

Summary

From Trieste to East Timor

In 1999, the United Nations established both the *United Nations Interim Administration in Kosovo* (UNMIK) and the *United Nations Transitional Administration in East Timor* (UNTAET). In doing so, the United Nations have for the first time in recent decades assumed all administrative authority within a given territory for an extended period of time. Prior to both missions, the *United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium* (UNTAES) constituted a rather more limited precedent, administering a small territory in Eastern Croatia from 1996 to 1998.

All three missions had in common that the UN assumed sole responsibility for all duties and responsibilities commonly borne by a territory's national government. Not only were the United Nations now responsible for maintaining law and order and organising elections, but they also had to rebuild the local economies, disburse pensions and organise the public welfare system. The United Nations thus became the sole legislative, executive and judicial power in these territories. Indeed, the first regulation passed by UNMIK on July 25, 1999, reads: "*All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.*" This raises questions as to the limits imposed by public international law on the UN's authority to administer territories. Do the constraints imposed e.g. by international human rights law on national governments apply equally to a territorial administration by the United Nations?

This dissertation attempts to define the legal framework for such all-encompassing administrations of crisis territories by the United Nations. It begins with a short introduction to the historical precedents to today's territorial administrations by the United Nations (1.), before examining the different legal foundations in UN-Charter allowing the organisation to administer territory (2.). The third part of this thesis deals with the constraints imposed on UN administrations by the UN-Charter and general (public) international law, first in the abstract (3.)

and then by examining the implementation of these constraints in practice (4.).

1. Historical Precedents

The administration of territories by international organisations is not a new phenomenon. The administration of the Saar-Territory by the League of Nations after the First World War is only the most important of several early precedents. As early as during the first decade of its existence, the United Nations themselves have at least planned to administer the cities of Trieste and Jerusalem. In its current form, UN territorial administration (e.g. in Kosovo or East Timor) is simply the culmination of a long development process, starting with the blue-helmet peacekeeping missions during the Cold War. Each mission tended to include more and more competencies for the UN, based on lessons learned during previous peacekeeping efforts. In Namibia (1989/1990) and Cambodia (1991-1993), UN-missions authorized by the Security Council tentatively assumed certain tasks and duties with regard to the organisation of free and fair elections, variously cooperating, supervising or replacing local authorities in these areas.

While these missions relied on the consent of the respective national governments and territorial states, the conflicts in Somalia and the former Yugoslavia showed that such consent was not always forthcoming and that in certain cases, measures needed to be taken independently of local consent. This step towards the so-called *robust peacekeeping* based on the Security Council's coercive powers under Chapter VII of the Charter was taken by the establishment of international administrations in Bosnia-Herzegovina and Eastern Slavonia in the mid 1990s. Even though both administrations are based on treaties by the parties to the underlying conflicts, the Security Council chose to supply these missions with an additional legal basis independent of local consent by passing the relevant enabling resolutions under Chapter VII of the UN-Charter.

In Kosovo, the United Nations implemented the lessons learned by the High Representative in Bosnia, namely that the integration of a multitude of participating organisations into a joint effort required an integrated and hierarchical mission structure. Thus, Security Council Resolution 1244/1999 gave the Special Representative of the Secretary-General (SRSG) overall authority over most international actors in

Kosovo (bar the NATO-led Kosovo Force). The United Nations administrative mission in East Timor, UNTAET, took this one step further by placing the military component of the mission under the SRSG's command as well.

Contrary to the previous trend towards ever more powerful and all-encompassing international territorial administrations, the most recent UN-administrative missions, such as those in Sierra-Leone, Liberia and Afghanistan, all have a considerably reduced scope of responsibilities. In these countries, all administrative functions are exercised by the respective national authorities and the UN is only charged with providing assistance, training and guidance. In Iraq, the interim international administration was provided by a coalition of countries lead by the United States. Legally, it was based primarily on the laws of occupation rather than on a resolution of the UN Security Council, and the UN has always played but a minor role in the running of the country.

That the United Nations now tend to limit their role indicates that the organisation has recognised that the full-blown administration of a larger territory stretches its resources to their limits. However, it remains to be seen if this development towards a more limited engagement is indicative of a permanent trend or simply a temporary phenomenon.

2. Legal basis of the UN's authority to administer territory

The UN-Charter contains in its Article 81 an explicit authorisation to administer territories under the Charter's trusteeship regime. However, this authorisation was never used. Similarly, the now defunct trusteeship council was never tasked with the administration of crisis territories, even though this would have been legally possible.

In practice, territorial administration by the Security Council has been the option of choice in all but two territorial administrations planned or implemented under the auspices of the United Nations. Both its unwritten peacekeeping-authority and its authority to implement coercive measures under Chapter VII of the Charter allow the UN Security Council to establish international territorial administrations. Insofar as the Council relies on its peacekeeping-authority, it needs the full consent of the state on whose territory the administration is to be established. If such consent is not forthcoming, the Security Council has to rely on its unilateral authority under Chapter VII of the Charter.

The General Assembly also possesses an unwritten authorisation to mandate territorial administrations under the auspices of the United Nations. However, it also requires full host state consent for such administrations. This will often render territorial administrations by the General Assembly impractical. Nonetheless, the UN General Assembly has itself administered the former Dutch colony of West-New Guinea (1962-1963) prior to the territory's incorporation into Indonesia.

As any direct administration by either Security Council or General Assembly will cause significant practical problems, UN territorial administrations are routinely established as subsidiary organs (Art. 22 or Art. 29 of the Charter respectively). An authorisation of member states or regional organisation to administer territories on behalf of the United Nations would also be permissible if certain constraints (duty to report regularly, overall authority of the Security Council etc.) are observed.

3. Legal limits to the UN's authority to administer territory

The most common form of UN-territorial administrations is that under the auspices of the Security Council and based on Chapter VII of the UN-Charter. This type of UN-administration thus stands at the centre of this study. As the Security Council can establish such administrations independently of the host state's consent, the Security Council's authority is limited only by the Charter and general (public) international law. Such constraints can be either *internal*, deriving from the UN-Charter or other UN-law, or *external* by deriving from general international law applicable to all legal entities recognised under international law.

a. Internal limits

Internally, Art. 24 (2) sentence 1 of the UN-Charter obliges the Security Council to observe the law of the Charter and the organisation's purposes and principles as laid down in Art. 1 and Art. 2 of the Charter. Art. 1 of the Charter gives the maintenance of international peace and security primacy over the duty to encourage human rights and self-determination of peoples. However, insofar as this does not compromise the maintenance of international peace and security, the Security Council is obliged to observe human rights and the right of peoples to self-determination when administering a crisis territory.

Furthermore, the relevant resolutions and treaties of the General Assembly and of the ECOSOC can be regarded as authoritative definitions of the human rights and the right to self-determination enshrined in Art. 1 of the Charter. Hence, the International Covenant on Civil and Political Rights and other general human rights treaties adopted under the auspices of the United Nations are binding on the Security Council insofar as such constraint does not directly endanger the Council's primary task of maintaining international peace and security. Similarly, General Assembly Resolutions 1514 (XV), 1541 (XV) and 2625 (XXV) contain definitions of the right of peoples to self-determination binding upon the Security Council.

b. External limits

Externally, the Security Council is the executive organ of an organisation incorporated under international law, and is thus bound to observe at least the fundamental standards of customary international law. Insofar as it assumes the functions of a territorial state, the Council is bound by the same norms of general customary international law binding on states, e.g. human rights. Similarly, the exceptions available to states, such as the declaration of a state of emergency, are also applicable to the Security Council. Thus, the difficult situations common to crisis territories would allow the Security Council to suspend certain rights.

Furthermore, by distinguishing between “*effective collective measures*” in dealing with threats to the peace on one side and “*peaceful means (...) [for] the settlement of international disputes*” on the other, Art. 1 (1) of the UN-Charter exempts the Council from the duty to observe the principles of international law when dealing with threats to the peace. Thus, by means of Art. 1 (1) of the Charter, the member states have – *vis-à-vis* the Security Council – waived their rights under general international law, insofar as such rights would hinder the Council from taking “*effective collective measures*” to combat threats to the peace. The rights thus waived comprise not only the sovereignty rights of the states themselves, but also the human rights and the right of self-determination of their citizens insofar as these rights can be disposed of by the member states.

Hence, Art. 1 (1) of the Charter considerably reduces the restraints imposed on the Security Council externally by customary international law. Customary international law only obliges the Council to observe those core rights of individuals and peoples, which are inalienable and

over which states have no right of disposition, i.e. those rights which are generally accorded the status of *jus cogens*. As states can fully dispose of their own sovereign rights, the Security Council is generally not obliged under general international law to take these into account when acting under Chapter VII of the Charter.

This, however, does not affect the Council's obligations under Art. 24 the UN-Charter to observe human rights and the right to self-determination as laid down in Art. 1 (2) and (3) of the Charter and as authoritatively defined by the General Assembly and ECOSOC (see *supra* lit. a).

c. The progressive constraints to the Security Council's authority to administer territory

The interaction of the constraints described above leads to a progressive limitation of the Security Council's authorities when administering a crisis territory. At the beginning, if and when the territory lacks even the most basic elements of a functioning state and law and order still need to be re-established, the Security Council is only obliged to observe those human rights which are inalienable, such as the prohibition of torture. Other rights, such as the *habeas corpus*-rights, can be suspended if and insofar as such suspension is necessary to restore peace with the limited means available to the United Nations in the given situation.

However, the greater the progress achieved by a UN-mission towards the full re-establishment of administrative and judicial institutions, the more it will become possible to fully observe human rights and self-determination without compromising the primary goal of maintaining world peace. The more stability a crisis territory attains, the lesser the threat it constitutes to world peace will become, and thus the occurrence of a conflict of aims between peace-maintenance and human rights will become ever more rare. Indeed, the primary aim of re-establishing peace and security will only be achieved in the long run the United Nations administration itself fully respects human rights and the right to self-determination of the governed.

4. The implementation in practice

This study then examines individual constraints applicable to the administration of crisis territories by the Security Council and how they are respected and implemented in practice.

It is shown that even though the subject matter of belligerent occupation and international territorial administration are very similar, the laws of occupation are by and large inapplicable to territorial administrations of the United Nations. This is *inter alia* due to the fact that UN administration typically have to reform and transform existing government institutions which have proved to be inoperable or threatening to international peace and security. This runs contrary to the principles of belligerent occupation which aim to maintain the *status quo* in an occupied territory.

The rights of due process and *habeas corpus* are an example of human rights whose protection will regularly require the existence of functioning government institutions and are thus especially endangered in crisis territories such as failed states. Due process rights have regularly found themselves at the centre of a conflict of aims in Kosovo and East Timor. In some cases, for instance, the release of certain suspects was deemed to endanger public law and order, but no functioning and unbiased judiciary existed to ensure due process. This conflict *inter alia* led the SRSG and KFOR in Kosovo to claim a right to “executive detention” under Security Council Resolution 1244 (1999). This part of the present study examines these and other legal issues relating to the reconstruction of the judiciary in a UN-administered territory to illustrate the implementation of the “progressive constraints” imposed on the Security Council under international law.

Other issues examined are the right of individual to seek redress from administrative acts of the UN-administration, problems of transitional justice and the limits imposed by the right of peoples to self-determination and by the principle of national sovereignty. Especially the right to self-determination requires a UN-administration to pass no lasting measures – i.e. no measures which cannot easily be reversed after the UN-administration has ended – without prior approval of the governed.

5. Limits applicable to UN administrations with host state consent

The constraints described above apply equally to those UN-administrations which operate with consent of the host state and which are based on the peacekeeping authority of either the Security Council or the General Assembly. However, the authority of such consensual administrations is further limited by the constraints imposed by the host state's consent. Hence, the UN Mission in Cambodia (UNTAC) was limited to exercising certain functions and duties with regard to the elections. As UNTAC lacked a Chapter VII-mandate, it could not go beyond the authority granted to it by the parties in the 1991 Treaty of Paris.

6. Conclusion

The UN administrations in Kosovo and East Timor have shown that the United Nations are capable of administering a crisis territory and that such an administration can be a valuable tool in the maintenance of international peace and security. However, the deficiencies of both missions and the continuing instability in both areas show that such missions strain the United Nations' resources and capacities to the limit and, in some cases, beyond.

Hence the current trend to smaller missions is a reasonable option. Merely assisting national actors in rebuilding their state institutions is rather more compatible with the UN's usual diplomatic approach and requires considerable less effort than administering a territory oneself. However, it remains to be seen if the administration of crisis territories by the United Nations has truly been renounced as impractical. Judging by the ups and downs of peacekeeping in the last sixty years, UNMIK in Kosovo will not have been the last UN administration of a crisis territory.