Accountability And Legitimacy In Practice:
Lawmaking By Transitional Administrations

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Abstract

The exercise of regulatory authority by international administrations has an established tradition in international practice. It has not only recently emerged in the cases of Bosnia and Herzegovina, Kosovo, East Timor and Iraq, but can be traced back to earlier experiments in the Saar, Namibia, Cambodia and Somalia. However, neither the foundations nor the implications of this type of lawmaking have been thoroughly reflected in international practice and thinking. Lawmaking by international actors raises fundamental authority questions. What authorizes international actors to exercise public authority on behalf or instead of domestic authorities? On which normative basis may international administrations enact legislation? Where are the limits of regulatory authority? International practice has not yet provided fully satisfactory answers to these questions. Lawmaking has been largely handled in an ad hoc fashion by international administrations, following the will or rule of the governing administrations. It has sometimes led to severe transformations of the legal and political system of territories under international administration, through a definition of the law applicable in the territory (East Timor), a re-organization of the judicial system (Kosovo, Iraq) or comprehensive private sector reform (Bosnia and Herzegovina, Kosovo and Iraq). This presentation reviews some of these conceptions in the light of the status of international administrations as public authorities and their authority under international law. It calls for moderation in law reform and argues that regulatory action should focus on institution-building rather than on legal transformation.

1. Lawmaking by Transitional Administrations as a Paradigm

International administrations have been engaged in the exercise of regulatory powers on various occasions over the last decades.[1] This type of regulatory action has its origins in the era of the League of Nations. The Permanent Court of International Justice opened a conceptual door by developing the concept of direct invocability of international treaty norms in the context of litigation concerning the railway system of the Free City of Danzig *(Jurisdiction of the Courts of*

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[1] For a survey of the practice in international territorial administration, see R. Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, American Journal of International Law, Vol. 95 (2001), 583: S. Chesterman, *You, The People: The United Nations, Transitional Administration and Statebuilding* (2004); R. Caplan, *International Governance of War-Torn-Territories* (2005). See on the issue of legitimacy specifically R. Wilde, Representing International Territorial Administration, *European Journal of International Law*, Vol. 15 (2004), 71; C. Stahn, Governance Beyond the State: Issues of Legitimacy in International Territorial Administration, *International Organizations Law Review*, Vol. 2, No. 1 (2005), 9-56; *id*. Justice Under Transitional Administration: Contours and Critique of a Paradigm, *Houston Journal of International Law*, Vol. 27 (2005), 312-342.

Danzig)[2] – over three decades before the famous jurisprudence of the European Court of Justice in *Van Gend en Loos*.[3] The decrees issued by the Governing Commission in the Saar in the 1920s enjoyed direct applicability in the domestic system of the territories under administration. They were later, *inter alia*, followed by the decrees enacted by the UN Council for Namibia in the 1970s[4]. In the last two decades, this practice has reached new heights. International administrations have exercised lawmaking powers ("executive or legislative authority") not only in the most recent cases of Bosnia and Herzegovina[5], Eastern Slavonia[6], Kosovo[7], East Timor[8] and Iraq[9], but also in the earlier experiments in Cambodia[10] and Somalia[11]

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[2] The PCIJ had to examine the effect of the Danzig-Polish Agreement of October 22, 1921 in the context of the establishment of conditions of service of Danzig citizens in Polish Railways. Poland had not implemented the agreement. The Permanent Court noted, while there was "a well-established principle of international law that [international agreements] cannot as such, create direct rights and obligations for private individuals", that did not necessarily exclude the "adoption by the parties of some definite rules creating individuals rights and obligations enforceable by the national courts". The Permanent Court argued that the creation of direct rights and obligations could be assumed if "[t]he wording and general tenor of the treaty establish that it was the 'intention'of the Contracting Parties' to do so, thereby creating a 'special legal regime'." See PCIJ, *Jurisdiction of Courts of Danzig,* PCIJ Ser. B, No. 15 (1928), at 17-18.

[3] See European Court of Justice, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62 (1963), ECR 1. The Court found, *inter alia*, that a provision of Community law may be directly effective, if it is clear and precise, unconditional and capable of producing rights for individuals.

[4] The Council of Nambia issued, *inter alia*, Decree No.1 for the Protection of the Natural Resources of Namibia of 27 September 1974 on the basis of its mandate under Resolution 2248 (S-V).

[5] The OHR in Bosnia adopted a wide range of laws and executive decisions. For a survey, see the list of OHR decisions at http:// www.ohr.int.

[6] UNTAES abrogated legislation enacted by the local Serb authorities and restored Croatian law by a directive issued on 29 May 1997. See para. 23 of the Report of the Secretary-General on the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium, UN. Doc S/1997/953 of 4 December 1997.

[7] UNMIK Regulation No. 1999/1 bestowed the SRSG with all legislative and executive authority. For an assessment of UNMIK's regulatory practice, see L. von Carlowitz, UNMIK Lawmaking between Effective Peace Support and Internal Self-Determination, *Archiv des Völkerrechts*, Vol. 41 (2003), 336, at 371.

[8] For a list of UNTAET's regulations, see http://www.un.org/peace/etimor/UntaetN.htm.

[9] The CPA has issued directly applicable regulations and orders affecting all aspects of civil administration. For a full list, see http://www.cpa-iraq.org. For an analysis, see Kaiyan Homi Kaikobad, Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003-June 2004, *International and Comparative Law Quarterly*, Vol. 54 (2005), 253-264.

[10] UNTAC elaborated, *inter alia*, Transitional Criminal Provisions for Cambodia in its Directive No. 93/1. See UN Third Progress Report of the Secretary-General on UNTAC, UN. Doc. S725154 of 25 January 1993, para. 103.

[11] The UN Special Representative in Somalia declared that the former Somali Penal Code of 162 was the criminal law in force in Somalia. For a critique, see D. Sarooshi, *The United Nations and*

A. Conceptual Background

On a conceptual level, international territorial administration marks one of the first areas in international law, in which international actors eclipsed the state as the exclusive holder of public authority. International administrations have, in particular, enacted legal acts which which are binding and directly applicable to both the internal legal order of the organization which created them, and to the legal order of the territory which is placed under international control. This direct penetration of these legal acts into the domestic legal system of territory under administration is innovative in a dual sense. It breaks with the conception that the regulatory powers of international organizations apply exclusively within the confines of their own legal order, namely vis-à-vis their own organs and member States.[12] Moreover, it deviates from the classical dualist tradition according to which international regulatory acts require domestic implementation, in order to be directly applicable in the domestic realm.[13]

B. Evolution

Throughout much of the history of the 20th century, this phenomenon has received relatively little attention. Some early textbooks contain some references the regulatory practice of the Saar Commission in 1920s, which occasionally caused dissatisfaction and protest due a lack of consultation of local leaders[14]. Furthermore, there is still some institutional memory about the

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the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers (1999), at 63.

[12] Note that even the Security Council has been reluctant to vest its subsidiary bodies with the power to directly implement measures in territories. See with respect to Sanctions Committees, Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), at 252.

[13] See Georg Schwarzenberger, *International Law*, Vol. 1 (1957), at 67. This statement is particularly well reflected in the judgment of the PCIJ regarding Certain German Interests in Polish Upper Silesia, where the Court found that "[f]rom the standpoint of international law and of the Court … municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative matters". See PCIJ, *German Interests in Polish Upper Silesia* (1926), Ser. A., No. 7, at 19.

[14] In a note of protest on June 2, 1923, the leaders of the political parties in the Saar Basin stated: "[T]he Advisory Council was to be crushed down into insignificance by all possible means. Even the very few rights left to it have been disregarded by the Governing Commission. Decrees affecting the population most intimately have been published without the Advisory Council having been heard at all, as, for instance, in the case of the notorious Provisional Decree and the decree *re* pickets. Where the Advisory Council has been heard, the Governing Commission has only carried out its proposals in matters of secondary importance, whilst in matters of the first importance it has never allowed itself to be influenced by its votes. Thus it has come about that the phrase which stands at the head of every decree: 'after consultation with the Elected Representatives of the people' is regarded by the people as an insult and designed to mislead. The people see in the autocratic administration of the finances by the Governing Commission a special contempt for their rights. The Governing Commission makes any real co-operation of the Advisory Council in the expenditure quite illusory by carefully giving its members a clear picture of how the money of the State is to be employed. The tax-payers have, however, even in the Saar

practice of the PCIJ which ruled on decrees issued by the governors of Danzig[15], or the practice of the Allied Control Council who regulated various domestic affairs of common interest in Germany after 1945, such the creation of German Labor Courts, the institution of indirect and direct taxation, the implementation of property restitution, or the control of shipbuilding and reparation issues.[16]

However, the issue of the legality and legitimacy of lawmaking by international administrations has only come under closer scrutiny in the context of recent state-building missions, where international governing institutions assumed not only direct responsibility for law and order in situations of transition, but further-reaching powers, such as the authority to repeal previous legislation, to rebuild and supervise the functioning of the domestic legal system or to appoint and dismiss public officials. In this context, the exercise of regulatory authority by international entities became a vehicle for the promotion of peace through political and economic liberalization.[17] Lawmaking functions were embedded in a broader mandate to promote liberal rights and democratic state structures in post-conflict societies through various techniques, such as the integration of international human rights standards into the domestic legal system, the expansion of mechanisms of political participation and the promotion of local self-government. Moreover, international administrators were vested with a whole array of economic tasks, including revenue-generation through customs and other taxes, the attraction of foreign investment, the creation of banking and fiscal authorities and the regulation of the budget.[18]

Regrettably, few efforts have been made to conceptualize this phenomenon in a systematic fashion. The UN has not yet undertaken a comprehensive assessment of its own policies as such, but rather confined itself to a review of individual missions. The "*Brahimi* Report' devoted only a few paragraphs to the topic of transitional administrations, without addressing the substantial tensions and challenges underlying the practice of international territorial administration.[19] The Report of the High-level Panel on Threats, Challenges and

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Basin, a right to know how their money is employed. There is no excuse now that the period of transition has been passed through, for not respecting this acknowledged principle of every modern democratic State." See W.R. Bisshop*, The Saar Controversy*, at 86.

[15] The PCIJ ruled in an advisory Opinion to the League Council that the amendment of the Danzig Penal Code by Nazi legislation constituted "an arbitrary encroachment of individual liberty on the part of the authorities of the State (of) Danzig". See PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, 57.

[16] For a survey, see E. H. Litchfield, *Emergence of German Governments*, in Litchfield*, Governing Postwar Germany* (1953) 19, at 24; W. Friedmann*, Allied Military Government of Germany* (1947), at 50-53.

[17] See R. Paris, Peacebuilding and the Limits of Liberal Internationalism, *International Security*, Vol. 22 (1997), 54, at 58. See also M. Ayoob, Third World Perspectives on Humanitarian Intervention and International Administration, *Global Governance*, Vol. 10, No. 1, Jan.-March 2004, 99-118.

[18] See also para. 77 of the *Brahimi* Report. In the context of Kosovo, see for instance, UNMIK Regulations No.16/1999 of 6 November 1999 (*Central Fiscal Authority*) and No. 20/1999 of 15 November 1999 (*Banking and Payment Authority*).

[19] See para. 76-83 of *Brahimi* Report. The report contained one key recommendation, namely to "evaluate the feasibility and utility of developing an interim criminal code, including any regional adaptations potentially required, for use by such operations pending the re-establishment of local rule of law and local enforcement capacity".

Change recommended some institutional reform of the UN system by favouring the establishment of a Peacebuilding Commission, but failed to mention transitional administration as one the primary responsibilities of the Commission.[20]

C. Institutional Diversity

Like international territorial administration as such[21], lawmaking has been largely handled in an *ad hoc* fashion by transitional administrations. Each mission was to some extent a pioneering experiment of its own. UNTAC exercised regulatory authority under the constitutional structure of Cambodia, according to a power-sharing procedure specified in the Paris Accords.[22] The European Union Administration in Mostar (EUAM) enjoyed lawmaking and executive powers on the basis of precise governing instructions laid down in a Memorandum of Understanding between the Member States of the European Union, the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Local Administration of Mostar.[23] UNOSOM and the High Representative in Bosnia and Herzegovina (OHR), by contrast, inferred their regulatory powers widely by way of necessity and self-interpretation from their respective mandates. UNTAES, UNMIK, UNTAET derived their lawmaking powers from Chapter VII mandates[24], but adopted different forms of action in practice. UNTAES exercised mostly executive authority. UNMIK, UNTAET and the Coalition Provisional Authority (CPA) in Iraq adopted a wide range of general and abstract ("legislative") acts by way of regulations or orders.

D. Legal Nature

This diversity is reflected in the discussion about the legal nature of regulatory acts of transitional administrations. The only common agreement that has been reached in doctrine is that regulatory acts of international administrations are *sui generis* acts. For example, Decree No. 1 of the Council for Namibia was described as a "new and strange concept" by the UN Commissioner for Namibia himself. [25] This tendency continued in the 1990s, when UNMIK and UNTAET regulations were presented as a special type of legislation, which is so new and unique that "we are faced with a special impact of Public International Law on specific territories"[26]. Later, the same argument was repeated in the context of CPA regulations. [27]

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[20] See Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: our shared responsibility*, UN.Doc. A/59/565, paras. 262-264.
[21] See generally Wilde, Representing International Territorial Administration, *supra* note 1, 71.
[22] See Article 6 of the Paris Accords.
[23] See Articles 7 (1), 8 and 10 of the Memorandum of Understanding on the European Union Administration of Mostar of 5 July 1994.
[24] See SC Resolutions 1244 (1999), 1272 (1999) and 1483 (2003).
[25] See *Report of the United Nations Commissioner for Namibia on the implementation of Decree No. 1*, UN Doc. A/AC.131/81 of 18 July 1980.
[26] See M. Ruffert, The Administration of Kosovo and East Timor by the International Community, *International & Comparative Law Quarterly*, Vol. 50 (2001), at 624.
[27] See E. De Wet, The Direct Administration of Territories by the United Nations and its Member States in the Post Cold War Era: Legal Bases and Implications for National Law, *Max Planck Yearbook of United Nations Law*, Vol. 5 (2001), 108, at 331, who notes that CPA Regulations have a "*sui generis* international character".

This *sui generis* methodology is unsatisfactory from an analytical perspective. Not all types of regulatory acts of international administrations are so special and distinct from each other that they are necessarily *sui generis* in nature. There is room for further differentiation. Acts of international administrations may be acts of an international character (that is acts which form part of the internal legal order of the organization or the legal person that established the respective administrations), and potentially also domestic acts of the territory under international administration.[28] The repeated invocation of the *sui generis* argument, and the contexts in which it has been invoked, almost raises the suspicion that the exceptional character of acts of transitional administrations has been used in practice as a pretext to distinguish and exclude these acts from the realm of domestic law.

E. Treatment in practice

One would expect that international actors are generally bound by similar obligations than state actors when exercising governmental functions in a territory placed under their administration.[29] However, the few efforts have been made to subject transitional administrations to traditional checks and balances and legal obligations in the exercise of public authority.

International legal practice has shown that there are double standards in the structural conception of "international governmental legitimacy", not only in the area of democratic legitimation, but also in the field of lawmaking The practice in the field of UN governance missions illustrates that international governing institutions were regularly treated as functional entities ruled by the laws and principles applicable to international organizations (e.g. in terms of privileges and immunities, legal obligations and intra-institutional power-sharing) rather than as state actors governed by standards of domestic law, even where they exercised governance functions in the role of a "surrogate state".[30]

The UN was reluctant to set up institutions to independently review the action of the United Nations transitional administration. The acts of UN administrators were on some occasions simply declared final and binding on domestic actors. One typical example is the case of Cambodia. Section B of Annex 1 to the Paris Settlements placed "all administrative agencies, bodies and offices acting in the field of foreign affairs, national defence, finance, public security

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[28] For a discussion of functional duality, see the decision of the Constitutional Court of Bosnia and Herzegovina in the case concerning the Law on the State Border Service, Case U 9/00, Decision 3 November 2000, in which the Court found that the OHR intervened in the Constitutional System of Bosnia and Herzegovina when enacting the law on the State Border Service. The decision is available at http://www.ccbh.ba/?lang=en&page=decisions/byyear/2000.

[29] See also C. Grossman & D. Bradlow, Are We Being Propelled Towards a People-Centered Transnational Legal Order?, *American University Journal of International Law and Policy*, Vol. 9 (1993), 1 at 21 (noting that "[p]eacekeepers relate to the general population within the country in much the same way that governmental actors relate to the population within a country. This suggests that the international community, in defining the mandate and in the execution of these operations, needs to ensure that the international peacekeepers perform their responsibilities to these private actors to the same extent and in a comparable manner to what would be expected of a national government").

[30] See also E. 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, *American University Law Review*, Vol. 52 (2003), 1291.

and information" under "the direct control of UNTAC", which was authorized to exercise this control "as necessary to ensure strict neutrality". The Special Representative of the Secretary-General enjoyed unfettered authority in the exercise of these powers under the terms of Annex 1 to the Paris settlements. The SRSG himself was required to "determine what is necessary" and was empowered to issue directives to domestic administrative agencies which were declared binding on all Cambodian parties.[31]

On other occasions, UN administrations limited administrative control over their own acts by excluding domestic control in their own legislation or by introducing non-reviewable or quasi non-reviewable forms of administrative discretion. In Kosovo, for example, parts of the executive branch of power were exempted from the jurisdiction of the national courts. In many areas which did not fall in the sphere of competence of the municipalities, attempts to seek justice in the courts were usually frustrated by UNMIK's claim of immunity.[32] UNMIK invoked immunity in administrative proceedings[33] and occasionally refused to enforce judgments by domestic court which challenged UNMIK administrative acts.[34]

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[31] See Section B.1 of Annex 1 to the Paris Accords. Moreover, other administrative agencies, bodies and offices which could directly influence the outcome of elections were placed under direct supervision or control of UNTAC and bound to "comply with any guidance provided by it". See Section B.1 of Annex 1 to the Paris Accords.

[32] For an example, see the suspension of the operations of the newspaper Dita by UNMIK before the creation of the Kosovo Media Appeals Board. The Board was not competent to deal with this claim, because its authority was limited exclusively to appeals against decisions of the TMC. Nonetheless, the Board adds in para. 55 of the *Dita* Decision: 'The Board observes, however, that the present proceedings are deeply coloured by earlier events, and that the Applicant continues to be sincerely concerned by the apparent lack of any forum in which to pursue a challenge to the earlier closure.' See *Beqaj and Dita v. Temporary Media Commissioner*, p. 14.

[33] For an illustration, see the reported case of a Kosovo Albanian woman who challenged an administrative act issued by Kacanik Municipality and by the former UNMIK Department of Education and Science. The woman challenged the conditions and procedure of the examination process for the position as a pre-school principal before the Municipal Court in Kacanik. UNMIK invoked immunity from legal process before the Court. On 1 March 2001, Legal Counsel for UNMIK DES sent a letter to the Kacanik Municipal Court, stating in part: "[…][The Director of Kacanik MDE] is currently employed as the Director of Directorate of the Department of Education and Science, in UNMIK's Interim Administration. He is therefore, immune from legal process in respect of words spoken and all acts performed by him in his official capacity. The immunity of UNMIK personnel is established in section 3 of UNMIK Regulation No. 2000/47 of 18 August 2000 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo." The Kacanik Municipal Court rejected this claim in a judgment of 12 March 2001 and accepted the applicant's claim as a whole and as completely founded. The relevant provisions of the judgment read as follows: "The claim by Mrs. Elife Murseli from Doganaj – Kacanik, is hereby accepted as being completely founded, thus annulling the decision on 29.11.2001 on the selection of the Director of PEC "Agimi" in Kacanik as unfair and unlawful. The respondent party, the Municipal Department of Education in Kacanik is obliged to select the best candidate on the basis of the open competition, in which the applicant and two other candidates applied, within 15 days from the entry into force of this decision, under the threat of forcible execution.The Municipal Court in Kacanik further found that it was competent to proceed and decide on the applicant's case as it related to a violation of the rights of the

A similar approach was taken by the OHR. The High Representative was reluctant to accept the exercise of judicial review by domestic courts. The OHR repeatedly argued that certain executive decisions were not subject to review, because they were adopted in the exercise of his "international mandate". In some cases, the OHR even introduced a specific clause into his decisions, in order to prevent the exercise of judicial review.[35]

It is even more difficult to identify cases in which judicial authorities exercised control over legislative acts of international administrations. The Permanent Court of International Justice served as an entity of last resort to settle disputes between Danzig and Poland. In that capacity, the PCIJ examined the "Consistency of Certain Danzig Legislative Decrees with the

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applicant, and did not fall within the scope of privileges and immunities of UNMIK in the sense of UNMIK Regulation 2000/47". See Ombudsperson Institution in Kosovo, Report, Registration No. 122/01, *Elife Murseli against The United Nations Missions in Kosovo*, 10 December 2001, paras. 14-15.

[34] When Mrs. Elife seeked to enforce the judgment of the Municipal Court of Kacanik of 12 March 2001, Legal Counsel for UNMIK DES sent a letter to the Kacanik Municipal Court stating, in part: " [T]he UNMIK Department of Education and Science established the Kosovo-wide School Director Selection Commission, administered the selection process and hired the School Directors, its employees …, all of which was done within the applicable UNMIK regulations. This selection process is not open to judicial review except in so far as there are irregularities. The present action is against the Kacanik Municipal Directorate of Education, an element of the Municipality of Kacanik. The Municipality of Kacanik, a local self-government organized pursuant to UNMIK Regulation No. 2000/45, has no authority to select and hire the staff of the UNMIK Department of Education and Science. The 12 March 2001 decision of the Kacanik Municipal Court orders the Municipality to reselect the School Director of the "Agimi" Pre-Primary School, an action that the Municipality of Kacanik has no authority to do. The order seeks to enforce an action that is solely within the jurisdiction of UNMIK. Please be informed that any action taken by the Municipality of Kacanik would be without validity and unenforceable against UNMIK or the Department of Education and Science Without in anyway (sic) involving itself in the case, UNMIK is presenting this letter for the Court's consideration and without prejudice to the privileges and immunities enjoyed by UNMIK under UNMIK Regulation No. 2000/47". The consequence of the position adopted by UNMIK was that the Court decision could not be enforced. See OSCE, *Review of the Criminal Justice System, September 2001 – February 2002*, at 39. The Ombudsperson Institution in Kosovo qualified UNMIK's non-execution of the judgment as a violation of article 6 ECHR. See Ombudsperson Institution in Kosovo, *Elife Murseli against The United Nations Missions in Kosovo*, paras. 37-49.

[35] See OHR, Order Blocking All Bank Accounts of, held by and/or in the name of Milovan Marijanovic of 9 February 2004. The order stated: "For the avoidance of doubt, it is hereby specifically declared and provided that the provisions of the Order contained herein are … laid down by the High Representative pursuant to his international mandate and are not therefore justiciable by the Courts of Bosnia and Herzegovina or its Entities or elsewhere, whether in respect of the Banking Agencies or otherwise, and no proceedings may be brought in respect of duties carried out thereunder before any court whatsoever at any time thereafter". See OHR, Decisions Relating to Individuals Indicted for War Crimes in the Former Yugoslavia, at http://ohr.int/decisions/war-crimes-decs/default.asp?content_id=31814.

Constitution of the Free City.[36] Furthermore, some foreign courts examined the legal value of Decree No. 1 of the Council for Namibia.[37] However, there is hardly any practice of domestic courts exercising judicial review over acts of international administrators.[38]

This absence of review may be explained by the fact that the underlying administrations themselves have been viewed as forming part of a legal order that is distinct and separate from the municipal legal order several factors. In some cases, it has, been argued that public acts of international entities do not come within the jurisdiction of domestic courts, because they do not stem from a public authority of the territory under international administration[39]. Acts of Security Council-established administrations have been said to benefit from the presumption of legality attached to Chapter VII Resolutions of the Security Council.[40] Finally, the scope of judicial review has been reduced by the fact that international administrations such as UNMIK[41], UNTAET[42] or the CPA[43] defined their law as the "supreme law of the land", taking precedence over domestic laws and regulations.

This accountability gap is complemented by structural ambiguities related to the process of lawmaking by international administrations. In a democratic domestic setting, the process of lawmaking is shaped by a balancing of interests through the involvement of competing political

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[36] The PCIJ found that several legislative decrees passed by the Danzig Government were incompatible with the rule of law and the principles of *Nullum crimen sine lege* and *Nulla poena sine lege*. See PCIJ, *Consistency of certain Danzig Legislative Decrees with the Constitution of the Free City*, Ser. A/B 65 (1935), at 57.

[37] For a survey, see H.G. Schermers, The Namibia Decree in National Courts, *International & Comparative Law Quarterly,* Vol. 26 (1977), 93-96.

[38] For a survey of the exercise of judicial review under the laws of occupation, see Kaikobad, *supra* note 9, at 256-259.

[39] German Courts explicitly relied on this argument in the context the occupation of Germany after 1945, arguing that the acts of the Allied powers were not reviewable due to the international character of their authority and the international legal nature of their acts. See Badischer Staatsgerichtshof, Judgment of 27 November 1948, Archiv des öffentlichen Rechts (1949), at 486: "Stellt die Anordnung über den Arbeitseinsatz ... somit ihrer äußeren Form nach badisches Recht, ihrem materiellem Gehalt nach aber Recht der französischen Militärregierung dar, so ist sie einer Nachprüfung durch den Staatsgerichtshof entzogen. Maßstab für eine solche Nachprüfung könnte nur die Badische Verfassung sein ... Die Badische Verfassung kann aber nicht den Maßstab für die Gültigkeit von Besatzungsrecht abgeben. Dieses letztere bemißt sich allein nach völkerrechtlichen Gesichtspunkten und auf einer völkerrechtlichen Ebene, die dem Staatsgerichtshof verwehrt ist". See also Badischer Staatsgerichtshof, Judgment of 15 January 1949, Archiv des öffentlichen Rechts (1949), 477, at 478: "Anstelle der deutschen Regierung, doch nicht als Stellvertreter, sondern kraft unmittelbar aus dem Völkerrecht fließenden eigenen Rechts übte die Besatzungsmacht vorübergehend die volle deutsche Staatsgewalt und damit auch das Recht der Gesetzgebung aus". For a survey of the German practice, see Albrecht Randelzhofer, Untersuchung über die Möglichkeiten des Rechtsschutzes der Einwohner Berlins gegen Akte der Alliierten, *Die Verwaltung,* Vol. 19 (1986), at 14.

[40] For such an argument, see De Wet, *supra* note 27, at 337.

[41] See UNMIK Regulations No. 24/1999 of 15 November 1999 and No. 59/2000 of 27 October 2000.

[42] See UNTAET Regulation No. 1/1999 of 27 November 1999.

[43] See CPA Regulation No. 1 of 16 May 2003.

forces and branches of government in the decision-making process. This balance of power is frequently distorted in the framework of international governance missions, due to the concentration of authority on international authorities. Substantive decisions are regularly drafted and designed at the international level. In the case of UNMIK and UNTAET, for example, the United Nations Secretariat supervised the adoption of legislative acts elaborated by the SRSG.[44] Later, different forms of power-sharing were introduced by both administrations ranging from consultation to devolution of authority. Nevertheless, even such participatory models of decision-making do not automatically restore full and representative local "ownership" over the process of lawmaking. Problems of representation arise, where international administrations choose the very domestic leaders that participate in domestic decision-making bodies[45] or where domestic institutions are constituted after non-inclusive elections. Moreover, there is often a "structural inequality" between the domestic constituency and the *apparatus* of the administration in the immediate aftermath of conflict. The process of decision-making itself remains largely driven by the preferences and choices of international administrations in post-conflict situations, because international actors have the technical and legal know-how and the infrastructure to initiate measures of law reform.

Last, but not least, the practice of transitional administrations raises some concerns in relation to the rule of law, more generally. It is increasingly recognized that transitional administrations are subject to limitations in the regulatory authority of international administrations, which follow from the mandate of the administration, the principles of the UN Charter, international human rights law, the laws of occupation and the principles of democratic governance and self-determination.[46] But these limitations have not always observed in practice. International administrations have been accused of violating international standards in specific areas of law[47], and they have on several occasions failed to accord their own regulatory policies to the general legal culture of the territory under administration or the prerogative of local ownership.

These shortcomings may, to some extent, be explained by the specific challenges which transitional administrations face in their practice and the improvised response of the international community to breaches or threats to peace more generally. However, this argument loses some of its force after more than a decade of multi-dimensional peacekeeping and after more than half of

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[44] *Hans Corell*, the former UN Legal Counsel, pointed out that the UN Secretariat tried to assist UNMIK "in particular by reviewing the constitutional elements of the legislations, i.e. that the regulations conform to the Charter of the United Nations, to the mandates given to UNMIK by the Security Council and also respect internationally recognized standards, in particular in the field of human rights". See Hans Corell, *The Role of the United Nations in Peacekeeping - Recent Developments from a Legal Perspective,* Address of 1 December 2000 at the Conference: National Security Law in a Changing World, The Tenth Annual Review of the Field, at 7, available under http://www.un.org.

[45] For a criticism of the choice of leaders involved in the negotiation of the Bonn Agreement by the UN, see A. Suhrke, K. Berg Harpiviken & A. Strand, *Conflictual Peacebuilding; Afghanistan Two Years After Bonn* (2004), at 63

[46] For a discussion of the legal limitations of UN transitional administrations, see De Wet, *supra* note 12, at 311-337.

[47] See generally F. Mégret & F. Hoffmann, The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities, *Human Rights Quarterly*, Vol. 25 (2003), 314.

a century of international experience in territorial administration. Some of the same mistakes and misconceptions have been repeated persistently over time. The contemporary conception of public authority is therefore subject to critical review.

II. Legal and Conceptual Challenges

It is widely accepted that international administrations may exercise lawmaking powers. However, there are divergent conceptions about the scope of regulatory authority to be exercised by international administrators. Both, the post-war administrations of Germany and Japan after 1945 and governance missions of the 1990's (OHR, UNMIK, UNTAET, CPA) have adopted "interventionist" approaches towards territorial administration, by shaping the internal and constitutional landscape of territories under international administration. The OHR turned into a "stand-in-legislator" and supervisor of the executive branch of power in the Bosnian legal system. Furthermore, UNMIK and UNTAET virtually became "lawmaking-factories" in practice – quite to the surprise of even some circles in the UN.

A. Legal Problems

This broad conception of international territorial authority raises several concerns from a legal perspective.

1. Authority Problems

There are, first of all, problems of authority.

a. Acts of UN administrations and the link to international peace and security

It is clear from the institutional law of the UN that acts of UN administrations, especially regulations by Chapter VII established administrations, must be related to the objectives of peace-maintenance.[48] As subsidiary bodies of the Security Council or the General Assembly, UN administrations do not have an unqualified right to determine the scope of the nexus to peace and security.[49] These limits have been interpreted in an extensive fashion in UN practice. UN administrations adopted a number of regulations which were only very loosely connected to the goals of international peace and security. Both UNMIK and UNTAET, for example, enacted

[48] Since the authority of the Security Council is tied to the maintenance of international peace and security, the same principle applies *à fortiori* to the exercise of regulatory authority by Chapter VII-established administrations. See also Frowein & Krisch, *Introduction to Chapter VII*, in Simma, Charter of the United Nations (2002), at 713, para. 33.

[49] See also Frowein & Krisch, *Introduction to Chapter VII*, in Simma, Charter of the United Nations (2002), at 713, para. 33 ("[T]he general delegation of the competence to determine a threat to the peace or to decide upon the measures to be used to restore the peace would be inadmissible, and any delegation of discretionary powers should be construed narrowly. In any event, the entity endowed with delegated powers is subject to their limits and, unless otherwise states, not entitled to give an authoritative interpretation of their scope").

legislation concerning the introduction of new currencies[50], the creation of central fiscal authorities[51], the registration of vehicles[52], or the regulation of road traffic[53] in the administered territories. It is at least questionable, whether they have a sufficient nexus to Chapter VII and may thus be justified on the basis of the model of delegated authority. [54]

b. Limits arising from the mandate of international administrations

Further limitations arise from the mandates of UN administrations and multinational administrations. The scope of regulatory authority of transitional administration must be determined by way of an interpretation of the mandate. One might expect that international administrations would exercise caution in interpreting the scope of powers delegated to them. However, a closer account survey of the existing practice provides some evidence to the contrary. Authority conflicts have arisen in four situations: Somalia, Bosnia and Herzegovina, Kosovo and Iraq.

i. UNOSOM

The framing of the mandate of UNOSOM II generated problems of regulatory authority in Somalia. Security Council Resolution 814 contained a rather vague mandate, which authorized the Secretary-General to "direct the Force Commander of UNOSOM II to assume responsibility for the consolidation, expansion and maintenance of a secure environment throughout Somalia". This mandate may, at best, be construed as encompassing a delegation of executive authority, but it did not authorize UNOSOM to exercise legislative authority generally, or to introduce the former Somali Penal Code of 1962 as the criminal law applicable in the territory. Such a power was neither expressly mentioned in the Resolution, nor necessarily implied by UNOSOM'S mandate[55]. The general promulgation of a criminal code is therefore difficult to justify in the light of rules of interpretation of Chapter VII Resolutions. Moreover, it contrasts with the principle of the continued application of penal laws under Article 64, paragraph 1 of Fourth Geneva

[50] See e.g. UNTAET Regulation No. 2000/7. See also UNMIK Regulation No 1999/4 on the Currency to be used in Kosovo which caused protests by Belgrade and Moscow as an act encroaching on the sovereignty of the FRY.
[51] See e.g. UNTAET Regulation No. 2000/1.
[52] See e.g. UNTAET Regulation No. 2001/6.
[53] See e.g. UNTAET Regulation No. 2001/8.
[54] See A. de Hoogh, Attribution or Delegation of (Legislative) Power by the Security Council?, The Case of the United Nations Transitional Administration in East Timor (UNTAET), *International Peacekeeping,* Vol. 7 (2001), at 31. Concurring von Leopold, *supra* note 7, at 344 ([I]t is doubtful, whether all aspects of UNMIK's regulatory efforts had a sufficiently strong linkage to international security interests that would warrant automatic justification through Chapter VII").
[55] Even the UN Commission of Inquiry noted in its 1994 report that "the promulgation of the Somali Penal Code of 1962 as the criminal law in force in Somalia by the Special Representative of the Secretary-General was capable of being interpreted by the USC/SNA as an overstepping of the UNOSOM II mandate". See UN Doc. S/1994/653, p. 17.

Convention[56], which might serve as a residual guideline for interpretation of the scope of powers held by transitional administrations in the case of legal gaps.

ii. OHR

Similar problems emerged in the case of the Dayton Peace Agreement. The wording of Annex 10 of the agreement provided the OHR only with very general powers of supervision ("[m]onitor the implementation of the peace settlement")[57] and dispute resolution ("[f]acilitate, as the High Representative judges necessary, the resolution of any difficulties arising in connection with civilian implementation")[58], without specifically attributing any regulatory powers to the OHR. The decision of the Peace Implementation Council and the OHR to infer this authority from the final authority clause in Article V of Annex 10 is, at least, arguable in legal terms. Under the agreement, the final authority of the OHR is linked to "theatre regarding the *interpretation* of [the] Agreement on the civilian implementation of the peace settlement".[59] This clause grants the OHR the authority to interpret its existing powers under the agreement. However, it does not, strictly speaking, grant the OHR the authority to imply all powers necessary to ensure the civilian implementation of the peace settlement. The assumption of direct executive and legislative powers by the OHR marked essentially a constructive adjustment of the law to factual necessity which received some backing by subsequent international practice[60], but comes very close to a *de facto* amendment of the Dayton Agreement.

iii. UNMIK

UNMIK's mandate was also framed in an ambiguous fashion. UNMIK's legislative authority over Kosovo was not directly mentioned by the terms of Security Council Resolution 1244 (1999). This omission weakened UNMIK's authority. The administration derived its legislative powers from an extensive interpretation of Resolution 1244 in Regulation No. 2000/1. This understanding was backed by key Western powers and was not contradicted by the Council itself.[61] However, the ambiguity in the law triggered calls for a parallel application of Resolution 1244 and the laws of laws of occupation in legal doctrine. It has been argued that some of the regulatory acts adopted by UNMIK in the field of private law violated the administration's duties under the "freezing clause" of the Hague Regulations, because they modified the law applicable in the territory.[62] This criticism was, in particular, formulated in relation to the introduction of the

[56] For doubts, see also De Wet, *supra* note 27, at 323-325.
[57] See Article II, para. 1 a. of Annex 10.
[58] See Article II, para. 1 d. of Annex 10
[59] Emphasis added.
[60] In particular, the practice of the Peace Implementation Council may be considered as an element of subsequent practice in the light of Article 31, paragraph 3 of the Vienna Convention on the Law of Treaties.
[61] See A. Yannis, The UN as Government in Kosovo, *Global Governance*, Vol. 10 (2004), at 70.
[62] See T. H. Irmscher, The Legal Framework for the Activities of the United Nations Interim Mission in Kosovo: The Charter, Human Rights and the Law of Occupation, *German Yearbook of International Law*, Vol. 44 (2001), at 393-394.

UN Convention for the Sales of Goods by UNMIK Regulation No. 2000/64[63], the adoption of a framework of foreign investment by UNMIK Regulation No. 2001/3[64] and the creation of a uniform regime for pledges over movable property by UNMIK Regulation No. 2001/5.[65]

iv. The CPA

Finally, doubts have arisen in relation to the scope of regulatory authority of the CPA. Security Council Resolution 1483 (2003) entrusted the CPA with broader responsibilities in the field of state-building, but failed to clarify how the legal contradictions between the "quasi-mandate" of the CPA under UN law and the existing limitations under the laws of occupation could be reconciled. The CPA adopted a practical stance on this issue. It solved the apparent contradiction inherent in the parallel application of SC resolutions and the laws of occupation by citing a dual foundation for its regulations and orders: "relevant U.N. Security Council resolutions, including Resolution 1483 (2003)" and "the laws and usages of war".[66]

This double invocation of UN law and the laws of occupation approach allowed the CPA to pick and chose the legal regime which was most favourable to it in the particular case, and in particular to invoke exceptions from its obligations under international humanitarian law in the exercise of its administering functions. But this approach remained critical from a point of view of legal interpretation. It is difficult to imply from the wording of the relevant SC resolutions an express indication of the Council's will to derogate from the framework of the law of occupation. Two factors speak against such an assumption: the fact that the Council reaffirmed the continued application of the law of occupation to the CPA[67], and the fact that the Council failed to link the state-building tasks of the CPA to specific regulatory powers in the field[68], as is usually done in peacekeeping mandates through an authorization to take "all necessary measures to fulfil [this] mandate".[69]

This leaves some doubts as to whether all of the regulatory acts adopted by the CPA had sufficient authority under international law. One may question whether the lawmaking practice of the CPA in the field of economic liberalization fits under the umbrella of occupation authority.[70]

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[63] See UNMIK Regulation No. 2000/68 on Contracts for the Sale of Goods of 29 November 2000. The regulation superseded the previously applicable law. See Section 1, para. 2 of Regulation No. 2000/68.

[64] See UNMIK Regulation No. 2001/3 on Foreign Investment in Kosovo of 12 January 2001.

[65] See UNMIK Regulation No. 2001/5 on Pledges of 7 February 2001.

[66] See e.g. the preamble of CPA Order No. 2 on the Dissolution of Entities of 23 May 2003.

[67] See para. 13 of the preamble of SC Resolution 1483 (2003) and para. 1 of SC Resolution 1511 (2003).

[68] See para. 4 of SC Resolution 1483 (2003) ("calls upon").

[69] See e.g. para. 4 of SC Resolution 1272 (1999).

[70] The CPA adopted at least three regulatory acts which went beyond the restoration of basic conditions for public order. CPA Order No. 39 replaced the existing Iraqi law on foreign investment with new legislation which specified the terms and procedures for making foreign investments. See CPA Order No. 39 of 19 September 2003 (*Foreign Investment*). CPA Order No. 74 introduced a new interim law on securities markets, "recognizing that some of the regulations concerning securities markets under the prior regime are not well-suited to a modern, efficient, transparent and independently regulated securities market". See CPA Order No. 74 of 18 April 2004 (Interim Law on Securities Markets"). Further, CPA Order No. 83 amended Iraqi Copyright

Some of the acts adopted against former member of the Ba'ath Party remained controversial in legal terms.[71] Finally, it is questionable whether the law of occupation provides an occupying power with sufficient legal authority to establish the legal framework and the rules of operation of a Property Claims Commission, as envisaged in CPA Regulation No. 12.[72]

v. Lessons learned

At least, two lessons may be learnt from these four examples. Firstly, it is essential for the credibility and success of transitional administrations that their authority is clearly defined in the U.N. resolutions or contractual arrangements which form the constitutive instruments of the administration. Experience shows that it is ambiguous to leave the determination of competences and authority widely to the (self-) interpretation of international administrations. This uncertainty may render regulatory acts of transitional administrations vulnerable to challenge by domestic actors. Secondly, it should be examined more carefully to what extent international actors should be entitled at all to take decisions on behalf of local actors in the period of administration

2. Modalities of the abrogation of existing law

UNMIK, UNTAET and the CPA have used their normative powers not only to abrogate the existing law, but to place the administered territories under a new legal order. This methodology has raised various problems, both from the angle of authority and legal certainty.

In Kosovo and East Timor, the main problem was of a practical nature. UNMIK and UNTEAT failed to set up a clear hierarchy between the different sources of law.

a. Kosovo

UNMIK Regulation 2000/59 defined four sources of law applicable in Kosovo: (1) Regulations promulgated by the SRSG, (2) the law in force in Kosovo on 22 March 1989, (3) the law applied in Kosovo between 22 March 1989 and 12 December 1999 (the date Regulation 1999/24 came into force), provided that it is not discriminatory, and (4) internationally recognized human rights standards. Unfortunately, the precedence of these different bodies of law within the legal system of Kosovo remained unclear. Section 1.1 of Regulation 2000/59 stated that regulations "shall take precedence" over 1989 law, while adding that the law in force in Kosovo after 22 March 1989 must comply with the internationally recognized human rights standards listed in Section 1.3 of the Regulation. However, the hierarchy between the other sources of law remains unclear.[73] Importantly, the Regulation did not specify whether human rights law takes precedence over domestic laws or UNMIK regulations. Section 1.3 of Regulation 2000/59 merely stated that "in exercising their functions, all persons undertaking public duties or holding public office in

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Law No. 3 of 1971, in order to "ensure that Iraqi copyright law meets current internationally-recognized standards of protection and, and to incorporate the modern standards of the World Trade Organization into Iraqi law". See Section 1 of CPA Order No. 83.

[71] CPA Order No. 1 instituted blanket restrictions on access to employment in the public sector for former members of the Ba'ath Party which are difficult to reconcile with the right of citizens to hold public office under article 25 of the ICCPR.

[72] See CPA Regulation No. 12 of 23 June 2004 (*Iraqi Property Claims Commission*).

[73] See also the analysis of the Ombudsperson Institution in Special Report No. 2, paras. 9 et seq.

Kosovo shall observe internationally recognised human rights standards" as defined in the Regulation.[74] The SRSG was forced to set out the meaning of Section 1.3 of Regulation 1999/24 in a letter to the Belgrade Bar Association, confirming that human rights law takes precedence over the provisions of domestic law[75].

This shortcoming was critical in legal terms, because it gave rise to doubts as to the applicable law in the early phase of the administration, in particular the field of criminal law where the principle of specificity *('nullum crimen sine lege stricta'*) requires a particularly high standard of legal clarity. A satisfactory degree of legal clarity was only established in 2001 by the enactment of the Constitutional Framework for Provisional Self-Government, which stated in unequivocal terms that the "Provisional Institutions of Self-Government shall observe and ensure" the internationally recognized human rights and fundamental freedoms" set forth in Chapter 3 of the document.[76]

b. East Timor

UNTAET's regulatory practice was clearer in this respect.[77] It implied from the beginning of the mission that domestic authorities must act in conformity with the international human rights standards declared applicable by UNTAET.[78] However, a fundamental dispute arose in the aftermath of the UN presence as to whether Portuguese law or Indonesian law was the domestic

[74] See also the critical remarks by the Ombudsperson Institution noting that international human rights obligations "do not only attach to public officials in their official capacities, but to the institutions on behalf of whom they exercise their public functions". However, neither UNMIK Regulation 2000/59 nor any other law codify this principle of state responsibility. See para. 11 of Special Report No. 2.

[75] See OSCE, *The Criminal Justice System in Kosovo* (February-July 2000), 15, at http://www.osce.org/kosovo/documents.html?lsi=true&src=8&cat=11&limit=10&dt=18&type=18&pos=20.

[76] Chapter 9.4.11 of the Constitutional Framework authorized the Special Chamber of the Supreme Court to examine whether "any law adopted by the Assembly is incompatible with this Constitutional Framework*, including the international legal instruments specified in Chapter 3 on Human Rights*" (emphasis added).

[77] For a general analysis, see Erica Harper, United Nations Transitional Administration: Missions in State or Nation-Building?, in H. Fischer & N. Quénivet (eds.) *Post-Conflict Reconstruction: Nation- and/or State-Building* (2005), 33-52.

[78] Section 2 of UNTAET Regulation 1999/1 repeated the equivocal formula contained in UNMIK Regulation 2000/59 by providing that "all persons undertaking public duties or holding public office in East Timor shall observe internationally recognized human rights standards" listed in the Regulation. But Section 3.1 of Regulation 1999/1 provided some more clarity by stating that "[u]ntil replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 5 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2, the fulfilment of the mandate given to UNTEAT under United Nations Security Resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator." It followed therefore directly from the wording of the Regulation that all domestic laws must comply with UNTEAT regulations and the human rights standards declared applicable in East Timor by Section 2 of Regulation 1999/1.

law applicable under UNTAET Regulation No. 1/1999, in the light of status of East Timor prior to the UN administration.[79] Section 3.1 of the Regulation reads:

> Until replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 shall apply in East Timor insofar as they do not conflict with the standards referred to in section 2, the fulfilment of the mandate given to UNTAET under United Nations Security Council resolution 1272 (1999), or the present or any other regulation and directive issued by the Transitional Administrator.

During the period of the UN administration it was understood that the expression "the laws applied in East Timor prior to 25 October 1999 in Regulation 1999/1 meant Indonesian law.[80] This understanding was guided by practical concerns[81] and reflected in the practice of the UNTAET Serious Crimes Panels established under UNTAET Regulation No. 2000/15. However, this interpretation was later challenged by the newly restored East Timorese Court of Appeal[82], which found in a decision of 15 July 2003 that only Portuguese law was in force in East Timor on 24 October 1999.[83]

The Court held:

> [T]here are abundant legal arguments ruling out the interpretation that the 'the laws applied in East Timor prior to 25 October 1999' would be Indonesian law. East Timor was a Portuguese colony when it was invaded and occupied militarily by Indonesia in December 1975. As that invasion and occupation constituted a

[79] See generally Sylvia de Bertodano, East Timor – Justice Denied, *Journal of International Criminal Justice*, Vol. 2 (2004), 910.

[80] Courts in East Timor applied Indonesian Law as the subsidiary law of East Timor.

[81] UNTAET's former Legal Advisor noted in 2001: "By Regulation No. 1999/1, UNTAET had, in effect decided that the laws which applied in East Timor prior to the adoption of Security Council Resolution 1272 (i.e. the Indonesian laws) would apply *mutatis mutandis*, in so far as they were consistent with internationally recognized human rights standards, and in so far as they did not conflict with the mandate given to the mission by the Security Council, or with any other subsequent regulation promulgated by the mission. The decision was made solely for practical reasons: first, to avoid a legal vacuum in the initial phase of the transitional administration, and second to avoid a situation in which local lawyers, virtually all of whom had obtained their law degree at domestic universities, had to be introduced to an entirely foreign legal system". See H.-J. Strohmeyer, Policing the Peace: Post-Conflict Judicial Reconstruction in East Timor, *University of South Wales Law Journal*, Vol. 24 (2001), 171, at 173-174.

[82] UNTAET Regulation No. 1/1999 is still relevant under East Timorese law following to the attainment of independence, because Section 165 of the Constitution of the Democratic Republic of Timor-Leste provides that "the laws and regulations in force in East Timor shall continue to be applicable to all matters except to the extent that they are inconsistent with the Constitution or the principles contained therein".

[83] See Court of Appeal*, Prosecutor v. Armando Dos Santos*, Case No. 16/2001, Decision of 15 July 2003, at http://jsmp.minihub.org.

> violation of international law, the United Nations never recognized that military occupation and, over the whole period of occupation, kept on classifying East Timor as a non-autonomous territory of Portugal. The Timorese people did not accept the military occupation by Indonesia and fought for 24 years until they got rid of it and saw their independence recognised by the international community. Therefore, from a legal viewpoint, the Indonesian administration, as well as Indonesian law, has never been validly in force in the territory of East Timor […]

In issuing Regulation 1999/1, UNTAET could not ignore that the Indonesian administration, as well as Indonesian law, has never been validly in force in the territory of East Timor, because the Indonesian occupation was in breach of international law….[I]f UNTAET really wanted to apply Indonesian law in East Timor, it would have said so explicitly; and if it did not do so, it was because UNTAET did not want to subject to Indonesian law the territory and the people they had just liberated from the Indonesian yoke and were now under UN administration".

The Court concluded that, in accordance with international law, the reference to the "laws applied in East Timor prior to 25 October 1999" could only mean Portuguese law.

The reasoning of the Court of Appeal is open to challenge in legal terms. The fact that UNTAET did not expressly mention Indonesian law in Regulation 1999/1 does not mean that it did not refer to it. Moreover the fact alone that the Indonesian occupation in 1975 was unlawful[84] does not rule out that the possibility that Indonesian law could be applied on an interim basis as the applicable law by the UN administration. One may therefore very well argue that UNTEAT had the authority to treat Indonesian law as the law applicable under its administering mandate, even if it was for functional purposes only.[85]

Nevertheless, the ongoing dispute as to the interpretation and validity of UNTAET's approach sends a clear message that a lack of clarity in sensitive areas, such as the definition of the applicable in the administered territory, may be a risky undertaking in situations of transition. The decision of the Court of Appeal in *Armando Dos Santos* caused confusion about the applicable law in East Timor and called into question previous convictions pronounced by the Special Crimes Panels on the basis of Indonesian law.[86] Moreover, the *Armando Dos Santos* incident raises the question, whether UNTAET should have been entrusted with the authority to decide about matters of public policy, such as the continued application of Indonesian law.

B. Legitimacy Problems

[84] It should be noted that the East Timor Parliament passed a Law on the Juridical Regime of Real Estate on 10 March 2003, the preamble of which calls the Indonesian occupation as illegal ("illegal occupation of the Maubere Motherland by foreign powers").

[85] See also para. 7 of the Dissenting Opinion by Judge Jacinta Correira da Costa in *The Prosecutor v. Augustinho da Costa*, Case No. 3/2003 of 18 July 2003, at http://jsmp.minihub.org; Special Panel for Serious Crimes, *Prosecutor v. Joao Sarmento Domingos Mendonca*, Case No. 18a/2001, Decision on the defense motion for the Court to order the Public Prosecutor to amend the indictment, 24 July 2003, at 10-13, at http://jsmp.minihub.org.

[86] See De Bertodano, *supra* note 78, at 922 ("The result is that the whole structure of law in East Timor has been thrown into a state of uncertainty").

These problems coincide with broader concerns about the legitimacy of transitional administrations. There are, at least, two substantial challenges which impair the authority of international authorities: a neutrality challenge and a democratic challenge.

1. The neutrality challenge

Impartiality is at the very essence of UN peacekeeping and transitional administration. International authorities are bestowed with governing powers in situations of transition, because they are supposedly more neutral and detached from the morass of local conflict and politics and therefore better equipped to exercise functions of public authority in situations of transition. This justification is, however, difficult to maintain in situations when the international institutions effectively become the "the state organs" of the administered territory, such as in Kosovo, East Timor or Iraq. It is questionable whether one may still attribute the labels of neutrality or impartiality to international entities, which have the mandate to run the internal affairs of a territory. The requirement of neutrality appears to collide in these cases with the responsibilities of the administration as an internal organ of the territory under administration.

2. The democratic challenge

The problem of (im-)partiality goes hand in hand with another problem of transitional administration: the lack of democratic legitimacy of transitional administrations. International administering institutions are usually neither elected or appointed by local representatives, nor formally accountable to the authorities of the administered territories. This deficit raises a legitimacy problem in the process of judicial reconstruction. The fundamental question of all undertakings in international territorial administration is to what extent international actors are entitled to take decisions on behalf of local actors in the period of administration.

A case for international authority may be made in cases of state collapse and in post-conflict situations, where international authorities enjoy special functional legitimacy, due to their formal impartiality, their expertise in special areas of reconstruction (election monitoring, policing, and refugee return) and their contribution to a sharing of the financial burdens of war. Nevertheless, an ultra-liberal critique of transitional administration would hold that international administrators should not intervene in core areas of state-building, such as democratization and judicial reconstruction, because domestic actors have right to make their own mistakes and to learn from them.[87]

3. Preservation of legal culture

Finally, the involvement of international administrations in the project of lawmaking creates tensions with respect to the preservation of local cultures and traditions. Lessons from colonial practice appear to suggest that international administrations should foster domestic institution-building and empower local authorities to make lawmaking choices instead of "parachuting" pre-conceived "package" solutions into the domestic legal system.[88].

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[87] See in the context of decisions on criminal justice, A.-M. Slaughter, *Not the Court of First Resort*, Editorial, Washington Post, 21 December 2003, at http://www. npjw.org.

[88] Less critical CASIN, *Administration and Governance in Kosovo: Lessons Learned and Lessons to be Learned*, at 18 ("The preferable solution would be a United Nations Criminal

It is questionable whether the development of a standard UN Criminal Code or a standard UN administrative Code[89] may serve as a useful model to address legal vacuums and problems of lawmaking in societies in transition.[90] 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 to address the particularities and culture differences which are inherent in any domestic system.[91]

3. Lessons Learned

Both, the experiences of international governance missions in the last decades and the practice of the CPA in Iraq highlight the need to revisit some of the methodologies deployed in international practice.

A. Fostering Consent

A clearer distinction should be drawn among the different juridical frameworks under which choices of law reform are made. Large scale modifications of the existing law, including changes in the hierarchy of norms and the incorporation of entirely new treaty systems into the domestic realm, should, if at all, only be introduced on the basis of a clear Security Council mandate or with domestic consent. Occupation-based frameworks, by contrast, do not lend themselves particularly well to comprehensive undertakings in statebuilding. Future operations should, in particular, avoid the pitfalls of the CPA, which transposed UNMIK's and UNTAET's law reform agenda to the practice Iraq, without paying adequate attention to the compatibility of such a methodology with the status as occupying powers.

Code and a United Nations Administrative Code, which could be applied whenever the United Nations is supposed to conduct the administration of a territory").

[89] Such an approach is suggested by the *Report of the Panel on United Nations Peace Operations* (Brahimi Report), UN Doc. A/55/305-S/2000/809, 21 August 2000, paras. 80-83.

[90] See also the criticism voiced in the Report of the Secretary-General on the implementation of the report of the Panel on United Nations peace operations of 20 October 2000, UN. Doc. A/55/502, para. 31 ("The [UN] working group's initial review concluded that the rebuilding of a legal system, or a sector thereof, and the promulgation of substantive rules of criminal law would be a long-term exercise. It requires extensive participation and training of the local judiciary and legal communities concerned, which will ultimately bear the burden of applying the law. The group doubted whether it would be practical, or even desirable given the diversity of country specific legal traditions, for the Secretariat to elaborate a model criminal code, whether worldwide, regional, or civil or common-law based, for use by future transitional administration missions").

[91] It is oversimplistic to claim that "where no law exists, a UN 'off the shelf' criminal law and criminal procedure is essential in any peace maintenance arsenal". But see M. Plunkett, Re-establishing Law and Order in Peace Maintenance, in *The Politics of Peace Maintenance* (J. Chopra, ed. 1998), 61, at 69. It is quite telling that even supporters of a model code of criminal justice for scenarios of transition are divided over its contents. While some advocates favour a merely criminal law and procedure based approach, others support a complementary role for human rights standards.

B. Taking Functional Duality Seriously

Secondly, the nature of authority exercised by international administrations should be re-assessed. Not all acts of international administrations are exclusively international in nature. International governance or co-governance missions may act in a dual function when exercising regulatory authority, namely as international authorities on the one hand, and as internationally appointed representatives of national institutions during interim period of administration on the other.[92] Regulatory acts of these international administrations may be both: acts of an international character and domestic acts of the territory under international administration.[93]

The concept of "functional duality"[94] may be developed into a more systematic tool to overcome the artificial conception of international administrators as extraneous actors in the exercise of international territorial authority, without compromising their status as separate legal persons or independent actors on the international plane.

The criteria of the 'functional duality' are most likely met in the context of internationalized states, where international actors exercise governing powers within the framework of an existing and well defined municipal system. Such conditions existed, in particular, in Cambodia and Bosnia and Herzegovina, including the Municipality of the City of Mostar[95], where international administrators acted as public authorities within an internationalized constitutional system determined by multilateral treaty arrangements.[96]

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[92] See specifically in relation to the UN Council for Namibia, Schermers, *supra* note 37, at 89; E. Osieke, Admission to Membership in International Organizations: The Case of Namibia*, British Yearbook of International Law* (1980), at 193.

[93] They acquire domestic character when they become part of the internal legal system of the administered territory. See generally M. Bothe & T. Marauhn*,* UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council Mandated Trusteeship Administration*,* in. C. Tomuschat (ed.), *Kosovo and the International Community* (2002), at 229 ("Thus, on the whole, the UN administration of both territories is of a dual nature: the Special Representatives, UNMIK and UNTAET are not only acting as organs of the UN, but at the same time they are also acting as organs of the territories concerned").

[94] See generally R. Wilde, The Complex Role of the Legal Adviser When International Organizations Administer Territory, American Society of International Law*, Proceedings of the 95th Annual Meeting* (2001), 251, at 254-255; *id*., International Territorial administration and human rights, in N. White & D. Klaasen (eds.), *The UN, human rights and post-conflict situations* (2005), 149, at 169-172; *id*. The Accountability of International Organizations and the Concept of 'Functional Duality', in W. P. Heere (ed.), *From Government to Governance*, Proceedings of the Sixth Hague Joint Conference (2004), 164, at 167.

[95] Article 8 of the Memorandum of Understanding on the European Union Administration of Mostar provided that that the "EU Administrator will apply the Constitution of the Federation of Bosnia and Herzegovina in conformity with Chapter IX, Article 10 this Constitution". Article 11 of the Memorandum of Understanding added that "Courts set up in the Mostar city municipality in conformity with the Constitution, will rest fully independent in performing their adjudicative tasks on the basis of the applicable law, including regulations issues by the EU Administrator".

[96] See Annex IV of the Dayton Peace Agreement and Annex 1 of the Agreement on the Political Settlement of the Cambodian Conflict.

Yet, applicability of the principle of "functional duality" is not confined to these cases. The concept may also be applied in situations in which international authorities frame the contours and structures of a domestic system through their regulatory activity. Functional duality may in this context serve as a model to ensure compliance by transitional administrations with the norms and standards which have been declared applicable by them to public authorities acting within the territory under administration. Domestic courts may hold that international administrations are not exempted from, but are required to comply with general governmental and human rights standards declared applicable to the territory as a whole in cases in which international authorities act in a capacity as domestic or surrogate domestic authorities. The "constitutional" parameters of the domestic legal system are in these cases defined by specific international legal acts which define the norms applicable in the territory. "Functional duality" ensures that both the acts of domestic authorities and individual acts taken by international administrators as a public authority of the territory under administration are, in principle, subject to objective standards of governance in the exercise of domestic authority.

This variation of "functional duality" may come into play in scenarios like Kosovo and East Timor, where UN transitional administrations shape both the normative system of the respective territories and their identity as legal entities on the international level. In both situations, competent domestic courts could have potentially invoked the concept of "functional duality" in order to determine whether specific regulatory acts of the UN administrations or public agencies created by them conform to the norms declared applicable in the Regulations on the law applicable in Kosovo and East Timor.

Finally, the concept of "functional duality" may be invoked to exercise control over the acts of specific multinational administrations which enjoy a legal personality separate from the states composing it, and which do not merely act as classical occupying powers, but as entities entitled to exercise general executive and lawmaking functions on behalf of local actors. The CPA may serve as an example here.[97] The Authority enjoyed a separate legal identity as multinational administering institution. Furthermore, it exercised a governance mandate which encompassed the responsibility to promote the "welfare of the Iraqi people through the effective administration of the territory"[98]. The concept of "functional duality" could have been used in this context to examine whether acts adopted by the authority in the exercise of regulatory authority on behalf domestic institutions[99] are consistent with the substantive law applicable in Iraq at the time of the administration.[100]

C. Moderation in Lawmaking

Finally, there is a need to rethink whether there are some sectors of public policy in which international administrations should not intervene at all. One may have some doubts whether the grand strategic decisions of a post-conflict society, including decisions over the prosecution of past atrocities and property restitution, should be ultimately made by a decision of international administrations, such as in Kosovo and East Timor, where UN transitional administrators

[97] Concurring De Wet*, supra* note 27, at 331.
[98] See para. 4 of SC Res. 1483 (2003).
[99] See Section 1.2 of CPA Order No. 1.
[100] See on the definition of the applicable law by the CPA, Section 2 of CPA Regulation No. 1.

determined the essential features of criminal adjudication,[101] restitution[102] and reconciliation[103] by way of legislation.

International administrations have approached this problem in a very formal manner, by limiting the scope of application of UN regulations until they are repealed by domestic institutions at the end of the period of administration.[104] Reality is, however, far more subtle. International legislation usually gains recognition and acceptance just through institutional routine and practice under transitional administration. If one takes local ownership seriously, the hard question is whether transitional administration should at all be entitled to adopt legal acts with a long-term, and possibly irreversible, impact on the domestic population, such as the introduction of a liberal market economy in territories under transition, or changes in criminal law and criminal procedure which lead to final convictions.[105]

1. A focus on institution-building

A key to state-building may lie in institution-building rather than in comprehensive lawmaking. This point was highlighted by *Paris*, who recommended a strategy of "Institutionalization before Liberalization" in international peace-building, noting that:

> [w]hat is needed, in the immediate post-conflict period is not quick elections, democratic ferment, or economic 'shock therapy' but a more controlled and

[101] See UNMIK Regulation No. 64/2000 (*On assignment of International Judges/Prosecutors and/or change of venue*), 15 December 2000; UNTAET Regulation No. 15/2000 (*Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*), 6 June 2000 ; UNTAET Regulation No. 16/2000 (*Organisation of the Public Prosecution Service in East Timor*), 6 June 2000.

[102] See UNMIK Regulation No. 23/1999 (*On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission*), Section 2.7 and UNMIK Regulation No. 60/2000,(*On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission*), Section 3.1.

[103] See UNTAET Regulation No. 10/2001 (*Establishment of a Commission for Reception, Truth and Reconciliation in East Timor*), 13 July 2001. For a survey, see C. Stahn, Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor, *American Journal of International Law*, Vol. 95 (2002), 952.

[104] See UNMIK Regulation No. 1/1999, Section 4 and UNTAET Regulation No. 1/1999, Section 4.

[105] See also Boutros Boutros-Ghali, *Agenda for Democratization*, Supplement to Reports A/50/332 and A/51/512 on Democratization, 17 December 1996, para. 10 ("While democracy can and should be assimilated by all cultures and traditions, it is not for the United Nations to offer a model of democratization or democracy or to promote democracy in a specific case. Indeed, to do so could be counter-productive to the process of democratization which, in order to take root and to flourish, must derive from the society itself. Each society must be able to choose the form, pace and character of its democratization process. Imposition of foreign models not only contravenes the Charter Principle of non-intervention in internal affairs, it may also generate resentment among both the Government and the public, which may in turn feed internal forces inimical to democratization and to the idea of democracy").

gradual approach to liberalization, combined with the immediate building of governmental institutions that can manage these political and economic reforms.[106]

Experiences like the *Armando Dos Santos* ruling in East Timor suggest that it may indeed be beneficial to concentrate legal reform on the building of reliable domestic institutions, including through partial institutional internationalization, before decreeing vast changes in the applicable law.

Except in the case of obvious injustices (e.g. ethnic discrimination) or gaps in the law, the introduction of new legal norms and structures does not offer quick answers to societal divisions. In the future, additional questions should be posed. It should be examined more closely whether it is necessary for international administrations to amend the applicable law, and whether this should be done at the beginning of the administration or after the establishment of the first domestic institutions.

2. Towards a fundamental questions doctrine in international territorial administration

Moreover, one may argue that fundamental decisions, which affect the domestic identity, the architecture of the local legal system or market liberalization should be taken by representative domestic institutions themselves. International administrations should therefore prioritize the establishment of domestic structures and local security, police and judicial institutions in their regulatory conduct. They should consider whether targeted law reform of specific sectors (e.g. the criminal justice system) may produce better results than a wholesale reform of the applicable law in the territory. Furthermore, they should try to view their own role in law and market reform primarily as advisory, or balancing in nature. In particular, far-reaching reforms of the political and economic system should not necessarily be imposed by international administrations in the immediate post-conflict phase. They should rather be managed by newly established domestic institutions or mixed national-international organs, acting in concert with international administrations.

Such a call for moderation is not only in line with legal limitations arising from the principle of self-determination and the laws of occupation, but also a reflection of recent acknowledgments in the UN practice[107].

A practical way to implement this policy in practice was highlighted by the Memorandum of Understanding on the EU Administration of Mostar, which obliged the EUAM to exercise its authority in conformity with the "overall principle of subsidiarity", taking "due account of the views and wishes of the local parties and population".[108] This principle merits further attention in other contexts, because it would compel international administrations to examine *ex ante* whether the policy goals of lawmaking may be achieved in an equivalent or a more effective fashion through regulatory action by domestic institutions.

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[106] See R. Paris, *At War's End – Building Peace After Civil Conflict* (2004).

[107] See the report of the Secretary-General on *"The rule of law and transitional justice in conflict and post-conflict societies*", which acknowledges that "ultimately, no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable" while emphasizing that "[t]he role of the United Nations and the international community should be solidarity, not substitution".

[108] See Article 7 (1) of the Memorandum of Understanding on the EU Administration of Mostar.