

The Limits of the Regulatory Authority of U.N. Administrations

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“Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men.”¹

I. Introduction

In 1999, the United Nations (U.N.) assumed the administration of two territories: Kosovo and East Timor. The most important characteristic of these two missions was that the U.N. administrations exercised authority almost equal to that of a sovereign power.² Their authority covered the exercise of all legislative and executive authority, including the administration of justice. The exercise of regulatory power at the domestic level constituted an important part of this wide-ranging authority, which was not common U.N. practice.³

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¹ J. Bartlett, *Familiar Quotations* 501 (13th ed. 1955) (citing Ralph W. Emerson, *Self-Reliance* (1841)).

² Alexandros Yannis, *Kosovo Under International Administration*, 43 *Survival* 31, 32 (2001) (stating that “[t]his was not the first time the UN assumed administrative functions inside a state. However, it was the first time the UN had been entrusted with such a broad mandate to assume full responsibility for the administration of a territory.”).

³ Press Release, Deputy-Secretary-General, U.N.-United States Relations, Secretary General’s Millennium Report Focus of Deputy-Secretary-General’s Address to U.N. Associ-

The regulatory authority granted to the U.N. administrations gave them the ability to change the domestic laws of the territories put under their administration. This included the introduction of a new constitution and the promulgation of new codes and regulations. Using this power, the U.N. administrators shaped the future of both nations; however, the U.N.'s broad authority also conflicted with the right of the people of the administrated territories to self-determination. In the future, this type of extreme authority should only be used sparingly and should not be left to the discretion of the administrator.

The practices of the U.N. administrations in Kosovo and East Timor demonstrated that they did not like being limited.⁴ Meanwhile, the administrators' extensive use of their regulatory authority sometimes led them to be referred to as kings⁵ or even despots.⁶ Whether the U.N. exceeded its authority in administering the territories may depend on perspective—that is, whether considered from the vantage point of the ruled or the rulers. Currently, the U.N. is not actively administering territories, but it is only a matter of time before the U.N. may be called to assume this enormous responsibility again, because only the U.N. has the legitimacy to represent the collective will of all the sovereign states in the world. In preparing for future territorial administrations, the U.N. must first accept that the authority of U.N.-appointed administrators is not unlimited and is subject to certain restrictions.

ation-United States, U.N. Doc. DSG/SM/91 (Apr. 3, 2000), available at <http://www.un.org/News/Press/docs/2000/20000403.dsgsm91.doc.html>. Deputy-Secretary-General Louise Frechette defines these administrations as follows:

These two missions are qualitatively different from almost any other the Organization has ever undertaken. In each place, the United Nations is the administration, responsible for fulfilling all the functions of a State from fiscal management and judicial affairs to everyday municipal services, such as cleaning the streets and conducting customs formalities at the borders. This is a new order of magnitude for an organization that more customarily provides States with technical assistance in such areas, rather than assuming complete responsibility for them.

⁴ Carsten Stahn, *The Law and Practice of International Territorial Administration* (2008).

⁵ Jarad Chopra, *The UN Kingdom of East Timor*, 93 *Survival* 27 (2000).

⁶ Joel C. Beauvais, *Benevolent Despotism: A Critique of UN State-Building in East Timor*, 33 *N.Y.U. J. Int'l L. & Pol.* 1101 (2001).

The U.N. administrations in Kosovo and East Timor were established by the U.N. Security Council under authority granted to it by relevant provisions of the U.N. Charter.⁷ As U.N.-created entities, they should have been subject to limitations imposed by the Charter and by internationally recognized principles of human rights. These basic sources—the U.N. Charter and the principles of human rights—represent the framework for limitations on the power of U.N. territorial administrations.

These limits, however, are only a starting point. In addition, the U.N. Security Council and/or the Secretary General must provide U.N. administrators with strict guidance, and even set up control mechanisms, to ensure future U.N. administrations are subject to the same limitations as any other democratic administration.

Although it is not the intention of this research paper to analyze all the aspects of U.N. administrations, it is necessary to understand the scope and basis of the U.N.'s—and, more specifically, U.N. administrations'—authority to examine the issue in depth. Part II will focus on the terms “U.N. administration” and “Regulatory Authority.” This will require an examination of past practices in the international arena. Part III will explore the Mandates System under the League of Nations and its successor, the Trusteeship Regime under the U.N. Charter System as well as the Free City of Danzig, the Saar Basin in order to provide historical context to these administrative regimes. In Part IV, the paper will first talk about the practices of U.N. administrations. Then it will analyze the bases for limitations on U.N. territorial administrations and possible mechanisms for ensuring that future administrations act within these limitations.

⁷ See *infra* Part II.A.2.

II. General

A. U.N. Administrations

1. Definition

The U.N. administrations in Kosovo⁸ and East Timor⁹ are regarded as examples of “international territorial administration.”¹⁰ Although scholars disagree on what exactly constitutes an “international territorial administration,”¹¹ most agree that one must meet three basic criteria. First, there must be an area to be administered. This area must be the territory of a state, in whole or in part, that is capable of being administered.¹² Second, the territory must be administered for a temporary

⁸ United Nations Interim Mission in Kosovo (UNMIK). See UNMIKonline, <http://www.unmikonline.org/index.html> (last visited Mar. 11, 2010) (for more detailed information).

⁹ United Nations Transitional Administration in East Timor (UNTAET). See United Nations Transitional Administration in East Timor: UNTAET, <http://www.un.org/en/peacekeeping/missions/past/etimor/etimor.htm> (last visited Mar. 11, 2010) (for more detailed information).

¹⁰ Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing mission Never Went Away* (Oxford University Press 2008). Stahn, *supra* note 4, at 654.

¹¹ Wilde defines international territorial administration as “a formally-constituted, locally-based management structure operating with respect to a particular territorial unit, whether a state, a sub-state unit or a non-state territorial entity.” Wilde, *supra* note 10, at 21. On the other hand, Stahn defines the international territorial administrations as “the exercise of administrating authority (executive, legislative or judicial authority) by an international entity for the benefit of a territory that is temporarily placed under international supervision or assistance for a communitarian purposes. Stahn, *supra* note 4, at 44. Stahn, in his definitions, highlights two points. The first one is the temporary nature of the administration. Second one is that the main objective of the international administration must be “the benefit of the territory. This factor actually distinguishes these institutions from colonies. *Id.* See also Jarat Chopra, *Peace Maintenance: The Evaluation of International political authority* 37 (Routledge Press, 1999); Richard Caplan, *A New Trusteeship? The International Administration of War Torn Territories* 13-16 (2005) (providing other definitions).

¹² Robert Jackson, *International Engagement in War-Torn Countries*, 10 *Global Governance* 21, 23 (2004).

period of time.¹³ Lastly, the administration cannot be headed by a person indigenous to the territory.¹⁴ International territorial administration, therefore, can be defined as the administration of territory of a state (or a part of a state) for a specific or unspecified, but temporary, period of time, by persons who are not indigenous, who exercise some or all the authority of a sovereign.

The United Nations, importantly, focuses on the temporary nature of these administrations. The *Handbook on United Nations Multidimensional Peace Keeping Operations*, for instance, calls these administrations “interim or transitional administrations.”¹⁵ Furthermore, it states that “a U.N. interim or transitional administration has authority over the legislative, executive and judicial structures in the territory or country.”¹⁶

2. Legal Basis for the Administration of a Territory by the United Nations

The U.N. administrations in Kosovo and East Timor were established under U.N. Security Council Resolutions 1244¹⁷ and 1272,¹⁸ respectively. The resolutions stated that the situation in both regions “constitute[d] a threat to [international] peace and security.”¹⁹ These findings were critical for two reasons. First, the U.N. Charter delegates primary responsibility for the maintenance of international peace and security to the Security Council.²⁰ Second, the Security Council can only

¹³ *Id.* at 24.

¹⁴ *Id.* at 23.

¹⁵ Peacekeeping Best Practices Unit- Department of Peacekeeping Operations, *Handbook on United Nations Multidimensional Peacekeeping Operations 20* (2003), available at <http://www.peacekeepingbestpractices.unlb.org/Pbps/library/Handbook%20on%20UN%20PKOs.pdf> [hereinafter U.N. Handbook].

¹⁶ *Id.* at 20.

¹⁷ S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999), available at <http://daccess-ods.un.org/TMP/3567529.61874008.html> [hereinafter S.C. Res. 1244].

¹⁸ S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999), available at <http://daccess-ods.un.org/TMP/2634126.24597549.html> [hereinafter S.C. Res. 1272].

¹⁹ S.C. Res. 1244, *supra* note 17; S.C. Res. 1272, *supra* note 18.

²⁰ U.N. Charter art. 24, para. 1. The wording of the paragraph is as follows: “In order to

pursue enforcement action under Chapter VII of the U.N. Charter after such a finding.²¹

Does the Security Council's authority to provide for the maintenance of international peace and security include the administration of the territory of a member state?²² There is no provision in the U.N. Charter that specifically addresses the administration of a territory by the U.N.²³ On the contrary, the U.N. Charter clearly states that respect for state sovereignty²⁴ and non-intervention²⁵ are the two of the most important principles of the United Nations. The drafting history of the U.N. Charter, however, demonstrates that the drafters had identified and discussed the possibility of territorial administration by the U.N. Ultimately, the drafters chose not to include a clearly stated provision in the Charter allowing for international territorial administration in order to avoid limiting the Chapter VII powers of the Security Council.²⁶ Although Kelsen argues

ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf." *Id.*

²¹ *Id.* art. 39. The wording of the article is as follows:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id.*

²² Since almost all of the states are member of the United Nations.

²³ Matthias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, 50 *Int'l & Comp. L. Q.* 613, 616 (2001); Erika de Wet, *Direct Administration of Territories by the United Nations*, 8 *Max Planck Y.B. Int'l L.* 291, 307-08 (2004); Markus Benzinger, *Midwifing a New State: The United Nations in East Timor*, 9 *Max Planck Y.B. Int'l L.* 295, 314-16 (2005); Carsten Stahn, *The United Nations Administrations in Kosovo and East Timor: A First Analysis*, 5 *Max Planck Y.B. Int'l L.* 105, 146 (2001).

²⁴ U.N. Charter art. 2, para. 1.

²⁵ *Id.* art. 2, para. 7.

²⁶ During the *travaux préparatoire* of the U.N. Charter the Norwegian delegation proposed a provision stating that "the Security Council may further, in special cases, and for the period of time deemed necessary, takeover on behalf of the Organization the administration of any territory of which the continued administration by the state in possession is found to constitute a threat to the peace." Doc.2, G/7 (n)(1), May 4, 1945, The United Nations Conference on International Organization, Amendments and Observations on

that “the Organisation is not authorised by the Charter to exercise sovereignty over a territory which has not the legal status of a trust territory,”²⁷ in light of the drafting history, the U.N. Charter could be read to grant the Security Council a wide range of authority when international peace and security are at stake, including but not limited to the administration of a territory.²⁸

3. Status of the U.N. Administrations

The status of the U.N. administrations is *sui generis*. This stems from the two roles that the administrations assumed. First of all, the U.N. administrations are subsidiary organs of the Security Council.²⁹ Article 29

the Dumbarton Oaks Proposals, Submitted by the Norwegian Delegation, May 3, 1945, at 7-8, *reprinted in* 3 Documents of the United Nations Conference on International Organizations San Francisco 365, 371-72 (United Nations Information Organizations, 1945).

The United Kingdom Delegate opposed to this in case of acceptance of the proposed amendment, “the presumption might be created that the Council lacked certain other specific power not mentioned; its action in a crisis situation might thereby hampered.” Then this proposal was withdrawn provided that “the record of the Committee’s work should show fully the grounds upon which the Delegate from the United Kingdom had opposed the amendment.” UN Doc. 539 III/3/24, Commission III, Committee 3, Session of 23 May 1945, The United Nations Conference on International Organization, *reprinted in* 12 Documents of the United Nations Conference on International Organizations San Francisco 353, 354-55 (United Nations Information Organizations, 1945).

²⁷ Hans Kelsen, *The Law of the United Nations* 651 (1951). *Contra* Boris Kondoch, *The United Nations Administration of East Timor*, J. Conflict & Sec. L. 245, 254-58 (2001) (arguing that Kelsen’s “argument would be correct if the UN Charter allows only UN [U.N.] governance under the trusteeship regulated in Chapters XII and XIII of the UN Charter. Article 78 of the UN Charter only precludes the application of the trusteeship system to Members of the United Nations but does not prohibit the establishment of another mechanisms allowing UN governance.”). *See also* Stahn, *supra* note 23 (providing a more detailed discussion of the issue).

²⁸ Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 Am. J. Int’l. L. 76, 83-85 (2001); *see also* Wet, *supra* note 23, at 306–18 (providing an analysis of the legal basis of for Direct (Co-) Administrations).

²⁹ Stahn, *supra* note 23, at 146; *see also* Rebecca Everly, *Reviewing General Acts of the United Nations in Kosovo*, 8 German L. J. 21, 22 (2007); Michael Bothe & Thilo Marauhn, *UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration*, in *Conflict Prevention in Practice: Essays*

of the U.N. Charter grants the U.N. Security Council the authority to establish subsidiary organs for the performance of its functions,³⁰ and the International Court of Justice (I.C.J.), in its Namibia Advisory Opinion, found that such missions consist of subsidiary organs of United Nations.³¹ Stahn argues that the authority to create international territorial administrations implicitly stems from article 29 of the U.N. Charter.³²

Being a subsidiary organ of the Security Council is common to all missions mandated by the Security Council. In addition to this role, U.N. administrations also act as the organs of the territories concerned by exercising the power of the public authority, which has traditionally been reserved to the sovereign of the respective territory.³³ In other words, a body of international legal order undertakes a role at the domestic level and its actions directly take effect within the territory under their administration.³⁴ By its nature this unique and complex status, by no surprise, introduced new problems. Whether they can do whatever they want is one of these problems? Do they lose their membership of international legal order by assuming a domestic level role is another one? Or, lastly, it is a new game wherein the international administrators decide the rules. This paper will discuss this issue in more depth, but before doing so, it is important to define the term “regulatory authority”.

in Honour of James Sutterlin 217, 228 (Bertrand Ramcharan ed., 2005); Ruffert, *supra* note 23, at 622.

³⁰ U.N. Charter art. 29. The wording of the article is as follows: “The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.” Article 22 of the U.N. Charter grants the authority to the General Assembly to “establish such subsidiary organs as it deems necessary for the performance of its function.” *Id.*

³¹ Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 15, 36 (June 27) available at <http://www.icj-cij.org/docket/files/53/5595.pdf> (last visited Jan. 7, 2010).

³² Stahn, *supra* note 4, at 653.

³³ Ruffert, *supra* note 23, at 626.

³⁴ Stahn, *supra* note 4, at 512-13.

B. Regulatory Authority

Regulatory authority was one of the most significant powers exercised by past international territorial administrations. Regulatory authority generally includes the power to make changes to the applicable law of a territory, including its constitution, laws, by-laws, regulations, and other sub-regulations. Importantly, regulatory authority is more than pure legislative authority. Legislative authority, for example, does not include the power to issue regulations; this power is generally reserved to the executive branch.

III. Historical Precedents and Analogous Institutions of International Law

A. League of Nations Era

Following WWI, the League of Nations was founded to “promote international co-operation, peace and security upon the basis of disarmament, the peaceful resolution of disputes, a guarantee of the sovereignty and independence of member states and sanctions.”³⁵ The League of Nations era was significant to the development of international territorial administrations because of the earlier Mandate System model and the experiences drawn from the administration of the Saar Basin and the Free City of Danzig.

1. Mandates

The Mandate System was established under article 22 of the Covenant of the League of Nations for the administration of the territories detached from Germany and the Ottoman Empire³⁶ that were not for-

³⁵ The Covenant of the League of Nations arts. 8 and 10-17, available at http://avalon.law.yale.edu/20th_century/leagcov.asp (last visited Nov. 24, 2009) [hereinafter The Covenant].

³⁶ “[T]hose colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them.” *Id.* art. 22.

mally annexed by the victorious powers.³⁷ The system was based on the administration of these territories by “Mandatories”³⁸ on behalf of League of Nations and was guided by the principle that “the well-being and development of [peoples not yet able to stand by themselves] form a sacred trust of civilization” with certain securities established “for the performance of this trust.” The assumption was that those areas were inhabited “by peoples not yet able to stand by themselves under the strenuous conditions of the modern world.”³⁹ Territories were grouped into three categories—based on the “the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances”—as either A Mandates,⁴⁰ B Mandates,⁴¹ or C Mandates.⁴²

³⁷ *Id.* art. 22.

³⁸ *Id.* art. 22, para. 2.

³⁹ *Id.* art. 22, para. 1.

⁴⁰ *Id.* art. 22, para. 4. Paragraph 4 reads as:

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

In this regard Iraq and Palestine (and Transjordan) was put under the mandate of Great Britain and Syria and Lebanon was put under the mandate of France. L. Oppenheim, *International Law: A Treatise* 216 (H. Lauterpacht eds., Longman, 8th ed., 1967).

⁴¹ The Covenant art. 22, para. 5. The paragraph reads as follows:

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

Id. B Mandates and their Mandatories were as follows: British Cameroons, British Togoland and Tanganyika to Great Britain; French Cameroons and French Togoland to France and Ruanda Urundi to Belgium. Oppenheim, *supra* note 40, at 219.

⁴² The Covenant art. 22, para.6. The paragraph reads as follows:

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remote-

The scope and status of the Mandate system was examined by ICJ in *Status of South-West Africa Case*. The ICJ stated, “The Mandate was created, in the interest of the inhabitants of the territory, and of humanity in general, as an international institution with an international object—a sacred trust of civilization . . . The international rules regulating the Mandate constituted an international status for the territory.”⁴³

The Mandate System, however, was not generally very quick or effective at bringing the territories to a level where they were “able to stand themselves under the strenuous conditions of the modern world.” Despite deficiencies in practice, however, the Mandate System did have securities for the performance of duties undertaken by Mandatory.⁴⁴

The first guarantee was the nature of the Mandate System. As highlighted above this system was set up temporarily⁴⁵ “in the interest of the inhabitants of the territory and of humanity.”⁴⁶ So every action of the Mandatory should have been aimed “not only . . . [at] the well-being but also the development of those entrusted to their protection,”⁴⁷ as com-

ness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

Id. C Mandates and their Mandatories were as follows: South-West Africa to Union of South Africa; Samoa to New Zealand; Nauru to British Empire (Great Britain, Australia, and New Zealand Jointly); other Pacific Islands north of Equator to Japan. Oppenheim, *supra* note 40, at 220.

⁴³ International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128, 132 (July 11), available at <http://www.icj-cij.org/docket/files/10/1891.pdf> [hereinafter Status of South-West Africa].

⁴⁴ Lauterpacht sees this undertaking as a duty rather than a right. 3 International Law Being the Collected Papers of Hersch Lauterpacht The Law of Peace Parts II-IV, at 42 (E. Lauterpacht eds., Cambridge University Press, 8th ed., 1967) [hereinafter Lauterpacht The Law of Peace].

⁴⁵ It was temporary because the rationale for not giving their sovereignty to them was that they were not at a level that they can “stand by themselves under the strenuous conditions of the modern world.” So whenever they reach to this level they should have granted their sovereignty.

⁴⁶ Status of South-West Africa, *supra* note 43, at 132.

⁴⁷ Lauterpacht The Law of Peace, *supra* note 45, at 42.

pared to the exploitative aims of the colonialist powers, who generally served as the Mandatory powers as well.

The Covenant of the League of Nations contained several provisions for the oversight of Mandatories. First of all, the Mandatory powers were required to “render to the Council an annual report in reference to the territory committed to its charge.”⁴⁸ In addition, a Mandate Commission was set up “to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.”⁴⁹ Furthermore, separate agreements between the League of Nations and the Mandatory powers established additional limits on these states’ authority to administer territories. The Mandatory powers were broadly charged with administering the territories “on behalf of the League.”⁵⁰

2. Saar Basin Administration

The Treaty of Versailles⁵¹ envisaged the administration of the Saar Basin region by the League of Nations through a Commission.⁵² It is seen as “one of the longest experiments in the international territorial administration ever.”⁵³ Administration of the Saar Basin Region was a compromise between “Wilsonian claims for the consideration of self-

⁴⁸ The Covenant, art. 22, para. 7.

⁴⁹ *Id.* art. 22, para. 8.

⁵⁰ *Id.*

⁵¹ Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) pt. III, sec. IV, June 28, 1919, 2 Beavens 43, 225 Consol. T.S 188, available at http://avalon.law.yale.edu/subject_menus/versailles_menu.asp [hereinafter Treaty of Versailles].

⁵² *Id.* pt. III, sec. IV, art. 48 and art. 50, annex, ch. II, arts. 16–17 (stating that “the Governing Commission . . . shall consist of five members chosen by the Council of the League of Nations, and will include one citizen of France, one native inhabitant of the Saar Basin, not a citizen of France, and three members belonging to three countries other than France or Germany.”).

⁵³ Wilde, *supra* note 10, at 111; Stahn, *supra* note 4, at 163.

determination in the delimitation of Europe's new borders" and "French security and compensation interest."⁵⁴

The administration of the Saar Basin was an explicitly temporary arrangement. Article 49 of the Treaty of Versailles clearly stated that "[a]t the end of fifteen years from the coming into force of the present Treaty the inhabitants of the said territory shall be called upon to indicate the sovereignty under which they desire to be placed."⁵⁵ In the same article, Germany, which had previously ruled the territory, renounced its right and authority to govern the Saar Basin Territory in favor of the League of Nations. As stated above, the territory was governed by an international commission of five states.⁵⁶

The Treaty of Versailles also clearly defined the limits of the Saar Basin Administration's authority.⁵⁷ One of the most important limitations concerned changes to the applicable law. According to the terms of the Treaty, any change to the applicable law⁵⁸ could only be made by the Governing Commission and only "after consultation with the elected representatives of the inhabitants."⁵⁹ In fact, some of the Governing Commission's decrees were later contested by local courts as *ultra vires* because they did not meet this requirement.⁶⁰ The structure of the Governing Commission itself provided for some degree of checks and balances regarding decisions over the territory.⁶¹ For example, the consent of three out of five members was needed to implement any decision. The

⁵⁴ *Id.*

⁵⁵ Treaty of Versailles, *supra* note 52, pt. III, sec. IV, ch. III annex to art. 50.

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *Id.*, *supra* note 52, pt. III, sec. IV, art. 23, para. 1, ch. II, annex to art. 50 ("The laws and regulations in force on November 11, 1918, in the territory of the Saar Basin (except those enacted in consequence of the state of war) shall continue to apply.").

⁵⁹ *Id.* pt. III, sec. IV, art. 23, para. 2, ch. II, annex to art. 50.

⁶⁰ Stahn, *supra* note 4, at 168 n.49.

⁶¹ Treaty of Versailles, *supra* note 52, pt. III, sec. IV, art. 17, ch. II, annex to art. 50 ("The Governing Commission provided for by paragraph 16 shall consist of five members chosen by the Council of the League of Nations, and will include one citizen of France, one native inhabitant of the Saar Basin, not a citizen of France, and three members belonging to three countries other than France or Germany.").

consent of three members would, “theoretically, reflect a more neutral viewpoint.”⁶²

To ensure the Governing Commission did not exceed its authority, the Council of the League of Nations scrutinized the Commission’s decisions through a system of reporting established under the Treaty.⁶³ The local populace could also raise issues before the Council of the League of Nations, which served as an additional check on the activities of the Commission.⁶⁴

3. Administration of the Free City of Danzig

The administration of the Free City of Danzig was an important achievement for the League of Nations. The legal basis for this administration was also the Treaty of Versailles,⁶⁵ but the administration of Danzig was totally different from the administration of the Saar Basin. In Danzig, for example, there was a “commissioner of the League of Nations”⁶⁶ with certain powers and Poland was granted certain rights, but in the end the people of the Saar Basin governed themselves through its Constitution.⁶⁷

⁶² Frank M. Russell, *The Saar Basin Governing Commission*, 36 *Pol. Sci. Q.* 169, 172 (1921).

⁶³ The Council of League of Nations summoned the Governing Commission in 1923 to investigate the rationale behind a decree on a criminal offence bringing a disproportional punishment. The Commission reviewed the decree afterwards. Stahn, *supra* note 4, at 168-69.

⁶⁴ *Id.* at 171.

⁶⁵ Treaty of Versailles, *supra* note 52, pt. III, sec. XI, arts. 100-08.

⁶⁶ League of Nations was to appoint a Commissioner. Two roles were given to the Commissioner by the Treaty of Versailles. The first one was to work together with the representatives of the region for the draw up of the constitution. Second one was “the duty of dealing in the first instance with all differences arising between Poland and the Free City of Danzig in regard to this Treaty or any arrangements or agreements made thereunder.” *Id.*, *supra* note 52, pt. III, sec. XI, art. 103.

⁶⁷ The Constitution of Free City of Danzig was approved by Council of the League of Nations on 17 November 1921, provided that certain amendments to ensure the right of Poland to conduct the foreign relations of the city under article 104 (6) of the Treaty of Versailles would be made. *See* Free City of Danzig and International Labour Organiza-

The administrative structure that was set up for the Free City of Danzig was very liberal compared to the one established for the Saar Basin. The Danzig administration ensured the people of the city the right to self-determination by allowing them to draft their own constitution, though subject to scrutiny of the Commissioner and the Council of the League of Nations. In fact Danzig was considered a sovereign state, subject to certain limitations.⁶⁸ Meanwhile, after the city's Constitution was passed, the role of the Commissioner was to act as an arbitrator to resolve "all differences arising between Poland and the Free City of Danzig in regard to [the Treaty of Versailles] or any arrangements or agreements made there under."⁶⁹ The Commissioner's decision, however, was not necessarily final.⁷⁰

As stated above, the Commissioner of the League of Nations did not have regulatory authority similar to that of the Saar Basin Commission. Regulatory authority was exercised by the legislative and administrative bodies of the city government, although the decisions of those bodies were scrutinized by the League of Nations, which even reviewed the constitutionality of laws passed.⁷¹

tion, Advisory Opinion, 1930 P.C.I.J. (ser. B) No. 18, at 11-12, available at http://www.icj-cij.org/pcij/serie_B/B_18/01_Ville_libre_de_Danzig_et_OIT_Avis_consultatif.pdf (last visited Dec.21, 09).

⁶⁸ There were two sources of limitations. The first one was the authority held by the League of Nations to approve any amendment to the Constitution of the Free City of Danzig as the guarantor of the Constitution. The second one was the rights established in favor of Poland through the agreement concluded between Poland and Free City of Danzig as directed by that Article 104 of Treaty of Versailles.

⁶⁹ Treaty of Versailles, *supra* note 52, pt. III, sec. XI, art. 103.

⁷⁰ Forty-two out of over eighty decisions of the Commissioner of the League of Nations were appealed by parties. Stahn, *supra* note 4, at 178. Some of them ended up PCJI for advisory opinion. *See id.* at 179 n.96 (for the list of those cases).

⁷¹ The Council of the League of Nations requested an advisory opinion from P.C.I.J. regarding the constitutionality of the amendment to Danzig Penal Code and Code of Penal Procedure. At the end P.C.I.J. advised that these amendments "are not consistent with the Constitution of Free City of Danzig and that they violate certain principles thereof." *See* Consistency of Certain Legislative Decrees with the Constitution of Danzig of the Free City, Advisory Opinion, 1935 P.C.I.J. (ser.A./B.) No. 65, at 57. Decision is also available at http://www.icj-cij.org/pcij/serie_AB/AB_65/01_Decrets-lois_danzikois_Avis_consultatif.pdf (last visited Dec.21, 09).

B. United Nations Trusteeship System

The U.N. Trusteeship System was created under Chapter XII of the U.N. Charter⁷² mainly to replace the League of Nations Mandate System. The Trusteeship System was specifically designed to *further self-government and decolonization*,⁷³ and it introduced new type of administrative authority: the U.N. itself.⁷⁴ But the reality on the ground did not change, because the Mandatory states continued to administer the territories con-

⁷² U.N. Charter, ch. XII. Wording of the respective articles of Chapter is as follows:

Article 75. The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

Article 76. The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

- a. to further international peace and security;
- b. 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 as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
- c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
- d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Article 77: 1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

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

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

Id.

⁷³ *Id.* art. 76 (emphasis added).

⁷⁴ *Id.* art. 81.

cerned.⁷⁵ Under the Trusteeship System, a Trusteeship Council created under Chapter XIII of the U.N. Charter, was responsible for overseeing the system, primarily through reports submitted by the administering authorities.⁷⁶

The U.N. Trusteeship System was a refined version of the Mandate System.⁷⁷ With the advent of the Trusteeship System, existing mandates were placed in trusteeship, with the exception of South-West Africa,⁷⁸ in accordance with trusteeship agreements⁷⁹ approved by the General Assembly.⁸⁰ Trusteeships were designed to be temporary and to endure only until “the political, economic, social, and educational advancement of the inhabitants of the territories, and their progressive development towards self-government or independence” had been achieved.⁸¹

⁷⁵ Stahn, *supra* note 4, at 92.

⁷⁶ Unlike the Mandates Commission, the U.N. Trusteeship Council was (and by law still is) the principle organ of the U.N. U.N. Charter art. 7. This organ authorized to hear oral petitions from the inhabitants of the Trust Territories and to visit the territories as necessary. *Id.* art. 87 (b), (c).

⁷⁷ Stahn explains this as follows:

It [the trusteeship system broke with the tradition of regarding colonial people ‘as uncivilised’ or as belonging to inferior races and cultures. The U.N. Charter repeated the concept of the ‘sacred trust’ in its Article 73, but deleted the Language Covenant’s unfortunate terminological use of notions such ‘tutelage’, (un)‘advanced nations’ and (in) ability ‘to stand by themselves under the strenuous conditions of the modern world’. Instead, the Charter used the more neutral language of ‘political, economic, social and educational advancement’, [citation omitted] ‘progressive development’ [citation omitted] and ‘equal treatment’ [citation omitted]. Furthermore, it made express reference to the ‘freely expressed wishes of the peoples concerned.’ [citation omitted] The notions reflected international opinion, moving from regarding colonial territories as ‘backward’, to acknowledging the rights of equality and self-determination.

Stahn, *supra* note 4, at 94-95.

⁷⁸ South-Africa refused to put South-West Africa Mandate under U.N. Trusteeship System and continued to administer the territory as a mandate until its Mandate over territory revoked by General Assembly. *Id.* at 103.

⁷⁹ U.N. Charter art. 75.

⁸⁰ *Id.* art. 85.

⁸¹ *Id.* art. 76(b).

Three basic objectives articulated in Article 76 of the Charter also serve to limit the administrating authority of trusteeships.⁸² The most interesting objective deals with the tension between the desire to further “international peace and security” and the reality of states incapable of governing themselves or of being independent.⁸³ In other words, a real peace in the international arena can be achieved when all of the nations acquire independence and exercise their right to self-determination.⁸⁴ Another important objective is “to encourage respect for human rights and fundamental freedoms.”⁸⁵ These rights and freedoms, however, also serve as limitations because the activities of administrating authorities must conform with the rights and freedoms the authorities are supposed to promote. Finally, Trusteeship Agreements may also serve as limiting factors.⁸⁶ In the past, each specific agreement included “the terms under which the trust territory will be administered.”⁸⁷

As stated above, the Trusteeship System features more robust monitoring and control mechanisms than the Mandate System. First, all Trusteeship Agreements are subject to the approval of the General Assembly⁸⁸ or the Security Council.⁸⁹ The Trusteeship System also featured a petition system that the Mandate System lacked.⁹⁰

⁸² *Id.* art. 76. See *supra* note 74 (for the wording of the article).

⁸³ *Id.* art. 76(a).

⁸⁴ *Id.* art. 76(b).

⁸⁵ *Id.* art. 76(c).

⁸⁶ *Id.* arts. 75, 77(2), 79, 81, 83 and 85.

⁸⁷ *Id.* art. 81. “Trusteeship agreements contained provisions concerning economic development (maintenance of land, preservation of natural resources) and the promotions of human rights and fundamental freedoms, such as freedom of speech, freedom of press, freedom of assembly.” Stahn, *supra* note 4, at 107.

⁸⁸ U.N. Charter arts. 16 and 85(1). All of the Trusteeship Agreements except those concerning the Strategic areas are approved by the General Assembly as an organ tasked to exercise the functions of the United Nations with regard to trusteeship agreements.

⁸⁹ *Id.* art. 83(1) (for strategic areas “[a]ll functions of the United Nations ... [regarding the trusteeship system was] exercised by the Security Council.”).

⁹⁰ *Id.* art. 87(1).

IV. Practice of the U.N. Administrations and Limitations on their Regulatory Powers

A. Practice of the U.N. Administrations

Before starting to analyze the limits of the regulatory authority of the U.N. administrations, a quick overview of the reality on the ground would be very helpful. For practical reasons this paper will focus on the practices of the U.N. administrations in Kosovo and East Timor, namely UN Interim Administration Mission in Kosovo (UNMIK) and UN Transitional Administration in East Timor (UNTAET), in two areas. The first is human rights, specifically the deprivation of *habeas corpus* and fair trial rights.⁹¹ The second area is the excessive use of regulatory authority to a level that it would amount to the imposition of a government on the peoples of two territories.

Article 9, paragraph 3 of the ICCPR ensures the right of *habeas corpus*, which requires that anyone who has been arrested or detained must be brought promptly before a judge to determine the lawfulness of his arrest or detention.⁹²

In Kosovo, there were two different detention practices, namely detentions by the executive orders of the Special Representative to Secretary General (SRSG) and detentions by Kosovo Force (KFOR).⁹³ Both failed to comply with *habeas corpus* guarantees.⁹⁴ The first one was

⁹¹ David Marshal & Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 Harv. Hum. Rts. J. 95, 102-03 (2003).

⁹² In addition to this universal convention various regional human rights conventions guarantee this important right. European Convention for the Protection of Human Rights and Fundamental Freedoms), art. 9, para. 3, Nov. 4, 1950, 312 U.N.T.S. 221, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> [hereinafter ECHR]; American Convention on Human Rights (ACHR), art. 7, para. 5, Nov. 22, 1969, 1114 U.N.T.S. 123, O.A.S.T.S. No. 36.

⁹³ OSCE Mission in Kosovo, *Kosovo: Review of the Criminal Justice System* (September 2001-February 2002), 45-46 (2002), available at http://www.osce.org/documents/milk/2002/04/965_en.pdf [hereinafter OSCE Review of the Criminal Justice System (September 2001-February 2002)].

⁹⁴ Stahn, *supra* note 4, at 693.

based on UNMIK⁹⁵ Regulation 1999/2, which provided a wide range of authority to law enforcement bodies for the “detention or temporary remov[al] [of] a person from a location, or [to] prevent access by a person to a location.” The discretion of law enforcement authorities was the only criterion for detentions.⁹⁶ UNMIK regulation made it possible for law enforcement authorities to detain anyone if they thought that it was necessary “in light of prevailing circumstances on the scene, to prevent a threat to public peace and order.”⁹⁷ This practice was a violation of the protections guaranteed by the ECHR,⁹⁸ specifically article 5, paragraph 1, which does not allow “preventive detention” for general purposes.⁹⁹ But the SRSG exercised this authority aggressively, even sometimes at the cost of conflicting with the courts. Once, for instance, he “ordered the detention of four Kosovo Albanians implicated in the bombing of a KFOR-escorted bus,” even after “the Pristina District Court—made up of international judges—ordered their release.”¹⁰⁰ Furthermore, their detentions were extended by the SRSG with successive executive orders¹⁰¹ (contrary to the clear wording of article 9, paragraph 3 of the International Covenant on Civil and Political Rights (ICCPR)) “without providing the detainee or his or her legal counsel with information about

⁹⁵ UN Interim Administration Mission in Kosovo.

⁹⁶ UNMIK Regulation 1999/2, *On the Prevention of Access by Individuals and Their Removal to Secure Public Place and Order*, arts. 1.1 and 2.1 (12 Aug. 1999), available at http://www.unmikonline.org/regulations/unmikgazette/02english/E1999regs/RE1999_02.htm [hereinafter UNMIK/REG/1999/2].

⁹⁷ *Id.*

⁹⁸ ECHR, *supra* note 94.

⁹⁹ Ombudsperson Institution in Kosovo, Special Report No. 3, *The Conformity of Deprivations of Liberty under ‘Executive Orders’ with Recognized International Standards* § 8-32 (2001) available at <http://www.ombudspersonkosovo.org/repository/docs/E4010629a.pdf> [hereinafter Ombudsperson Special Report No.3] (providing a detailed analysis and recommendations).

¹⁰⁰ Richard Caplan, *International Governance of War-Torn Territories: Rule and Reconstruction* 64 (2005).

¹⁰¹ *Id.*; see also Elizabeth Abraham, *The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo*, 52 *Am. U. L. Rev.* 1291, 1328-30 (2003) (for cases including this one).

the grounds for the continued detention and giving the detainee the opportunity to challenge the lawfulness of the detention.”¹⁰²

UNMIK faced heavy criticism of the Ombudsperson¹⁰³ and the Organization for Security and Cooperation in Europe (OSCE).¹⁰⁴ As a response to these criticisms, UNMIK, while defending its decision,¹⁰⁵ at the same time created a Detention Review Commission composed of three international members appointed by the SRSG to review detentions based on the executive orders.¹⁰⁶ The Detention Review Commission could not meet the requirements of a “court” as defined by the

¹⁰² Stahn, *supra* note 4, at 693; see also Abraham, *supra* note 102, at 1327-31.

¹⁰³ Ombudsperson Special Report No.3, *supra* note 100.

¹⁰⁴ Osce Review of the Criminal Justice System (September 2001-February 2002), *supra* note 95, at 45 (stating that “the SRSG’s authority to detain persons outside the judicial process still raises the same kind of concerns in respect of the lack of a clear legal basis and non-compliance with the human rights guarantees against arbitrary deprivation of liberty.”).

¹⁰⁵ See *UNMIK Refutes Allegations of Judicial Bias and Lack of Strategy*, UNMIK News No. 98 (Division of Public Information, UNMIK Pristina), June 25, 2001, available at <http://www.unmikonline.org/pub/news/nl98.html> [hereinafter, *Judicial Bias*] (arguing that Kosovo “still ranks as an internationally-recognized emergency” and that under such circumstances “international human rights standards accept the need for special measures that, in the wider interests of security, and under prescribed legal conditions, allow authorities to respond to the findings of intelligence that are not able to be present to the court system.”).

¹⁰⁶ UNMIK Regulation 2001/18, *On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders* (25 Aug. 2001), available at http://www.unmikonline.org/regulations/unmikgazette/02english/RE2001_18.pdf [hereinafter UNMIK/REG/2001/18].

ECHR¹⁰⁷ even though two of the three members were to be “judges in their respective countries.”¹⁰⁸

KFOR detention operations faced similar criticisms¹⁰⁹ even though KFOR created a Detention Review Panel by KFOR Detention Directive which also contained a number of safeguards against unlawful detention.¹¹⁰ Despite these safeguards, those detentions constituted a violation of respective human rights norms because they were based on administrative decisions instead of judicial decisions.¹¹¹

UNTAET, on the other hand, did not face much criticism, because its policy to observe human rights standards in the area of detentions was based on detention procedures to the provisions of the ICCPR.¹¹² UNTAET did not promulgate a regulation similar to UNMIK Regulation 1999/2 allowing preventive detention. Pretrial detention was not allowed for crimes carrying a sentence less than one year.¹¹³ The inves-

¹⁰⁷ See Ombudsperson Institution in Kosovo, Special Report No. 4, The Conformity of Deprivations of Liberty under ‘Executive Orders’ with Recognized International Standards ¶ 18 (2001), available at <http://www.ombudspersonkosovo.org/repository/docs/E4010912a.pdf> [hereinafter Ombudsperson Special Report No. 4] (stating “that the body envisioned under UNMIK Regulation 2001/18, on the Establishment of a Detention Review Commission for Extra-Judicial Detentions based on Executive Orders, cannot be considered to a court in the sense of paragraph 4 of article 5 of [ECHR]:”). See also OSCE Review of the Criminal Justice (September 2001-February 2002), *supra* note 95, at 37 n.68 (stating that “the commission established under UNMIK Regulation 2001/18 could not be considered a tribunal in the meaning of article 6 of ECHR and in the meaning of Principle 5 of the Basic Principles on the Independence of the Judiciary” because of its “apparent dependency on the executive” as reflected by European Court of Human Rights in its respective case law”).

¹⁰⁸ UNMIK/REG/2001/18, *supra* note 107.

¹⁰⁹ Osce Review of the Criminal Justice System (September 2001-February 2002), *supra* note 95, at 33-34.

¹¹⁰ Stahn, *supra* note 4, at 695. The directive granted the detainees the right to be informed of the reasons for detention in their own language, right to access to a legal representative and right to make submissions on their detentions. *Id.* at 696.

¹¹¹ *Id.*

¹¹² *Id.* at 695 n.272.

¹¹³ UNTAET Regulation 2000/11, *On the Organization of Courts in East Timor (as amended by UNTAET Regulation 2000/14)*, art. 12a.1 (6 Mar. 2000), available at <http://www.eastimorlawjournal.org/UNTAETLaw/Regulations/Reg2000-11.pdf> and <http://>

tigating judge was also required to review each detention every thirty days¹¹⁴ in addition to observing *habeas corpus* procedure.¹¹⁵

It is a well accepted fact that the territorial administrations should have legislative powers.¹¹⁶ On the other hand, excessive use of this power to such an extent that it effectively imposes a government on the peoples of territories could violate the people's right to self-determination.¹¹⁷ So there must be a balance in the legislative activities of the U.N. administration. Boon proposes the use of the "principle of proportionality" to balance the needs of mission accomplishment and the right of self-determination.¹¹⁸ In Kosovo and East Timor, the U.N. administrations abused their legislative authority.¹¹⁹

www.easttimorlawjournal.org/UNTAETLaw/Regulations/Reg2000-14.pdf [hereinafter UNTAET/REG/2000/11] (for amending regulation).

¹¹⁴ UNTAET Regulation 2000/30, *On the Transitional Rules of Criminal Procedure*, art. 20.9 (25 September 2000), available at <http://www.easttimorlawjournal.org/UNTAETLaw/Regulations/Reg2000-30.pdf> [hereinafter UNTAET/REG/12000/30].

¹¹⁵ *Id.* art. 47.

¹¹⁶ Kristen Boon, *Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 McGill L. J. 285, 322 (2005) (arguing that "[f]ailure to give authorities the power to pass and to enforce new laws may create legal and political vacuums in . . . territories [concerned] which could lead to chaos and even harm to the inhabitants. The capacity to change laws is also integral to the democratic system.").

¹¹⁷ *Id.* (stating that "[i]nadequate or unenforced limits on legislative powers means that occupiers risk taking on quasi-imperial roles, blurring the distinction between occupation and conquest, self-determination and subjugation. The consequence may be to undermine the right of a people to exercise self-determination.").

¹¹⁸ Boon, *supra* note 117, at 323.

¹¹⁹ *Id.* at 325 (claiming that "the legal reforms in . . . Kosovo and East Timor were disproportionate because occupants introduced far too many new regulations than could realistically take root. The limited ability of local institutions to enforce the regulations due in large part to poorly functioning and under resourced judicial systems, and the very different legal cultures existing in these societies, has meant that the legal reforms surpassed the local absorptive limits."), see also Kristen Daglish & Hitoshi Nasu, *Towards a True Incarnation of the Rule of Law in War-Torn Territories: Centering Peacebuilding in the Will of People*, Neth. Int'l L. Rev. 81, 104 (2007) (arguing that "[t]he top-down style of UN administrations has . . . tended to hamper the right of self-determination being fully exercised.").

UNMIK, for example, promulgated 443 regulations in nine years between 25 July 1999¹²⁰ and 14 June 2008,¹²¹ which averages forty nine regulations per year. One might argue that this was necessary to build a nation, and this argument might have had some merit if UNMIK did not continue to heavily use its legislative power even after the inauguration of Assembly of Kosovo on 10 December 2001 following the elections held on 17 November 2001.¹²² The Assembly of Kosovo did not start exercising its legislative authority until 4 July 2002, the day that the Assembly

¹²⁰ UNMIK Regulation 1999/1, *On the Authority of Interim Administration in Kosovo* (July 24, 1999) available at http://www.unmikonline.org/regulations/unmikgazette/02english/E1999regs/RE1999_01.htm [hereinafter UNMIK/REG/1999/1].

¹²¹ UNMIK Regulation 2008/34, *On the Promulgation of the Law on the Supplementation and Amendment of the Labour Inspectorate Law Adopted by the Assembly of Kosovo* (June 14, 2008), available at http://www.unmikonline.org/regulations/unmikgazette/02english/E2008regs/RE2008_34.pdf [hereinafter UNMIK/REG/2008/34]. Actually the last real regulation enacted by UNMIK was the one for the amendment of UNMIK Regulation 2000/8. UNMIK Regulations 2008/29, *On the Amendment of UNMIK Regulation No.2008/4, Amending UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters* (May 31, 2008), available at http://www.unmikonline.org/regulations/unmikgazette/02english/E2008regs/RE2008_29.pdf.

¹²² The Secretary-General, *Report of Secretary-General on the United Nations Interim Administration in Kosovo*, paras. 3-5, delivered to the Security Council, U.N. Doc. S/2002/62 (Jan. 15, 2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/209/22/IMG/N0220922.pdf?OpenElement> [hereinafter U.N. Doc. S/2002/62 (Jan. 15, 2002)]. The elections for the Assembly of Kosovo were successfully conducted on 17 November 2001. That was an important step for Kosovo people for self-government although Kosovo Serb participation was not realized as required. At the end of the elections none of the political parties gained sufficient seats to govern alone. Despite the possible difficulties faced to reach to a compromise between the three major political parties to form a government, it was a chance that any compromise achieved represented the majority of the electorate. The first compromise was the election of the President of Kosovo. The Assembly of Kosovo could not elect the President at the end of the third round where only a simple majority of 61 votes were sufficient. *Id.* At the end, the political parties representing more than two-thirds of the Assembly of Kosovo reached to an agreement on coalition government including the nomination of Ibrahim Rugova as the President of Kosovo. The Secretary-General, *Report of Secretary-General on the United Nations Interim Administration in Kosovo*, para. 2, delivered to the Security Council, U.N. Doc. S/2002/436 (Apr. 22, 2002), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/336/06/IMG/N0233606.pdf?OpenElement>.

passed its first law.¹²³ Later in 2002 the SRSG promulgated three laws, in addition to this one, passed by Assembly of Kosovo where he enacted five laws within the same time period.¹²⁴ This might look proportional considering that the Assembly of Kosovo had just started to exercise its legislative authority, but during this period the SRSG issued a regulation which was directly related to the form of government something that the people of Kosovo should have had a say about. With this regulation, SRSG established the Office of the Auditor-General and Audit Office of Kosovo.¹²⁵ This was technically legal because the Constitutional Framework for Provisional Self-Government in Kosovo¹²⁶ reserved this authority for the SRSG.¹²⁷ However reserving too much power for the SRSG itself was a violation of the right of self-determination after the elections reflecting the political will of the population of Kosovo. The SRSG continued to exercise this power even after the declaration of independence,¹²⁸ until 15 of June 2008,¹²⁹ the date on which the Constitution of Kosovo entered

¹²³ See UNMIK Regulation 2002/15, *On the Promulgation of a Law by the Assembly of Kosovo on the Methodology for Setting the Level of Basic Pension in Kosovo, and Determining the Commencement Date for Provision of Basic Pension* (July 26, 2002), available at http://www.unmikonline.org/regulations/unmikgazette/02english/E2002regs/RE2002_15.pdf [hereinafter UNMIK/REG/2002/15].

¹²⁴ See UNMIK Regulations 2002, <http://www.unmikonline.org/regulations/unmikgazette/02english/E2002regs/E2002regs.htm> (last visited Mar. 7, 2010) (for the regulation passed by Assembly of Kosovo and promulgated by SRSG).

¹²⁵ See UNMIK Regulation 2002/18, *On the Establishment of the Office of the Auditor-General and Audit Office of Kosovo* (Oct. 4, 2002), available at http://www.unmikonline.org/regulations/unmikgazette/02english/E2002regs/RE2002_18.pdf [hereinafter UNMIK/REG/2002/18].

¹²⁶ See UNMIK Regulation 2001/9, *A Constitutional Framework for Provisional Self-Government in Kosovo* (May 15, 2001), available at http://www.unmikonline.org/regulations/unmikgazette/02english/E2001regs/RE2001_09.pdf [hereinafter Constitutional Framework].

¹²⁷ See *id.* ch. 8 (for the powers and responsibilities reserved to the SRSG).

¹²⁸ Assembly of Kosovo declared independence on 17 February 2008. See Republic of Kosovo Assembly, *Kosovo Declaration of Independence*, <http://www.assembly-kosova.org/?cid=2,128,1635> (last visited Mar. 7, 2010).

¹²⁹ See UNMIK Regulations 2008, <http://www.unmikonline.org/regulations/unmikgazette/02english/E2008regs/E2008regs.htm> (last visited Mar. 7, 2010) (for all of the regulations issued in 2008).

into force.¹³⁰ This Constitution effectively removed from UNMIK its powers as an interim administration.¹³¹

In East Timor, on the other hand, UNTAET did not exercise its legislative authority as aggressively as UNMIK. UNTAET exercised its regulatory authority between 29 December 1999¹³² and 23 April 2002.¹³³ Within this almost three year period, UNTAET issued seventy-five regulations.¹³⁴ This amounts to 25 regulations for per year. It is possible to say that UNTAET managed to accomplish its mission by exercising its regulatory authority 50% less than UNMIK. The main reason for this practice was that the people of East Timor had already decided their future through a popular consultation held on 30 August 1999 and voted for independence by rejecting “a proposed special autonomy for East Timor within the unitary Republic of Indonesia.”¹³⁵ Unlike UNMIK, UNTAET did not envisage a constitutional framework for East Timor. Instead UNTAET quickly arranged an election for the Constituent As-

¹³⁰ The Secretary-General, *Report of Secretary-General on the United Nations Interim Administration in Kosovo*, ¶ 7, delivered to the Security Council, U.N. Doc. S/2008/354 (June 12, 2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/377/90/PDF/N0837790.pdf?OpenElement> [hereinafter U.N. Doc. S/2008/354 (June 12, 2008)].

¹³¹ *Id*; see also Constitution of Kosovo, arts. 146-147, available at <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf> (last visited Mar. 11, 2010).

¹³² UNTAET Regulation 1999/1, *On the Authority of Transitional Administration in East Timor* (Nov. 27, 1999), available at <http://secint50.un.org/peace/etimor/untaetR/etreg1.htm> [hereinafter UNTAET/REG/1999/1].

¹³³ UNTAET Regulation 2002/4, *On the Replacement of Regulation 2000/4 on the Registration of Business* (Apr. 23, 2002), available at http://secint50.un.org/peace/etimor/untaetR/2002_04.pdf [hereinafter UNTAET/REG/1999/1].

¹³⁴ See East Timor Law Journal, UNTAET Regulations Index, <http://www.eastimorlawjournal.org/UNTAETLaw/Regulations/Index.html> (last visited Mar. 7, 2010) (providing the list of all UNTAET Regulations).

¹³⁵ The Secretary-General, *Letter Dated 3 September 1999 from Secretary-General Addressed to the President of Security Council*, para. 1, delivered to President of Security Council, U.N. Doc. S/1999/944 (Sept. 3, 1999), available at <http://www.un.org/peace/etimor99/docs.html> [hereinafter U.N. Doc. S/1999/944 (Sept. 3, 1999)] (stating that people of East Timor voted for independence with 78,5 % and this results requires the orderly transfer of authority in East Timor to the United Nations).

sembly to prepare a constitution for independent East Timor.¹³⁶ Even though UNTAET was less interventionist, it did continue to exercise its regulatory authority and established an important government institution, Banking and Payment Authority of East Timor, establishment of which would have left to the independent East Timor government.¹³⁷

B. Limitations on the Regulatory Powers of the U.N. Administrations

1. General

The U.N. administrations that operated in Kosovo and East Timor resisted acknowledging limitations to their authority, claiming they were mandated by the Security Council under Chapter VII of the U.N. Charter.¹³⁸ Nevertheless, a variety of scholars agreed that various international legal obligations limited their exercise of regulatory power.¹³⁹

¹³⁶ UNTAET Regulation 2001/2, *On the Election of a Constituent Assembly to Prepare a Constitution for an Independent and Democratic East Timor* (Mar. 16, 2001), available at <http://www.eastimorlawjournal.org/UNTAETLaw/Regulations/Reg2001-02.pdf> [hereinafter UNTAET/REG/2001/2]. The election of the Constituent Assembly held on 30 August 2001 and the member of the Assembly sworn on 15 September 2001. See The Secretary-General, *Report of Secretary-General on the United Nations Transitional Administration in East Timor*, ¶ 5, delivered to the Security Council, U.N. Doc. S/2001/983 (Oct. 18, 2001), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/583/27/IMG/N0158327.pdf?OpenElement> [hereinafter U.N. Doc. S/2001/983 (Oct. 18, 2001)].

¹³⁷ UNTAET Regulation 2001/30, *On the Banking and Payments Authority of East Timor* (Nov. 30, 2001), available at <http://secint50.un.org/peace/etimor/untaetR/2001-30.pdf> [hereinafter UNTAET/REG/2001/30].

¹³⁸ Press Briefing, UNMIK-KFOR-UNHCR-UNMIK Police (July 2, 2001), available at <http://www.unmikonline.org/press/2001/trans/tr020701.html> (last visited March 14, 2010).

¹³⁹ See Stahn, *supra* note 4, at 454; Frédéric Mégret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections of the United Nations Changing Human Rights Responsibilities*, 25 Hum. Rts. Q. 314, 316-17 (2003); Bothe & Marauhn, *supra* note 29, at 235.

In fact, despite the claims of the administrations, the most significant legal basis for limitations on their regulatory power was the U.N. Charter itself.¹⁴⁰ A well-established rule of interpretation states that “no powers may be delegated which the delegating organ does not itself have.”¹⁴¹ Does the U.N. Security Council have such authority which relieves U.N. administrations from any kind of limitations? The answer is a simple no.¹⁴² The U.N. Security Council has the primary responsibility for the maintenance of international peace and security.¹⁴³ This responsibility plays a key role in the United Nations System.¹⁴⁴ The rationale for granting the Security Council such a wide range of power is to “ensure prompt and effective action by the United Nations.”¹⁴⁵ Some scholars even use the term “blank check” to emphasize the latitude of this authority.¹⁴⁶ On the other hand, some scholars have argued that the U.N. Charter does not

¹⁴⁰ See Stahn, *supra* note 4, at 454.

¹⁴¹ Niels Blokker, *Is the Authorizations Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by ‘Coalitions of the Able and Willing’*, 11 Eur. J. Int’l L. 541, 552 (2000) (also providing a detailed analysis of the power of Security Council to adopt authoritative resolutions); see also Benzing, *supra* note 23, at 326 (referring to the phrase in Latin “*nemo plus iuris transferre potest quam ipse habet*”).

¹⁴² Daghli & Nasu, *supra* note 120, at 104 (arguing that “UN transitional administrations are by no means free from certain rules of international law, even if they are acting with absolute authority under Chapter VII. There are several basic principles that must be taken into account at the inception of a transitional territorial administration and throughout the course of its operation, including those enshrined in the UN Charter and minimum humanitarian law.” *Id.*; contra Marten Zwanenburg, *Existentialism in Iraq: Security Council Resolution 1483 and Law of Occupation*, 86 Int’l Rev. Red Cross 745, 759-63 (2004) (arguing that the Security Council can derogate certain rules of international law).

¹⁴³ U.N. Charter art. 24. para. 1; see *supra* note 20 (for the wording).

¹⁴⁴ Indeed what the U.N. Charter presented is a new system for international community. It replaced the practically dead system of League of Nations. The main purpose was to introduce a system that will “save the succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”. See U.N. Charter pmb. In this regard maintaining international peace and security accepted as the one of the four purposes of the United Nations. *Id.*

¹⁴⁵ U.N. Charter art. 24. para. 1.

¹⁴⁶ Jared Schott, *Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 Nw. J. Int’l Hum. Rts. 1 (2007).

grant blank-check authority to the Security Council.¹⁴⁷ When responding to threats to international peace and security, the Security Council may use its enormous powers on behalf of member states,¹⁴⁸ but, the Security Council must also “act in accordance with the Purposes and Principles of the United Nations.”¹⁴⁹

¹⁴⁷ Blokker, *supra* note 142, at 549-50; Blokker, *supra* note 142, at 554.

¹⁴⁸ U.N. Charter art. 24, para. 1. The paragraph states that “. . . [I]ts Members . . . agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.” *Id.*

¹⁴⁹ *Id.* art. 24, para. 2. The Purposes of the U.N. are stated in the art. 1 and the Principles of the U.N. are stated in Article 2 of the U.N. Charter. The wording of the two articles are as follows:

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

Article 2.

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other

Therefore, even a Security Council mandate authorizing a U.N. administration “to take all necessary means” for the administration of a territory does not entitle the administration to blank-check power to act free of any kind of limitation. The same restrictions that bind the Security Council—that is, the “Purposes and Principles of the United Nations” and other provisions of the U.N. Charter—also necessarily bind the administration.¹⁵⁰ This proposition is clearly stated by Stavrinides, who has written that “it is self-evident that the Organization [the United Nations] is obliged to pursue and try to realize its own purpose.”¹⁵¹ To summarize, any limitations binding on the Security Council will *ipso facto* bind U.N. administrations as subsidiary organs.

2. Limitations Stemming for the U.N. Charter Itself

The U.N. Charter places limitations on U.N. territorial administrations in three ways: through the nexus of (1) international peace and security, (2) human rights and fundamental freedoms, and (3) the right to self determination.

manner inconsistent with the Purposes of the United Nations.

5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

¹⁵⁰ Benzing, *supra* note 23, at 327; S.C. Res. 1327, U.N. Doc. S/RES/1327 (2000), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/745/04/PDF/N0074504.pdf?OpenElement> (stating that “peacekeeping operations should strictly observe the purposes and principles of the Charter of the United Nations.”).

¹⁵¹ Zenon Stavrinides, *Human Rights Obligations under the United Nations Charter*, 3 Int’l J. Hum. Rts. 38, 40 (1999).

a. Nexus to International Peace and Security

As highlighted above, the Security Council uses the delegated authority to maintain the international peace and security.¹⁵² Using this authority, the Security Council can place a territory under U.N. territorial administration if there is a threat to the peace, breach of peace, or act of aggression. Under the traditional principle of delegation, the U.N. administration must limit the exercise of its regulatory authority so as not to exceed the scope of the authority upon which its mandate was based.¹⁵³

b. Human Rights and Fundamental Freedoms as a Limiting Factor

Human rights law is possibly the most important factor limiting the power of U.N. administrations. Different reasons can be given to support this thesis, but the special place of the human rights and fundamental freedoms within the U.N. Charter system¹⁵⁴ will definitely be the first.

Promoting and encouraging respect for human rights and fundamental freedoms has been one of the most important focus areas of the United Nations since its foundation, because the protection of human rights and fundamental freedom were clearly given as a mandate to the U.N. by the “peoples of the United Nations.”¹⁵⁵ For example, the U.N. Charter at the very beginning in article 1(3) designates “promoting and encouraging respect for human rights and for fundamental freedoms” as

¹⁵² See *supra* Part II.A.2.

¹⁵³ Stahn, *supra* note 4, at 454–55; see also Blokker, *supra* note 142, at 552–54 (providing an analysis of limits to the power of delegation).

¹⁵⁴ The foundation of U.N. played opened a new era. Its position and legitimacy improved gradually as the number of its members grows following the independence of regions under trusteeship administration or colonial administration. As of today it is an international organization that all most all of the nations in the world bounded themselves with its Charter and principles. It is fair to say that the the U.N. Charter is the constitution of the international society and it is a U.N. Charter System that the world is living in.

¹⁵⁵ U.N. Charter pmbl.

one of its purposes.¹⁵⁶ This mandate is reiterated in different articles of the U.N. Charter, namely articles 55(3),¹⁵⁷ 76(c),¹⁵⁸ and 83(2).¹⁵⁹ Article 55 emphasizes the nexus between the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations and the United Nations' promotion of universal respect for, and observance of, human rights and fundamental freedoms.¹⁶⁰

The U.N. has also initiated and sponsored the codification of several key conventions that are widely accepted as statements of universally recognized human rights standards.¹⁶¹ These conventions are: the Universal Declaration of Human Rights,¹⁶² the International Convention on the Elimination of All Forms of Forms of Racial Discrimination,¹⁶³ the International Covenant on Civil and Political Rights (ICCPR),¹⁶⁴ the International Covenant on Economic, Cultural and Social Rights,¹⁶⁵ the

¹⁵⁶ See *supra* note 150 (for the wording of the respective paragraph).

¹⁵⁷ U.N. Charter art. 55 (stating that:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determinations of peoples, the United Nations shall promote:

....

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.).

¹⁵⁸ See *supra* note 74 (providing the text of the respective paragraph).

¹⁵⁹ In fact, paragraph 2 of the article refers back to the basic principles set forth in Article 76. U.N. Charter art. 83 para. 3.

¹⁶⁰ *Id.* art. 55.

¹⁶¹ See Carla Bongiorno, *A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor*, 33 Colum. Hum. Rts. L. Rev. 623, 633-38 (2002) (providing a short overview of development of international human rights law under the auspices of the U.N.).

¹⁶² Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

¹⁶³ International Convention on the Elimination of All Forms of Forms of Racial Discrimination, Jan. 7, 1966, 5 I.L.M. 352, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/218/69/IMG/NR021869.pdf?OpenElement>.

¹⁶⁴ International Covenant on Civil and Political Rights and, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf?OpenElement>.

¹⁶⁵ International Covenant on Economic, Cultural and Social Rights, Dec. 16, 1966, 993

Convention on the Elimination of all Forms of Discrimination against Women,¹⁶⁶ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁶⁷ and the International Convention on the Rights of the Child.¹⁶⁸

The U.N. is not a party to any of these international agreements because they are not open to accession by international organizations.¹⁶⁹ However, the lack of signatory status to these agreements does not prevent U.N. administrations from upholding the principles embodied in the agreements, such as the principles of human rights law.

Additionally, as an international organization with roots in international law, the United Nations, and U.N. administrations as subsidiary organs, are bound by rules that rise to the level of customary international law.¹⁷⁰ In the past, the United Nations has acknowledged that it must at

U.N.T.S. 3, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf?OpenElement>.

¹⁶⁶ Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 19 I.L.M. 33, available at <http://www.un.org/documents/gen/res/34/a34res180.pdf>.

¹⁶⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/460/23/IMG/NR046023.pdf?OpenElement>.

¹⁶⁸ Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/547/84/IMG/NR054784.pdf?OpenElement>.

¹⁶⁹ Stahn, *supra* note 4, at 480; see also Mégret & Hoffmann, *supra* note 140, at 316 (providing a reason that “the U.N. will probably never behave in all aspects like a state.”); Benzig, *supra* note 23, at 327; Tobias H. Irmscher, *Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation*, German Y.B. Int’l L. 353, 369 (2001)

¹⁷⁰ This is an important and strong argument. Based on this argument, the international community can request the non-state actors (like rebel groups) to respect the provision of law of war. Mégret & Hoffmann under “external conception” argue as follows: “Indeed, it has been contended that, in the case of ‘treaties the have been drafted by representatives of nearly all States with the intention of creating universal law,’ international organizations, whose ‘constitutional roots are in international law’ cannot invoke their non-party status. This is because ‘the legal foundation (of the obligation to apply such treaties) lies not in its character as an international treaty but rather in its character as a general principle of law codified by treaty.’” *Id.* at 317; see also Bongiorno, *supra* note 162

least respect the customary international law.¹⁷¹ Another argument can be based on the United Nations' responsibility to promote human rights. In other words, "human rights law [is] . . . so characteristically embedded into the U.N. general mission." As stated above, it would be strange even to think the U.N. might violate human rights laws,¹⁷² because it is the responsibility for the U.N. "to ensure that it does not violate human rights standards that have become norms of international law."¹⁷³

As General Assembly-endorsed international agreements, the provisions of those agreements must be taken into consideration by U.N. administrations. In fact all of these international agreements were cited by the U.N. administrations in Kosovo¹⁷⁴ and East Timor¹⁷⁵ in their resolutions establishing the applicable law in their respective territories. In Kosovo, the U.N. Administrator also included the European Convention for the Protection of Human Rights and Fundamental Freedoms to the

at 640-41 (arguing that "the international norms evinced by customary international law or general principle of law recognized by civilized nations create a framework that is even more binding upon the U.N., as an international organization, than that is upon states.").

¹⁷¹ Bothe & Marauhn, *supra* note 29, at 237 (arguing that "if . . . an international institution has been established within the framework of existing international law, it must respect the rules of international law, in particular customary rules and those of UN Charter. This may include respect for international human rights law and international humanitarian law.").

¹⁷² *Id.*

¹⁷³ Bongiorno, *supra* note 162, at 642; see also Irmscher, *supra* note 170, at 367 (providing justifications for the applicability of human rights norms: "duty follows from the UN Charter and the practice of its organs"; "the UN is bound by these norms as a matter of customary law" and as an "obligation a result of automatic succession in the administration of territory.").

¹⁷⁴ UNMIK Regulation 1999/24, *On the Applicable Law in Kosovo*, (Dec. 12, 1999), available at http://www.unmikonline.org/regulations/unmikgazette/02english/E1999regs/RE1999_24.htm, [hereinafter UNMIK/REG/1999/24]. Actually the first regulation of UNMIK did not mention any of these agreements. UNMIK Regulation 1999/1 was just referring to "internationally recognized human rights standards". Then this regulation is amended by UNMIK Regulation 1999/24.

¹⁷⁵ UNTAET Regulation 1999/1, *On the Authority of the Transitional Administration in East Timor*, (Nov. 27, 1999), available at <http://secint50.un.org/peace/etimor/untaetR/etreg1.htm> [hereinafter UNTAET/REG/1999/1] (Section 2 of this regulation enumerates all of these U.N. endorsed international agreements).

list of U.N. - endorsed ones.¹⁷⁶ By citing human rights conventions, UNMIK Regulation No. 1999/24 and UNTAET Regulation No. 1999/1 put international standards of human rights in a superior, quasi-constitutional status within the territory.¹⁷⁷

On the other hand, the argument that U.N. administrations exist to respond to a threat to international peace and security is significant. Most, if not all, human rights covenants and conventions provide for certain derogations in states of emergency.¹⁷⁸ Based on these provisions, U.N. administrations could potentially limit certain human rights in administered territories, except ones considered non-derogable “including the right to life, the right to be free from torture and other inhumane or degrading treatment or punishment, the right to be free from slavery or servitude and the right to be free from retroactive application of penal laws.”¹⁷⁹ Notwithstanding this possibility, any decision to derogate certain rights should be made at the U.N. Security Council level to prevent questions about the legitimacy of the action. If not, then any decision taken by U.N. administrations, at least, “must be subject to review [by the U.N.] within a reasonable time frame.”¹⁸⁰ Furthermore, any suspension of rights should be as short as possible, and the rights suspended should be limited as little as possible depending on the circumstances.

c. Right of Self-determination as a Limiting Factor

The right of nations to determine their form of government has played a very important role in the U.N. System and has helped nations under foreign rule gain their independence. Like the obligation to “re-

¹⁷⁶ *Id.*

¹⁷⁷ UNMIK/REG/1999/24, *supra* note 175, art. 1.2.

¹⁷⁸ See, e.g., ICCPR, *supra* note 165, art. 4.

¹⁷⁹ Enable United Nations, International Norms and Standards Relating to Disability, <http://www.un.org/esa/socdev/enable/comp210.htm> (last visited Mar. 11, 2010) (specifically pt. 10.2 “Human Rights in Emergency”). These are non-derogable rights common to all human rights regulations.

¹⁸⁰ See Bongiorno, *supra* note 162, at 680.

spect human rights and fundamental freedoms,”¹⁸¹ “developing friendly relations among nations based on respect for principle of . . . self determinations of peoples” is stated as one of the principle purposes of the United Nations.¹⁸² The argument mentioned above,¹⁸³ that the U.N. administrations, as subsidiary organs of the United Nations, should act in line with the purpose of its constitutional framework, is valid for this right as well.

Within U.N. Charter System, the right of self-determination was first introduced in Articles 1(2) and 55 of the U.N. Charter.¹⁸⁴ This right was also restated in ICCPR and the ICESCR.¹⁸⁵ Lastly the U.N. General Assembly endorsed the Friendly Relations Declarations,¹⁸⁶ which determined the scope of this right.¹⁸⁷ The I.C.J. cited self-determination as a right under international law.¹⁸⁸ Benzing argues that this right is “custom-

¹⁸¹ U.N. Charter art. 1 para. 3; *see supra* note 150 (providing the text of the paragraph)

¹⁸² *Id.* art. 1 para. 2; *see supra* note 150 (providing the text of the paragraph)

¹⁸³ *See supra* notes 151 and 152 (and accompanying text).

¹⁸⁴ *See supra* notes 150 and 158 (providing text of the respective paragraphs).

¹⁸⁵ *See supra* notes 165 and 166.

¹⁸⁶ The Declaration on Principles of International Law concerning Friendly Relations and Co-operation Among States in accordance with the Charter of United Nations, G.A. Res. 2625 (XXV), Annex, U.N. Doc. A/RES/47/135/Annex (Oct. 24, 1970), *available at* <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement> [hereinafter The Declaration of Friendly Relations].

¹⁸⁷ The Declaration of Friendly Relations was and is important for two reasons. First, the General Assembly emphasized the importance of right of self-determinations once more for the international peace and security by stating that the “subjection of the people to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security” and also stating that the “the principles of equal rights and self-determinations of peoples constitutes a significant contribution to the contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States.” The other reason was that it introduced a new criterion to ensure the territorial integrity or political unity of the sovereign and independent states that “possessed a government representing whole people belonging to the territory without distinction to the race, creed or color.” *Id.*

¹⁸⁸ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31, *available at* <http://www.icj-cij.org/docket/files/53/5595.pdf>; Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 31-33 (Oct. 16), 68, *available at* <http://www.icj-cij.org/docket/files/61/6195.pdf> [hereinafter Western Sahara Opin-

ary international law” and “has the status of *jus cogens* and the character of an *erga omnes* obligation,” so “it forms a direct limitation of powers.”¹⁸⁹ The right of self-determination is believed to be composed of external and internal self-determination components.

External self-determination is defined as “the right of a people to organize its own state free from foreign oppression.”¹⁹⁰ Internal self-determination, however, is defined as “the right of a people to adequate political representation within the constitutional structure of its own state.”¹⁹¹

Self-determination, as an inalienable right, serves as a limiting factor in two areas of the U.N. administrations. First, it prohibits the imposition of a particular form of government on the people of a territory. Second, it ensures the right of a people to require adequate representation in the process of governance.¹⁹²

Contrary to the current practice of UNMIK and UNTAET,¹⁹³ the right of self-determination prohibits the external imposition of any type of government models. Stahn distinguishes between “people [that have] organized [themselves] within the framework of a state” and “people [that have] not yet attained statehood.”¹⁹⁴ However, there is no practical benefit in making such distinction. The existence of the right might be evident for the first group. As stated above, this right has nothing to do with statehood. The only nexus here is the existence of a people that is entitled to use this right. For instance, the I.C.J. did not see any problem

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¹⁸⁹ Benzign, *supra* note 23, at 314.

¹⁹⁰ Stahn, *supra* note 4, at 457.

¹⁹¹ *Id.* at 457-59.

¹⁹² *Id.* at 460; see also Jürgen Friedrich, *UNMIK in Kosovo: Struggling with Uncertainty*, 9 Max Planck Y.B. Int'l L. 225, 270 (2005).

¹⁹³ See *supra* Part IV.2.A (for UNMIK and UNTAET practice).

¹⁹⁴ Stahn, *supra* note 4, at 460.

for the right of self-determination for the peoples of Western Sahara¹⁹⁵ and Palestine,¹⁹⁶ even though they were not organized as states.

Since the right of self-determination grants a people of any territory “the right freely to decide the form of government that it wish[es] to adopt;” it “restricts the scope of the authority of the U.N. administrations;” and it “precludes them from imposing any permanent form of government on the people [of the territory under their administration] against or without their will.”¹⁹⁷ In other words, U.N. administrations should “refrain from instituting long-term structures of governance and large-scale constitutional reforms which cannot be reversed by the population of the administered territories after the period of transitional administration.”¹⁹⁸

The right of a people to require adequate representation in the process of governance is another limiting factor. The importance of this right comes from the fact that it can even be invoked against the indigenous ruler of a sovereign state. Simply put, “a people must be in position to take part in the formation of the political will of its rulers, in order to enjoy self-government.”¹⁹⁹ From a contrary/negative interpretation of the saving clause of the Declaration of Friendly Relations, one can conclude that if states do not “conduct themselves in compliance with the principle of equal rights and self-determination” and do not “posses a government representing the whole people belonging to the territory without distinction to race, creed or color,”²⁰⁰ then they are entitled to exercise their right of self-determination.

¹⁹⁵ Western Sahara Opinion, *supra* note 189.

¹⁹⁶ Legal Consequences of Construction of a Wall in the Occupied Palestine Territory, Advisory Opinion, 2004 I.C.J. 136, (July 9), 182-83, available at <http://www.icj-cij.org/docket/files/131/1671.pdf> [hereinafter The Wall Opinion].

¹⁹⁷ Stahn, *supra* note 4, at 461.

¹⁹⁸ *Id.* at 461; see also Friedrich, *supra* note 193, at 270 (stating that “[i]t prevents UNMIK from deciding essential questions regarding the form and content of their autonomous government because such decisions are predetermining the future of format of autonomy.”).

¹⁹⁹ *Id.* at 461-62.

²⁰⁰ Gerd Seidel, *A New Dimension of the Right of Self-Determination in Kosovo*, in *Conflict Prevention in Practice: Essays in Honour of James Sutterlin 203, 207* (Bertrand Ramcharan

There is no exception to this right in case of the U.N. administration as a “ruler and people subject to rule” relation. United Nations administrations must ensure the participatory rights of indigenous peoples through meaningful access to government. Stahn sees this right as the “institutional basis for the realization of all other individual rights” for “a people . . . subject to foreign rule.”²⁰¹

The scope of this right will be affected by the security environment and general state of the territory, including the political system. United Nations administrations should act in favor of options that ensure the right of self-determination wherever possible, unless doing so would otherwise jeopardize the overall mission.

ed., 2005). Declaration of Friendly Relations, *supra* note 187. This is also the conclusion reached by the Supreme Court of Canada in its Reference Re Secession of Quebec decision. Reference Re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.), para. 154, *available at* <http://scc.lexum.umontreal.ca/en/1998/1998scr2-217/1998scr2-217.html>. The Court held the following:

Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the ‘people’ issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where ‘a people’ is governed as part of a colonial empire; where ‘a people’ is subject to alien subjugation, domination or exploitation; and possibly where ‘a people’ is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

Id.

²⁰¹ Stahn, *supra* note 4, at 462.

3. Applicable Law of the Territory as a Limiting Factor

State succession requires the continuance of the applicable law of the territory, even a territory under U.N. administration. Regardless of the status of the U.N. administration, whether it is an international entity or a *sui generis* entity exercising the public authority, the law applicable within the territory prior to the establishment of the U.N. administration will continue to apply as a matter of law.²⁰² The practice of the two U.N. administrations in Kosovo and East Timor, in fact, comports with this understanding. Both missions decided to continue to apply the applicable law of the land before a certain date.²⁰³ For Kosovo, “[t]he laws applicable in the territory of Kosovo prior to 24 March 1999 continue[d] to apply.”²⁰⁴ This date was then changed to 22 March 1989, the date that the autonomous status of the Kosovo was repealed.²⁰⁵ For East Timor “the laws applied in East Timor prior to 25 October 1999 appl[ied] in East Timor.”²⁰⁶

United Nations administrations should be bound by the local law in force in the course of exercising their authority unless they are amended, repelled or suspended with their legislative acts.

4. Law of Occupation as a Limiting Factor

Some scholars argue that U.N.-mandated peace enforcement operations and U.N. administrations are forms of humanitarian occupation.²⁰⁷ Indeed there are similarities between the two activities. Three common

²⁰² See Malcolm N. Shaw, *International Law* § 17 (2003) (providing the theory of state succession).

²⁰³ See UNTAET/REG/1999/1, *supra* note 133; UNMIK/REG/1999/1, *supra* note 121.

²⁰⁴ *Id.* § 3.

²⁰⁵ UNMIK/REG/1999/24, *supra* note 175, art. 1.1 (b).

²⁰⁶ UNTAET/REG/1999/1, *supra* note 133, art. 3.1.

²⁰⁷ See Gregory Z. Fox, *Humanitarian Occupation* (Cambridge University Press 2008); *Humanitarian Intervention: The United Nations & Collective Responsibility* 350 (2005) (classifying Kosovo as a humanitarian occupation). Cf. Boon, *supra* note 117, at 311 (naming international administrations as “functional occupants”).

points can be found between belligerent occupation and the U.N. administrations. The first and maybe the most important one is the exercise of power by the administrating authority in the foreign territory under its effective control.²⁰⁸ The second one is the temporary nature of this control.²⁰⁹ The last one is the suspension of the sovereignty of actual sovereign.²¹⁰

On the other hand, the U.N. administrations and belligerent occupation are different because, in general, the U.N. territorial administrations are not belligerents or parties to conflict.²¹¹ These administrations exercise control over territory based on a mandate by the U.N. Security Council and sometimes by invitation of the parties to the conflict. Another point might be the focus of interest. To be more specific, in belligerent occupation the focus is “the state interest in an occupant-occupied relationship” where it is “cooperation and gradual power-sharing between the administrating power and the inhabitants of the local population” in U.N. administrations.²¹²

The importance of the law of occupation for this discussion is the limitation imposed on occupying powers governing regions under occupation. It is generally accepted that the U.N. is not bound by the law of war, but, if the U.N. conducts a mission usually carried out by states, then the U.N. should at least bind itself to the provisions of the applicable international law.²¹³

²⁰⁸ See *infra* Part IV.B.4.a.

²⁰⁹ See *infra* note 226 (and accompanying text); see also GC (IV), art. 6 (stating that “[i]n case of occupied territory, the application of the present Convention shall cease one year after the general close of the military operations”).

²¹⁰ Benzing, *supra* note 23, at 333.

²¹¹ Geneva Convention (IV) for the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 2 [hereinafter GC (IV)] (requiring application of GCs during armed conflict or occupation of two parties).

²¹² Stahn, *supra* note 4, at 467.

²¹³ See Daghish & Nasu, *supra* note 120, at 104 (stating that “[t]here are several basic principles that must be taken into account at the inception of a transitional territorial administration and throughout the course of its operation, including those enshrined in the UN Charter and minimum humanitarian law.”).

The provisions of the treaties governing the law of occupation are widely accepted to be the customary international law.²¹⁴ As discussed above the U.N. and its subsidiary bodies are generally bound by the customary international law as this body of law does not necessitate being party to be bound by its provisions.²¹⁵

a. What constitutes an occupation?

The law of occupation consists of The Hague Regulations (Hague IV)²¹⁶ and Geneva Conventions (GC (IV)).²¹⁷ The importance of these two agreements is their status under international law. The I.C.J. reaffirmed the customary international law status of the Hague (IV) in its Nuclear Weapons Advisory Opinion.²¹⁸ The definition of occupation is provided by Article 42 of the Hague (IV), which states, “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” This definition is very clear and does not require any clarification. Scholars, on the other hand, have offered different definitions,²¹⁹ but the I.C.J., in the Wall

²¹⁴ *Contra* Major Nicholas F. Lancaster, *Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Still be Considered Customary International Law*, 189 *Mil. L. Rev.* 89-90 (2006) (arguing that the provisions of the “Regulations and Conventions . . . seldom if ever honored those related to transformation of governments and economies of occupied countries.”).

²¹⁵ *See supra* note 171 and accompanying text.

²¹⁶ Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 *Stat.* 2277, 205 *Consol. T.S.* 277 [hereinafter Hague (IV)].

²¹⁷ GC (IV), *supra* note 212; *see* Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 *Law & Hist. Rev.* 621 (2008) (for a detailed work on the historical evolution of the law of occupation); *see also* Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 *Eur. J. Int’l L.* 721, 724-34 (2005) (providing preliminary conceptual history of the idea of belligerent occupation).

²¹⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (Jul. 9), 256, available at <http://www.icj-cij.org/docket/files/95/7495.pdf> [hereinafter *Nuclear Weapons Opinion*].

²¹⁹ Wilde, *supra* note 10 (defining the occupations as “territorial control by a state or group of states over territory the title to which is not vested in the state or states concerned” and

Opinion, used the same language as the Hague (IV) to define the term “occupation.”²²⁰

The triggering factor for the application of Hague (IV) provisions is dependent on to the existence of a hostile army. The GC (IV) loosens this tight requirement. Article 2 of GC (IV) broadened the applicability of occupation law to cases where an occupying force does not meet any armed resistance.²²¹ Article 4 further required the protection of all persons “who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or occupying power of which they are not nationals.” This provision is generally invoked to support the idea that “the regime of the [GC (IV)] applies to U.N. peace operations involving military forces.”²²² The GC (IV) limits the applicability of the occupation regime for the period of one year.²²³ Stahn interprets this provision as restricting “the

further stating that “in occupation law, claiming or altering this title through the occupation is legally prohibited.”); Ben Clarke, *Military Occupation and the Rule of Law: The Legal Obligations of Occupying Forces in Iraq*, 8 Murdoch U. Electronic J.L. (2005), available at <http://austlii.edu.au/au/journals/MurUEJL/2005/8.html> (defining the term under “What is the Law of Belligerent Military Occupation” as “the exercise of authority over territory by military rule without the consent of the deposed regime.”); Sylvain Vité, *L'applicabilité du droit international de l'occupation militaire aux activités des organisations internationales [Applicability of the International Law of Military Occupation to the Activities of the International Organizations]*, 86 Int'l Rev. Red Cross 9, 11 (2004), available at [http://www.icrc.org/web/fre/sitefre0.nsf/htmlall/SZCDRX/\\$File/IRRC_853_Vite.pdf](http://www.icrc.org/web/fre/sitefre0.nsf/htmlall/SZCDRX/$File/IRRC_853_Vite.pdf) (stating that “the definition of the occupation is not build on a subjective perception of a situation by the parties concerned, but a objectively sizeable reality: *de facto* submission of a territory and its population under the authority of hostile army.”).

²²⁰ The Wall Opinion, *supra* note 197, para. 78, at 168. The Court later affirmed this definition by citing Wall Opinion in its decision on Armed Activities on Congo Case. Armed Activities on the Territory of Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1, para. 172, at 59, available at <http://www.icj-cij.org/docket/files/116/10455.pdf> [hereinafter Congo Armed Activities Case].

²²¹ GC (IV), *supra* note 212, art. 2. The article reads as: “Convention shall also apply to all case of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” *Id.*

²²² Stahn, *supra* note 4, at 472.

²²³ GC (IV), *supra* note 212, art. 6(3). Article reads as:

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power

formal application of the Convention to long-term administrations²²⁴ like U.N. administrations.

The main purpose of the law of occupation is to maintain the *status quo* of the occupied territory until a final status can be decided by the parties involved.²²⁵ The law of occupation, while recognizing certain rights of an occupying power regarding force protection, also imposes very strict restrictions, particularly with respect to preservation of the applicable law²²⁶ and governmental institutions in the territory.²²⁷ In this regard, the law of occupation can be a helpful source for U.N. administrations when deciding how to arrange their relationship with the local population and how to administer the territory.²²⁸

Whether the law of occupation applies to the U.N. administrations is still an ongoing debate. As is the case in human rights, the United Nations is not a party to the conventions that enumerate the principles of occupation.²²⁹ There must be an additional nexus for the applicability of the law of occupation to the U.N. administrations other than the treaty obligation.²³⁰ Not being a party to these conventions should not prevent the U.N. from observing the principles enshrined in the law of

shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

Id.

²²⁴ Stahn, *supra* note 4, at 467.

²²⁵ Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 Eur. J. Int'l L. 695, 700 (2005) (stating that "modern occupation law operates within the framework of fundamental principle of the illegality of acquisition of territory by force. Under this framework, the watchword is maintenance of the legal status quo while protecting the basic welfare of the population, pending a final disposition of the territory, typically a withdrawal from it").

²²⁶ Hague (IV), *supra* note 217, art. 43.

²²⁷ Wet, *supra* note 23, at 327.

²²⁸ Stahn, *supra* note 4, at 467; Vité, *supra* note 220, at 30-31.

²²⁹ Irmscher, *supra* note 170, at 375.

²³⁰ Stahn *supra* note 4, at 467.

occupation, however.²³¹ The widespread agreement in this regard,²³² led the United Nations to concede that the core rule of the customary law of armed conflict apply to enforcement operations.²³³ It might be argued that the customary law of armed conflict only covers combat-type operations, not the practices of the U.N. administrations, but in fact it does apply.

Customary international law is one of the four sources of the law that the I.C.J. uses to decide disputes. The Preamble of the U.N. Charter states that the “People of the United Nations determined . . . to establish conditions under which justice and respect for the obligations arising from treaties and *other sources of international law* can be maintained.”²³⁴ That is to say that the United Nations and its organs are bound by the customary international law.²³⁵

b. Limits of the Regulatory Authority of Occupying Power

For the purpose of this research we will focus on the provisions of the law of occupation on applicable law and retention described in Article 43 of Hague (IV), the decisive article concerning the limits of governance and administrative authority of occupying powers.²³⁶ The most widely adopted English translation of the original French text reads as follows:

²³¹ See Irmscher, *supra* note 170, at 375–76 (stating that “absent treaty obligation, [UNMIK] can be obliged to apply these norms [law of occupation] by virtue of a functional succession or insofar as they reflect customary international law.”).

²³² Stahn, *supra* note 4, at 467.

²³³ Secretary General’s Bulletin, Observance by United Nations Forces of International Humanitarian Law, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999), available at <http://www.unhcr.org/refworld/publisher,UNSECGEN,,,451bb5724,0.html>; The Secretary-General, *Report of Secretary-General on Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Aspects, Annex to the Report art. 28*, delivered to the General Assembly, U.N. Doc. A/46/185 (May 23, 1991) available at http://www.un.org/ga/search/view_doc.asp?symbol=A%2F46%2F185&Submit=Search&Lang=E.

²³⁴ U.N. Charter pmb. (emphasis added).

²³⁵ Stahn, *supra* note 4, at 469.

²³⁶ Boon, *supra* note 117, at 300.

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”

As a general rule, this provision obliges the occupying power to respect the “laws in force in the country [occupied territory].”²³⁷ In other words, the occupying power is supposed to fulfill its obligations as a substitute for the suspended sovereign. To accomplish this, the occupying power must “restore, and ensure, as far as possible public order and safety”²³⁸ under the rules established by the suspended sovereign “unless absolutely prevented”²³⁹ from doing so in order to fill a *de facto* power vacuum. This can be seen as a prohibition to legislate with certain exceptions.²⁴⁰ The only justification for introducing new rules under this Article is to ensure public order and civil life.²⁴¹ Article 43 of Hague (IV) must be read together with the Article 64 of GC (IV), which explains that such situations amount to situations of necessity.²⁴² The Article 64 of GC (IV) reads as follows:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application the present Convention. Subject to the latter considerations and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied

²³⁷ According to Sassòli the term “law in force in the country” in this article covers more than “just law in the strict sense of the word, but also to the constitution, decrees, ordinances, court precedents (especially in territories of common law tradition), as well as administrative regulations and executive orders.” Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 Eur. J. Int’l L. 661, 669 (2005). See also Yoram Dinstein, *The International Law of Occupation* (Cambridge University Press 2009).

²³⁸ Hague (IV), *supra* note 217, art. 43.

²³⁹ *Id.*

²⁴⁰ Sassòli, *supra* note 238, at 668

²⁴¹ Hague (IV), *supra* note 217, art. 43.

²⁴² Dinstein, *supra* note 238, at 110.

territory shall continue to function in respect of all offences covered by the said laws.

*The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.*²⁴³

GC (IV), along with the other three Conventions, was drafted to reflect the lessons of the two major world wars²⁴⁴ that “brought an untold sorrow to the mankind.²⁴⁵” Essentially, GC (IV) amplifies the provisions of Hague (IV).²⁴⁶ Almost all of the countries in the world are parties to GC (IV).²⁴⁷ The second paragraph of Article 64 is analogous to Article 43 of Hague (IV), which limits the legislative authority of the occupying power.²⁴⁸

²⁴³ GC (IV), *supra* note 212, art. 64. See Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 Am. J. Int’l L. 580, 588 (2006) (providing historical background of the article 64 of GC (IV)).

²⁴⁴ Boon, *supra* note 117, at 301.

²⁴⁵ U.N. Charter pmbl.

²⁴⁶ GC (IV), *supra* note 212, art. 154. This article reads as:

In the relations between the Powers who are bound by the Hague Conventions respecting the Laws and Customs of War on Land, whether that of July 29, 1899, or that of October 18, 1907, and who are parties to the present Convention, this last Convention shall be supplementary to Sections II and III of the Regulations annexed to the above-mentioned Conventions of The Hague.

Id., see also Lancaster, *supra* note 215, at 58; Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Jean S. Pictet et al. eds. 1958), available at <http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=380&t=com> [hereinafter Pictet’s Commentary] (claiming that “Article 64 expresses, in a more precise and detailed form, the terms of Article 43 of the Hague of Regulations, which lays down that the Occupying Power is to respect the laws in force in the country ‘unless absolutely prevented.’”).

²⁴⁷ One hundred and ninety-four countries are party the GC (IV). See Geneva Conventions of 12 August 1949, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited Mar. 10, 2010) (for the state parties).

²⁴⁸ Lancaster, *supra* note 215, at 60.

As stated above, GC (IV) provides more flexibility and clarity for the occupying power in terms of its obligation to respect and maintain the prior applicable law.²⁴⁹ GC (IV) places special emphasis on penal legislation and criminal procedure.²⁵⁰ Article 64 is composed of two parts.

The first paragraph specifically addresses the issue of respect for existing penal laws and tribunals of the occupied territory. (The continued operation of indigenous tribunals will be discussed as a separate issue below.) According to the first paragraph, the penal laws of the occupied territory can be suspended or repealed only if they constitute a threat to its security, or when they are an obstacle to the application of GC (IV).²⁵¹ One might argue that this paragraph only restricts changes to the penal law and not the civil law. Pictet's *Commentary* explains that "[t]he reason for the Diplomatic Conference making express reference only to respect for penal law was that it had not been sufficiently observed during past conflicts" and "there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution."²⁵² Some scholars disagree with this view.²⁵³ They argue that "the intentions of the delegates were to intentionally establish a different norm for civil laws in the article 64(2)."²⁵⁴ Was this really the case?²⁵⁵

²⁴⁹ *Contra* Eyal Benvenisti, *The International Law of Occupation* 101 (Princeton University Press, 1993) (arguing that "Article 64 introduces innovative element into the law of occupation, and thus represents a departure from Article 43 of the Hague Regulations, rather than a more precise and detailed expression.").

²⁵⁰ GC (IV), *supra* note 218, arts. 64-75.

²⁵¹ *See* Boon, *supra* note 117, at 302 n.81 (providing information on how the U.S. proposal for a more liberal authority to change the applicable law of the occupied territory was rejected).

²⁵² Pictet's *Commentary*, *supra* note 247, at 335.

²⁵³ *See* Benvenisti, *supra* note 250, at 101 (stating that "[t]his explanation could hardly satisfy the reader of previous chapters: the infringements of international limitations concerning the occupant's legislative powers extended during the war also, if not primarily, to nonpenal legislation."); Boon, *supra* note 117, at 302-03.

²⁵⁴ *Id.* 302-03; *see also* Benvenisti, *supra* note 250, at 101-02.

²⁵⁵ Actually the first paragraph does not talk specifically about introducing new penal regulations. The wording is clear. There are two possibilities in the wording. First, as a general rule, the penal law of the territory will continue to be in force. If the conditions in

The second paragraph of Article 64 empowers the occupying power to introduce new laws under three circumstances. First, the occupying power may legislate to ensure its own security, to include the security of its forces, personnel, property, and supply routes. This security provision existed in Hague (IV) as well. The other two aimed to meet the obligations of the occupying power. In this regard the occupying power possesses the regulatory authority it needs to fulfill its obligation under GC (IV).²⁵⁶ This includes the improvement of domestic laws to ensure the rights of protected persons under GC (IV).²⁵⁷ Pictet articulates this as follows:

*[A] reservation [that] is in the interests of the population and makes it possible to abrogate any discriminatory measures incompatible with humane requirements. It refers in particular, to provisions which adversely affect racial or religious minorities, such provisions being contrary to the spirit of the Convention (Article 27), which forbids all adverse distinction based, in particular, on race, religion or political opinion.*²⁵⁸

the save clause are met then the Occupying Power can repeal or suspend the respective law or certain provisions of the law.

Repeal is defined by *Black's Law Dictionary* as "abrogation of an existing law by legislative act." *Black's Law Dictionary* 1301, 1460 (7th ed. 1999). There are two types of repeal express and implied. In "express repeal" the "repeal effected by specific declaration in a new statute." *Id.* Implied repeal, occurs when there is an "irreconcilable conflict between an old law and a new law." *Id.* The "suspension", is defined as "[t]he act of temporarily delaying, interrupting, or terminating something" (i.e. a statute). *Id.* When repealed the law does not constitute a part of the law in force but in suspension on the other hand, the respective law continues to constitute. Since the first paragraph does not cover the introducing a new law the repeal in here must be an "express repeal."

When it comes to introducing a new rule then the second paragraph kicks in. According to Benvenisti, "add[ing] the restrictive adjective 'penal' to the noun 'provision' in the second paragraph." Out of the two versions voted by the delegates the one without the restrictive adjective "penal" was majority of the votes. Benvenisti, *supra* note 250, at 101-02.

²⁵⁶ See David J. Scheffer, *Beyond Occupation Law*, Am. J. Int'l L. 842, 847 n.24 (2003) (detailing list of obligations of the occupying power under Hague (IV) and GC (IV)).

²⁵⁷ Dinstein, *supra* note 238, at 113-15; see also GC (IV), *supra* note 212, art. 27 (guaranteeing religious rights, or right to family, bodily dignity, and group rights for minorities).

²⁵⁸ Pictet's Commentary, *supra* note 247, at 335.

In summary, it can be said that if the law of occupation is designed to protect the local population then occupying powers should have the authority to make required amendments that benefit the local population.²⁵⁹

Maintaining orderly government in occupied territory is the last of the three exceptions. This last exception could be abused if it is interpreted too liberally. In any case, Article 47 of GC (IV) prohibits any kind of action by occupying powers that might deprive protected persons of rights granted under GC (IV).²⁶⁰

The administrative structure of the territories occupied is another important issue. According to Pictet's *Commentary*, "changes in constitutional forms or in the form of government, the establishment of new military or political organizations, the dissolution of the State, or the formation of new political entities" by occupying powers are prohibited by the law of occupation, specifically Article 43 of Hague (IV).²⁶¹ These kinds of modifications to the governmental structure of occupied territories are prohibited because they "are solely based on the military strength of the occupying power and not a sovereign decision by the occupied State."²⁶² Article 43 protects the existence of the State, its institutions and its laws. This fact did not change with the signing of GC (IV).²⁶³

²⁵⁹ Roberts, *supra* note 244, at 622.

²⁶⁰ GC (IV), *supra* note 212, art. 47. Article 47 reads as:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Id.

²⁶¹ Pictet's *Commentary*, *supra* note 247, at 273.

²⁶² *Id.* Moreover, Pictet argues that the attempts to legitimize the institutional changes by giving independence to the new organization, even through co-operation of certain element among the population of the occupied territory, will not make any sense because of the fact that these institutions will be subservient to the will of the Occupying Power. *Id.*

²⁶³ *Id.* at 273 ("Although the GC (IV) merely amplifies [Hague (IV) Article 43] so far as the question of the protection of civilians is concerned.")

GC (IV) “does not expressly prohibit the occupying power from modifying the institutions or government of the occupied territory.”²⁶⁴ No one can deny that there might be a need for the occupying power to intervene to the governmental structure to a certain extent. On the other hand, GC (IV) does impose limitations in provisions protecting the rights of protected persons.²⁶⁵ Drastic changes in administrative structures could arguably affect the rights of protected persons. But what if changes do not affect rights? Does the occupying power have the authority to change governmental structures then? Pictet’s *Commentary* states that the objective of Article 47 “is to safeguard human beings and not to protect the political institutions and government machinery of the State” under occupation,²⁶⁶ then it is possible to make changes within this context.

In addition to the discussions above it must be remembered that any changes to administrative or political structures cannot be accomplished without amending the respective applicable law. That is to say, all of the limitations imposed on the occupying power concerning changes to the applicable law, *mutatis mutandis*, apply to changes to administrative and political structures in the occupied territory. Dinstein is of the view that “the occupying power should not be allowed to interfere with fundamental institutions of government in the occupied territory. By way of illustration, the occupying power should not be able to transform validly a unitary system in the occupied territory into a federal one (or vice versa).”²⁶⁷

²⁶⁴ Pictet’s *Commentary*, *supra* note 247, at 274.

²⁶⁵ GC (IV), *supra* note 212, art. 47; *see supra* note 261 (providing the wording of the Article 47).

²⁶⁶ Pictet’s *Commentary*, *supra* note 247, at 274.

²⁶⁷ Yoram Dinstein, *Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding* 10 (Harv. U. Occasional Paper Ser. No. 1, 2004), available at <http://www.hpcrresearch.org/pdfs/OccasionalPaper1.pdf>.

C. Possible Mechanisms to Ensure that U.N. Administrations are Subject to Certain Limitations on Their Regulatory Power.

Until now, we discussed considerations that might limit the regulatory authority of U.N. administrations. The applicability of those limitations is still debatable, and there are good arguments both in favor and against applying those limitations. Even if we accept all of the arguments mentioned above against the applicability of limitations as a matter of law to the U.N. administration, there is nothing preventing the U.N. from binding itself and its subsidiary organs by declaring that such standards, or most of them, apply to the U.N. and the U.N. administrations, in order to help “sustain the legitimacy of the mission itself.”²⁶⁸ But which organ can and should do this? And what should be done?

The answer to the first question is in the source of the authority. The Security Council is the U.N. organ that authorizes the U.N. administrations to administer the respective territories under its Chapter VII powers. As stated above, the U.N. administrations are subsidiary organs of the Security Council,²⁶⁹ and the U.N. administrations act under the delegated authority of the Security Council. Delegation of authority to subsidiary organs does not necessarily mean that the delegation of responsibility. It is still the responsibility of the Security Council to ensure that the authority it has delegated is not being abused. On the other hand, involving the General Assembly would definitely strengthen the legitimacy. The current practice of the Security Council is to task the Secretary-General to establish these U.N. administrations.²⁷⁰ In this re-

²⁶⁸ Marshall & Inglis, *supra* note 93, at 104.

²⁶⁹ See *supra* Part II.A.3.

²⁷⁰ See S.C. Res. 1244, *supra* note 17 (authorizing “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.”) and S.C. Res. 1272, *supra* note 18 (welcoming “the intention of the Secretary-General to appoint a Special Representative who, as the Transitional Administrator, will be responsible for all aspects of the United Nations work in East Timor and will have the power to enact new laws and regulations and to amend, suspend or repeal existing ones.”).

gard, the Security Council may task the Secretary-General to ensure that the U.N. administrations are subject to certain limitations.

Different mechanisms can be proposed when it comes to what should be done.²⁷¹ Peace operations are not a new concept for the U.N. It has been more than sixty years since the U.N. began conducting peacekeeping operations. Traditionally these operations have been conducted under missions headed by a SRSG on behalf of the Secretary-General. The U.N. kept the same structure for the administrations of Kosovo and East Timor,²⁷² although the responsibilities of those missions were far more extensive than those of normal peacekeeping missions.²⁷³ The structure of the mission must be different than that of classic peacekeeping operations, in which the U.N. mission just monitors or, if necessary, enforces the implementation of a predetermined roadmap.

The U.N. administrations are *sui generis*. Despite their strong links to the U.N. as subsidiary organs, they are legal personalities designed to substitute governmental functions at the domestic level.²⁷⁴ They function as state actors, so, to the maximum extend; they must be subject to the same rules of the game. In other words, they must be subject to the same control mechanisms that states must observe.²⁷⁵ Separation of

²⁷¹ For instance, Stahn proposes the institutionalization of a complaint procedure, the creation of an independent ombudsperson, the establishment of independent administrative supervisory bodies, and judicial review by domestic courts of acts adopted by international administrators in their capacity as public organs of the territory. Carsten Stahn, *Governance Beyond the State: Issues of Legitimacy in International Territorial Administration*, 2 Int'l. Org. L. Rev. 9, 53 (2005).

²⁷² *Id.* at 25.

²⁷³ See *supra* note 3 and accompanying text.

²⁷⁴ Bothe & Marauhn, *supra* note 29, at 237 (stating that "UNMIK and UNTAET assume functions which, under normal circumstances, are exercised by the organs of a state.").

²⁷⁵ Stahn, *supra* note 272, at 52 ("The exercise of governmental authority with direct powers over individuals . . . requires the institution of basic forms of responsibility towards domestic or quasi-domestic actors."); see also Carsten Stahn, *Accountability and Legitimacy in Practice: Lawmaking by Transitional Administrations*, 2005 ASIL Geneva Research Forum (How Does Contemporary International Law Accommodates Private Actors), http://www.esil-sedi.eu/fichiers/en/Stahn_604.pdf (last visited Mar. 14, 2010) (stating that "one would expect that international actors are generally bound by similar obligations than state actors when exercising governmental functions in a territory placed

powers is the key principle for democratic governance.²⁷⁶ This principle ensures checks and balances within the government. Judicial review of legislation, in terms of the constitutionality of the laws, and administration, in terms of lawfulness of the actions, is a fundamental feature of a domestic system of checks and balances.²⁷⁷

This review should be done through the judicial system of the governed territory.²⁷⁸ Although, the U.N. administrations showed a very strong reluctance to this idea,²⁷⁹ for various practical reasons, including the most of the activities of the U.N. administrations, specifically those of administrative nature, should still be subject to review by domestic courts. This will help to train the local actors on how a democracy should run. Some of the activities of the U.N. administrations, including exercise of legislative power by SRSG and high level appointments, can be kept out of the jurisdiction of the domestic courts. But in any case, this does

under their administration. However, the few efforts have made to subject transitional administrations to traditional checks and balances and legal obligations in the exercise of public authority.”).

²⁷⁶ Chopra, *supra* note 5 (arguing that “the results will be merely another form of authoritarianism unless the transitional administrators themselves submit to a judicious separation of powers and to genuine accountability to the local people whom they serve. Peace-maintenance will win legitimacy only if global governors lead by example.”); see also Bothe & Marauhn, *supra* note 29, at 239 (arguing that democratic governance is a human right).

²⁷⁷ See Everly, *supra* note 29, at 36 (stating that “[f]rom a rule of law perspective, it is important to ensure that some avenues are available for holding such actors judicially accountable for their governmental conduct.”).

²⁷⁸ See Dominik Zaum, *The Authority of International Administrations in International Society*, 32 *Rev. Int’l Stud.* 455, 472 (2006) stating that:

“[I]t is difficult to hold international administrations democratically accountable. However, accountability could be strengthened, for example by extending the jurisdiction of local supreme courts over acts of the international administrations, by strengthening the Ombudsperson institution, or by establishing appeal boards to which the local populations has access, and which can review and sanction the decisions of the administration, rather than just issue recommendations and opinions. An example of the latter is the Media Appeals Board in Kosovo, which reviews decisions of UNMIK against the media, such as the closure of newspapers. These institutions can help to uphold due process, and to increase the transparency and responsiveness of international administrations.”

²⁷⁹ See Everly, *supra* note 29, at 23–31 (providing an overview of how UNMIK reacted to the attempts of the local courts to review the legality of its actions or regulations).

not necessarily mean that these activities will not be subject to any kind of judicial review.

Different solutions can be found for judicial review of the activities left outside of the jurisdiction of domestic courts. Establishment of a separate court system by the Security Council to review the SRSG's actions is the most viable solution.²⁸⁰ This court can be authorized to hear certain cases alongside its function to review the lawfulness of the actions of the SRSG. Alternatively, one of the existing bodies of the U.N., like I.C.J.,²⁸¹ the U.N. Administrative Tribunal, or the Peacebuilding Commission,²⁸² could be tasked to assume this function in addition to their ordinary functions.

An effective judicial review requires clear, pre-established rules governing the administration of territories by the U.N. This can be realized in two ways. The first tool that the U.N. Security Council would use is the resolutions authorizing the U.N. administrations. The Security Council can draw strict lines governing the powers granted to the U.N. administrations by adopting clear resolutions,²⁸³ but in practicality, going

²⁸⁰ Cf. Everly, *supra* note 29, at 36 (proposing the establishment of “a *sui generis* judicial body, of either international or mixed international/local composition for the purpose of hearing complaints concerning the governmental conduct of these actors and reviewing the legal instrument issued by these actors for compliance with applicable law.”).

²⁸¹ Lindsey Cameron, *Accountability of International Organisations Engaged in the Administration of Territory*, at 93-95, http://www.prix-henry-dunant.org/sites/prixhd/doc/2006b_LCameron.pdf (last visited Mar. 11, 2010) (proposing the use of advisory opinion mechanism of I.C.J. for the review of the administrative actions of the international administrations analogous to the practice of the League of Nations Council requested an advisory opinion from P.C.I.J. regarding lawfulness of decision of High Commissioner relative to jurisdiction of courts in Free City of Danzig).

²⁸² Stahn, *supra* note 272, at 53 (proposing re-configuration of the powers of the Peacebuilding Commission). See also United Nations Peacebuilding Commission, <http://www.un.org/peace/peacebuilding/> (last visited Mar. 11, 2010) (providing detailed information on Peacebuilding Commission).

²⁸³ Sylvain Vité, *Re-establishing the Rule of Law Under Transitional Administration*, in *Security Governance in Post-Conflict Peace Building*, 187, 197 (Alan Bryden & Heiner Hänggi eds., 2005) (stating that “the U.N. Security Council, when establishing a mission, must play a key role. Its resolutions establishing a particular mission should provide that all actors involved, including international organizations, such as the U.N. or NATO, as

into too much detail for every mission might not be possible. The second tool might be the adoption of some sort of constitutional framework (as was the case for Kosovo in the later phases of the operation) that will govern the transitional period under a U.N. administration.²⁸⁴ The Security Council can add a package of transitional laws including, but not limited to, a concise penal code and criminal procedural code²⁸⁵ or other instruments.²⁸⁶ But these transitional rules should be limited to meet the emergency requirement of the situation. Making public these kinds of regulations will have two benefits. The first is visibility. By publicizing transitional laws the people of the territories and other interested parties will be aware of the limits of the powers of the administrations and the law that will apply. Secondly, the U.N. will have the chance to train possible administrators and their staff on the limits of their authority and applicable law.

well as individual States, are bound by the same set of IHL, and HRL rules. References to specific relevant treaties should also be made.”).

²⁸⁴ See Bongiorno, *supra* note 162, at 653 (stating that “[g]iven the current lack of U.N. regulations, any provisions for applicable standards and enforcement mechanisms have to be separately drafted and incorporated into the mandates of U.N. mission.”).

²⁸⁵ Panel on the United Nations Peace-Operations (March 2000), Report to Secretary General, ¶ 79-83, U.N. Doc. A/55/305 and S/2000/809 (Aug. 21, 2000), available at http://www.un.org/peace/reports/peace_operations/ [hereinafter Brahimi Report] (recommending that “the Secretary-General invite a panel of international legal experts, including individuals with experience in United Nations operations that have transitional administration mandates, to evaluate the feasibility and utility of developing an interim criminal code, including any regional adaptations potentially required, for use for such operations pending the re-establishment of local rule of law and local law enforcement capacity.”). *Contra*, Stahn, *supra* note 276, at 20 (arguing that “it is questionable whether the development of a standard UN Criminal Code or a standard UN administrative Code may serve as a useful model to address legal vacuums and problems of lawmaking in societies in transition. Such codes may, at best, help establish an ‘emergency’ set of rules governing the relations between local actors and UN administrations or military contingents. But they are ill-equipped to serve as generally applicable frameworks of law in a post-conflict society because they fail do address the particularities and culture differences which are inherent in any domestic system.”).

²⁸⁶ See Bongiorno, *supra* note 162, at 678-79 (proposing to draft a “Peacekeeping Bill of Rights” to clarify the content of the U.N.’s human rights obligations to be approved either by the Security Council or by the General Assembly).

V. Conclusions

The administration of a territory by a state, coalition of states, or an international organization or body is not a new phenomenon of international law, but it is new for the United Nations. Before Kosovo and East Timor, the United Nations had never administered a territory with that such a broad scope of authority. In these two cases, the U.N. Security Council granted the U.N. administrations authority to act like sovereigns over the territories. The two administrations made use of the broad authority, granted under Chapter VII of the U.N. Charter, to the maximum extent and placed mission accomplishment over all other issues. However, human rights activists and scholars heavily criticized this approach.

These critics were right. This paper has shown that the U.N. has the authority to administer any territory for the purpose of maintaining or restoring international peace and security. This authority is unquestionable. Nevertheless, this unique authority, delegated by members of the U.N. to the Security Council, is subject to limitations, particularly limits imposed by international law.

The first limitation stems from the right of self-determination. This principle clearly states that every nation should be able to decide how they want to be governed without the influence of any other country. The actions taken by the U.N. administrations, as a result of their transformative and transitional nature, generally conflict with this important principle. The tendency thus far has been to impose a government structure rather than to leave the choice to the wishes of the local population. The U.N. strives to ensure that all nations under foreign rule gain their independence and exercise the right of self-determination. In this regard, the conduct of the U.N. administrations could conflict with the right and principle of self-determination and could discredit the U.N.

The second limitation to the regulatory authority of the U.N. administrations stems from human rights. The promotion of human rights is one of the primary purposes of the United Nations. Again, the United Nations has played a significant role in this regard. The U.N. administra-

tions, as representative bodies of the United Nations, should put human rights before any other consideration, even more so than other states or international organizations. Once a U.N. administration becomes a violator of human rights, it degrades the credibility of the United Nations.

The U.N. administrations require the support of the international community to maintain their legitimacy. It is highly unlikely that future administrations will be anything other than creations of the U.N. Thus, the U.N., based on its experiences from Kosovo and East Timor, must find a way to stay within the limits of international law while addressing threats to international peace and security. This can only be achieved by establishing clear limits to the authority of the U.N. administrations and by creating mechanisms to ensure compliance with the rules. Only when these measures have been put in place will U.N. administrations gain the legitimacy and credibility they need to accomplish their missions.