for the civil administration component of the operation may be found in Article 39 in conjunction with Article 29 or Article 98 of the Charter, which allow the delegation of powers from the Security Council to subsidiary organs of the Council or to the Secretary General;¹⁶⁰ otherwise, the creation of civilian institutions may fall within the ambit of Article 41¹⁶¹ which covers a wide and non exhaustive¹⁶² range of measures not involving the use of armed force. The military components of the operation, however, can only be

¹⁵⁸ See Commission III, Committee 3, Session of 23 May 1945, UNCIO Vol. 12, 353 et seq., 54-355, Doc. 539 III/3/24.

¹⁵⁹ Cf. J.A. Frowein, "On Article 39", in: Simma, see note 141, 610 et seq.

¹⁶⁰ The organizational power to create subsidiary organs (Article 29) or to entrust certain functions to the Secretary-General (Article 98) is applicable to both, Chapter VI and Chapter VII operations. See M. Bothe, "Peacekeeping", in: Simma, see note 141, 590. See also Bothe/ Marauhn, see note 3, sub. III.1

¹⁶¹ See also Matheson, see note 3, 83-84; Bothe/ Marauhn, see note 3, sub. III.1; Ruffert, see note 3, 620-621.

¹⁶² See J.A. Frowein, "On Article 41", in: Simma, see note 141, 625.

based on Article 42¹⁶³ which, in turn, applies in conjunction with Article 48, if the Council authorizes individual states to use force.

The situation is less clear when action is taken by the General Assembly, such as in the case of West Irian¹⁶⁴ or Namibia.¹⁶⁵ It has been clearly established by the jurisprudence of the ICJ that the General Assembly does generally have the authority to initiate peace operations with the consent of the government on whose territory the mission shall be stationed.¹⁶⁶ Article 98 of the Charter allows for functions to be entrusted to the Secretary-General by the General Assembly. However, a substantial limitation on the General Assembly's powers is that it cannot authorize Chapter VII operations which fall exclusively in the competence of the Security Council.¹⁶⁷ Action involving the creation of military organs would therefore have to be effected through the Council.¹⁶⁸

V. Nature of Authority

Although the United Nations transitional administrations in Kosovo and East Timor were formally established outside the context of the

¹⁶³ See also Bothe, see note 160, 590.

¹⁶⁴ Higgins sees the legal basis in Article 14 of the Charter. See Higgins, see note 95, 120. See also Kelly, see note 106, 100.

¹⁶⁵ Sagay invokes the concept of implied powers. See Sagay, see note 110, 271: "Since it is clear that the establishment of the Council for South West Africa, and the appointment of a Commissioner for the Territory, was deemed necessary by the General Assembly for the performance of its functions in the mandated Territory, and that the Authority granted to the Commission does not exceed that of the General Assembly ... the constitutional or legal validity of the establishment of the Council cannot be in any doubt".

¹⁶⁶ Cf. Case Certain Expenses of the United Nations, ICJ Reports 1962, 151 et seq., (163).

¹⁶⁷ The main problem lies in the limitation which Article 11 para. 2 of the Charter imposes on the powers of the General Assembly. For a discussion of what constitutes "action" which has to be referred to the Security Council, see Bothe, see note 160, 591-592.

¹⁶⁸ Cf. Bothe, see note 160, 592 "... the exclusion of the GA from the creation of such military organs now seems to be an established rule ... But this does not preclude the GA from authorizing the inclusion of some kind of security element in an essentially non-military mission, e.g. human rights or election monitoring."

trusteeship system under the Charter, they share many of the features which are typical for the administration of territories under the Mandates System of the League of Nations or the United Nations Trusteeship System. Territorial administration under Article 22 of the Covenant of the League of Nations and Chapters XII and XIII of the United Nations Charter was essentially based on a tripartite relationship between the territories placed under the mandates or the Trusteeship System, a state or a group of states acting as administering authority on behalf of the League of Nations or the United Nations, and the League or the United Nations itself retaining the powers of supervision and ultimate control.¹⁶⁹ The administering states exercised their powers subject to the conditions and limitations provided for in the mandate or the Trusteeship agreement with the United Nations. The theoretical foundation of this model of territorial administration may be found in the institution of the "trust", namely 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 at the heart of the mission of the trustee and the establishment of the trust.¹⁷⁰ The concept of trusteeship used in both the Covenant of the League of Nations and the United Nations Charter as an institution of public international law, is closely related to a trust under private law.¹⁷¹ The difference is that other than in private law relations, the trustee is not a private person but a state or an international organization and that the object of the trust is not the administration of property but the administration of territories inhabited by peoples.¹⁷²

Article 22 of the Covenant of the League of Nations contained a direct reference to the institution of the trust by providing that the well-being and development of the administered peoples "form a sacred trust of civilisation".¹⁷³ In terms of legal theory, trusteeship was twofold. The League of Nations held all mandated territories as a trustee on behalf of

¹⁶⁹ For a survey see R. N. Chowdhuri, *International Mandates and Trusteeship System: A Comparative Study*, 1955; D. Rauschnig, "Mandates", R. Bernhardt (ed.), *EPIL* II (1995), 280 et seq.; J. Crawford, *Creation of States*, 1980, 225 et seq.; Kelsen, see note 87, 566 et seq., D. Rauschnig, "On Article 75", see note 141, 933 et seq. and Sagay, see note 110, 1 et seq.

¹⁷⁰ For an insight into the legal concept of the trust, see Sagay, see note 110, 17 et seq.

¹⁷¹ See the Separate Opinion of Sir Arnold Mc Nair in the International Status of South West Africa Case, ICJ Reports 1950, 128 et seq., (149).

¹⁷² See also Kelsen, see note 87, 566.

¹⁷³ See Article 22 para. 1 of the Covenant.

the international community, while each mandatory state administered the territory as a trustee on behalf of the League of Nations.¹⁷⁴ The trust had a double function. It served the rights of the inhabitants of the mandated territories and the collective interests of the international community.¹⁷⁵

As opposed to Article 22 of the Covenant of the League of Nations,¹⁷⁶ the United Nations Charter did not expressly provide that the administering authorities exercise their functions “on behalf” of the organization.¹⁷⁷ But trusteeship under the Charter was built on the same premises as trusteeship under the Covenant. Article 76 of the Charter obliges the administering authorities to act for the benefit of the population of the administered territory.¹⁷⁸ Furthermore, the United Nations assumes the role of a “trustor” by acting as supervising authority¹⁷⁹ and “master” of the trusteeship agreement.¹⁸⁰

A number of arguments lend support to the view that the concept of trusteeship as an institution of public international law is not only at the heart of the mandates and the Trusteeship System, but also an overarching principle of complex peace-keeping and peace-enforcement operations involving the take-over of comprehensive administrative

¹⁷⁴ Cf. Sagay, see note 110, 26.

¹⁷⁵ See *International Status of South West Africa Case*, ICJ Reports 1950, 128 et seq., (132) “The mandate was created in the interests of the inhabitants of the territory, and of *humanity in general*, as an international institution with an international object – a sacred trust of civilisation” (emphasis added).

¹⁷⁶ Article 22 para. 2 of the Covenant stated that the mandated territories were to be administered “on behalf of the League”.

¹⁷⁷ See also the statement of the representative of Australia at the 22nd Mtg. of the Trusteeship Council, emphasizing that “the Charter establishes the administering authority as an authority in its own right” and that “neither the Charter nor the [trusteeship] agreements use the phrase ‘on behalf of the United Nations’”, Doc. T/P.V. 95, 87 et seq.

¹⁷⁸ See in particular Article 76 lit.(b), requiring “to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence...”.

¹⁷⁹ See Article 87 of the Charter.

¹⁸⁰ See Article 79 of the Charter. In particular, any disposition of the trust territory requires the approval of the United Nations. For a discussion of the question of sovereignty over trust territories, see Kelsen, see note 87, 688 et seq., and D. Rauschnig, “On Article 75”, see note 141, 933 et seq., (937).

authority over a territory by the United Nations.¹⁸¹ The establishment of the United Nations transitional administrations in Kosovo and East Timor provides an excellent example of this practice.¹⁸²

1. The Fiduciary Character of the United Nations Administering Authority

Even though the terms and principles guiding the administration of Kosovo and East Timor are not laid down in a formal Trusteeship agreement, but determined by the Security Council Resolutions 1244 and 1272 and the subsequent regulations adopted by the United Nations representatives, the United Nations exercises authority over the respective territories on the basis of a list of general principles approved by the former administering powers. These basic principles are included in Annex 2 of Security Council Resolution 1244 which contains the agreement of the FRY to the establishment of UNMIK, and article 6 of the Agreement of 5 May 1999, which provides for the transfer of authority in East Timor to the United Nations.

Furthermore, in both cases the territories were placed under the authority of the United Nations without making them in the ordinary sense a possession of the United Nations. This is evident in the case of Kosovo, where the FRY remains the official "sovereign" over the territory.¹⁸³ But the same may be said of East Timor, which was handed over to the United Nations, in order "to initiate the procedure enabling East Timor to begin a process of transition towards independence".¹⁸⁴

¹⁸¹ Cf. Stahn, *International Territorial Administration*, see note 3, 132 et seq. For a similar view, Hufnagel, see note 5, 216. See also the Report of Amnesty International on the situation in East Timor of July 2000, *East Timor: Building a New Country Based on Human Rights*: "The effect of the 5 May 1999 Tripartite Agreement and the result of the 30 August 1999 vote was to entrust legal responsibility for East Timor to the UN in a relationship that is analogous to a Trusteeship under the UN Charter."

¹⁸² For an excellent discussion, see Bothe/ Maruhn, see note 3, sub. I and II. See on the resemblance between the Trusteeship System and UNMIK also E. Franckx/ A. Pauwels/ S. Smis, "An International Trusteeship for Kosovo: Attempt to Find a Solution to the Conflict. in: *Studia Diplomatica*, 1999, 156 et seq., (164–165).

¹⁸³ See para. 10 of the preamble of S/RES/1244 and para. 10.

¹⁸⁴ See article 6 of the Agreement of 5 May 1999 and para. 3 of the preamble of S/RES/1272.

As has been asserted with regard to the rights of a trustee,¹⁸⁵ the rights of the United Nations over the administered territories are limited by its duties and obligations. The United Nations exercises only as much powers as necessary for the administration of the territory. But it does not acquire a title over the territory.

Moreover, unlike a sovereign authority, the United Nations administration does not administer the territories of Kosovo and East Timor for its own benefit, but carries out its functions primarily in the interests and for the benefit of the territories, which has interests of its own, such as the realization of basic human rights protection and democratic governance or even further reaching claims, ranging from self-governance to the attainment of independence. In fact, both in Kosovo and in East Timor, the United Nations transitional administration is designed to provide individuals, minorities or peoples with the help and protection necessary to enable them to manage their own affairs in accordance with the basic principles of "good governance".¹⁸⁶

Finally, in both cases the authority of the United Nations is of a temporary nature. The duration of the United Nations presence is limited by the fulfilment of its mandate, which consists in the creation of a stable political and legal environment in the territory and the establishment of a settled legal status.¹⁸⁷ Once this is achieved, the United Nations must allow the local authorities to resume full and exclusive authority.

All of these factors show that the role of the United Nations in Kosovo and East Timor is that of an authority-in-trust assuming governmental authority in the interests of the inhabitants of the territory.¹⁸⁸

¹⁸⁵ See J. Brierly, "Trusts and Mandates", *BYIL* 10 (1929), 217 et seq., (218–219): "The trust is not a species of ownership, but an institution to be contrasted with ownership ... the rights of the trustee have their foundation in his obligations: they are tools given to him in order to achieve the work assigned to him."

¹⁸⁶ See para. 11 of S/RES/1244 and paras 2 and 8 of S/RES/1272.

¹⁸⁷ The duration of the United Nations administration may vary from case to case. See para. 11 lit.(b) of S/RES/1244, allowing UNMIK to perform "basic civilian administrative functions where and as long as required" and para. 17 of S/RES/1272, establishing UNTAET "for an initial period until 31 January 2001".

¹⁸⁸ See also Bothe/ Marauhn, see note 3, sub. I and II. See with respect to Kosovo Franckx/ Pauwels/ Smis, see note 182, 164 ("de facto Trusteeship"). For a similar conclusion with respect to the Council for Namibia,

2. Functional Duality

The special legal situation created by the exercise of fiduciary authority by the United Nations in Kosovo and East Timor is reflected in the legal order of the territories. In their capacity as administering powers UNMIK and UNTAET have taken significant legal action in order to re-establish a legal and social environment in which a comprehensive peace settlement may emerge. Most notably, the internationalization of the existing legal system has been used by the United Nations as an instrument of conflict resolution. When taking over administrative authority, the United Nations administrations in both Kosovo and East Timor have transformed the legal system of the territory, by complementing it with additional sources and rules of law. In both cases, the national laws in force in the territories before the establishment of UNMIK and UNTAET were declared applicable, but only insofar as they did not conflict with the legislation adopted by the United Nations administration ("regulations") and internationally recognized human rights standards defined by the transitional administrations.¹⁸⁹ At the same time, special attention was given to the establishment of human rights guarantees facilitating the return and care of refugees and displaced persons and to the revocation of discriminatory legislation. The United Nations Special Representative in East Timor repealed existing Indonesian security laws in his first Regulation.¹⁹⁰ Furthermore, the United Nations Special Representatives in Kosovo decided in his Regulation No. 1999/24 that, in addition to his own regulations, the law applicable in Kosovo would be the law in force before the abrogation of Kosovo's autonomy status by the FRY.¹⁹¹

Technically, the internationalization of municipal law was both in Kosovo and in East Timor achieved most effectively through the incorporation of directly applicable international legal norms and acts into the domestic legal system. Following the model used by the Bosnian

cf. Sagay, see note 110, 268–269. See with regard to UNTEA, Higgins, see note 95, 95 ("a sort of trusteeship").

¹⁸⁹ See Section 2 of UNMIK Regulation 1999/1; Section 1.2 and 1.3 of UNMIK Regulation 1999/24, as amended by UNMIK Regulation 2000/59 and Section 3.1 of UNTAET Regulation 1999/1.

¹⁹⁰ See Section 3.2 of UNTAET Regulation 1999/1.

¹⁹¹ See Section 1 of UNMIK Regulation 1999/24, as amended by UNMIK Regulation 2000/59.

Constitution,¹⁹² UNMIK Regulation 1999/24 and UNTAET Regulation No. 1999/1 declared the adherence of the United Nations administrations to human rights standards set forth in international treaty instruments such as the two International Human Rights Covenants or the Convention on the Elimination of All Forms of Racial Discrimination. The instruments listed in both regulations are therefore self-imposed and binding through their incorporation in the domestic legal system, without requiring a treaty accession by the territories to the relevant legal instruments.¹⁹³

However, the main source of law in the United Nations transitional administrations are the legislative acts ("regulations") adopted by the Special Representatives of the Secretary-General. These regulations are formally international legal acts enacted by subsidiary organs of the Security Council within the meaning of Article 29 of the Charter. They shall "remain in force until repealed" by the international transitional administrations or "superseded by such rules as are issued" either by the "institutions established under a political settlement" for Kosovo¹⁹⁴ or "upon the transfer of UNTAET's administrative and public service functions to the democratic institutions of East Timor".¹⁹⁵ Their qualification as "regulations", differing from domestic "laws",¹⁹⁶ reveals that the acts of the United Nations administration constitute a specific source of law, placing Kosovo and East Timor provisionally under the legal order of the United Nations.¹⁹⁷ Furthermore, the regulations adopted by the United Nations Special Representatives enjoy direct applicability. In the case of Kosovo, where the FRY has remained the official territorial sovereign over the territory, the direct applicability of UNMIK legislation may be justified by interpreting Security Council Resolution 1244 as a legal instrument, which in conjunction with the approval of the FRY expressed in Annex 1 of the resolution, opened the legal order of the FRY so as to allow for a direct application of acts of the United Nations administration within Kosovo. In the case of East Timor, the direct applicability of UNTAET regulations may be ex-

¹⁹² See article II 2 of the Bosnian Constitution and its Annex I.

¹⁹³ See Chapter 3.3 of the Constitutional Framework.

¹⁹⁴ See Section 4 of UNMIK Regulation 1991/1.

¹⁹⁵ See Section 4 of UNTAET Regulation 1999/1.

¹⁹⁶ For the differentiation between "laws" and "regulations", see Section 1 of Regulation 1999/24 on the law applicable in Kosovo.

¹⁹⁷ See also Ruffert, see note 3, 622 et seq.; Bothe/ Marauhn, see note 3, sub. II.3.

plained by way of a transfer of governmental authority to the United Nations by the former administering powers, agreed upon in the Agreement of 5 May 1999 and finally implemented by the United Nations in Security Council Resolution 1272.

At the same time, the acts of the United Nations do not only form part of the legal order of the United Nations, but constitute also internal acts of the administered "internationalized" territories. There is authority to argue that the United Nations Special Representative acts in a dual capacity¹⁹⁸ when adopting legislation, namely as an organ of the United Nations and as an international authority, representing or replacing the national institutions during the period under administration. Within the legal order of the United Nations, UNMIK and UNTAET function as the legal administering authorities of Kosovo and East Timor with all legislative and executive authority. In the absence of both a functioning internal legal system and domestic authorities capable of taking action, the United Nations administrations may be conceived as provisional representatives of the domestic governmental in-

¹⁹⁸ In what might be called a Bosnian version of the US Supreme Court's *Marbury v. Madison* decision, the Constitutional Court of Bosnia and Herzegovina recently introduced the notion of 'functional duality', by holding that the High Representative acts both as a national organ of Bosnia and Herzegovina and as an international authority when adopting decisions in the form of national laws. A description of this concept is given in para. 5 of the judgment where the court notes that "... the legal role of the High Representative, as agent of the international community is not unprecedented ... Pertinent examples are the mandates under the regime of the League of Nations and, in some respects, Germany and Austria after the Second World War. Though recognised as sovereign, the States concerned were placed under international supervision, and foreign authorities acted in these States, on behalf of the international community, substituting themselves for the domestic authorities. Acts by such international authorities were often passed in the name of the States under supervision. Such situation amounts to a sort of functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual." See Constitutional Court of Bosnia and Herzegovina, Decision in the Case No. U 9/00 of 3 November 2000, reprinted in *ZaöRV* 61 (2001), 173 et seq. For an analysis of the decision, see Stahn, *International Territorial Administration*, see note 3, 166 et seq. The same idea has been expressed by some authors with reference to the authority of the Allied powers in Germany after 1945. They argued that the occupying powers exercised both military and public authority in Germany. See W. Grewe, *Ein Besatzungsstatut für Deutschland*, 1948, 82.

stitutions.¹⁹⁹ Furthermore, considering their object and purpose, the regulations of the United Nations administrators in Kosovo and East Timor differ from acts concerning exclusively the internal legal order of the United Nations. UNMIK or UNTAET regulations are intrinsically linked to the inhabitants and the territory of Kosovo and East Timor. In fact, one may argue that the existing municipal law and the “new” United Nations law form a functional unity, creating the law of the internationalized territory which constitutes a legal entity of its own, separate from the United Nations. Finally, a parallel may be drawn to the Decree of the Commissioner for Namibia, which has been characterized as a *sui generis* legal instrument, but was at the same time assimilated to a law of a foreign state by the Member States of the United Nations.²⁰⁰

VI. Regulatory Framework

UNMIK and UNTAET have been created by the Security Council with the overall objective to establish democratic governmental structures and a functioning political and legal system in the administered territories. In exercising their functions, both transitional administrations have encountered similar challenges and obstacles. Therefore, it does not come as a surprise that the regulatory framework and the legal mechanisms used by UNMIK and UNTAET in the course of their activities reveal a number of striking parallels. However, when comparing the legal action of the United Nations in Kosovo and in East Timor one may observe that in a number of cases the practice of UNTAET deviates from the approach adopted by UNMIK.

¹⁹⁹ The Ombudsperson Institution argues that Security Council Resolution 1244 established UNMIK as “a surrogate state”, see Special Report No. 1 on the Compatibility with recognised international standards of UNMIK Regulation No. 2000/47 of 26 April 2001, 8 and Special Report No. 2 on Certain Aspects of UNMIK Regulation No. 2000/59 Amending UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo of 30 May 2001, 4. For a summary see, Ombudsperson Institution in Kosovo, First Annual Report 2000–2001 of 18 July 2001.

²⁰⁰ See Klein, see note 66, 488, Schermer, see note 112, 90.

1. The Development of Joint Governing and Administrative Structures

One of the first steps of both administrations has been to develop governing institutions involving UN and local representatives. In Kosovo, a joint administrative structure was established by the United Nations in an Agreement on Joint Interim Administration in Kosovo of 15 December 1999, the terms of which were later implemented by UNMIK Regulation 2000/1 of 14 January 2000. Local representatives were given a share in the provisional administrative management of Kosovo, while the United Nations administrators retained the full legislative and executive authority.²⁰¹ The Kosovo Transitional Council (KTC), a common institution of representatives of the different political parties and ethnic groups in Kosovo, was charged with a consultative role in the decision-making process.²⁰² Furthermore, an Interim Administrative Council (IAC) composed equally of members appointed by UNMIK and local representatives,²⁰³ was vested with the power to recommend the adoption of new legislation or amendments to the existing legal framework. But the Special Representative of the Secretary-General maintained the authority to reject such proposals.²⁰⁴ In addition, UNMIK Regulation 2000/1 established Administrative Departments under the supervision of a Kosovar and an UNMIK Co-Head of Department, responsible for making policy recommendations to the IAC.²⁰⁵

Although the powers of the joint administrative bodies were finally rather limited, the early participation of local actors in the decision-making process at the central level served an important function, namely the dissolution of the Albanian “shadow” government, elected under the proclaimed Constitution of the “Republic of Kosovo”. Regulation 2000/1 provided that the parallel political institutions of the Albanian community, be they executive, legislative or judicial such as

²⁰¹ See Section 1 a) of UNMIK Regulation 2000/1.

²⁰² See Section 2.1 of UNMIK Regulation 2000/1.

²⁰³ See Section 4 of UNMIK Regulation 2000/1.

²⁰⁴ See Sections 6.2 of UNMIK Regulation 2000/1: “[T]he Special Representative of the Secretary-General shall accept such decision unless he advises the Interim Administrative Council otherwise in writing within seven days explaining the reasons for his differing decision”.

²⁰⁵ See Section 7 of UNMIK Regulation 2000/1.

the Provisional Government of Kosovo or the Presidency of the Republic of Kosovo should “cease to exist” by 31 January 2000.²⁰⁶

Regulation 2000/45 of 11 August 2000 on Self-Government of Municipalities in Kosovo conferred broader powers upon the authorities at the local level. Municipalities were authorized to regulate and manage a substantial share of public affairs under their own responsibility. Areas such as urban and rural planning, primary and secondary education, health care or tourism were placed under the authority of municipalities. But the municipalities continued to operate under the overall supervision of UNMIK. Municipal Administrators were obliged to “ensure that municipal decisions are in compliance with United Nations Security Council Resolution 1244 and the applicable law”.²⁰⁷ The Special Representative of the Secretary-General remained empowered to “set aside any decision of a municipality”, which he considered “to be in conflict” with these rules or which did “not sufficiently take into account the rights and interests” of the minority communities living in the municipality.²⁰⁸

The re-establishment of the judiciary in Kosovo was also effected under close scrutiny of UNMIK.²⁰⁹ In the beginning of the operation, the United Nations administration set up district courts and public prosecutors offices in some cities, while other areas were simply served by mobile units consisting of “flying judges”.²¹⁰ The judges and prosecutors were appointed by UNMIK. Later, UNMIK established the Advisory Judicial Commission to advise the Special Representative on the appointment of judges and prosecutors on a permanent basis.²¹¹ Again, the Special Representative retained the final authority over the judiciary which was clearly reflected in the rules on the nomination of prosecu-

²⁰⁶ See Section 1 b) of UNMIK Regulation 2000/1.

²⁰⁷ See Section 48.1 of UNMIK Regulation 2000/45. On the appointment of regional and municipal administrators, see also UNMIK Regulation 1999/14 of 21 October 1999.

²⁰⁸ See Section 47.2 of UNMIK Regulation 2000/45.

²⁰⁹ For a survey of the problems arising in the context of the reconstruction of the judicial system in Kosovo, see Stromeyer, see note 3, 51 et seq.

²¹⁰ See the report of the OSCE Mission in Kosovo “Review of the Criminal Justice System”, 11, available under <http://www.oesce.org/kosovo> – See also UNMIK Regulation No. 1999/5 on the establishment of an *ad hoc* Court of Final Appeal and an *ad hoc* Office of the Public Prosecutor.

²¹¹ See Section 1 of UNMIK Regulation 1999/7, as amended by UNMIK Regulation 2000/57 of 6 October 2000.

tors and judges. Regulation 2000/6, which spells out the legal framework governing the appointment and removal from office of international judges and international prosecutors contains almost no safeguards for international judges and prosecutors against their removal from office. According to the terms of the regulation, the removal from office does not even require a specific procedure; it is merely based on a decision by the Special Representative, which may be based on such indeterminate grounds as "serious misconduct" or "failure in the due execution of office".²¹² The very same vague criteria were deployed in the context of the removal from office of national judges and prosecutors. In this case, however, the Special Representative was asked to "consult" the Advisory Judicial Commission²¹³ before taking his decision. Section 7 of Regulation 1999/7 endows the Commission with the task of submitting "an appropriate recommendation" to the Special Representative, who may then remove a judge or prosecutor from office "after taking into account the recommendation of the Commission". It is obvious that this procedure does not offer significantly greater safeguards for the independence of the judiciary.

UNMIK has shown some more willingness to establish mechanisms of shared governance and administration by transferring legislative and executive powers to the domestic authorities in the Constitutional Framework on Provisional Self-Government in Kosovo. The document creates a number of legislative, executive and judicial bodies which are charged with the main tasks of public administration in Kosovo on the basis of a catalogue of enumerated competencies.²¹⁴ The Provisional Institutions of Self-Government are institutions, which would normally be associated with a state or the sub-entities of a federation, namely a Parliamentary Assembly, a President, a Government and a Supreme

²¹² Section 4.1 of UNMIK Regulation 2000/6 reads: "The Special Representative of the Secretary-General may remove from office an international judge or international prosecutor on any of the following grounds: a. physical or mental incapacity which is likely to be permanent or prolonged; b. serious misconduct; c. failure in the due execution of office; or d. having been placed, by personal conduct or otherwise, in a position incompatible with the due execution of office".

²¹³ The Commission is composed of eight local and three international experts. See Section 2 of Regulation 1999/7, as amended by UNMIK Regulation 2000/57 of 6 October 2000.

²¹⁴ For the responsibilities of the Provisional Institutions of Self-Government, see Chapter 5 of the Constitutional Framework. See on this issue also Stahn, *Constitution without a State*, see note 3.

Court with a Special Chamber on "Constitutional Framework Matters".²¹⁵ Furthermore, the powers attributed to the institutions provide the local authorities with the opportunity to administer their daily affairs. They encompass regulatory powers in fields such as economic and financial policy, domestic and foreign trade, labour and family policy, transport and telecommunication issues and agricultural and non-resident-affairs. At the same time, however, one cannot fail to note that key areas of responsibility such as external relations,²¹⁶ the maintenance of law and order²¹⁷ and ultimate budgetary control²¹⁸ remain under the direct authority of the Special Representative. Moreover, the exercise of the responsibilities of the provisional institutions of self-government does in no way affect the ultimate authority of the Special Representative. This is not only explicitly stated in the preamble of the Constitutional Framework,²¹⁹ but also reiterated in Section 12 of the document according to which the Special Representative is empowered to oversee "the Provisional Institutions of Self-Government, its officials and its agencies" and to take "appropriate measures whenever their actions are inconsistent with UNSCR Resolution 1244 (1999) or this Constitutional Framework".²²⁰ It would therefore be premature to assume that the promulgation of the Constitutional Framework has brought about a permanent transfer of public authority to local control.

UNMIK's reluctance to cede its administering powers at the central level to local institutions may be explained by two factors: the ongoing security challenges and ethnic divisions on the hand, and the unsolved territorial status of Kosovo on the other hand. These premises make UNMIK's mandate more difficult to accomplish than the task of the United Nations Transitional Administration in East Timor, which has been charged with a very specific mission, namely the smooth transition of East Timor from Indonesian rule to independence.

²¹⁵ See Chapter 1.5 of the Constitutional Framework.

²¹⁶ See Chapter 8 o) of the Constitutional Framework.

²¹⁷ See Chapter 6 of the Constitutional Framework.

²¹⁸ See Chapter 8 c) and e) of the Constitutional Framework.

²¹⁹ See para. 9 of the preamble, which reads: "Affirming that the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244 (1999)."

²²⁰ Moreover, the Special Representative may, on his own initiative, amend the legal framework document. See Chapter 14.3 of the Constitutional Framework.

When comparing the governing structure established by UNMIK with the system of administration developed by UNTAET, one may note that the United Nations administration in East Timor has placed greater emphasis on the participation of local actors in the central administration than the corresponding United Nations Mission in Kosovo.²²¹ UNTAET responded to East Timorese criticism that it failed to take due account of the views of the local population by creating the National Council and the Cabinet of the Transitional Government in East Timor. While retaining the ultimate executive and legislative authority conferred upon him by the Security Council, the Special Representative has delegated important parts of his powers to these two institutions. The Cabinet, a special administering body comparable to a national government, was not only authorized to recommend to the Transitional Administrator the approval and promulgation of regulations,²²² but also charged with the supervision of the East Timor Administration.²²³ Furthermore, in its Regulation No. 2000/24 of 14 July 2000, the Special Representative established the National Council "to act as a forum for all legislative matters related to the exercise of the legislative authority of the Transitional Administrator".²²⁴ The Council, a body entirely composed of East Timorese,²²⁵ was *inter alia* empowered to initiate, to modify and to recommend draft regulations and to amend existing regulations.²²⁶ Section 2.3 of Regulation 2000/24 added that the "Transitional Administrator *shall* approve a draft regulation or amendment endorsed by the Council upon the recommendation of the Cabinet where, in his sole discretion, the draft regulation is consistent with the fulfilment of his mandate under Security Council Resolution 1272 (1999)" (emphasis added). Moreover, Section 2.1 of Regulation 2000/24 introduced a mechanism of parliamentary control, by authorizing the National Council to "require the appearance of Cabinet Officers appointed pursuant to UNTAET Regulation No. 2000/23 to answer questions regarding their respective functions".

²²¹ Cf. Ruffert, see note 3, 625.

²²² See Section 4 d) of UNTAET Regulation 2000/23.

²²³ See Section 4 b) of UNTAET Regulation 2000/23.

²²⁴ See Section 1.1 of UNTAET Regulation 2000/24.

²²⁵ The National Council consisted of 36 members representing the 13 districts of East Timor, different political parties, civic organizations and religious groups.

²²⁶ See Section 2.1 a) of UNTAET Regulation 2000/24.

Like in Kosovo, international and local administrative structures were not only combined at the central, but also at the local level. A particularly interesting example is the establishment of village and sub-district development councils for the allocation of development funds granted to UNTAET by the World Bank for the purposes of the implementation of Security Council Resolution 1272. The Grant Agreement concluded by the IDA and UNTAET made the payment of the funds dependent on the adoption of a regulation creating development councils at the village and sub-district levels.²²⁷ The Special Representative laid down a system for the establishment of Village Development Councils and Sub-District Developments in UNMIK Regulation 2000/13. The councils were created as special administering bodies²²⁸ with autonomous decision-making power concerning the allocation of funds.²²⁹ But they were at the same time obliged to cooperate with the UNTAET District Administrators.²³⁰

Another institution reflecting the interaction of international and local administrative structures in East Timor is the Public Service Commission, created by UNTAET Regulation 2000/3. The Commission was established as an independent administering body "charged with the oversight of the proper functioning of the East Timor Administration".²³¹ Its main task was the recruitment, appointment and supervision of civil servants.²³² The Commission was composed of international and East Timorese members.²³³ Although being "independent in the exercise of its functions", the Commission remained accountable to

²²⁷ See IDA-UNTAET: Trust Fund for the East Timor Grant Agreement of 21 February 2000, article 6.01 c), Schedule 4.

²²⁸ Section 1.3 of UNTAET Regulation 2000/13 states that the Village Councils and Sub-District Councils "shall not exercise the legislative, executive and judicial power of government". Furthermore, Section 1.4 of the Regulation provides that the councils "shall not duplicate or replace the role of the traditional and local leaders of such villages and sub-districts."

²²⁹ See Sections 7.1, 7.2, 11.1 and 11.2 of UNTAET Regulation 2000/13.

²³⁰ See Sections 5.4, 9.3, 11.3, 11.6, 12.4, 13 and 14 of UNTAET Regulation 2000/13.

²³¹ See Section 1.1 of UNTAET Regulation 2000/3.

²³² See Section 1.2 of UNTAET Regulation 2000/3.

²³³ The Commission comprised 7 members appointed by the Transitional Administrator. At least two of them had been international experts.

the United Nations Transitional Administrator and the National Council.²³⁴

Furthermore, the internationalization and the supervision of the local judiciary have turned out to be features common to both the United Nations operation in Kosovo and the transitional administration in East Timor. UNTAET created a civil law court system with districts courts and a Court of Appeal in East Timor,²³⁵ which was soon complemented by a public prosecutor's office.²³⁶ UNTAET also established special serious crimes panels within the District Court of Dili with exclusive and "universal jurisdiction" to adjudicate cases of genocide, war crimes and crimes and against humanity committed between 1 January 1999 and 25 October 1999.²³⁷ Section 10.3 of UNTAET Regulation 2000/11 provides that these panels shall "be composed of both East Timorese and international judges". But similar to the situation in Kosovo, the judicial system in East Timor continued to be subject to strict monitoring by the United Nations administration. The Special Representative retained the "final authority" to decide on a removal from office of judges on grounds such as the "serious violation of professional responsibilities" or "the acceptance of bribes or other emoluments beyond the granted remuneration, as determined by the Transitional Administration".²³⁸ Moreover, Section 9.5 of Regulation 2000/11 allowed him to "decide to vest jurisdiction on matters of particular concern, including matters related to public administration ... exclusively into individual District Courts, where the interests and efficacy of justice so requires".

A change of direction, however, reflecting the gradual decline of UNTAET's powers in the process of East Timor's access to independence, may be found in Regulation 2001/2. The Constituent Assembly charged with the preparation of a Constitution for an independent and democratic East Timor may consider "such draft regulations as may be referred to it by the Transitional Administrator", but is in no way compelled to abide by these proposals.²³⁹ It is also clear that the authority of the United Nations will diminish significantly, once East Timor has gained independence. In fact, it has even been stated by the Secretary-

²³⁴ See Section 2.1 and 4 of UNTAET Regulation 2000/3.

²³⁵ See Sections 4 and 7 of UNTAET Regulation 2000/11.

²³⁶ See UNTAET Regulation 2000/16 of 6 June 2000.

²³⁷ See Sections 1.3 and 2 of UNTAET Regulation 2000/15.

²³⁸ See Section 29 1 a) of UNTAET Regulation 2000/11 referring to article 13.3 of UNTAET Regulation 1999/3.

²³⁹ See Section 2 of UNTAET Regulation 2001/2.

General that a United Nations successor mission in East Timor would be vested with a much more limited mandate than UNTAET.²⁴⁰

2. The Definition of the Applicable Law

Both in Kosovo and in East Timor, a number of problems have emerged with respect to the definition of the applicable law. In their regulations establishing the foundations of the legal system of the administered territories, UNMIK and UNTAET have failed to set up a clear hierarchy between the different sources of law. UNMIK Regulation 2000/59 mentions four sources of law applicable in Kosovo: 1.) Regulations promulgated by the Special Representative, 2.) the law in force in Kosovo on 22 March 1989, 3.) the law applied in Kosovo between 22 March 1989 and 12 December 1999 (the date Regulation 1999/24 came into force), provided that it is not discriminatory and 4.) recognized internationally human rights standards. Unfortunately, the rank of these different bodies of law in the legal system of Kosovo is not entirely clear from the wording of the Regulation. Section 1.1 of Regulation 2000/59 states that regulations "shall take precedence" over 1989 law. Furthermore, it is pointed out that the law in force in Kosovo after 22 March 1989 must comply with the internationally recognized human rights standards listed in Section 1.3 of the Regulation. But the hierarchy between the other sources of law remains unclear.²⁴¹ In particular, it has not been specified whether human rights law takes precedence over domestic laws or UNMIK regulations.

Section 1.3 of Regulation 2000/59 confines itself to state that "in exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognised human rights standards as defined in the Regulation".²⁴² Section 2 of

²⁴⁰ Planning for such a post UNTAET United Nations presence in East Timor has been undertaken by a working group. The Secretary-General notes in his progress report on the United Nations Transitional Administration in East Timor of 24 July 2001 that there would be "a substantial reduction in the overall presence" once East Timor has reached independence. See Report of the Secretary-General of 24 July 2001, Doc. S/2001/719, para. 53 et seq.

²⁴¹ See also the analysis of the Ombudsperson Institution in Special Report No. 2, see note 199, paras 9 et seq.

²⁴² See also the critical remarks by the Ombudsperson Institution noting that international human rights obligations "do not only attach to public offi-

the Regulation adds that the "courts in Kosovo may request clarification from the Special Representative of the Secretary-General in connection with the implementation of the present regulation". The Special Representative was finally forced to set out the meaning of Section 1.3 of Regulation 1999/24 in a letter to the Belgrade Bar Association, confirming thereby that human rights law takes precedence over the provisions of the domestic law.²⁴³ The same principle has now been codified in the Constitutional Framework, which states that the "Provisional Institutions of Self-Government shall observe and ensure the internationally recognized human rights and fundamental freedoms" set forth in Chapter 3 of the document. Furthermore, Chapter 9.4.11 of the Constitutional Framework authorizes the Special Chamber of the Supreme Court to examine whether "any law adopted by the Assembly is incompatible with this Constitutional Framework, *including the international legal instruments specified in Chapter 3 on Human Rights*" (emphasis added).

UNMIK, on the contrary, appears to be the "final arbiter" of the lawfulness of its own legislation. While the general precedence of the applicable human rights law above UNMIK regulations may be inferred from Section 3 of Regulation 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo, which provides that "... the Ombudsperson may provide advice and make recommendations to any person or entity concerning the compatibility of domestic laws and *regulations* with recognized international standards" (emphasis added), there are no institutions to invalidate UNMIK legislation for violation of human rights standards. In particular, the courts in Kosovo are not authorized to declare UNMIK regulations null and void and therefore inapplicable for non-conformity with the human rights instruments listed in Section 1.3. of Regulation 1999/57. The right to file complaints concerning an abuse of authority by UNMIK is restricted to the procedure before the Ombudsperson.²⁴⁴ Furthermore, Section 9.4.11 of the Constitutional Framework exempts UNMIK regulations from the ju-

cial in their official capacities, but to the institutions on behalf of whom they exercise their public functions". However, neither UNMIK Regulation 2000/59 nor any other law codifies this principle of state responsibility. See para. 11 of Special Report No. 2.

²⁴³ Cf. OSCE, Justice System, see note 210, page 15.

²⁴⁴ See Sections 3 and 4 of UNMIK Regulation 2000/38.

risdiction of the Special Chamber of the Supreme Court on Constitutional Framework Matters.²⁴⁵

Similar uncertainties concerning the applicable law have also arisen under the legal framework established by UNTAET in East Timor. In particular, Section 2 of UNTAET Regulation 1999/1 repeats the equivocal formula contained in UNMIK Regulation 2000/59 by providing that “all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards” as listed in the Regulation. Section 3.1 of Regulation 1999/1 provides some more specific information by stating that “[u]ntil replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 5 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2, the fulfilment of the mandate given to UNTAET under United Nations Security Resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator.” It follows directly from the wording of the Regulation that all domestic laws must comply with UNTAET regulations and the human rights standards declared applicable in East Timor by Section 2 of Regulation 1999/1. The regulatory framework established by UNTAET is therefore, at least in this regard, much clearer than the legislation adopted by UNMIK.

However, UNTAET Regulation 1999/1 remains silent on the question of whether UNTAET legislation itself must be in accordance with the self-imposed human rights standards. The general obligation of the United Nations administration to secure and promote human rights in East Timor, as laid down in Security Council Resolution 1272, would support such a view.²⁴⁶ But, just as in Kosovo, the jurisdiction of the

²⁴⁵ The jurisdiction of the Court is limited to the control of acts adopted by the Provisional Institutions of Self-Government. The Special Representative, however, does not form part of this group of institutions defined in Chapter 1.5 of the Constitutional Framework.

²⁴⁶ For a clear affirmation of this obligation under S/RES/1244, see para. 8 of Special Report No. 2 of the Ombudsperson Institution: “Resolution 1244 establishes the premise that the SRSG has an obligation to observe internationally recognised human rights standards in fulfilling his mandate ... It follows that when exercising his legislative authority to promulgate regulations and subsidiary instruments issued thereunder (cf. Section 1.1 a of UNMIK Regulation 2000/59), the SRSG should ensure internationally recognised human rights standards which are entrenched in such legal enactments. It also follows that when exercising his executive authority in any

East Timorese courts is limited to the review of the legality of domestic laws. Section 5 of UNTAET Regulation 2000/11 states that "in exercising their jurisdiction, the courts in East Timor shall apply the law of East Timor as promulgated by Section 3 of UNTAET Regulation 1999/1". A special mechanism, which would allow the courts to control the conformity of UNTAET Regulations with human rights standards, was not introduced. One must therefore assume that, while being obliged to comply with the applicable human rights law in East Timor, UNTAET Regulations "remain in force until repealed by the Transitional Administrator or superseded" by the rules of the democratic institutions of an independent East Timor.²⁴⁷

3. The Legal Status of the Interim Administration

Another issue, which has given rise to legal controversies is the status of the United Nations administration within the administered territories. Within the framework of a UN led peace-keeping operation, the different international actors usually enjoy far-reaching immunities. But it is questionable whether the same standards may be applied, if the United Nations acts as a provisional government of a territory, assuming the classical powers of a state. The question has been tackled differently in Kosovo and in East Timor.

In its Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their personnel, the United Nations administration in Kosovo has conferred wide immunities upon UNMIK and KFOR, making it very difficult, if not impossible, for individuals to defend their rights against these authorities. In a democratic state, immunity is normally conferred upon individuals who act as members of the government or members of parliaments. In Kosovo, however, immunity is granted to UNMIK as an institution.²⁴⁸ Section 3.1 of Regulation 2000/47 provides that "UNMIK, its property, funds and assets

capacity, the SRSG should do so within the parameters defined by the international human rights canon and with regard to any law in force in Kosovo, without distinction".

²⁴⁷ See Section 4 of UNMIK Regulation 1999/1.

²⁴⁸ See also Section 6.1 of Regulation 2000/47, which reads "The immunity from legal process of KFOR and UNMIK personnel and KFOR contractors is in the interests of KFOR and UNMIK and not for the benefit of the individuals themselves."

shall be immune from any legal process". The same immunity standard applies to KFOR. Section 2.1 of Regulation 2000/47 states that "KFOR, its property, funds and assets shall be immune from any legal process". Similar privileges are usually accorded to international organizations, in order to protect them against the interferences of the government of a state in which they are located.²⁴⁹ However, the absence of legal accountability is rather unusual in the relationship between an administering authority and the individuals under its jurisdiction. In fact, Regulation 2000/47 left individuals largely without a remedy against acts taken by UNMIK or KFOR.²⁵⁰ Attempts to challenge the occupation or the damage of private property by UNMIK and KFOR or to claim compensation for financial and material losses suffered from action conducted by their personnel have been frustrated by the immunities granted under Regulation 2000/47.

This lack of administrative or judicial remedies is highly questionable from a legal perspective. UNMIK and KFOR are not ordinary peace-keeping forces, but international authorities exercising tasks of public administration for the benefit of the local population. UNMIK, for example, administers the movable and immovable property, which is in the territory of Kosovo.²⁵¹ KFOR carries out police tasks. A self-accorded grant of immunity from any administrative, civil or criminal responsibility for actions carried out in this capacity is hardly justifiable.²⁵² It is one of the basic principles of democratic states that the executive and legislative branches of power are bound by the law. The degree of accountability may be reduced in situations of emergency. But the absence of mechanisms for the protection against arbitrary exercises of public authority is hardly compatible with principles of democratic governance²⁵³ and the rule of law.²⁵⁴

²⁴⁹ For a recent analysis of the immunity of international organizations, see European Court of Human Rights, *Waite and Kennedy v. Germany*, Reports of Judgments and Decisions, 1999-I, para. 63.

²⁵⁰ See OSCE, *Justice System*, see note 210, page 19.

²⁵¹ See Section 6 of UNMIK Regulation 1999/1, as amended by Regulation 2000/54.

²⁵² See also Chopra see note 5, 54 "the peace-maintenance authority must be accountable itself, and not in some way above the law", and at 55 "Consequently, civil officials and military contingents participating in peace-maintenance operations are subject to an interim rule of law, no less than is the local population".

²⁵³ See on this principle, T. M. Franck, "The Emerging Right to Democratic Governance", *AJIL* 46 (1992), 86 et seq. For the proclamation of the right

The Ombudsperson Institution addressed the issue of the immunities granted under Regulation 2000/47 in Special Report No. 1, following a large number of individual applications concerning the occupation or damage of private or socially-owned property by UNMIK and KFOR.²⁵⁵ The Ombudsperson found that the wholesale removal of UNMIK and KFOR from the jurisdiction of the courts of the territory in which they operate, violates several provisions of the European Convention on Human Rights (ECHR), namely article 6 ECHR, in that individuals have no adequate judicial forum to raise civil claims against UNMIK and KFOR;²⁵⁶ article 1 of Protocol 1, in that KFOR and UNMIK may occupy or damage property without compensating the owners;²⁵⁷ article 8 ECHR, in that KFOR and UNMIK may deprive individuals of access to their homes²⁵⁸ and article 15 ECHR, in that KFOR and UNMIK have limited these and other rights beyond what is strictly necessary.²⁵⁹

UNTAET, on the contrary, seems to have taken a different approach. While a Status of Forces Agreement (SOFA) concluded between Australia and Indonesia²⁶⁰ established that INTERFET, its property, funds, assets and its members were to enjoy immunity from Indonesian criminal and civil jurisdiction,²⁶¹ UNTAET and Indonesia have not entered into a similar arrangement.²⁶² Furthermore, the United Nations administration in East Timor has refrained from adopting a regulation spelling out the status, privileges and immunities of UNTAET.

to democracy as a human right, see the United Nations Commission on Human Rights, Res. 1999/57 of 27 April 1999.

²⁵⁴ See also Ombudsperson Institution, Special Report No. 1, see note 199, paras 23–24.

²⁵⁵ For the number of complaints lodged with the Ombudsperson, see Annual Report, see note 199, 8–9.

²⁵⁶ See Ombudsperson Institution, Special Report No. 1, see note 199, paras 52 et seq.

²⁵⁷ See Ombudsperson Institution, Special Report No. 1 *ibid.*, paras 29 et seq.

²⁵⁸ See Ombudsperson Institution, Special Report No. 1, *ibid.*, paras 45 et seq.

²⁵⁹ See Ombudsperson Institution, Special Report No. 1 *ibid.*, paras 18 et seq. and 82.

²⁶⁰ The Agreement was negotiated by Australia as the lead nation of INTERFET. New Zealand, however, took the view that the SOFA was a bilateral issue between Australia and Indonesia, because it not recognized that Indonesia had sovereign rights over East Timor.

²⁶¹ See Kelly /McCormack/ Muggleton /Oswald, see note 35, 137.

²⁶² See Kelly/ McCormack/ Muggleton/ Oswald, *ibid.*, 118.

Instead, the United Nations administrator has laid down in several regulations that executive decisions taken by organs of the administration may be challenged before the courts. An identical clause may be found in UNTAET Regulations 2000/17 and 2000/19. It reads:

“Pending the establishment of adequate judicial procedures for administrative matters, a person or legal entity may challenge a decision of the Deputy Transitional Administrator to uphold the original decision adverse to their interests with the competent judicial authorities in East Timor. In any court proceeding arising out of or in connection with the present regulation against UNTAET or a servant of UNTAET, the court shall apply the same substantive norms as would be applicable under the procedures for administrative matters”.²⁶³

Moreover, UNMIK Regulation 2000/10 provided for a review of decisions taken by the UNTAET procurement policy body before a court of competent jurisdiction.²⁶⁴ These few examples show that UNTAET obviously considered itself rather as a surrogate government of East Timor than as a foreign ruler vested with far-reaching immunities.

VII. Observance of Human Rights Standards

The question of the observance of human rights standards by the United Nations Interim Administrations has been another subject of debate. It is quite clear that as UN bodies both UNTAET and UNMIK have to comply with the human rights standards embodied in the United Nations Charter and international customary law. This is expressly stated in Section 11 lit.(j) of Security Council Resolution 1244 which provides that “the main responsibilities of the international civil presence will include ... protecting and promoting human rights”. In the case of East Timor, the corresponding formulation²⁶⁵ may be found in Part IV of the Report of the Secretary-General of 4 October 1999, to

²⁶³ See Sections 6.4 and 6.5 of UNTAET Regulation 2000/17 of 8 June 2000 and Sections 8.4 and 8.5 of UNTAET Regulation 2000/19 of 30 June 2000.

²⁶⁴ See Section 42 of UNTAET Regulation 2000/10 of 6 March 2000.

²⁶⁵ Para. 29 h) of the Report of the Secretary-General of 4 October 1999 notes that UNTAET will have the objective to “ensure the establishment and maintenance of the rule of law and to promote and protect human rights”. See Doc. S/1999/1024, page 7.

which paragraph 3 of Security Council Resolution 1272 refers.²⁶⁶ Furthermore, building upon the idea of the automatic succession into the human rights treaties, one may argue that the human rights guarantees enshrined in the treaties applicable and Kosovo and east Timor before the establishment of the United Nations administrations are building upon UNMIK and UNTAET, because they form an integral part of the status of the territory and the *acquis* of the population.²⁶⁷

However, as peace-keeping missions operating in a post-conflict environment, both United Nations administrations had to face the question, to what extent security concerns may take precedence over the strict observance of human rights standards. This issue has, in particular, been raised in the context of detentions carried out in Kosovo and east Timor. UNMIK's general legal position is reflected in a paper entitled "Security and the Rule of Law in Kosovo" of 12 January 2000.²⁶⁸ It describes the position of UNMIK as follows:

"Human rights principles should not be viewed as operating to dogmatically bar action that must be taken to address urgent security issues. A number of rights, including the rights to privacy, freedom of expression, freedom of assembly and freedom of movement, are subject to limitations which are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order [and] for the prevention of crime. Within the framework of human rights, there is flexibility to take the necessary steps to promote public peace and order, even where such steps may constrain individual rights."

It should also be noted that both the ECHR and the International Covenant on Civil and Political Rights (ICCPR) contain a provision on "public emergency". This permits states, which are in a declared state of public emergency, to take measures derogating from human rights standards. For instance, it may be noted that a declaration of public emergency was accepted by the European Court of Human Rights in the

²⁶⁶ Para. 3 of S/RES/1272 provides that "UNTAET will have the objectives and a structure along the lines set out in part IV of the report of the Secretary-General".

²⁶⁷ See on this concept with respect on the territorial application of the International Covenant on Civil and Political Rights, General Comment 26 of the Human Rights Committee, Doc. HRI/GEN/1/Rev.5 of 26 April 2001. Cf. generally in this respect the article of T. Buergenthal in this Volume.

²⁶⁸ See *UNMIK, Security and the Rule of Law in Kosovo*, document issued by the Special Representative of the Secretary-General on 12 January 2000.

case of Northern Ireland, where low-intensity, irregular violence was established. It is clear, on its face, that Kosovo falls within this category of a public emergency given the security situation and the need for an international military force to maintain peace and order. Further consideration should, however, be given to how the principles of derogation may apply to the current situation in Kosovo".²⁶⁹

Following the legal view adopted in this report, UNMIK has adopted a number of Regulations, placing security interests over the rights of individuals. One of the first Regulations of UNMIK, namely Regulation 1999/2, provides for a temporary detention or restriction on the freedom of movement of individuals who may pose a "threat to public peace and order".²⁷⁰ Section 2 of the Regulation reads:

"The relevant law enforcement authorities may temporarily detain a person, if this is necessary in the opinion of the law enforcement authorities and in the light of the prevailing circumstances on the scene, to remove a person from a location, or to prevent access by a person to a location in accordance with Section 1 of the present regulation."

Accordingly, UNMIK has on several occasions carried out preventive detentions, arguing that the individual poses a "threat" to the safe and secure environment or to the public safety and order. This approach, however, is incompatible with the standards of the ECHR.²⁷¹ Under article 5 para. 1 ECHR, a threat to the public order is not a sufficient ground to justify the detention of a person, unless there is a concrete suspicion that the person will commit an offence.²⁷² A "preventive de-

²⁶⁹ See UNMIK Security and the Rule of Law, see above, page 5.

²⁷⁰ According to Section 1.2 of the Regulation 1999/2 such a threat to public peace and order may be posed by any act that jeopardizes the rule of law, the human rights of individuals, public and private property and the unimpeded functioning of public institutions.

²⁷¹ See also Ombudsperson Institution, Special Report No. 3 on the Conformity of Deprivations of Liberty under "Executive Orders" with Recognised International Standards of 29 June 2001, para. 10.

²⁷² See article 5 para. 1 lit.(c) "No one shall be deprived of his liberty save in the following cases ... c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

tion” for general security purposes, on the contrary, does not meet the requirements of article 5 para. 1.²⁷³

Moreover, the United Nations Special Representative in Kosovo has issued a number of Executive Orders extending detention periods without providing the detainee or his or her legal counsel with information about the grounds for the continued detention, and without giving the detainee the opportunity to challenge the lawfulness of the detention. This practice is in accordance with UNMIK Regulation 1999/26 on the extension of pre-trial detention which fails to provide for a mechanism allowing the detainee to challenge the lawfulness of an order for continued detention. However, it is a clear breach of international human rights standards.²⁷⁴ Article 5 para. 3 of the ECHR and article 9 para. 3 of the ICCPR require that anyone who has been arrested or detained be brought promptly before a judge in order to determine the lawfulness of the arrest or the detention. In addition article 5 para. 4 of the ECHR and article 9 para. 4 of the ICCPR demand that all persons, who have been deprived of their liberty by arrest or by detention be entitled to take proceedings by which the lawfulness of their detention may be decided speedily by a court. National authorities are therefore under an obligation to provide a forum by which the lawfulness of a detention may be challenged during the entire period of pre-trial detention. This includes, *inter alia*, the duty to secure a periodic review of the detention order within short intervals.²⁷⁵

Both the preventive detentions carried out by UNMIK and the absence of sufficient judicial control over deprivations of liberty have been criticized by the Ombudsperson Institution in its Special Report No. 3²⁷⁶ on the Conformity of Deprivations of Liberty under “Executive Orders” with Recognised International Standards of 29 June 2001.

²⁷³ See most recently ECHR, *Jecius v. Lithuania*, Appl. No. 34578/97, 31 July 2000. See on the case law also W. Peukert, “Article 5”, in: J.A. Frowein/ W. Peukert, *Europäische Menschenrechtskonvention*, 1996, 68 et seq., (111).

²⁷⁴ Cf. OSCE, Report No. 6, Extension of Custody Time Limits and the Rights of Detainees: The Unlawfulness of Regulation 1999/26, 29 April 2000, available under <http://www.osce.org/kosovo> – See also Ombudsperson Institution, Special Report No. 3, paras 25 et seq.

²⁷⁵ See ECHR, *Bezicheri*, Series A, No. 164, para. 24 et seq., 25 October 1989. The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment also provide for a right to a review of continued detention by a court or other authority at reasonable intervals. See Principles 11 (3) and 39.

²⁷⁶ Cf. Report, see note 271.

The Ombudsperson found, in particular, that these practices do not conform with the above-mentioned provisions of the ECHR.²⁷⁷ UNMIK, on the contrary, denied a violation of internationally recognized standards, when it reacted to the findings of the report. Interestingly, UNMIK did not call into legal concern the legal reasoning under the European Convention itself. Instead, it invoked the derogation clause under the Convention and argued that Security Council Resolution 1244 had authorized it to deviate from the strict observance of the Convention. In a Press Briefing, held on 2 July 2001, the UNMIK Representative stated the following:

“Our position is that the authority for law and order and public safety is vested in the SRSG acting on behalf of the Secretary-General and the Security Council, according to Resolution 1244. Article 15 of the European Convention on Human Rights recognizes that there may be exceptions to the conventions principles in certain emergency situations. This is acceptable in European courts. The situation in Kosovo is analogous to emergency situations envisioned in the human rights conventions. We emphasize that UNMIK’s mandate was adopted under Chapter VII, which means that the situation calls for extraordinary means and force can be used to carry out the mandate. Any deprivation of liberty by an Executive Order is temporary and extraordinary, and its objective is the effective and impartial administration of justice”.²⁷⁸

This reasoning is hardly convincing. While the Security Council may exempt peace-keeping missions from the observance of certain human rights standards under a Chapter VII Resolution, in particular, if they are derogable in a state of emergency,²⁷⁹ such a derogation can only be assumed in exceptional circumstances, given both the proclaimed adherence of the United Nations to international human rights instruments and standards within the framework of international UN Peace operations²⁸⁰ and the general obligation to notify derogations from

²⁷⁷ See para. 29 of the Report, see note 271.

²⁷⁸ See UNMIK Press Briefing of 2 July 2001, Statement on the Ombudsperson’s report.

²⁷⁹ See article 15 ECHR and article 4 ICCPR. The right to challenge the lawfulness of a detention before a court is a derogable right.

²⁸⁰ See para. 6 of the recent report of the Panel on United Nations Peace Operations, which stressed “the essential importance of the United Nations system adhering to and promoting international rights instruments and

human rights law under the relevant international treaty law.²⁸¹ One may even argue such an exemption needs to be declared expressly by the Council or its subsidiary bodies,²⁸² if the United Nations acts as a surrogate government, assuming the classical powers of a state within a specific territory. In the case of Kosovo, however, a declaration indicating the scope of the derogation and the reasons for the specific measures has not been made by UNMIK or the Security Council itself.²⁸³ In particular, UNMIK has abstained from derogating certain human rights guarantees when defining the applicable law in Kosovo. Regulation 2000/59 declares the ECHR and the ICCPR applicable in their entirety.²⁸⁴

Furthermore, it can hardly be invoked that a state of “public emergency” in Kosovo would allow UNMIK to impose severe restrictions on the rights guaranteed in article 5 ECHR and article 9 ICCPR. Under article 15 para. 1 ECHR and article 4 para. 1 ICCPR, human rights obligations continue to apply in principle even in an active state of war. Derogations from these obligations must be temporary and “strictly required by the exigencies of the situation”.²⁸⁵ It is highly questionable, whether both, the absence of adequate remedies to challenge the lawfulness of a detention, and the performance of preventive detentions may be justified on the basis of their strict necessity, once a functioning legal system has been established in the respective territory, which includes domestic courts and prosecutors to effectively combat crimes.²⁸⁶

It seems that UNTAET has paid greater respect to the strict observance of human rights standards in the area of detentions. The current regulatory framework of UNTAET is largely based on the ICCPR.

standards and international humanitarian law in all aspects of its peace and security activities.”

²⁸¹ See article 15 para. 3 ECHR and article 4 para. 3 ICCPR.

²⁸² See also J. Cerone, “Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo”, *EJIL* 12 (2001), 469 et seq. who argues that this duty would derive from “the general principle of interpretation that obligations should be construed, where possible, so as to avoid conflicting obligations”. Cf. Cerone, 478 at note 50.

²⁸³ See on the absence of a derogation of human rights law in Kosovo also Cerone, see note 281, under VI.

²⁸⁴ See Sec. 1.3 of Regulation 2000/59.

²⁸⁵ See also Ombudsperson Institution, Special Report No. 1, see note 199, paras 19–20.

²⁸⁶ See also Ombudsperson Institution, Special Report No. 3, see note 271, paras 10, 24 and 29.

UNTAET Regulation 2000/30 on Transitional Rules of Criminal Procedure contains detailed regulations of the procedures to be followed at all stages of criminal proceedings. Pre-trial detention is allowed only for crimes carrying a sentence of over one year.²⁸⁷ Furthermore, Section 20.9 of Regulation 2000/30 provides that an Investigating Judge shall review the detention of a suspect every thirty days. In addition, Section 47 of the Regulation introduces a special *habeas corpus* procedure, allowing one to challenge unlawful arrest or detention. Even more critical²⁸⁸ is Section 20.12 of the Regulation which provides that:

“On exceptional grounds, and taking into account the prevailing circumstances in East Timor, for particularly complex cases of crimes carrying out imprisonment of ten years or more under the law, a panel of the District Court may, at the request of the public prosecutor order the continued detention of a suspect, if the interests of justice so require, and as long as the length of pre-trial detention is reasonable in the circumstances, and having due regard to international standards of fair trial”.

The Regulation fails to adequately define what may be regarded as “exceptional grounds” or “interests of justice”, justifying a pre-trial detention. Furthermore, it is questionable if the “prevailing circumstances in East Timor” provide a sufficient ground to extend the period of detention.²⁸⁹ Article 4 ICCPR allows the derogation of the rights to liberty and to a fair trial only in the case of a public emergency which “threatens the life of the nation and the existence of which is officially proclaimed.” Much will therefore depend on the question to what extent “international standards of fair trial” are given full and not only “due” regard.

Furthermore, some problems have emerged with respect to the lapse of time between the appointment of the first judges, prosecutors and defenders and the final creation of the District Court of Dili. The court was established three months after the first judges and prosecutors had been appointed by the SRSG.²⁹⁰ The judges and prosecutors, however,

²⁸⁷ See Section 12 a. 1 of UNTAET Regulation 2000/11, as amended by UNTAET Regulation 2000/14.

²⁸⁸ See also Amnesty International, *East Timor: Building a New Country Based on Human Rights* 2000, 4.12.

²⁸⁹ See also Linton, see note 4, 145

²⁹⁰ The District Court of Dili was established on 6 March 2000 by UNTAET Regulation 2000/11. The first judges, prosecutors and defenders were established on 7 January 2000. See Notification on the Appointment of

were authorized to act from the moment of their appointment, without being affiliated to an existing court.²⁹¹ Regulation 2000/14 solved this problem, by retroactively validating the arrests and detentions ordered before the creation of the District Court of Dili by Regulation 2000/11. Section 12.a.) 10 of Regulation 2000/14, amending Regulation 2000/14 provides:

“Pursuant to Security Council resolutions 1264 (1999) and 1272 (1999) and taking into consideration the prevailing circumstances in East Timor, all warrants for detention issued by the Investigating Judge or Public Prosecutor prior to the coming into force of the present Regulation shall be deemed valid and in accordance with the present Regulation.”

Finally, a number of other difficulties have arisen in the period before the establishment of UNTAET. INTERFET, the UNTAET predecessor force deployed under Security Council 1264 was faced with a large number of crimes, including serious offences such as violent assault, rape and murder, without being vested with an adequate legal mechanism to deal with arrests and detentions. The Status of Forces Agreement with Indonesia authorized INTERFET to arrest and detain persons, but required that the detainees be handed over to the Indonesian police.²⁹² This mechanism proved to be unsatisfactory, because the civilian legal and administrative order in East Timor had collapsed. Detainees were promptly released by the Indonesian police after their transfer of custody. INTERFET established therefore a temporary detention centre (the Detention Management Unit, in the following DMU) on 21 October 1999, which served as an interim legal mechanism to deal with persons suspected of the commission of serious criminal offences pending the re-establishment of a civil judiciary.²⁹³ Individuals taken in custody by INTERFET were held in the Detention Centre and granted an initial hearing within 24 hours. Furthermore, the detention order was to be reviewed within 96 hours by the Reviewing Authority of the DMU, which could extend the detention

Judges and Prosecutors of 7 January 2000, Official Gazette of East Timor, UNTAET/GAZ/2000/1, page 25.

²⁹¹ See also Linton, see note 4, 134.

²⁹² See Kelly/ McCormack/ Muggleton/ Oswald, see note 35, 130.

²⁹³ See Report of the Secretary-General of 4 October 1999, para. 13. For a full account, see Kelly/ McCormack/ Muggleton/ Oswald, see note 35, 131 et seq.

indefinitely.²⁹⁴ The conduct of trials was reserved to UNTAET. A Detainee Ordinance declared Indonesian law as the criminal law applicable in East Timor, while suspending all provisions of Indonesian law that were incompatible with the DMU's own provisions on detention and arrest.²⁹⁵ In the absence of any other legal basis for the establishment of an interim arrest and detention mechanism, which would under normal circumstances fall within the exclusive competence of the local authorities, the creation of the DMU and the Detainee Ordinance were based on the framework of the Fourth Geneva Convention,²⁹⁶ which was designed to regulate the relationship between foreign military forces and a civilian population in cases in which the military forces assume comprehensive control over the foreign territory.²⁹⁷

VIII. The Prosecution of War Crimes and Other Serious Offences

UNMIK and UNTAET have chosen similar approaches to prosecute war crimes and other serious offences committed in the administered territories. Both United Nations administrations have in principle charged domestic institutions with the adjudication and prosecution of serious crimes, while providing them with international staff. The creation of internationalized court chambers is fully in line with the developments in Cambodia²⁹⁸ and Sierra Leone,²⁹⁹ which have both vested

²⁹⁴ See also Strohmeier, see note 3, 51 note 22.

²⁹⁵ For a discussion of the Ordinance, see Kelly/ McCormack/ Muggleton/ Oswald, see note 35, 133 et seq.

²⁹⁶ Cf. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949. For a discussion of its applicability, see Linton, see note 4, 131. See also B. Levrant, "Le droit international humanitaire au Timor oriental: entre théorie et pratique", *Int'l Rev. of the Red Cross* 83 (2001), 77 et seq., (80 et seq., 96 et seq.).

²⁹⁷ See generally on application of the IV. Geneva Convention to United Nations operations, Kelly, see note 106, 162 et seq.

²⁹⁸ See Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes available under: <http://www.cambodian-parliament.org>

²⁹⁹ See Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, 4 October 2000, Doc. S/2000/915. See also M. P. Scharf, "The Special Court for Sierra Leone", *ASIL Insights*, October 2000;

mixed national-international courts with the prosecution and trial of classical international crimes such as genocide, crimes against humanity and war crimes.

1. The Panels with Exclusive Jurisdiction over Serious Criminal Offences

The Extraordinary Chambers in the Court of Cambodia or the Special Court for Sierra have obviously served as a model for the establishment of the Panels with exclusive jurisdiction over serious criminal offences in East Timor.³⁰⁰ The International Commission of Inquiry on East Timor had recommended the establishment of an international criminal tribunal to try the atrocities committed in East Timor.³⁰¹ The Secretary-General, however, took a different view, arguing that priority be given to the domestic courts, in order to strengthen UNTAET's own capacities.³⁰² This approach was finally adopted. On 6 June 2000, UNTAET adopted Regulation 2000/15 creating the panels of judges with exclusive jurisdiction as partly internationalized institutions, acting under the authority of the District Court of Dili. The panels are composed of two international judges and one East Timorese judge.³⁰³ Furthermore, UNTAET Regulation 2000/16 vested the "Deputy General Prosecutor for Serious Crimes" with the exclusive prosecutorial authority to direct and supervise the investigation and prosecution of serious crimes.³⁰⁴

The jurisdiction of the special panels covers two main groups of serious criminal offences: first, a number of classical international crimes, namely genocide, crimes against humanity, war crimes and torture;³⁰⁵ second, murder and sexual offences, as defined in the applicable Indo-

M. Frulli, "The Special Court for Sierra Leone: Some Preliminary Comments", *EJIL* 11 (2000), 857 et seq.

³⁰⁰ See also Linton, see note 4, 146.

³⁰¹ See Report of the International Commission of Inquiry on East Timor to the Secretary-General, Doc. A/54/726, S/2000/59 (2000), at 153.

³⁰² See Letter of 31 January 2000 from the Secretary-General to the President of the General Assembly, the President of the Security Council and the Chairperson of the Commission on Human Rights, accompanying UN Doc. A/54/726, S/2000/59 (2000).

³⁰³ See Section 22.1 of UNTAET Regulation 2000/15.

³⁰⁴ See Section 14.4 of UNTAET Regulation 2000/16.

³⁰⁵ See Sections 4 to 7 of UNTAET Regulation 2000/15.

nesian law.³⁰⁶ When defining the crimes contained in the first group and the general principles of criminal law applicable to serious offences, UNTAET relied heavily on the provisions of the Rome Statute of the International Criminal Court. The rules and definitions laid down in UNTAET Regulation 2000/15 were almost verbatim modelled after the corresponding provisions of the Rome Statute.³⁰⁷ However, the scope of jurisdiction was extended.³⁰⁸ The panels exercise “universal jurisdiction” over genocide, war crimes, crimes against humanity and torture. The term “universal jurisdiction” was more closely defined in Section 2.2 of the Regulation so as to encompass - a. serious criminal offences “committed within the territory of East Timor” (territoriality principle), b. serious criminal offences “committed by an East Timorese citizen” (principle of active personality) and c. serious criminal offences committed against an East Timorese citizen (principle of passive personality). A different regime applies to murder and sexual offences,³⁰⁹ which are classical domestic offences. They are not covered by the “universal jurisdiction”- clause of UNTAET Regulation 2000/15. Instead, in these cases, the jurisdiction of the panels is exclusively limited to crimes committed in East Timor.³¹⁰ Moreover, these charges may only be tried by the panels, if they have been committed in the immedi-

³⁰⁶ See Section 8 to 9 of UNTAET Regulation 2000/15.

³⁰⁷ For a full analysis, see Linton, see note 4, 150 et seq.

³⁰⁸ See article 12 para. 2 of the Rome Statute for the International Criminal Court, which does not provide for “universal jurisdiction”. See on the jurisdiction of the International Criminal Court also C. Stahn, “Zwischen Weltfrieden und materieller Gerechtigkeit: Die Gerichtsbarkeit des Ständigen Internationalen Strafgerichtshofs”, *EuGRZ* 25 (1998), 577 et seq., (586 et seq.). See generally on the Rome Statute, A. Zimmermann, “The Creation of a Permanent International Criminal Court”, *Max Planck UNYB* 2 (1998), 169 et seq., (206 et seq.).

³⁰⁹ See also the critique by Linton, see note 4, 169–170, pointing out that international law has become more progressive in this area than the Indonesian Criminal Code.

³¹⁰ See Section 2.4 of UNTAET Regulation 2000/15 referring to Section 3.1 of UNTAET Regulation 1999/1, which declares Indonesian criminal law applicable. Indonesian law provides that “if a person commits a criminal offence abroad which can be judged by the law of the Republic of Indonesia, the Jakarta Court of Justice shall be competent to judge the case.” See Dili District Court, Special Panel for Serious Crimes, Case of The Prosecutor v. Lenardus Kasa, Judgment of 5 May 2001, Case No. 11/CG/2000.

ate context of the vote on East Timorese independence, namely in the period between 1 January 1999 and 25 October 1999.³¹¹

The provisions contained in Regulation 2000/15 provide the special panels with the opportunity to try a great variety of crimes, ranging from large-scale crimes to less significant offences. However, cooperation with Indonesia proved to be a difficult issue. Many of the key suspects, including Indonesian governmental officials, military personnel or militia leaders have returned to Indonesia in the aftermath of the post-referendum conflict. UNTAET requested assistance from the Government of Indonesia in extraditing identified suspects at large in Indonesia. But the Indonesian Government refused to extradite suspects to East Timor or to allow UNTAET investigators to question suspects in Indonesia,³¹² despite the existence of a Memorandum of Understanding with UNTAET in which both parties agreed to provide each other with assistance in investigations and court proceedings.³¹³ Instead, Indonesia established its own mechanism to investigate the serious human rights violations committed in East Timor. Following the pressure of the international community, pushing Indonesia to try those responsible for the violence in East Timor, Indonesia's parliament adopted a Law on Human Rights Courts to prosecute the human rights abuses related to the East Timorese referendum on independence.³¹⁴ Fi-

³¹¹ See Section 10.2 of UNTAET Regulation 2000/11 and Section 2.3 of UNTAET Regulation 2000/15: "With regard to the serious criminal offences listed under Section 10.1 d) [murder] to e) [sexual offences] of UNTAET Regulation 2000/11 ... the panels established within the District Court of Dili shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January, 1999 and 25 October 1999."

³¹² See Amnesty International, *East Timor, Justice Past, Present and Future*, Report of 27 July 2001, 9.3.

³¹³ See Memorandum of Understanding between the Republic of Indonesia and UNTAET Regarding Cooperation in Legal, Judicial and Human Rights Related Matters of 6 April 2000. See on the lack of implementation of Section 9, which allows the transfer of persons for purposes of prosecution, Progress Report of the Secretary-General on the United Nations Transitional Administration in East Timor of 24 July 2001, Doc. S/2001/719, para. 30. See also Report of the Secretary-General on the United Nations Transitional Administration in East Timor of 15 January 2001, Doc. S/2001/42, para. 25.

³¹⁴ See Republic of Indonesia, House of Representatives, Act No. 26/2000 on Human Rights Courts. See also the Amnesty International Documents, *Indonesia, Comments on the Draft Law on Human Rights Tribunals*, AI Index: ASA 21/25/00, June 2000 and Indonesia, Comments on the Law on

nally, on 23 April 2001, President Wahid enacted Presidential Decree No. 53/2001 establishing an *ad hoc* human rights court at the Jakarta District Court with the authority to try cases of gross human rights violations committed *after* the 1999 ballot.³¹⁵ It is therefore unlikely that military personnel and civilians residing in Indonesia will be tried by the East Timorese Special Panels with exclusive jurisdiction.

2. The Situation in Kosovo

Although both UNTAET and UNMIK have opted for a model of domestic prosecution of war crimes and other related offences, the situation in Kosovo differs from that in East Timor in that it has been clear since September 1999 that the ICTY would exercise its jurisdiction with respect to crimes committed in the Kosovo crisis. Carla Del Ponte, the Chief Prosecutor of the ICTY declared in a statement of 29 September 1999 that the ICTY would try "high level, civilian, police and military leaders, of whichever party to the conflict who may be held responsible for crimes committed during the armed conflict in Kosovo".³¹⁶ Furthermore, the prosecutor announced that investigations would also be initiated against other individuals responsible for particularly serious crimes, adding however that the primary investigative and prosecutorial responsibility would lie with UNMIK.

UNMIK had plans to establish an extraordinary domestic tribunal with jurisdiction over war crimes and other serious violations of international humanitarian law and serious ethnically motivated crimes (the "Kosovo War and Ethnic Crimes Court"). The Court should have enjoyed concurrent jurisdiction with domestic courts, while being composed of at least one international and two international judges.³¹⁷ The

Human Rights Courts (Law No. 26/2000), AI Index ASA 21/005/2001, February 2001.

³¹⁵ See Decree of the President of the Republic on Indonesia No. 53/2001 concerning the Establishment of an *ad hoc* Human Rights Tribunal at the Central Jakarta District Court of 23 April 2001. See on the Decree also M. Othman, "Peacekeeping Operations in Asia, Justice and UNTAET", *International Law Forum* 3 (2001), 114 et seq., (120).

³¹⁶ See ICTY, Statement on the Investigation and Prosecution of Crimes Committed in Kosovo, The Hague, 29 September 1999, available under <http://www.icty.org>

³¹⁷ See OSCE, Justice System, see note 210, at 71–72.

basic rationale underlying the creation of a special Kosovo War Crimes Court was to ensure an impartial and neutral conduct of politically sensitive trials outside the existing judicial institutions. However, due to budgetary restraints and delays in the establishment of the court, the project was finally dropped. Instead, efforts were made to provide international judges and prosecutors to the domestic courts.³¹⁸

The general framework for the assignment of international judges and prosecutors to cases is laid down in Regulations 2000/64 and 2000/6, as amended by Regulation 2000/34. Sections 1.2 of Regulation 2000/6 provides that international judges shall have “the authority to select and take responsibility for new and pending criminal cases within the jurisdiction of the court” to which they are appointed. Similarly, Section 1.3 of the Regulation vests international prosecutors with the authority to conduct criminal investigations and to select and take responsibility for new and pending criminal investigations.³¹⁹ Moreover, Section 1 of Regulation 2000/64 grants the competent prosecutor, the accused or the defence counsel the right to submit a petition to the UNMIK Department of Judicial Affairs for the assignment of international prosecutors and judges “where this is considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice”. This may, for example, be the case if the appointment of an international judge or prosecutor is likely to have an impact upon a trial which has an ethnically motivated background.³²⁰ In cases in which the Special Representative of the Secretary-General approves the petition, the Department of Judicial Affairs may decide to assign an international prosecutor or an international investigating judge to the case or establish a panel composed of three judges, including at least two international judges (the “Regulation 64 panel”).³²¹ However, a restriction is contained in Section 2.4 of Regulation 2000/64. Regulation 64 panels may not be convened, once a trial session

³¹⁸ See OSCE, Justice System, see note 210, 72. See also OSCE, Kosovo, A Review of the Criminal Justice System, 1 September 2000 – 28 February 2001, Section 8.

³¹⁹ These powers remain unaffected by the adoption of Regulation 2000/64. See Section 3.2 of Regulation 2000/64.

³²⁰ Unfortunately, UNMIK Regulation 2000/64 does not contain more specific criteria concerning the rejection or approval of an application filed under Section 1 of the Regulation. See generally on the problems arising in the context of Regulation 2000/64, OSCE, Review of the Criminal Justice System, see note 318, Section 8, sub. I.

³²¹ See Section 2.1 of Regulation 2000/64.

or appeal session has already commenced. In these cases, defective proceedings may be remedied on appeal or by extraordinary legal remedies.³²²

The domestic courts have conducted quite a number of trials involving war and ethnically related crimes.³²³ The proceedings were, in most cases, related to charges of genocide, war crimes, murder and rape.³²⁴ The trials were held either before Regulation 64 panels or panels of judges involving at least one international judge.³²⁵ Regulation 2001/1 specified that no person may be tried *in absentia* for serious violations of international humanitarian law.³²⁶

IX. International Legal Personality

The last issue which shall be addressed in this comparative overview of the practice of the United Nations Transitional Administrations in Kosovo and East Timor is the question of the international legal personality of the UN administered territories. It has been contended that Kosovo and East Timor have been transformed into internationalized territories by Security Council Resolutions 1244 and 1272 and the subsequent practice of the United Nations administrations. There is also authority to argue that the administered territories enjoy limited international legal personality, which is exercised by UNTAET and UNMIK in their capacity as governmental authorities of the respective territories.

In case of non-state entities, legal personality may, generally be founded upon functional criteria, such as the powers necessary to fulfill the mandate of the entity.³²⁷ The administration of internationalized

³²² See Section 2.1 lit.(a) and (b) of Regulation 2000/64.

³²³ For a full analysis, see OSCE, Justice System, see note 210, 70 and OSCE, Review of the Criminal Justice System, see note 318, Section 8, sub. II to IV and Section 9 ("genocide charges").

³²⁴ For a statistical survey, see OSCE, Justice System, see note 210, 74 and OSCE, Review of the Criminal Justice System, see note 318, Section 8, Annex I.

³²⁵ See OSCE, Review of the Criminal Justice System, see note 318, Section 8, sub. II to IV and Section 9 ("genocide charges").

³²⁶ See Section 1 of UNMIK Regulation 2001/1.

³²⁷ See with respect to international organizations, H. Mosler, "Subjects of International Law", in: R. Bernhardt (ed.), *EPIL IV* (2000), 710 et seq.,(722).

territories such as Kosovo and East Timor requires the establishment of external relations with subjects of international law, such as international organizations or neighbouring states. This necessity has, in particular, been recognized by Security Council Resolution 1272 which authorizes "UNTAET to take all necessary measures to fulfil its mandate".³²⁸ Resolution 1272 thereby refers to para. 35 of the Secretary-General's Report on the Situation in East Timor of 4 October 1999,³²⁹ which makes specific mention of UNTAET's power to "conclude such international agreements with states and international organisations as may be necessary for the carrying out of the functions of UNTAET in East Timor." UNTAET has made use of its treaty-making power when concluding the Trust Fund for the East Timor Grant Agreement³³⁰ or negotiating the Exchange of Notes constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor concerning the Continued Operation of the Timor Gap Treaty.³³¹ Furthermore, Australian and the East Timorese Cabinet ministers initialled the Timor Sea Arrangement on 5 July 2001, which provides East Timor with 90 per cent of the oil and gas production in the area covered under the Timor Gap Treaty. The negotiations were jointly led by an international and an East Timorese Cabinet member. The Agreement will come into force as a treaty after its approval, signature and ratification by the elected Government of East Timor.³³² At the same time, UNTAET has institutionalized its relationship with foreign states, by providing for the establishment of Representative Offices of foreign governments in East Timor. The functions of these offices are largely identical to those of a diplomatic mission under the Vienna Convention on Diplomatic Relations of 18 April 1961.³³³ UNTAET Regulation 2000/31 provides that the Representative Offices shall, *inter alia*, represent and conduct the relations of a foreign government with the Transitional Administration and protect the inter-

³²⁸ See para. 4 of Security Council Resolution 1272.

³²⁹ See Report of the Secretary-General on the Situation in East Timor, 4 October 1999, para. 35, Doc. S/1999/1024.

³³⁰ See on this issue Chopra, see note 4, 30.

³³¹ See note 67. See on this issue also G. Triggs, "Legal and Commercial Risks of Investment in the Timor Gap", *Melbourne Journal of International Law* 1 (2000), 99 et seq., (100 et seq.).

³³² See Report of the Secretary-General on the United Nations Transitional Administration in East Timor of 24 July 2001, para. 12.

³³³ See Vienna Convention on Diplomatic Relations, UNTS Vol. 500 No.7310.

ests of this government and its nationals in East Timor.³³⁴ Moreover, the Representative Office and its staff enjoy far-reaching immunities. Section 16 of Regulation 2000/31 grants members of the representative staff the immunities from jurisdiction and legal process granted to diplomats under article 31 of the Vienna Convention on Diplomatic Relations.³³⁵ Section 19 of the regulation adds that “the premises and assets of a Representative Office shall be immune from search, seizure or any other form of interference, whether by legislative, judicial or executive action.”³³⁶

It is more difficult to establish that Kosovo enjoys limited international legal personality while being administered by the United Nations. Security Council Resolution 1244 does not contain a specific reference to the conduct of foreign relations by UNMIK. However, the capacity to entertain such relations must be regarded as an implicit power of the United Nations administration, required by its mandate. UNMIK has, in particular, interpreted its powers under Resolution 1244 so as to encompass treaty-making power. It has concluded international agreements with the territory’s neighbouring states in the field of economic co-operation³³⁷ and agreements with other third parties on the repatriation of Kosovars,³³⁸ acting on behalf of United Nations administered Kosovo. Furthermore, a large number of states and international organisations have, in the meantime, opened liaison offices in Pristina. The legal status of these offices is largely identical to the status of the Representative Offices under UNTAET Regulation 2000/31.³³⁹ Finally, the Constitutional Framework has confirmed the external affairs powers of UNMIK by providing that the Special Representative remains exclusively responsible for “concluding agreements with states

³³⁴ See Section 3.1 of UNTAET Regulation 2000/31. See also article 3 of the Vienna Convention on Diplomatic Relations.

³³⁵ The wording of Section 16 of UNTAET Regulation 2000/31 and article 31 of the Vienna Convention on Diplomatic Relations is almost identical.

³³⁶ This provision is even more specific than article 22 of the Vienna Convention on Diplomatic Relations.

³³⁷ See the cooperation agreement on cross-border economic issues with Macedonia of 7 March 2000, Doc. S/2000/538 of 6 June 2000, para. 20.

³³⁸ See UNMIK Press Release of 7 April 2000 on the agreement with the Swiss government on the return of refugees.

³³⁹ See Section 2.2 of UNMIK Regulation 2000/31 on the functions of the liaison offices and Sections 2.3 to 2.8 of the regulation on the immunities of these offices.

and international organizations in all matters within the scope of UNSCR 1244 (1999).³⁴⁰

Considering the practice of the United Nations in Kosovo and in East Timor, one may observe that partial legal personality is an important element of internationalization. Both the mandates of UNTAET and UNMIK have involved tasks requiring the enjoyment of limited international legal personality.³⁴¹ Moreover, since both United Nations administrations have been established under a binding Chapter VII Resolution of the Security Council, one may even argue that unlike the case of international organizations, this international legal personality does not even require a separate (explicit or implicit) recognition by third states.³⁴²

X. Conclusions

A first analysis of the mandate and the practice of the United Nations Transitional Administrations in Kosovo and East Timor confirms both the complexity and the challenges of the task, which the Security Council inflicted on the organization, when adopting Resolutions 1244 and 1272. UNMIK and UNTAET are landmark operations, marking the preliminary culmination of a number of state-building missions involving the world organization in the supervision and reconstruction of post-conflict-democracies.³⁴³ This far-reaching engagement of the United Nations in the process of state-building and democratization is the result of the changed security architecture in the post-cold war era, characterized by a growing use of the powers under Chapter VII of the

³⁴⁰ See Chapter 8, para. 8 (m) of the Constitutional Framework.

³⁴¹ Ruffert, see note 3, sub. IV. 2 speaks of "functional legal personality".

³⁴² See also Zimmermann/ Stahn, see note 3. See generally on the recognition of international organisations by third states I. Seidl-Hohenveldern/ G. Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, 1996, 82 et seq.

³⁴³ See also the Statement of the Secretary-General in the Report on the United Nations Transitional Administration in East Timor of 26 July 2000, Doc. S/2000/738, para. 64: "The last six months have also made clearer how daunting the task is that the United Nations has undertaken in East Timor. The Organization had never before attempted to build and manage a State. Nor did it have an opportunity to prepare for this assignment".

Charter on the hand, and the invention of various new forms of enforcement measures under Article 41 of the Charter on the other.

From a legal perspective, the establishment of UNMIK and UNTAET is remarkable in several ways. First of all, it is worth noting that the regulatory framework of the United Nations administrations in Kosovo and East Timor has not only laid the foundations for the creation of democratic political institutions and the restoration of justice in the administered territories, but also brought about a provisional internationalization of their legal and political status. This approach sheds a new light on the concept of internationalization,³⁴⁴ which has become a familiar notion in the 19th and 20th century.

Originally, internationalization was applied to territorial entities with special strategic importance, such as harbour cities or outlets to the sea, which were — mostly in the aftermath of a conflict — exempted from the authority of the states to which they previously belonged, while being placed under the administration of a group of states or an international organization.³⁴⁵ In most cases, such as the Free Territory of Danzig, the administration of the Saar Territory or the proposed United Nations oversight of Trieste, the objective of the internationalization was to create independent political entities, in order to balance the conflicting interests of competing states.³⁴⁶ The legal status of the territories was established on the basis of treaties between the powers concerned. Later, the concept of internationalization has, *inter alia*, been extended to common spaces outside the national jurisdiction, such as Antarctica, the High Seas, the Deep Sea-Bed and outer space.³⁴⁷ In this context, the development of international regimes was largely motivated by the goal of utilizing and distributing natural resources of areas beyond national jurisdiction. At the same time, elements of internationalization were introduced, in order to meet the needs and interests of the international community as whole.³⁴⁸ The establishment of

³⁴⁴ See generally on the concept of internationalization, R. Wolfrum, *Die Internationalisierung staatsfreier Räume*, 1984, 10 et seq.; R. Beck, *Die Internationalisierung von Territorien*, 1962, 60 et seq.

³⁴⁵ See Ydit, see note 8, 11 et seq.

³⁴⁶ For a detailed analysis, cf. Beck, see note 344, 17 et seq., 30 et seq., 41 et seq. and Ydit, see note 8, 44 et seq., 185 et seq., 231 et seq.

³⁴⁷ For a full account, see Wolfrum, see note 344, 30 et seq.

³⁴⁸ This approach is most clearly reflected in the common heritage principle governing the Sea-Bed and its resources. See article 136 of the United Na-

the United Nations administrations in Kosovo and East Timor may be conceived as a new variation of the concept of internationalization. The technique was slightly modified. In the cases of Kosovo and East Timor, internationalization was brought about by a Chapter VII Resolution of the Security Council rather than by way of an international agreement. Furthermore, the objective of internationalization has shifted. Within the framework of Chapter VII peace-building, internationalization is not primarily designed to preserve state guided-interests, such as a right balance of power between nations or the use and distribution of natural resources, but rather used as an instrument to serve the interests and needs of the population of the territory, namely reconstruction and the realization of human rights. At the same time, following the earlier examples of administration of territories by the League of Nations or the creation of international regimes for common spaces, internationalization is carried out in the name of the international community as a whole.

Several basic features characterize what may be referred to as the "internationalization of territories under Chapter VII of the Charter". First, the take-over of exclusive administrative authority by the United Nations over the territory, involving comprehensive regulatory powers and the provisional disjunction of the territory of its former administering power;³⁴⁹ second, the special purpose of the international authority, which is to serve the interests and benefits of the local population;³⁵⁰ third, the juxtaposition of different legal orders, namely the domestic legal order and the legal order of the United Nations, bringing about changes in the applicable law and imposing obligations on both the domestic and the international actors;³⁵¹ fourth, the internationalization of the institutional system of the territory, consisting in the creation of international or mixed national-international governing bodies and courts at the central and the local level³⁵² and fifth, the grant of limited international personality to the territories, allowing the international authorities to enter into relations with international organizations and states for the purpose of the administration.³⁵³

tions Convention on the Law of the Sea of 10 December 1982. For a discussion, cf. Wolfrum, see note 344, 389 et seq.

³⁴⁹ See on this aspect under II.

³⁵⁰ See on this aspect under V. 1.

³⁵¹ See under V. 2 and VI. 2.

³⁵² See under VI. 1, VII. and VIII.

³⁵³ See under IX.

The second remarkable aspect of the exercise of governmental powers by the United Nations in the cases of Kosovo and East Timor is that it draws on the tradition of the administration of territories practised under the Mandates System of the League of Nations or the United Nations Trusteeship System. Conceptually the assumption of exclusive administering authority by the United Nations under Chapter VII may be regarded as a modern form of trusteeship.³⁵⁴ Given the experiences made in Kosovo and East Timor, the concept of "Chapter VII based trusteeship administration"³⁵⁵ may serve as a useful model to deal with claims to external or internal self-determination or issues of protection of minorities. Cases like Bosnia and Herzegovina, Kosovo and East Timor provide evidence that under some circumstances, only a temporary internationalization of a territory may re-establish the environment in which a comprehensive peace settlement may emerge.

However, taking into account the current practice, some shortcomings need to be overcome. While UNMIK and UNTAET deserve great respect for their diligent and constructive activism in law-making and institution-building in a large number of areas, they are to be blamed for a lack of accountability and power-sharing.³⁵⁶ The exercise of public authority cannot be disconnected from the take-over of corresponding responsibilities. Every modern system of governance is built upon law-making, administration and adjudication. If international institutions assume functions and powers which are usually those of a state, they must, in principle, be subject to similar checks and balances as a state. UNMIK and UNTAET have not fully complied with this principle. They have adopted a number of measures of a constitutional dimension without however providing for adequate mechanisms of control concerning the legality of their actions. Furthermore, they have been reluctant to grant domestic actors a substantial role in the process of decision-making. Admittedly, a full concentration of powers within the hands of the international administering authority may be acceptable in the first months after the take-over of the mandate or in a state of emergency; yet, a growing stabilization of law and order in the territory and progress in the development of national governmental institutions must go hand in hand with greater direct accountability towards these insti-

³⁵⁴ See under V.

³⁵⁵ For a conceptualization, see Bothe/ Maruhn, see note 3, sub. II.

³⁵⁶ See in this sense Chopra, see note 4, 29; S. Chesterman, *East Timor under Transition: From Conflict Prevention to State-Building*, 2001, 21, available under <http://www.ipacademy.org>

tutions and the individuals affected by the acts of the international administration.