Post-Colonial Governments of Leading Strings:
The Legitimacy and Accountability of International Transitional Administrations

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Abstract:

International Transitional Administrations (ITAs) are a relatively new phenomenon, whereby the United Nations takes over the running of a state and effectively acts as sovereign, until self-governance is deemed possible. The aims and underlying philosophy of such projects bear striking similarities to the stated intentions of certain nineteenth-century colonialist ventures, termed "governments of leading strings" by John Stuart Mill.

Despite the fact that such interventions are carried out under the mantle of creating sustainable democracy and protecting human rights, transitional administrations are themselves far from democratic, and recent experience shows that their record regarding conformity to human rights standards and the rule of law, particularly as regards providing sufficient standards of accountability, leaves much to be desired.

This paper therefore seeks to determine whether ITA is legitimate as an institution and to analyse its shortcomings, regarding legitimacy and accountability. Topics addressed include: the recent history of ITAs and their precedents; their legitimacy, and the purposes for which they should apply their powers; the legal framework within which ITAs operate; whether ITAs conform to existing norms of public international law; accountability mechanisms existing within ITAs; the record of ITAs regarding their usage of powers; and issues of consultation, ownership and transfer of powers. Finally, some concrete suggestions are offered as to how the inherent democratic deficit of ITAs may be mitigated in present and future missions.

INTRODUCTION

> *"A despotism, which may tame the savage, will … only confirm the slaves in their incapacities. Yet a government under their own control would be entirely unmanageable by them. Their improvement cannot come from themselves, but must be superinduced from without. … They have to be taught self-government, and this, in its initial stage, means the capacity to act on general instructions. What they require is not a government of force, but one of guidance. Being, however, in too low a state to yield to the guidance of any but those to whom they look up as the possessors of force, the sort of government fittest for them is one which possesses force, but seldom uses it: a parental despotism or aristocracy … This, which may be termed the government of leading-strings, seems to be the one required to carry such a people the most rapidly through the next necessary step in social progress... I need scarcely remark that leading-strings are only admissible as a means of gradually training the people to walk alone."*[1]

In the above extract the nineteenth century political philosopher John Stuart Mill, outlines the philosophy which in his view legitimated the colonialist ventures of the age, such as those conducted by his employer the British East India Company; yet he could very well be describing modern international transitional administrations (ITAs). Although the language he employs would today be seen as crude to the point of insulting, the underlying premises and assumptions remain the same. In this sense the twentieth century has seen a remarkable transformation, as the perception of foreign rule imposed from the outside has been progressively discredited until finally being re-legitimated, in its closing years, under the new guise of ITA.

ITAs, although not entirely without precedent, are a recent phenomenon in which the international community, in the form of the United Nations (UN), temporarily takes over the governance of a country for the purposes of preparing that state, its peoples and institutions, for self-governance. Absent the legitimacy conferred by democratic elections or many of the accountability mechanisms normally to be found in functioning democracies, this has necessarily resulted in a "benevolent despotism"[2], comparable to Mill's "governments of leading strings" described above. Given that many other commentators have found that "the similarities of style and substance are

[1] John Stuart Mill, Considerations on Representative Government, 1861, Chapter II.
[2] Sergio Vieira de Mello, in Jarat Chopra, *The UN's Kingdom of East Timor*, «Survival»,vol.42, 2000,p.35.

astonishing"[3], when comparing the ambitions, underlying philosophy and methods employed by both today's international governors and nineteenth century colonialists, it is perhaps surprising that this shift in attitude towards externally-imposed rule has received so little attention. However, it has not gone entirely unnoticed and the few academics who address this subject have generally come to the same conclusion: that "ITA is protection and colonialism in a new guise … It enables the same underlying process without attracting the opprobrium that the foreign state administration model, especially in the colonial context, came to attract in the twentieth century."[4]

Although the UN, and the League of Nations before it, has on occasion in the past taken on executive powers within a state, or a portion of a state, the recent examples of the UN Mission in Kosovo (UNMIK), the UN Transitional Administration in East Timor (UNTAET) and, to a lesser extent, the Office of the High Representative (OHR) in Bosnia, jointly represent a remarkable development whereby the UN has allocated to itself unprecedented powers, comparable even with those of "a pre-constitutional monarch in a sovereign kingdom"[5]. Further missions with more circumscribed mandates and on a lesser scale were established during the same period for the region of Eastern Slavonia in Croatia (UNTAES) and the administration of the city of Mostar in Bosnia and Herzegovina by the European Union (EUAM). However, this approach of creating "surrogate states"[6] was notably abandoned in the creation of the UN Assistance Mission to Afghanistan (UNAMA), in which the UN plays only an advisory role to a quasi-legitimately appointed domestic administration. This so-called "light-footprint" approach, due to its significantly reduced financial burden and the fact of less controversy regarding its legitimacy, represents for many the future of UN state-building, although others assert that such a model would not be appropriate for all situations or that increased legitimacy in the early stages is won at the expense of decreased sustainability over the long-run and respect for human rights and the rule of law.

[3] Gerald Knaus, Felix Martin, *Lessons from Bosnia and Herzegovina: Travails of the European Raj*, «Journal of Democracy»,vol.14, no.3, 2003,p.62.
[4] Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, «American Journal of International Law»,vol.95, 2001,p.602.
[5] Jarat Chopra, *The UN's Kingdom of East Timor*, «Survival»,vol.42, 2000,p.28.
[6] Ombudsperson Institution in Kosovo, Third Annual Report, 2002–2003, p.3.

In the absence of the legitimacy conferred by elections, which constitute the primary accountability mechanism in democratic states, it would perhaps be presumed that other accountability mechanisms would be made stronger to counteract this inevitable democratic deficit, so as to ensure that the executive does not deviate too far from the will of the people or infringe the rule of law. Seemingly, however, the reverse has been true. There is considerable uncertainty about the standards to which ITAs are, or should be, bound, including even the most basic human rights norms, and oversight at both the international and national level is at best lax, at worst non-existent. Such concerns become ever more relevant when one considers that it is likely that ITAs, so far characterised by a reactionary and ad hoc development, may become a "permanent or recurrent feature of international life"[7].

Although this outcome is by no means inevitable, and many contend that recent examples of ITA, especially in light of the Afghan experience, will rather "come to represent the high-water mark of UN peace operations"[8] and "a historic anomaly in the manuals of past UN peacekeeping operations"[9], such debates on the future of ITA tend to focus on the efficacy or financial viability of this institution, rather than the arguably equally important issue of its legitimacy. Fundamental to their legitimacy is the accountability of ITAs and thus it is the purpose of this paper to examine from this, so far little-explored, viewpoint whether ITAs are an appropriate tool of the international community and, if so, how they may be made to be more accountable and therefore more legitimate.

To this end the second half of this chapter will outline the recent history of ITAs and their precedents, while the following chapter will address the issue of their legitimacy, and the purposes for which they should apply their powers. Chapter 3 will deal with the legal framework within which ITAs operate; whether their very existence conforms to existing norms of public international law and whether that legal regime imposes any limitations upon them, such as a duty to respect human rights, humanitarian law or the law of occupation. Chapter 4 will examine accountability

[7] Edward Mortimer, *International Administration of War-Torn Societies*, «Global Governance», vol.10, 2004,p.12.
[8] *State Building and the United Nations*, «Strategic Survey», 2002/3,p.60.
[9] Paulo Gorjao, *The Legacy and Lessons of the United Nations Transitional Administration in East Timor*, «Contemporary Southeast Asia», vol.24, 2002,p.333.

mechanisms existing within ITAs and their adequacy for guarding against abuse of power and conformity to the rule of law. Chapter 5 will then consider the record of ITAs regarding their usage of powers and the practical implications of the lack of appropriate safeguards and accountability. Chapter 6 will examine the issues of consultation, ownership and transfer of powers to determine the extent of local input into ITAs, bearing in mind that a satisfactory fulfilment of all these criteria is essential in decreasing the legitimacy deficit inherent in ITAs. Finally, Chapter 7 will present the findings of the previous chapters in the form of concrete recommendations aimed at making future and present ITAs more legitimate and more accountable.

The first examples of international administration of territory date from the period of the League of Nations, which played a limited supervisory role in the administration of certain colonial territories through its system of mandates and also directly administered the Free City of Danzig between 1920 and 1939, and more extensively the Saarland from 1920 to 1935, which may be the only historical example that comes close to rivalling current transitional administrations in terms of the extent of power and responsibility exercised by international agents in local executive, legislative and judicial affairs[10]. The League also briefly administered the town and district of Leticia from 1933 to 1934 on behalf of the Government of Colombia and played a further, albeit limited, role in the Upper Silesia Mixed Commission in 1922 and the Memel harbour board in Lithuania in 1924 by appointing the Presidents of these boards. Proposals were also put forward for League governance of Fiume in Dalmatia (in 1919), Memel (between 1921 and 1923) and Alexandretta in Syria (in 1937) but these projects were never realised[11].

Despite these tentative efforts at international administration under the League of Nations, under its successor organisation, the UN, it originally appeared unlikely that ITA would develop into a permanent feature of the international agenda due to the strict provisions of the UN Charter, which seemingly restricted the UN power of direct administration to those territories within the trusteeships system; a provision

[10] Richard Caplan, *International Authority and State Building: the Case of Bosnia and Herzegovina*, «Global Governance»,vol.10, 2004,p.54.
[11] Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, «American Journal of International Law»,vol.95, 2001,p.586.

which has never been applied[12]. The trusteeships system, governed by the Trusteeships Council, was primarily intended to monitor the governing of the former colonies of the defeated States of the Second World War and the mandated territories of the League of Nations, yet the role of the UN under this regime only amounted in practice to very general supervision falling far short of actual governance. However, a creative interpretation of the UN Charter led to the development of the power to administer territory outside of the trusteeships system, originally as a power of recommendation reliant on the consent of the parties under Chapter VI, and later as an added tool in the inventory of legally binding Chapter VII measures (which form the basis for today's transitional administrations).

Although later developments opened the door to an extensive UN usage of ITAs many of its early agreed-upon projects were frustrated due to factors such as Security Council inability to reach agreement in the performance of its powers (for instance on the appointment of a governor for Trieste from 1947 to 1954), the intransigence of a pre-existing occupying power (South Africa in Namibia in 1967 and Morocco in Western Sahara from 1991) or the fact of subsequent events rendering an international protectorate no longer necessary (such as the elaboration of a constitution for Libya in 1950, which effectively completed its transition to independence). In other cases international territorial administrations were proposed but agreement was never reached such as for Jerusalem since 1947 and Sarajevo in 1994.

The first instance of the UN directly exercising executive power within a sovereign State was in the Congo between 1960 and 1964[13]. The presence of the UN peacekeeping operation, United Nations Operation in the Congo (ONUC), was at the agreement of the Congolese government but its subsequent expansion and use of executive authority at times directly contravened the wishes of the government, representing an important evolution both in terms of peacekeeping and international territorial administration[14]. The only other Cold War example of UN exercise of executive powers is its seven month stewardship of Irian Jaya (Western New Guinea)

[12] Article 81, UN Charter.
[13] See Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, «American Journal of International Law», vol.95, 2001,p.586.
[14] *Idem*,*p*.592, also Steven Ratner, *The New UN Peacekeeping*, MacMillan Press, 1997,p.38.

from 1962 to 1963, preparing its transition from Dutch to Indonesian rule and basing its powers on an agreement between these two States[15].

Almost three decades then elapsed before the "first major UN exercise in governance"[16]: the establishment of the UN Transitional Authority in Cambodia (UNTAC) in 1992. This operation differed in several ways from the more recent examples that form the focus of this paper, in that it was mandated under Chapter VI, so only possessed advisory powers and was thus subordinate to Cambodian authorities, which at the time consisted of a Supreme National Council, established by the Paris peace agreement and comprising the four Cambodian factions. Nevertheless the UN exercised substantial powers, delegated to it by the Supreme National Council, directly controlling important Cambodian agencies (notably foreign affairs, national defence, finance, public security and information), supervising others and possessing investigative powers over yet more agencies. Another essential distinction between this and future missions was its concentration on a single objective as an exit strategy, namely the organisation of free and fair elections, rather than the wider mandates that current ITAs have bestowed upon themselves.

On several further occasions in the early 1990s the UN exercised executive authority, such as in Somalia (1993) and Haiti (1994), with varying degrees of success, but in neither of these missions did it attempt to effectively govern the territories. Some commentators would also include the administration of refugee camps by the UN High Commissioner for Refugees (UNHCR) and the operation of material assistance programmes by international organisations in various territories, as modern examples of at least partial international territorial governance[17].

However, although the cases mentioned above have involved the UN exercising executive authority, even at times contrary to the wishes of national institutions, it was only with the undertakings of the latter half of the 1990s, and since, that the UN has delegated to itself unprecedented authority rivalling that of an independent state,

[15] Agreement Concerning West New Guinea (West Irian), Aug. 15, 1962, Indon-Neth.
[16] Michael Matheson, *United Nations Governance of Post-Conflict Societies*, «American Journal of International Law»,vol.95, 2001, p.77.
[17] Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, «American Journal of International Law»,vol.95, 2001,p.583.

yet without many of the democratic safeguards that citizens of such a state should theoretically enjoy. Consequently it is these missions in which questions of accountability and legitimacy are the most pressing, and which will therefore form the focus of this paper.

The break-up of the Federal Republic of Yugoslavia (FRY) set the scene for the first real experiments in UN governance; starting with the establishment of the relatively small-scale administrations of UNTAES in Eastern Slavonia in Croatia in 1996, and the EUAM in the town of Mostar in Bosnia and Herzegovina (BiH) in 1994, each for a fixed-term duration of two years. The administration of the Bosnian district of Brcko was also subjected to international oversight from 1997 onwards under the International Supervisory Regime (appointed by the OHR and originally enjoying wider powers than its parent body). The purpose of these three regimes was to facilitate ethnic reconciliation and peaceful reintegration following the Balkans conflict, and all three missions were set up on a consensual basis with the agreement of the parties, and enjoyed limited executive, but not legislative or judicial, powers.

The Bosnian OHR was established in 1995 to monitor the implementation of the Dayton Peace Accords in BiH, and although the role was one of supervision rather than governance the extent of the powers of the OHR were originally unclear; indeed "the very existence of governmental powers only became clear when they were used for the first time"[18]. Faced with an unwillingness on all sides (Bosniac, Croat and Serb) to work within the structures established by the Dayton accords the OHR has adopted a progressively more pro-active approach in the discharge of this office's responsibility to oversee the implementation of the peace accords, and the power to exercise executive authority in the fulfilment of this task, which was not expressly conferred in the Dayton accords, was confirmed by the Peace Implementation Council (PIC) in December 1997. The constantly-increasing use of these powers for ever-more diffuse purposes has had the effect of transforming the OHR from a merely supervisory body into something more closely resembling an international governor.

[18] *Idem*, p.600.

However, it is the final Balkans example, that of UNMIK in Kosovo, which in an unprecedented "move into uncharted territory"[19] created the first territory that may be likened to a fully UN-administered state. Although, pending final status negotiations, sovereignty over Kosovo technically rests with Serbia, for all practical purposes the UN is sovereign. Following the withdrawal of Serbian forces from Kosovo as a result of the NATO bombing campaign in 1999 the territory was left with a complete institutional vacuum, which the UN mission moved quickly to fill, taking over the direct administration of all governmental functions, whilst domestic institutions were created, with care taken not to prejudge the final status of the territory.

Whilst the creation of UNMIK was viewed by most members of the UN Secretariat and Member States alike as a one-off exception, this view was quickly dispelled with the creation less than five months later of UNTAET in East Timor. The territory of East Timor, a former Portuguese colony, had been ruled by Indonesia since 1975 but Indonesian sovereignty remained contested and had been accepted by very few states. Following a UN-sponsored referendum on independence in which the Timorese voted overwhelmingly to secede from Indonesia, pro-integration militia backed by the Indonesian military conducted an intense campaign of violence, displacing the vast majority of the population, which only came to an end with the introduction of an Australian-led force of peacekeepers in 1999. As with Kosovo, the UN faced in East Timor "the massive destruction of infrastructure, more than 250,000 refugees, a high death toll, and a political power vacuum"[20]. The solution was once again deemed to be the creation of an ITA. In May 2002, almost three years after its creation, UNTAET was transformed into an assistance mission and sovereignty officially handed over to the nascent East Timorese authorities.

Despite a largely successful transition to independence in East Timor the defeat of the Taliban in Afghanistan in 2001 and the subsequent creation of UNAMA heralded a return to a minimalist approach to UN state-building. The choice to opt for an assistance mission, with the territory being governed by an administration locally appointed through a semi-democratic process, the *Loya Jirga*, rather than an ITA

[19] Alexandros Yannis, *The UN as Government in Kosovo*, «Global Governance»,vol.10, 2004,p.67.
[20] Paulo Gorjao, *The Legacy and Lessons of the United Nations Transitional Administration in East Timor*, «Contemporary Southeast Asia», vol.24, 2002,p.315.

possessing executive authority, was the result of a combination of factors, such as budgeting constraints and an assumption that the UN would be able to make progress in pushing its international agenda through "exercising greater than normal political influence"[21] played out behind the scenes. Proponents of this model argue that through increased local ownership of the reconstruction of the state the resulting Afghan institutions will ultimately prove to be more self-sustainable, yet others argue that greater progress on issues such as human and minority rights and the rule of law could be achieved were the UN to possess greater authority. Although the jury of world opinion is still undecided on the effectiveness of this model, as opposed to those of East Timor and Kosovo or the Bosnian OHR, it is clear that from a financial point of view, often the deciding factor, the Afghan example is likely to be far more attractive to donors.

The last ten years have therefore seen a remarkable, and not entirely linear, succession of developments in the evolution of the powers of ITAs. As it is far from clear what the next ten years may bring, and it is naïve to assume that the international community will never again be faced with situations such as those outlined above, questions of the legitimacy and accountability of ITAs deserve to be examined as a matter of priority. As noted in a recent Civitas report "past failures make it inexcusable to approach each crisis as an *ad hoc* event, which as if one would never occur again need not be dealt with systematically or even particularly well. The primary emphasis in responsible foreign and defence policy for the next two decades must be ***to do it right***."[22]

[21] Simon Chesterman, *Walking Softly in Afghanistan: The Future of UN State Building,* «Survival»,vol.44, 2002,p.40.
[22] Civitas Working Paper, Graham Day and Christopher Freeman, *From Policekeeping to Peace: Intervention, Transitional Administration and the Responsibility to Do It Right*, 2003, p.3.

LEGITIMACY

> *"Given that the principles of state sovereignty and self-determination of peoples are the fundamental corollaries of contemporary international relations, how could any foreign administration, even 'international', be considered legitimate?"*[23]

At the beginning of the twenty-first century one ideology has come to surpass any other in terms of its near universal acceptance: Democracy. The premise that the only legitimate form of government is one that bases its authority on the will of the people, a premise that runs counter to the very notion of ITA, is not a new phenomenon; indeed Mill referred to it in the nineteenth century as "the ideally best form of government", being the only way to ensure that the executive maintains "that complete and ever-operative identity of interest with the governed."[24] Yet it is only recently that this ideology has come to enjoy its current unchallenged status and that nowadays, "except in a few scattered marginal states, only democracy possesses legitimacy at the ideological level."[25]

Although the ultimate purpose of ITA is to establish stable democracies, the means by which they achieve this aim are far from democratic. Many authors have therefore commented upon this "fundamental contradiction that lies at the heart of these initiatives"[26] and come to the conclusion that ITA is "embedded in a paradox"[27]. However this paper argues that ITA, as an institution imposed from the outside and lacking the political legitimacy "which under normal circumstances is acquired by democratic elections"[28], should not automatically be regarded as completely lacking in legitimacy. But if legitimacy cannot therefore be based on formal mechanisms for directly ensuring the representation of the will of the people, are there therefore further legitimating grounds upon which ITA might be based?

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[23] Riika Koskenmaki, *Workshop 'Legitimacy and Accountability of International Administrations' Introductory Remarks*, European Society of International Law,p.3.
[24] John Stuart Mill, Considerations on Representative Government, 1861.
[25] Samuel Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, «American Journal of International Law»,vol.95, 2001,p.87.
[26] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.198.
[27] Paulo Gorjao, *The Legacy and Lessons of the United Nations Transitional Administration in East Timor*, «Contemporary Southeast Asia», vol.24, 2002,p.330.
[28] *Idem*,p.328.

Caplan defines legitimacy as "a particular status that an individual, a body, or a norm enjoys by virtue of its conformity to recognized principles or accepted standards and rules of behaviour that allows it to function with the broad consent of governments, peoples, organizations and other agents."[29] This definition is unusual in that consent must only be broad, rather than the more demanding standards of specific and formally demonstrable, and it expands upon the usual assumption that the sole legitimating group is the subject people: in this classification the will of governments, organizations and, curiously, "other agents", is a necessary precondition for legitimacy. To make this definition meaningful, though, the "recognized principles, accepted standards and rules of behaviour" need to be specified.

The principle in question that Caplan identifies at the basis of ITA is the notion of a trust: "the idea of international governance of a foreign territory, then, can be legitimate only if that governance is exercised on behalf of, and for the benefit of, the foreign population."[30] Whilst this is true, and the exercise of authority for the sole, or at least principal, purpose of benefiting the governed is a condition *sine qua non* for a regime to qualify as legitimate, it is too simplistic as an overall justification. Indeed dictatorships the world over would argue that they exercise power with the best interests of their people in mind. What is needed to justify this state of affairs, beyond the promise of benevolent intentions, is the existence of exceptional circumstances, necessitating the imposition of a trust-like situation.

Wilde argues that ITA addresses two distinct situations, for which legitimating arguments necessarily differ: these are the existence of a "sovereignty problem", where there is a lack of legitimate local actors capable of exercising government functions, or the existence of a "governance problem", where it is the quality of governance, rather than the legitimacy of the actors exercising it *per se*, that is at fault[31]. It is in order to combat the first problem that the two best known and most extensive examples of ITA were originally established, and its use in this respect is quite easily defendable. In Kosovo and East Timor, following the withdrawal of the

[29] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.185.
[30] *Idem*,p.197.
[31] Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, «American Journal of International Law»,vol.95, 2001, pp.583-606.

Yugoslav and Indonesian forces respectively, both territories were left with a complete absence of legitimate authorities. Whilst the Kosovo Liberation Army (KLA) or National Council of Timorese Resistance (CNRT) could conceivably have taken control of administering the territory, neither of these groups enjoyed any more democratic legitimacy, having never submitted themselves to elections, than the international missions that eventually took on the role. However, this is not to say that in the absence of democratically-legitimated actors there is no immediate alternative to ITA, as the example of Afghanistan clearly demonstrates. Moreover once democratic elections have taken place, the argument of a sovereignty problem ceases to be relevant. This is especially significant as "only in the cases of the Congo mission and the UN-run refugee camps has the official reason for ITA remained the pre-existing incapacity of local actors."[32]

The real debate on this subject therefore focuses, firstly, on the other more controversial usage of ITA; to address a "perceived risk that local actors will exercise their governmental powers in a manner that conflicts with certain policy objectives"[33], and, secondly, the purposes for which ITA authority may be legitimately exercised.

It has long been established, since the Roman republic, that in times of emergency it may be necessary and legitimate to abrogate the normal functionings of government and bestow supreme power in the hands of the executive. Indeed, Machiavelli claimed that "republics which, when in imminent danger, have recourse neither to a dictatorship, nor to some form of authority analogous to it, will always be ruined when some grave misfortune befalls them."[34] Yet the reasoning behind Machiavelli's argument is to ensure a rapid and responsive decision-making process, the need for which he contends is more pressing in emergency situations. Whilst this may represent the basis for some exercises of ITA authority[35], it is peripheral to the more underlying, and arguably more controversial, justification, that local actors, despite democratic legitimacy, are not considered by the international community to have

[32] *Idem* p.600.
[33] *Idem* p.592.
[34] Niccolo Machiavelli, Discourses on the first ten books of Titus Livy, 1513-1521.
[35] For instance, interventions of the OHR in BiH to force through legislative measures in order to counter political deadlock between the rivalling factions.

achieved the necessary "political maturity"[36] to be entrusted with governance of their own territory.

This idea is not new, and its connection with colonialism makes it automatically unpalatable to some. (Consider Mill's defence of foreign rule in the colonial context that "this mode of government is as legitimate as any other, if it is the one which in the existing state of civilisation of the subject people, most facilitates their transition to a higher state of improvement."[37]) However the links between this argument and the institution of colonialism are not sufficient to discredit it entirely out of hand.

To take an extreme, yet arguably defensible, view, the power to exercise executive authority in situations where local actors, despite democratic mandates, cannot be trusted to adhere to standards of human rights, good governance and the rule of law, is not only a right of the international community, but a responsibility. If the international community takes it upon itself to intervene in a war-torn territory then it also assumes the corollary responsibility to rebuild[38]. The primary focus of such a responsibility should thus, according to current trends, be the achievement of a sustainable peace[39], which denotes a wider concept than simply transferring power to local democratically-mandated actors[40]. This concentration on final outcomes as the primary goals of ITA, especially the maintenance of peace and adherence to standards of good governance (including human rights and the rule of law) necessarily entails a change of focus away from process issues, such as the legitimacy of the mechanisms used to arrive at such praise-worthy aims.

Whilst it may be true that "process issues are what ultimately determine the legitimacy of systems, institutions and mechanisms of governance and administration

[36] Kai Eide, Special Envoy of the Secretary-General of the United Nations, *Comprehensive Review of the Situation in Kosovo*, 2005.
[37] John Stuart Mill, Considerations on Representative Government, 1861.
[38] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 2001.
[39] *No Exit without Strategy: Security Council decision-making and the closure or transition of United Nations peacekeeping operations*, Office of the Secretary-General of the United Nations.
[40] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.212.

established in the course of the mission"[41], it is rare that the criteria used to judge the success of ITA take such factors into account. Furthermore in intervening, it is not only the general welfare of a subject people that is at stake; by assuming such wide-ranging responsibilities the international community, specifically the UN, is also putting its reputation on the line. Whether it is preferable for the international community to fail legitimately, or achieve greater success through breaching norms of internal self-determination and democracy in the short term for the purpose of protecting them in the long term, is a moot point and "there can be no clearcut or definitive answers to these types of questions, though they clearly do need to be debated."[42]

Ultimately, perhaps the most defensible position is the middle-ground option that the legitimacy of exercising executive power by international administrators in situations of a "governance problem" should be viewed as a matter of degree, which should be assessed on a case-by-case basis: whilst not all actions taken to promote long-term democracy against the wishes of local populations and institutions are illegitimate, some will be. Similarly not all purposes, however benevolent, can legitimize the use of executive or legislative powers when this runs counter to more immediate notions of democracy.

Regarding the purposes for which ITA power may be exercised, it is clear from current practice that "nation building does not mean simply bringing a country back; it suggests an intention to create multiethnic, secular, and capitalist states, regardless of a country's past, its culture, or the particularities of recent history."[43] Questions of legitimacy of purpose become all the more pertinent when one considers that ITAs "may take decisions that have, perhaps, irreversible, long term effects"[44].

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[41] Sukanya Mohan Das, *Process issues: An argument for inclusion of grass-roots communities in the formulation of national and international initiatives in re-building Afghanistan*, «The Journal of Humanitarian Assistance», 2006,p.1.

[42] Mats Berdal, Richard Caplan, *The Politics of International Administration*, «Global Governance»,vol.10, 2004,p.3.

[43] Patrice McMahon, *Rebuilding Bosnia: a Model to Emulate or Avoid?* «Political Science Quarterly», 2004-05,p.598.

[44] Riika Koskenmaki, Workshop 'Legitimacy and Accountability of International Administrations' Introductory Remarks, European Society of International Law,p.3.

Obviously there are certain elements of the "international liberal agenda as promoted by donors"[45], which are more defensible than others. Perhaps the objective for which the UN may most legitimately exercise its power is for the maintenance of international peace and security, as this is both the original *raison d'etre* of the world organisation, the purpose for which Governments have chosen to bestow upon it such powers, and the legal basis for ITA mandated under Chapter VII. The requisite of *international* peace and security should not be over-emphasised, and not only because conflicts almost always have a destabilizing effect on surrounding regions. The relatively new, and admittedly vague, concept of "human security", upon which many now contend that sovereignty is premised[46], provides a legitimate basis for the protection of *internal* peace and it is now recognised as "increasingly providing a conceptual framework for international action"[47]. According to this theory, if the State is unable to guarantee human security within its territory then the international community inherits this responsibility[48]. Similarly, therefore, if the UN is taking on the functions of the State, human security within its territorial limits should be its primary responsibility.

Hobbes would have agreed with this analysis, when he claimed that the legitimacy of an administration should be judged not according to "how representative it is of the opinions of the governed, but by how well it keeps peace between them"[49]. Whilst in general this theory does not underpin modern conceptions of governmental legitimacy, the moral justification of acting to avoid war and thereby saving countless lives seems almost self-evident. It should also be noted that in acting to maintain peace, the establishment of the rule of law must be viewed as a necessary corollary to this function, as well as for the separate purpose of protecting human rights (see below).

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[45] *State Building and the United Nations*, «Strategic Survey», 2002/3,p.53.
[46] Graham Day and Christopher Freeman, *From Policekeeping to Peace: Intervention, Transitional Administration and the Responsibility to Do It Right*, Civitas Working Paper, November 2003.
[47] "The Responsibility to Protect", International Commission on Intervention and State Sovereignty, December 2001, art.1.28.
[48] Mark Duffield, Experts Meeting on "*Peacebuilding Processes and State Failure Strategies*", Coimbra Mar.31st–Apr.1st,2006.
[49] Thomas Hobbes, *The Leviathan*, 1660.

The second item on the ITA agenda of the international community is the creation of stable democracies. This has sometimes been defended as an extension of the purpose of maintaining peace and security, as democracy is now widely viewed as "itself the political keystone of resolving bitter conflicts."[50] Whilst it is true that successive studies have shown that democracy decreases the potential for war, there is a strong argument for taking the opinion that "the protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves."[51]

Despite the fact that many Member States of the UN are still clearly undemocratic, it can now be claimed that the principle of democracy is "firmly established in Public International Law"[52]. Franck argues that although a specific right to democracy is not yet fully acknowledged in international law, current trends are certainly proceeding in that direction[53]. This is demonstrable by, for instance, the evolution of the case law of the European Court of Human Rights[54], and the fact that there is a growing trend to give international effect to legislation only if it has been passed by democratic regimes in accordance with democratic processes[55]. This has mostly been the case regarding amnesty legislation[56], but courts have also applied similar tests regarding civil laws[57]. How legislation passed by ITAs would fare under judicial scrutiny according to such tests remains to be seen.

It is therefore now no longer controversial to assert that "the right to choose how they are ruled, and who rules them, must be the birthright of all people, and its universal achievement must be a central objective of an Organization devoted to the cause of larger freedom."[58] Whilst this runs counter to the usage of ITA in the short term the

[50] Samuel Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, «American Journal of International Law»,vol.95, 2001,p.101.
[51] Secretary-General of the United Nations, *In Larger Freedom, towards Security, Development and Human Rights for All*, September 2005,art.128.
[52] Matthias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, «International and Comparative Law Quarterly», vol.50, 2001,p.624.
[53] Thomas Franck, *The Emerging Right to Democratic Government*, «American Journal of International Law»,1992.
[54] ECHR *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987,series A, no.113.
[55] William Burke-White, *Reframing Immunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, Harvard International Law Journal 467, 2001.
[56] For example the practice of the Inter-American Court of Human Rights in the cases of Velasques Rodriguez v. Honduras, Consuelo v. Argentina, Mendoza v. Uruguay.
[57] Bi v. Union Carbide Chemicals and Plastics.
[58] Secretary-General of the United Nations, *In Larger Freedom, towards Security, Development and Human Rights for All*, 2005, art.148.

establishment of democracy as a long term objective is clearly a legitimate aim, and, according to Chesterman, a right which subjects of ITA should automatically enjoy by virtue of its legal status as an emerging human rights norm[59]. That said, there exist many different forms of democracy and it would be inappropriate for the international community to impose any specific democratic philosophy.

A third stated purpose of ITA is the protection and promotion of human rights and the rule of law. Whilst it is clear that respect for human rights "is fundamental for strengthening the legitimacy of such interventions"[60], promoting and ensuring their respect by third parties is also arguably not only a right, but a duty of international administrators. According to the Vienna Declaration and Programme of Action, ensuring respect for human rights should be the "primary responsibility of governments"[61]. Whilst the argument of automatic succession of the human rights obligations of the State which ITA effectively replaces may be legally questionable, its moral validity is compelling. Even in situations where ITA is not functioning it is widely acknowledged that the protection of human rights is a legitimate concern of the international community; a concern that cannot be hidden behind the veil of state sovereignty. Where the international community and the state are one and the same the arguments that the protection of human rights is a purely internal matter disappear entirely. The Human Rights Committee has supported this view and states that the protection and promotion of human rights must be "one of the main responsibilities of the international civil presence"[62].

Whereas, in the enforcement of human rights, arguments about cultural relativism may surface, they should not be allowed to override the internationally-agreed standards, although this is not to say these concerns should not be addressed through dialogue and education, with the aim of explaining the need for such measures. Another important aspect of this debate is that almost all of the literature on this topic refers only to civil and political rights. The inclusion of economic, social and cultural

[59] Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, 2005,p.127.
[60] Sylvain Vité, *Re-establishing the Rule of Law under Transitional Administration* in Yearbook of the Geneva Centre for the Democratic Control of Armed Forces 2005,p.189.
[61] Vienna Declaration, 1993,art.38.
[62] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Serbia and Montenegro*. 12/08/2004. CCPR/CO/81/SEMO.

rights as part of the mandate of ITA is more controversial for many reasons; primarily that the long term protection of such rights would impose a duty upon international administrators to take decisions with perhaps irreversible long-term effects, which may be better left to democratically-mandated actors. Such decisions could include restructuring the economy and the welfare system, including health, education, social services, state pensions and many other areas.

Regarding the restructuring of the economy, the practice of ITA has consistently promoted liberal free-market based economic models, and many academics have highlighted this as a primary goal of the international community in ITA[63]. This is perhaps one of the most controversial uses of ITA authority, particularly bearing in mind the potentially non-altruistic motives that have in the past motivated outside actors to apply pressure to states with protected economies to become more receptive to outside investment. On the one hand this may be defended on the grounds that it is the only way to ensure economic prosperity in the future, which is necessary both for maintaining a peaceful society and a stable democracy[64]; both legitimate aims according to the above analysis. Furthermore proponents of this policy argue strongly that delaying this process until democratically-mandated actors are able to take on the role will ultimately have damaging effects on the economy and that such reforms should be undertaken whilst the fleeting spotlight of international interest rests upon the country. However, these arguments have only limited weight, when one considers the importance of such issues for a state and the divergence of opinions among economists about the best, and most equitable, ways to achieve prosperity. Obviously some management of the economy is a necessary function of any caretaker government, yet any decisions with long-term effects should be undertaken only if absolutely necessary, and then with the full involvement and broad consent of local parties.

[63] Richard Caplan, *International Authority and State Building: the Case of Bosnia and Herzegovina*, «Global Governance»,vol.10, 2004, Riika Koskenmaki, *Workshop 'Legitimacy and Accountability of International Administrations' Introductory Remarks*, and McMahon, Patrice C., *Rebuilding Bosnia: a Model to Emulate or Avoid?* «Political Science Quarterly».

[64] Barnes notes "If democracy does not produce prosperity, at least in the medium term, it is likely to lose legitimacy." *The Contribution of Democracy to Rebuilding Postconflict Societies*, «American Journal of International Law»,vol.95, 2001,p.87.

Any other purposes for which executive power may be exercised must also be viewed with suspicion. With the responsibility of running a state through the means of nominally unlimited power, inevitably comes the temptation for legal experimentalism. Any international administrator must, at some point or another, feel the inclination to create their "ideal" state, without considering local opinions or traditions or, above all, what may be considered legitimate. Such temptations should obviously be avoided.

Regarding the means taken to ensure the achievement of the previously noted goals, they must conform to certain standards in order to be legitimate: At a minimum they must not breach human rights standards and must conform to the rule of law. They must be exercised consistently and according to stipulated and publicly-available criteria. Wherever possible they must take account of the views of local actors, and reasons should be given if at any point the actions of ITA are deemed necessary to override local consensus. Sufficient safeguards should be in place to ensure against abuse of power and the ultimate aim of ITA should be to lead by example, as well as simply by prescription. The conformity to these standards is analysed further in subsequent chapters.

A final question necessary for determining the legitimacy of bestowing executive, legislative and judicial powers on ITAs is whether there is any alternative. The underlying premise of ITA is, as noted above, the assumption that either there are no local actors capable of legitimately fulfilling governmental roles, or that local actors cannot be trusted to govern adequately. The experience of Afghanistan may suggest otherwise.

The "light footprint" approach, entailing as much local ownership as possible, with the UN acting as an assistance mission to a locally-controlled transitional administration, was hailed by many as "the future of UN state-building"[65]. The convening of an emergency *Loya Jirga* (traditional Afghani popular consultation) to agree on internationally acceptable actors and bestow these actors with a semblance of legitimacy, allowed the UN to adopt a back-seat approach to reconstructing the state.

[65] Simon Chesterman, *Walking Softly in Afghanistan: The Future of UN State Building*, «Survival»,vol.44, 2002,p.37.

The underlying assumption was that the actors would prove to be sufficiently "democratically" minded and would adhere to the rule of law in their exercise of power, and that, furthermore, the UN would be able to exert sufficient behind-the-scenes influence to achieve the goals laid out above. However, this choice of model probably had far more to do with concerns about budgeting limits than any concerns about legitimacy. With this in mind it should be noted that "few people deluded themselves into thinking that the Loya Jirga was a meaningful popular consultation"[66], and consequently the resulting Interim Administration "was less of a centralised government than it was a centralised gathering of factions, dominated by those favoured by the United States in its recent battle with al-Qaeda and the Taliban."[67]

This method has since been followed in Iraq, with the so-called "nation-building lite" approach, but it should be borne in mind that in both Afghanistan and Iraq the essential elements of a state were already in place, whereas this was not the case in either Kosovo or East Timor. Whereas this approach may be more legitimate if one concentrates on process issues, "it is a dubious approach, at least if one cares about the final outcome."[68] Furthermore the fact that processes for appointing interim leaders can never approach the legitimacy of democratic elections, and that even-democratically-mandated actors may not in all circumstances be trusted to respect human rights or be capable of maintaining peace and security, means that ITA as a policy institution should not be automatically ruled out.

In the end, with modern conceptions of sovereignty amounting to a duty to protect human security and represent the will of the people, then in situations where ITAs are more capable of fulfilling this function than local actors, they should not be considered illegitimate. On the other hand, the fact that "they are, from start to end, undemocratic in their nature and there is very little to overcome it"[69], leads to the

[66] *Idem,p.*40.
[67] *Idem,p.*39.
[68] Francis Fukuyama, *Nation-Building 101*, «The Atlantic Monthly», 2004,p.162.
[69] Paulo Gorjao, *The Legacy and Lessons of the United Nations Transitional Administration in East Timor*, «Contemporary Southeast Asia»,vol.24, 2002,p.330.

unavoidable conclusion that "all international administration, however benign, is to some extent illegitimate."[70]

[70] David Harland, *Legitimacy and Effectiveness in International Administration*, «Global Governance» vol.10, 2004,p.15.

LEGAL BASIS AND CONSTRAINTS

> *"Sovereignty issues necessarily arise with any continued presence by the intervener in the target country in the follow-up period. Intervention suspends sovereignty claims to the extent that good governance - as well as peace and stability - cannot be promoted or restored unless the intervener has authority over a territory. But the suspension of the exercise of sovereignty is only de facto for the period of the intervention and follow-up, and not de jure."*[71]

An important issue, indeed potentially the most important, in establishing the legitimacy of any act or institution, is its legality. Whilst ethical justifications for bestowing power on ITAs, and constraining that power, have been examined in the previous chapter, this chapter will examine the legal framework within which ITAs operate; whether their very existence conforms to existing rules of international law, and, if so, what limits that regime imposes upon them. These limitations primarily derive from four distinct sources: limitations inherent in the UN Charter, international human rights law, humanitarian law, and the law of occupation.

Whilst it is true that imprecise notions such as the maintenance of international peace and the protection of human rights and human security have "served to question and redefine traditional Westphalian (or territorial) notions of sovereignty"[72], it is clear that state sovereignty remains the fundamental principle upon which the foundations of international law rest. Any exercise of executive, legislative or judicial powers within a state by any outside actor constitutes *prima facia* an illegal violation of state sovereignty, and must therefore be justified as an exceptional circumstance permitted by a recognised norm of international law. One such circumstance capable of allowing an outside actor to exercise governmental prerogatives within a state, and perhaps the most obvious, is the consent of the legitimate authorities of the state concerned.

On all occasions in which the UN has exercised executive power it has done so, at least nominally, with the consent of the concerned state, with the sole exception of

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[71] *The Responsibility to Protect*, International Commission on Intervention and State Sovereignty, December 2001,art.1.28.

[72] Graham Day and Christopher Freeman, *From Policekeeping to Peace: Intervention, Transitional Administration and the Responsibility to Do It Right*, Civitas Working Paper, 2003.

Somalia[73]. On occasion the Security Council has arguably "resorted to artifice"[74] in order to fulfil this requirement, for instance by obtaining consent from a government-in-exile in the case of Haiti, or directly contravened the wishes of local authorities after obtaining their consent to enter the territory of the state in question, as was the case in the Congo[75]. On other occasions, including the Yugoslav examples, East Timor and Afghanistan, consent was grudgingly obtained following the threat, or actual use, of force. According to the Vienna Convention on the Law of Treaties consent obtained through the threat of the use of force is only legitimate if the use of force itself would be legal[76]. This is, of course, a separate issue, arguably beyond the scope of this paper, but it is widely established that in cases of genocide[77] (FRY and East Timor), the Security Council, or in invocation of the right to self-defence[78] (Afghanistan), individual states, have the legal right to use, and hence to threaten the use of, force.

However, although the consent of local parties may be considered "a political and operational imperative"[79] for the establishment of ITAs, in most circumstances the consent of local parties will be nowadays, in the words of UN Secretary-General Kofi Annan, "neither right nor wrong; it will be, quite simply, irrelevant"[80]. This is partly because in many situations where ITAs are established, such as Kosovo or East Timor, there are in fact no local authorities to give such consent. However, the much more fundamental reason, at least from a legal standpoint, is the fact that all recent ITAs, in contrast to the historical examples of the Cold War, have been mandated under Chapter VII of the UN Charter.

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[73] Matthias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, «International and Comparative Law Quarterly»,vol.50, 2001,p.616.
[74] O'Connor, *Policing the Peace* in Thakur, R., Schnabel, A., *UN Peacekeeping Operations, Ad Hoc Missions, Permanent Engagement*, United Nations University Press, New York/Tokyo, 2002 ,p.61.
[75] Steven Ratner, *The New UN Peacekeeping*, MacMillan Press, 1997,p.38.
[76] Vienna Convention on the Law of Treaties, art.52.
[77] *A More Secure World, our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change, 2004, para.200: "the principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council".
[78] Article 51, UN Charter.
[79] Weiss and Chopra, quoted in United Nations in Post-Cold War Era,p.105.
[80] Kofi Annan, Challenges of the New Peacekeeping in O. Otunnu., M. Doyle., *Peacemaking and Peacekeeping for the New Century*, Rowman & Littlefield Publishers, 1998,p.172.

Despite "the UN Charter's unequivocal statement of respect for national sovereignty"[81], it has become apparent, and indeed "no principle seems clearer"[82], that the UN Security Council is not limited by issues of consent when intervening in a state under Chapter VII. However, intervening militarily in a state is one thing; taking over the running of that state, a power not expressly granted to the UN by its Charter, is quite another. In this sense, as in other areas, "practice has led theory and the Charter has shown to be a flexible – some would say malleable – instrument."[83]

The Security Council power to create ITAs through its invocation of Chapter VII could rest on three distinct legal bases[84]. Firstly, the power to "take measures" in Article 39 could be read as being essentially unlimited and the Tadic judgment[85] of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has been cited as persuasive authority for this position[86]. In this case the ICTY stated that "the Security Council has a very wide margin of discretion under Article 39 to choose the appropriate course of action and to evaluate the suitability of the measure chosen", and thus found that the Security Council was competent to create a judicial organ as "an instrument for the exercise of its own principal function of maintenance of peace and security."[87] However, whilst the court did not lay down any explicit limitations to the potential measures available under article 39, it is clear that "a very wide margin of discretion" is not equivalent to an unlimited power. Although it was not expressed in this way, the reasoning of the court appears to be much more similar to the *implied-powers* doctrine.

This doctrine, described by Ruffert as "more convincing"[88] than the previous explanation, constitutes the second potential legal basis for the Security Council

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[81] O'Connor, *Policing the Peace* in Thakur, R., Schnabel, A., *UN Peacekeeping Operations, Ad Hoc Missions, Permanent Engagement*, United Nations University Press, New York/Tokyo, 2002,,p.57.
[82] D.,Bowett, *United Nations Forces*, Stevenson & Sons, 1964,p.412.
[83] *State Building and the United Nations*, «Strategic Survey», 2002/3,p.50.
[84] Matthias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, «International and Comparative Law Quarterly»,vol.50, 2001,p.620.
[85] ICTY, Prosecutor v. Tadic (Jurisdiction), (1996) 35.I.L.M. 35.
[86] Michael Matheson, *United Nations Governance of Post-Conflict Societies*, «American Journal of International Law», vol.95, 2001,p.84, and Matthias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, «International and Comparative Law Quarterly»,vol.50, 2001,p.620.
[87] ICTY, Prosecutor v. Tadic (Jurisdiction), (1996) 35.I.L.M. 35, paras.32-38.
[88] Matthias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, «International and Comparative Law Quarterly»,vol.50, 2001,p.620.

power to create ITAs, and was first alluded to in the Reparations for Injuries case[89]. The doctrine holds that the United Nations "must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."[90] This judgment recognises that "international organisations would not be able to fulfil their functions efficiently in a rapidly changing world, if their powers were limited to those explicitly attributed to them at the time of their creation"[91] and consequently, under this analysis, the creation of ITAs must be viewed as a necessarily-implied corollary of the duty to maintain international peace.

The third potential legal justification is "to consider the broad consensus behind the administration of [Kosovo and East Timor] as indicative of instantaneous customary law."[92] Examples of the Security Council gaining, or modifying, its powers through the general acceptance of UN Member States amounting to a new rule of customary law, include its power to take decisions on non-procedural matters notwithstanding the abstention of its permanent members, its expanded interpretation of the term "breach of international peace and security", or its creation of the institution of peacekeeping. In practice, "the threshold for determining that consensus has been reached is not so high"[93] and according to the International Court of Justice a state that does not object at the time of the modification of the rule will later be estopped from contesting it[94]. General acceptance by the international community of the legitimacy of the Security Council's actions in creating recent ITAs can therefore be evidenced by the fact that they have all been endorsed by General Assembly Resolutions[95].

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[89] ICJ, Reparations for Injuries Suffered in the Service of the United Nations Case, ICJ Rep.1949, 174.
[90] *Idem*, at para.182.
[91] Erika 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 International Law UNYB»,vol.8, 2004,p.308.
[92] Matthias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, «International and Comparative Law Quarterly»,vol.50, 2001,p.620.
[93] Erika 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 International Law UNYB»,vol.8, 2004,p.310.
[94] ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) (1970), Advisory Opinion, ICJ Rep.1971.
[95] For Eastern Slavonia, Baranja and Western Sirmium: A/RES/51/153 13 June 1997; Kosovo: A/RES/53/241, 28 July 1999 and A/RES/54/245, 22 December 1999; East Timor: A/RES/54/246, 23 December 1999; Somalia: A/RES/47/41 B, 15 April 1993; Bosnia-Herzegovina: A/RES/51/203, 17 December 1996.

It is also worth noting that a fourth legal base is potentially available for the creation of UN-mandated ITAs, albeit one that has never been used and would not be applicable in any recent cases. Article 81 of the UN Charter explicitly empowers the UN to act as the administering power of a trust territory, through the Trusteeships Council. However, the requirements prohibit a UN Member State from becoming a trust territory (which would prohibit former Yugoslav States and Afghanistan from being treated under this regime) and an agreement must have been concluded to this end (which would exclude East Timor).

Hence it can be fairly clearly established that the UN Security Council possesses the legal authority to create ITAs, arguably under multiple legal bases, as an extension of its wider function of maintaining peace and security under Chapter VII. Whether the UN Charter specifically constrains the extent or usage of the powers of such ITAs, is a much more controversial subject. It has been submitted that three Charter-enshrined principles in particular are capable of having such a legally-constraining effect: the duty to respect the territorial integrity of states, the principle of self-determination and the duty to protect and promote human rights standards[96]. Whilst the first two principles refer primarily to limitations in the Council's power to create, and bestow powers on, ITAs, the third principle is essentially a limitation applicable directly to the functioning of ITAs, rather than the Council itself, and so will be examined as part of a wider debate in the second half of this chapter.

The duty to respect the territorial integrity of states is deduced from articles 2(1) and (4) of the UN Charter. According to Irmscher these provisions have the resulting effect that "the organization lacks any competence for transferring sovereignty unilaterally over a portion of a state's territory."[97] Conversely, Matheson takes the opposite approach, and asserts that "there can in fact be situations in which the Security Council would be justified in directing a permanent change in some aspect of the status, boundaries, political structure or legal system of territory within a state, if the Council should determine that doing so is necessary to restore and maintain

[96] Tobias Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights and the Law of Occupation*, «German Yearbook of International Law»,vol.44, 2001,p.364.
[97] *Idem*,p.364.

international peace and security"[98]. Whilst there is no official hierarchy among the purposes of the UN it is notable that the maintenance of peace and security occupies first place on the list, and many would contend that this represents the primary purpose of the UN. With this in mind, the second explanation is perhaps more compelling; that the exigencies of maintaining peace take priority over the goal of respecting the sovereign equality of states. This is not to say that these provisions should be completely lacking in legal effect: Arguably they should amount to a strong presumption that unilateral redrawing of borders or transfer of sovereignty by the UN is beyond its competence. This presumption should be rebutted only by evidence that it is absolutely necessary for the more central purpose of maintaining peace.

The second principle, that of self-determination[99] contained in articles 1(2) and 55 of the Charter, arguably carries even less weight as applied to ITAs. Irmscher argues that it should be applicable in its 'internal' sense (since the 'external' sense is, he argues, restricted to colonial situations) and should therefore require the clear consent to the establishment of ITAs of the citizens of the territory on which they are to be based.[100] However, ITAs are by their very nature far from democratic and it is "simply misleading to suggest that the international presence in Eastern Slavonia, Bosnia, Kosovo or East Timor depended in any meaningful way or local consent or 'ownership'"[101]. Irmscher's argument then, that this principle should be a necessary condition to the taking of certain measures under Chapter VII, is therefore clearly flawed; or if legally valid then it has evidently been ignored. On the other hand, an alternative interpretation may give legal effect to this provision by imposing a duty on ITAs to rank internal self-determination (i.e. the creation of democracy) as one of its primary goals, second only to the maintenance of peace and security.

However, in many ways the above discussion on the legal limitations of the Security Council, despite the judgment of the ICJ[102] that the Security Council is bound by its

[98] Michael Matheson, *United Nations Governance of Post-Conflict Societies*, «American Journal of International Law»,vol.95, 2001,p.85.
[99] UN Charter, articles 1(2) and 55.
[100]Tobias Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights and the Law of Occupation*, «German Yearbook of International Law»,vol.44, 2001,p.365.
[101] Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, 2005,p.152.
[102] ICJ, Lockerbie Case.

own Charter, "seems destined to remain a theoretical one, since there is no provision for judicial review of Security Council decisions, and therefore no way that a dispute over Charter interpretation can be resolved."[103] It seems likely therefore that "in an organisation such as the United Nations, which lacks a centralised system of judicial review and where each organ is primarily responsible for interpreting its own functions"[104], the Security Council will continue to enjoy considerable latitude in setting its own boundaries. Indeed, many even contend that this is the way the system was intended to function[105], and in the absence of any review mechanisms it is difficult to escape this conclusion.

The restrictions outlined above in the first half of this chapter refer primarily to the *creation* of ITAs and the power and limitations of the Security Council in exercising this function. The second half of this chapter will focus on international law limitations that apply to the *functioning* of ITAs after they have been established, which, as noted above, may include human rights law, international humanitarian law (IHL) and the law of occupation.

Whilst in a moral and political sense "respect for IHL and human rights is fundamental for strengthening the legitimacy of such interventions"[106], in a legal sense the duty for ITAs to abide by these legal regimes is surprisingly far from being clearly established. Some authors and human rights groups have sought to ground this obligation, at least in part, in the UN Charter[107], yet the Charter alone does not

[103] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, December 2001, Art.6.18.
[104] Erika 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 International Law UNYB»,vol.8, 2004,p.310.
[105] Michael Matheson: "The Charter vests this judgment in the Council and, in my view, the Council alone, guided by a good faith appreciation of its role and responsibilities under the Charter." *United Nations Governance of Post-Conflict Societies*, «American Journal of International Law»,vol.95, 2001,p.83.
[106] Sylvain Vité; Vité continues: "It is of utmost importance for guaranteeing their acceptance by local populations and subsequent support of peace negotiations. Thus, respect for these legal regimes must be an essential condition for sustainable post-conflict peacebuilding". *Re-establishing the Rule of Law under Transitional Administration*, in Yearbook of the Geneva Centre for the Democratic Control of Armed Forces 2005,p.189.
[107] David Marshall and Shelley Inglis: "Bound by the human rights provisions of the Charter on which it was founded, the UN has a special responsibility to set the standard for human rights protection for governments when the UN itself is acting as a governing power." *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, «Harvard Human Rights Journal»,vol.16, Spring 2003,p.104.

represent an entirely sound basis for establishing such a duty. Although the promotion of human rights is a stated purpose of the UN[108], this does not in itself amount to a duty to respect those rights. Nevertheless, some have sought to argue that the UN, by virtue of its guiding principles and its role as the foremost international actor in standard-setting and promotion of human rights, "would be estopped from deliberate non-compliance with human rights standards."[109] Whilst this remains legally questionable, though ethically compelling, there are thankfully more-solid legal bases upon which a duty to respect human rights may be established: These are through automatic succession of human rights obligations and through customary international law.

Before analysing these two concepts, two further potential sources for a duty to respect human rights deserve attention. Firstly it should be noted that the Security Council Resolutions establishing all recent ITAs do not specifically impose such a duty. Although they tend to mention human rights as a responsibility of the ITA "this is not equal to an obligation to act under every circumstance in conformity with human rights law" and "the wording does not allow in itself the conclusion that [ITAs are] bound by human rights law."[110] This is certainly curious, as one would expect that if any obligations were to be imposed on an ITA they would be contained in its founding document, and this absence lends weight to the conclusion that the Security Council never intended that human rights should be directly applicable. If this is so, as is probably the case, it is a worrying and hypocritical omission from the organisation charged with promoting human rights worldwide.

It should also be clarified that the duty to protect human rights cannot be imposed as a corollary of the overriding duty of the UN to maintain peace and security, as has been argued by some authors[111]. To imply such a legal obligation involves a necessarily-strained interpretation of the UN Charter, resting on shaky legal footings, and many

[108] UN Charter, Preamble.
[109] Tobias Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights and the Law of Occupation*, «German Yearbook of International Law», vol.44, 2001,p.369.
[110] *Idem.*,p.366.
[111] Tobias Irmscher: "the duty to apply human rights norms follows directly from the task to provide a durable solution, bearing in mind the close relationship between the enjoyment of human rights and international peace.", *Idem.*,p.369.

administrators would even argue to the contrary; that the duty to establish a durable peace in some cases imposes an obligation *not* to respect human rights[112].

The principle of automatic succession to human rights obligations, according to the Human Rights Committee[113], is that any later government or successor state to a state party to a human rights convention automatically inherits the responsibilities of that convention. Although this is widely established regarding the transfer of duties from one state to another in cases of state succession, the practice regarding international organisations is not so clear. The case law would seem to suggest that states remain the primary guarantors of human rights and that the ultimate duty to protect human rights remains with the state even if it has devolved certain powers to international organisations thus rendering it unable to fulfil its obligations[114]. In applying this to the case of Kosovo, for instance, although for all practical purposes sovereignty is exercised by the United Nations, theoretically it rests with Serbia. The Human Rights Committee implicitly recognised this when it required Serbia and Montenegro (as it was then) to continue its reporting obligations under the ICCPR in Kosovo but only "encouraged" UNMIK to submit a report "without prejudice to the legal status of Kosovo"[115]. Only in the case of East Timor has it been contended that the UN was the actual sovereign, legally as well as *de facto*, during the period of the interim administration[116], though has been disputed[117].

[112] An example of this is UNMIK's policy of executive detention. Widely recognised to be in breach of human rights standards, it was deemed necessary to keep potential offenders from committing violent acts leading in turn to a break-down in law and order.

[113] Human Rights Committee, General Comment 26: Continuity of obligations. Art.4: "The rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant." 08/12/97. CCPR/C/21/Rev.1/Add.8/Rev.1.

[114] Waite and Kennedy v. Germany, ILR,vol.118, 2001, 121.

[115] Concluding Observations of the Human Rights Committee: Serbia and Montenegro. 12/08/2004. CCPR/CO/81/SEMO.

[116] Paulo Gorjao, *The Legacy and Lessons of the United Nations Transitional Administration in East Timor*, «Contemporary Southeast Asia»,vol.24, 2002 and Jarat Chopra, *The UN's Kingdom of East Timor*, «Survival»,vol.42, 2000.

[117] Matthias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, «International and Comparative Law Quarterly»,vol.50, 2001,p.627.

It is ironic then, that despite the fact that the "rationale underlying the principle is that obligations pass with control over territory and that beneficiaries of rights are entitled to maintain them"[118], in its application to situations of ITA, an outcome evidently not foreseen by the Human Rights Committee, it is clearly self-defeating. It is for this reason that some academics have posited the idea of "functional succession" for situations where sovereignty is a "mere fig leaf"[119] concealing the fact that for all practical purposes the state is unable to exercise any control over the enjoyment of human rights in the territory in question. According to this theory it is the *de facto* control over territory and the exercise of the sovereign's functions that leads to the succession of human rights treaty obligations.[120] However, others have found this theory to be unconvincing, due to the technical question of whether the UN could be the successor to a treaty to which its Member States are bound, and the lack of state practice in this area[121]. These are not major concerns. Human rights treaty obligations pass with sovereignty over territory; if the UN is the holder of that sovereignty then there is no logical argument, least of all the lack of state practice, to deny the imposition of the obligations. On the other hand, there is arguably a far more fundamental obstacle to this theory. In situations where the UN is only a *de facto* sovereign, and not *de jure*, as in all ITA situations with the possible exception of East Timor, it is submitted that it cannot succeed to the human rights obligations contained in international instruments because these instruments do not foresee the possibility of multiple duty-holders, and it is clear from the case-law and the opinions of the Human Rights Committee that the legal sovereign is not absolved. It would therefore seem more persuasive in these situations to ground the obligation of international administrators to respect human rights standards in customary international law.

[118] John Cerone, , *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo,* «European Journal of International Law», 2001,p.478.
[119] Alexandros Yannis, *The UN as Government in Kosovo,* «Global Governance»,vol.10, 2004,p.70.
[120] Tobias Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights and the Law of Occupation,* «German Yearbook of International Law»,vol.44, 2001,p.372.
[121]Erika 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 International Law UNYB»,vol.8, 2004,p.319.

It is clearly established that the UN, as a subject of public international law[122], is capable of being bound by norms of customary law[123], which would in theory include human rights norms. Although there is currently little evidence of this in respect of human rights, it is notable that the *ad hoc* criminal tribunals of the UN consider human rights principles applicable to their own proceedings[124]. Furthermore regarding humanitarian law, "contrary to early doubts, it can now be considered generally recognised that military forces deployed under the auspices of the UN are subject to those rules of customary character as an obligation of the organisation."[125] Applying the same principle to human rights it is logical to assume that the UN must assume all customary international human rights obligations insofar as they may be applied to an international organisation. The test for determining this must be the extent of the UN's powers over territory: if it is equivalent to a state, then so must the obligation be.

Whilst it has been noted that customary humanitarian law is applicable to the UN, it should also be noted that the UN maintained for many years that it could not be bound by the Geneva Conventions, as these require the exercise of powers that the UN does not possess, such as certain judicial and administrative powers[126]. Although "one has to acknowledge that the United Nations cannot be bound to international humanitarian law in the same manner as states"[127], this problem has largely been solved by the UN Secretary General's promulgation in August 1999 of a code of principles[128], which "essentially sets forth, in summary fashion, the main provisions of the Geneva Conventions and holds that they are applicable to United Nations forces"[129] when in situations of armed conflict.

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[122] ICJ, Reparations for Injuries Suffered in the Service of the United Nations Case, ICJ Rep.1949, 174.
[123] ICJ, Agreement between the WHO and Egypt, Advisory Opinion, ICJ Reports 1980, 67.
[124] Tobias Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights and the Law of Occupation*, «German Yearbook of International Law»,vol.44, 2001 p.370.
[125] *Idem*,p.368.
[126] Legal Opinion of the Secretariat of the United Nations, "Question of the Possible Accession of Intergovernmental Organisations to the Geneva Conventions for the Protection of War Victims."
[127]Erika 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 International Law UNYB»,vol.8, 2004,p.323.
[128] "Observance by the United Nations Forces of International Humanitarian Law" ST/SGB/1999/13, 1999.
[129] John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, «European Journal of International Law», 2001,p.481.

The situation of Kosovo presents a unique situation, in that the military arm of the international mission (KFOR), whilst technically "under the auspices of the United Nations"[130], is NATO-led and not subject to UN control or review. Although UN peacekeepers are theoretically under the direct control of the United Nations, even if in practice they will often defer to orders from their home state, NATO troop-contributing states exercise a greater degree of control over the actions of their forces. For instance, each national contingent follows its own rules of engagement and is able to veto (according to the so-called "red card procedure") orders from NATO HQ on the advice of their home military command. This, it has been suggested, plus the fact that NATO states freely entered into this military coalition, is capable of triggering the individual legal responsibility of contributing states for human rights and humanitarian law violations. It has now been widely established that human rights obligations may have an extra-territorial effect when a state "exercises effective control of an area outside its national territory"[131], or vis-à-vis individuals who are "subject to its authority and control"[132] despite the fact that they are not within that state's legal jurisdiction. Therefore it has been contended that "the very fact that the various KFOR contingents exercise different powers and discharge different responsibilities supports the notion that their level of obligation should be tied to their fields of operation"[133] and consequently that they may be held individually liable in cases of extra-territorial breaches of human rights and humanitarian law.

The law of occupation represents the final legal regime capable of restricting the actions of ITAs. This body of law, contained within the Geneva and Hague Conventions and the optional protocols thereto[134], aims at limiting the powers of occupiers, in particular, but not exclusively, regarding regime change, modifications of the domestic law or any changes affecting the boundaries or structure of the state. Many of these provisions run counter to the very objectives of ITAs and, whilst the

[130] SC Res 1244.
[131] Loizidou v. Turkey (Preliminary Objections), ECHR (1995) Series A, No. 310, 1995.
[132] Coard et al. v. United States, IACHR, Case 10.951, Report No. 109/99, 1999.
[133] John Cerone, *Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo*, «European Journal of International Law», 2001,p.480.
[134] See in particular section III of the Hague Regulations, annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, and Articles 27-34 and 47-48 of the Fourth (Civilian) Geneva Convention of 1949 (GC IV). Also Articles 14, 63 and 69 of the 1977 Additional Protocol to the 1949 Geneva Conventions.

UN is not party to these treaties, it would be bound by these norms, in so far as they are applicable, by virtue of the fact that they constitute customary international law.

The conventions are "at best ambiguous as to 'authorized' occupations"[135]. Despite the fact that their reliance on factual circumstances, rather than labels given by the parties, and their application to "all cases of partial or total occupation of the territory … even if the said occupation meets with no armed resistance"[136], would allow for a wide interpretation, state practice regarding consensual occupations has been mixed. In all situations of agreed-upon occupations it is clear that the "first and highest source of law governing the foreign presence"[137] is the instrument authorising the occupation, whether it be an armistice agreement, treaty, 'status of forces agreement' or Security Council Resolution. The pertinent question in these cases, and one which has by no means been agreed upon, is therefore whether the law of occupation would apply to fill any legal gaps in the instrument in question.

In general, occupations agreed on the basis of an armistice following military action have tended to apply the law of occupation, whereas pacific occupations, consensually agreed to without the use or threat of force, have tended not to apply this body of law. UN peacekeeping forces likewise do not generally view the law of occupation as applicable and consider their 'status of forces agreements' as the only legally-relevant instruments, concerning their powers and limitations[138]. Whilst it is clear that the Security Council acting under Chapter VII, "in accordance with the overriding character of this framework"[139] and article 103 of the UN Charter, can deviate from the law of occupation, such Resolutions are by no means comprehensive (much less so for instance than treaties or 'status of forces agreements') and some

[135] Tobias Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights and the Law of Occupation*, «German Yearbook of International Law»,vol.44, 2001,p.378.
[136] GC IV 1949, Art.2.
[137] Tobias Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights and the Law of Occupation*, «German Yearbook of International Law»,vol.44, 2001,p.384.
[138] However, exceptions exist and, for instance, Australian peacekeeping troops in Somalia (in UNOSOM II) applied the law of occupation, whilst their American counterparts (in UNITAF) did not.
[139]Erika 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 International Law UNYB»,vol.8, 2004,p.327.

have argued that therefore the law of occupation should be applied to address any issues where the authorising resolution is silent.

Whilst the case-law concerning pacific and Security-Council mandated occupations is scarce, perhaps the most relevant judicial decision is the judgment of the Israeli Supreme Court[140]; that military control is the decisive element in determining the applicability of the law of occupation notwithstanding any other legal instruments, which would, according to the above analysis, take priority. This would appear to correspond to the intentions of the drafters of the Geneva and Hague Conventions, to accord occupied peoples a body of minimum standards, along with a literal reading of the texts. Therefore, "the authorization of an 'occupation' by resolution cannot render the law of occupation inapplicable."[141]

The application of the law of occupation would have several consequences for UN-mandated ITAs, and it would appear that current practice has not been entirely in accordance with these provisions. The duty to ensure public order and the administration of the territory, for instance, imposes an obligation to administer public immovable property "in accordance with the rules of usufruct"[142]. Privatizing state-owned companies, as UNMIK has done, would therefore constitute a breach of the law of occupation, justifiable only according to a very broad, and arguably excessively so, reading of Resolution 1244's authorisation to support "economic reconstruction".

Most fundamentally perhaps, is the duty to respect the existing law "unless absolutely prevented"[143]. Notably no UN Resolutions establishing ITAs explicitly authorise the power to legislate. Although this may be implied by the responsibility to "provide an interim administration", it would, in the case of Kosovo, be necessarily restrained by the duty to respect the continuing sovereignty of the FRY, and in all other cases by the exigencies of the law of occupation. It has been submitted that this would mean therefore that, despite the power to pass laws in order to fulfil the stipulations of the

[140] Affo et al. v. Commander of the I.D.F., ILM,vol.29, 1990, 164.
[141] Tobias Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights and the Law of Occupation*, «German Yearbook of International Law»,vol.44, 2001,p.385.
[142] Hague Convention, Art.55.
[143] *Idem*, Art.43.

SC founding resolutions, or for such established purposes as maintaining public order[144], "an overall reform and modernization of all areas of law, however, would be untenable."[145] UNMIK's regulation of the formation of contracts for the international sale of goods[146], or UNTAET's regulation of the banking and telecommunications sectors[147] have been heralded by some as examples of legislative activism exceeding the duty to respect the existing law "unless absolutely prevented". On the other hand, it is not inconceivable that the actions of ITAs in this area, coupled with the scarcity of commentary from states and the lack of judicial decisions, could be indicative of a new rule of customary international law, modifying the application of the law of occupation as it applies to ITAs. The alternative viewpoint would entail a significant scaling-back of the legislative powers of ITAs. In any event, more scrutiny of this area, and of which justifications for legislating are legitimate, would certainly be welcome. At the very least, further SC Resolutions authorising ITAs should contain more detailed guidelines.

[144] Belgo-German Mixed Arbitral Tribunal, Ville d'Anvers v. Germany, Recueil des Tribunaux Arbitraux Mixtes,vol.5, 1926, 712.
[145]Tobias Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights and the Law of Occupation*, «German Yearbook of International Law»,vol.44, 2001,p.391.
[146] UNMIK Regulation 2000/68.
[147] UNTAET Regulation 2000/8, Regulation 2001/15, Regulation 2001/30.

ACCOUNTABILITY

"Sed quis custodiet ipsos custodies?"[148]
(But who guards the guards?)

Accountability, despite being a vague notion capable of various different meanings, is an essential ingredient of any judgment of legitimacy and "is fundamental to the exercise of democracy; indeed it is to a large extent what makes a democratic society democratic."[149] With this in mind, the accountability deficit displayed in all recent examples of ITA is striking, and all the more worrisome given that the overall purpose of ITA is to promote stable democracies, which are premised on the notion of accountability to the people.

The main function of accountability is to prevent abuse of power, even benevolent abuse, and it is therefore a central element of the rule of law. In ITA, accountability plays the two further, equally important, functions of standard-setting, and also of increasing local trust in the institution mandated with their governance. Whilst it is understandable to measure accountability in terms of institutions and processes capable of producing binding judgments on the legitimacy of a certain act, it should be borne in mind that:

> *"Accountability can mean many different things to different people. The legal profession may be tempted to account it with liability or responsibility – terms that denote consequences of harmful or wrongful behaviour – and these are certainly important aspects of accountability. However, as political scientists justly remind them, accountability signifies a concept broader than that. It encompasses political, administrative, and various informal, non-legal mechanisms by which someone may be held answerable for something."*[150]

[148] Juvenal, *Satires*, 55–127.
[149] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.199.
[150] August Reinisch, *Governance without Accountability*, «German Yearbook of International Law», 2001,p.273.

Any analysis of the accountability of ITA must therefore go beyond the preliminary examination of institutions and mechanisms and examine the wider context in which such ITAs operate, including any other factors which may serve to bring international governors to account for their actions.

The most obvious accountability mechanism, and perhaps the most amenable to qualitative analysis, is legal accountability exercised through the means of an impartial judiciary. The right to an effective remedy "determined by competent judicial, administrative or legislative authorities"[151] has been enshrined in numerous human rights treaties and is now regarded as a legal obligation of customary law status incumbent upon states. In this respect, the recent history of ITA has been seriously inadequate.

All UN missions enjoy complete immunity in domestic courts and this applies also to all recent examples of ITA. This would appear to run counter to the statement of UN Secretary-General Kofi Annan that "if the rule of law means anything at all, it means that no one, including peacekeepers, is above the law"[152], and indeed this state of affairs has been heavily criticised by a great many academics and commentators. The Kosovo ombudsperson has been perhaps the staunchest critic of UNMIK's immunity, recalling that "the fundamental precept of the rule of law is that the executive and legislative authorities are bound by the law and are not above it. He further recalls that, therefore, the actions and operations of these two branches of government must be subject to the oversight of the judiciary, as the arbiter of legality in a democratic society"[153].

The justification for UN immunity is the arguably-legitimate aim of protecting UN missions from arbitrary interference from the government of the State in which the mission is based[154]. However, as many academics have been quick to point out, in cases of ITA, the UN *is* the government, and therefore "it follows that the underlying purpose of a grant of immunity does not apply as there is no need for a government to

[151] International Covenant on Civil and Political Rights,Art.2.3(a) and (b).
[152] Quoted in Sylvain Vité, *Re-establishing the Rule of Law under Transitional Administration*, in Yearbook of the Geneva Centre for the Democratic Control of Armed Forces 2005,p.194.
[153] Kosovo Ombudsperson Special Report No. 1,sec. 24.
[154] Waite and Kennedy v. Germany, 1999, Reports of Judgments and Decisions, *1999-I*, para.63.

be protected against itself."[155] Consequently, "Regulation 2000/47 in Kosovo is tantamount to a government granting immunity to itself. In other words, through the adoption of this regulation, UNMIK placed itself above the law."[156]

The consequences of this are not simply that citizens are deprived of their fundamental right to seek a remedy in a judicial setting; it also has negative consequences for the rule of law (including a judicious separation of powers), levels of trust in both the ITA institution itself and the judiciary, and example-setting for any successor governments.

Various authors have sought to defend[157], or at least explain[158], this accountability deficit on the basis of the emergency nature of ITA missions, yet this explanation is not entirely satisfactory. Surely in an emergency situation, when human rights are most at risk, there is a need for more accountability, rather than less? Furthermore, at the very least, at some point in the transition the emergency should be deemed to be over and normal judicial proceedings should recommence. This has not been the case in any recent examples of ITA. Moreover, the irony of the situation is that, especially as regards Kosovo, the population of the administered territory would otherwise enjoy much stronger human rights safeguards, at least in theory, such as Belgrade's recent accession to the first Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), allowing individual petitions, and its recent membership of the Council of Europe, which will entail appeals to the European Court of Human Rights (ECtHR). The ombudsperson summarised this situation, saying "the United Nations, the self-proclaimed champion of human rights in the world, has by its own actions placed the people of Kosovo under UN control, thereby removing them from the protection of the international human rights regimes that formed the justification for UN engagement in Kosovo in the first place."[159]

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[155] Kosovo Ombudsperson Special Report No.1, sec.23.
[156] Sylvain Vité, *Re-establishing the Rule of Law under Transitional Administration*, in Yearbook of the Geneva Centre for the Democratic Control of Armed Forces 2005,p.194.
[157] Alexandros Yannis, *The UN as Government in Kosovo*, «Global Governance»,vol.10, 2004,p.72.
[158] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.200.
[159] Kosovo Ombudsperson Second Annual Report, 2001-2002.

However, this is not to say that, in the absence of judicial scrutiny of ITAs, there are no avenues of complaint open to citizens. The establishment of ombudsperson and equivalent institutions, and internal complaints mechanisms also amount to important, albeit in practice flawed, mechanisms of accountability.

Regarding internal complaints procedures, these have been established in all ITAs, and at least with regards to UNMIK, have been found to be worryingly unsatisfactory in many respects, given the lack of any judicial alternatives. According to one academic, these "commissions fall short of real administrative tribunals in terms of independence, accountability and transparency"[160]. The Kosovo ombudsperson also notes serious problems related to the prohibition on legal representation for petitioners, the composition of the panel entirely of UNMIK staff members, the lack of any adequate appeals process, and the difficulty of obtaining information from UNMIK regarding the numbers and types of pending or resolved claims[161]. The ombudsperson further notes, incredibly, that "it appears that even claims regarding which UNMIK has been found liable remain pending indefinitely, as the UN has apparently allocated no portion of its budget for the payment of such claims."[162]

Ombudsperson institutions, on the other hand, have had differing levels of success. The Kosovo institution, despite the fact that its powers are essentially limited to recommendations, has proved to be a harsh and vocal critic of the administration. However, the fact that the ombudsperson lacks the power to make binding judgments, and that the NATO-controlled military wing of the mission, KFOR, is excluded from its jurisdiction, has consequently meant that its influence has been "excessively limited"[163] and it has often been ignored by UNMIK[164]. By the ombudsperson's own reckoning, fewer than a third of its requests for interim measures, against both

[160] Sylvain Vité, *Re-establishing the Rule of Law under Transitional Administration*, Chapter 9, in Yearbook of the Geneva Centre for the Democratic Control of Armed Forces 2005,p.194.
[161] Ombudsperson Institution in Kosovo, Third Annual Report, 2002-2003, p.4.
[162] *Idem*,p.5.
[163] Sylvain Vité, *Re-establishing the Rule of Law under Transitional Administration*, in Yearbook of the Geneva Centre for the Democratic Control of Armed Forces 2005,p.195.
[164] David Marshall, Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, «Harvard Human Rights Journal»,vol.16, Spring 2003,p.138.

international and national authorities, were fully successful[165]. On the other hand, the powers of the ombudsperson are "by no means negligible"[166]. The institution enjoys a wide power to examine all UNMIK documents, unless security reasons prevent it and reasons are given in writing, all persons are required to cooperate with the ombudsperson and the institution may start investigations either on its own initiative or subject to a complaint filed with it. Furthermore the power to mobilise national and international public opinion is one that the ombudsperson has proved to be adept at using. Finally, the harshness and frequency of its criticism of UNMIK is clear proof that it has successfully filled the role of an independent watchdog that was expected of it: It has at times referred to Kosovo as a "human rights black hole"[167] and chided UNMIK for its "indifference to the rule of law"[168] and "disregard for human rights"[169], as well as publicly highlighting many specific failings of the administration.

It is therefore surprising and a cause for great concern, that with the recent transfer of the institution from international to local control (Kosovanization), oversight of UNMIK has been removed from its jurisdiction. It is difficult to interpret this decision as anything other than a deep lack of faith on the part of UNMIK in the ability of local actors to perform this role impartially. The only other possible alternative explanation, of being a convenient means to silence a vocal critic, is so utterly undemocratic as to strain credibility. Under either explanation it is surprising that this decision has received so little international attention. By displaying such a lack of trust in the newly nationalised ombudsperson, UNMIK will hardly serve to engender trust among the local population in the ombudsperson institution (the same argument applies equally to the judiciary and judicial scrutiny of UNMIK), and if concerns about the ability of local actors to adequately fulfil their role are justified then it must be wondered at whether it was advisable to proceed with the nationalisation at such a rushed pace. This act has denied Kosovars their only

[165] Of 28 requests for interim measures the ombudsperson deemed nine to be successful, five were partly successful and fourteen were unsuccessful. Ombudsperson Institution in Kosovo, First Annual Report 2000-2001, Second Annual Report 2001-2002, Third Annual Report 2002-2003.
[166] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.202.
[167] Kosovo Ombudsperson Third Annual Report, 2002-2003.
[168] *Idem.*
[169] *Idem.*

remaining, albeit non-binding, avenue of independent complaint against their caretaker international government and sets a bad example for successor governments. Therefore "with current calls for greater UN accountability, it seems extraordinary that UNMIK has speedily and – some would argue – arbitrarily removed itself from the Ombudsperson's jurisdiction."[170]

This precedent is not entirely new, as the Bosnian OHR is not subject to review by the Bosnian ombudsperson. The East Timorese ombudsperson did oversee UNTAET but with a more limited mandate than the Kosovo ombudsperson, for instance lacking the authority to investigate allegations of human rights abuse. This, combined with the fact that it lacks the institutional support that the OSCE provided the Kosovo equivalent, has led to it being "generally seen as ineffective."[171]

A second accountability mechanism, the Office of the Inspector General, was created in East Timor to oversee the use of funds from the World Bank-administered Trust Fund for East Timor. The institution was notably established following a request from the CNRT and was locally led. However, due to the fact that the primary focus of its activities was regulating the Timorese authorities, rather than UNTAET, and that much of its work was taken up with promotional activities, its effectiveness as watchdog has also been limited.[172]

Although ITAs are not directly accountable to local populations through democratic elections, nor to a large extent through any of the mechanisms outlined above, they are at least theoretically accountable to the body that appoints them: the UN Security Council (and the PIC in the case of the BiH OHR). The ITAs in Eastern Slavonia, Kosovo, East Timor and BiH must all submit regular reports to the Security Council, at intervals varying from once a month to every six months depending on the missions. In addition the Bosnian OHR must regularly brief and submit reports to the PIC and its Steering Board, and report to the European Union, the United States, Russia and "other interested governments, parties and organizations."[173] However,

[170] Christopher Waters, *Nationalising Kosovo's Ombudsperson*, unpublished paper.
[171] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.150.
[172] *Idem.*
[173] General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 10, Art.II.1(f).

the overall effects of this should not be overstated as "the Council does not really have any mechanism, and its members seldom have much appetite, for scrutinizing the conduct of an administration in detail."[174] Consequently, in most cases the reports to the Council are "generally taken at face value"[175] and equally the UN Secretary-General has shown a tendency to trust in the legitimacy of the actions of his Special Representatives in the field.

The inadequacy of these accountability mechanisms have even led to calls for the complete revocation of the executive powers of ITAs. In their open letter to the previous Bosnian OHR, Lord Ashdown, the directors of the European Stability Institute, Marcus Cox and Gerald Knaus, cite the fact that "the PIC does not, in practice, control individual decisions of your office, and it has not set down any rules to control the exercise of the Bonn powers" as a persuasive reason why the OHR should not enjoy such extraordinary powers[176].

On the other hand, it has been argued that this accountability deficit "has so far had limited political implications, and unless things unravel for other reasons, it should not pose any significant political challenges in the future."[177] Whether or not this is true, the political reasons for ensuring accountability, though obviously important, arguably must take second place to the ethical reasons of ensuring that power is exercised legitimately, and consequently accountably.

However, the same author also points out that "the international administrations of our times, whether in Kosovo or East Timor, operate in a rather sophisticated and developed international environment with consolidated democratic values and institutions, a developed international legal machinery, an advanced political and human rights culture, and international institutions including strong media and civil society-all of which indirectly provide considerable checks and balances against

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[174] Edward Mortimer, *International Administration of War-Torn Societies*, «Global Governance»,vol.10, 2004,p.13.
[175] Chesterman, Simon, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, Oxford, 2005,p.151.
[176] Marcus Cox, Gerald Knaus, *Open Letter to Lord Ashdown: After the Bonn Powers*, European Stability Initiative, Sarajevo, 2003.
[177] Alexandros Yannis, *The UN as Government in Kosovo*, «Global Governance»,vol.10, 2004,p.72.

abuses."[178] Regarding the media and Non-Governmental Organisations (NGOs) in particular, it is certainly fair to say that these have had a noticeable constraining effect on ITAs.

The media, whilst also capable of having a destabilising effect in divided or post-conflict states[179], act as an important conduit for informing and expressing public opinion, and therefore provide one of the most important accountability mechanisms in democratic states. In ITA situations local and international media largely fulfil different functions. The main role of local media is to inform the local public and bring local pressure to bear on the administration. This both influences decision making and enables the local population to develop opinions and take informed decisions. Furthermore it has the added benefit that increased understanding normally breeds increased acceptance. Regarding local media the practice of ITAs has been mixed. According to Caplan, they have been quick to recognise the importance of freedom of expression and have thus expended considerable amounts of funding on the local media as part of civil society capacity building. However, they have "sometimes been slow to adopt or promote adoption of the regulations necessary to facilitate responsible journalism."[180] These include regulations on defamation, the establishment of a transparent licensing regime and codes of practice[181], all of which act to ensure that the media are themselves accountable and thereby worthy of local trust.

The international media fulfil a slightly different role in holding ITAs accountable, in that they are more capable of reaching and influencing international decision makers and the domestic publics of donor states. Their notoriously short attention span however, compared to that of local media, may lead to a temptation for international administrators to simply keep a low profile and deflect criticism until the storm has passed without actually addressing underlying problems. That said, some academic studies have noted that in certain areas, such as corruption, the international media have adeptly played the role of a responsible watchdog in bringing ITAs to account,

[178] *Idem.*
[179] Samuel Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, «American Journal of International Law»,vol.95, 2001.
[180] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.206.
[181] *Idem*,p.206.

and that there is evidence that both local and international media have had an effect on ITA decision making[182].

In relation to supporting the development of the independent media and creating a culture of free speech ITAs are largely to be congratulated on their legacies. Bosnia-Herzegovina (33rd), Croatia (56th) and East Timor (58th) all rank within the top 60 states in the world for press freedom according to the Worldwide Press Freedom Index 2005, compiled by the NGO Reporters Without Borders (Kosovo is not listed due to its non-independent status)[183]. According to this organization these states are "very observant of press freedom and give the lie to the insistence of many authoritarian leaders that democracy takes decades to establish itself."[184]

Along with the media, international and local NGOs also perform an important accountability function and they serve to "increase local understanding about international governance of their territories and thus enhance the capacity of the population to participate more effectively in the development process, although it is not evident that international officials have felt accountable to them in any meaningful way"[185]. Some local NGOs in ITA contexts have even been established with the exclusive goal of scrutinising the international presence in their country; one of the best known examples of which is the East Timorese NGO La'o Hamutuk[186]. Similarly international NGOs, such as Human Rights Watch have on occasion acted to bring international administrators to account in situations where "dismal

[182] Ahmed Buric, The Media War and Peace in Bosnia, Regional Media in Conflict: Case Studies in Local War Reporting, London Institute for War and Peace Reporting, 2000,p.71.
[183] Reporters Without Borders, Worldwide Press Freedom Index 2005.
[184] *Idem.*
[185] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.207.
[186] La'o Hamutuk's mission statement commences: "La'o Hamutuk is a joint East Timorese-international organization that seeks to monitor and to report on the activities of the principal international institutions present in Timor Lorosa'e as they relate to the physical and social reconstruction of the country. The institute operates under the assumption that the people of East Timor must be the ultimate arbiters of the reconstruction process and, thus, that the process should be as democratic and transparent as possible. In this regard, La'o Hamutuk provides non-partisan analysis of international activities in the territory with the goal of facilitating greater levels of effective East Timorese participation in the reconstruction and development of the country." Available at http://www.laohamutuk.org/issues.html#UN

performance of the international community has escaped similar critical scrutiny"[187] as that afforded to local leaderships. The voices of such international NGOs carry much greater weight in the meeting rooms of Brussels, New York or Washington, where important decisions affecting ITAs are made.

International administrators have in turn not been deaf to the voices of organised civil society. Examples of this include the fact that the European Stability Institute (ESI) was invited to establish a Lessons Learned and Analysis Unit within UNMIK in 2001[188], and the Human Rights Office of UNTAET conducted weekly meetings with local and international NGOs in order to generate discussions on topics of particular immediacy[189].

In conclusion then, although the existing mechanisms for ITA supervision are in many respects inadequate, fuelling the search for alternatives, the wider environment in which they operate must also be taken into account. However it is clear that ITAs are, by their own actions, largely exempted from independent scrutiny and "the promulgation and exercise of such expansive immunity is in violation of international human rights standards"[190]. It is also clear that far more could be done to bridge the accountability deficit. Such a gap can never be completely filled, due to the undeniably undemocratic nature of ITAs, but it can certainly be attenuated.

[187] Human Rights Watch, Failure to Protect: Anti-Minority Violence in Kosovo, March 2004, published July 2004,vol.16, No.6(D), available at http://hrw.org/reports/2004/kosovo0704/
[188] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.206.
[189] Report of the High Commissioner for Human Rights**,** E/CN.4/2000/27, 2000.
[190] David Marshall, Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, «Harvard Human Rights Journal»,vol.16, Spring 2003,p.220.

USE OF POWERS

> *"The UN's sovereign government in **East Timor** has mimicked monarchical power. But even if conducted under the banner of peace, humanitarianism and human rights, and with all the accompanying good intentions, the international assumption of domestic rule requires built in restraint. De Mello admits that he had no clear conception of how to 'exercise fair governance with absolute powers', other than seeking a model for 'benevolent despotism'. But this has rarely led to good and fair governance, or to self-determination. Unless transitional administration guarantees self-determination, it will be unwelcome"*[191]

> *"In our Second Annual Report, we stressed that **Kosovo** should prepare itself to be a 'human rights black hole', in Europe and the world. This observation remains an accurate one, particularly given that UNMIK continues to ignore any findings that it has violated human rights guaranteed under international rights conventions"*[192]

> *"The experience of **Bosnia** shows the ease with which a state-building mission may start out with unlimited powers to meet extraordinary circumstances and end up as an uncomfortable caricature of a Utilitarian despot. No mission should be relied upon to impose limits on itself."*[193]

Whereas previous chapters have demonstrated that there are convincing ethical and legal reasons for limiting the powers of ITAs, this chapter will focus on their record in practice; a record that it is fair to say has not entirely reflected the standards that have come to be expected of democratic governments worldwide. Of course, this may in part be explained by reference to exceptional circumstances: the fact that ITAs operate in difficult circumstances facing daily almost-insurmountable obstacles is undeniable. However, this does not entirely absolve ITA administrators of their duty to provide good governance in the wider meaning of the term. Rather, in many ways, the exceptional nature of ITAs should suggest that they be held to a higher standard than usual: if one cannot expect the "self-proclaimed champion of human rights in the world"[194] to set a good example, to governments around the world as well as to the population they are preparing for democratic governance, then the prospects for global respect for human rights and democracy may be more distant than imagined.

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[191] Jarat Chopra, *The UN's Kingdom of East Timor*, «Survival»,vol.42, 2000,p.35.
[192] Ombudsperson Institution in Kosovo, Third Annual Report, 2002 – 2003.
[193] Gerald Knaus, Felix Martin, *Lessons from Bosnia and Herzegovina: Travails of the European Raj*, «Journal of Democracy»,vol.14, no.3, 2003,p.73.
[194] Ombudsperson Institution in Kosovo, Second Annual Report, 2001 – 2002.

As a general point of reference for judging the legitimacy of the practice of ITAs, the UN Secretary-General's comprehensive definition of the rule of law represents a good starting point:

> *"The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."*[195]

Certain elements of this definition (such as legal accountability) have been discussed in previous chapters, whereas other elements (such as participation in decision-making) will be the focus of later chapters. This chapter, therefore, will examine the adherence of ITAs to the principles of separation of powers, adequate quality of laws (including respect of human rights standards) and a sufficiently transparent, fair and non-arbitrary implementation of the law or other use of executive powers.

The principle of separation of powers has been a guiding tenet of governance since first articulated by Montesquieu in 1748. The idea that the three branches of government should be independent of each other is widely considered to be essential in prohibiting, or at least restraining, abuses of power. Indeed James Madison went so far as to say "the accumulation of all powers, legislative, executive and judiciary in the same hands … may justly be pronounced the very definition of tyranny"[196]. In practice, this principle has been interpreted in widely differing ways, and in all states a certain amount of overlapping and intertwining of the powers is inevitable, and even, to some extent, desirable. It is submitted though, that, at least nominally, in no democratic state is the principle so entirely disregarded as in situations of ITA.

[195] United Nations Security Council, the rule of law and transitional justice in conflict and post-conflict societies, report of the Secretary General, UN Doc. S/2004/616, 2004, para.6.
[196] James Madison, Federalist 47, 1788.

The Kosovo ombudsperson noted that "an important attribute of respect for the rule of law is that the executive branch of government is not considered to be above the law. In Kosovo, as the executive and the legislature are one and the same individual, the premise is already compromised"[197]. Moreover, the third branch of government also did not escape unscathed as "the conflation of executive and legislative power has provided significant room for interference in the judicial realm."[198]

Whereas the concentration of all powers in the hands of a single entity or individual certainly provides scope for the abuse of power, ITAs operate in a sophisticated human rights-sensitive environment, capable of constraining their actions and excesses, despite the distinct lack of procedural safeguards. If therefore the custom of ITAs was in practice to respect the division of powers, and the rule of law in a wider sense, then the problem that the potential for abuse exists would be much less significant. However, this has not always proven to be the case and at times ITAs have been accused of exerting unwarranted control over the judicial process, contravening human rights standards in their promulgation and application of the law, and interfering in internal political processes. Whilst the negative aspects of the record of ITAs should perhaps not be exaggerated, given their many successes and the unique situations in which they operate, it is certainly no exaggeration to say that "some of these actions have been so intrusive that in many other contexts they would likely be seen as violations of democratic principles."[199]

To be in compliance with the rule of law, legislation must meet a certain standard. In addition to the obvious criterion of not directly contravening international human rights standards it must pass the tests of "accessibility, foreseeability and quality of the law, all of which conjoin to protect the individual against arbitrary governmental action"[200]. Furthermore, in ITA situations, legislators should exercise a certain amount of restraint, in recognition of the fact that they do not enjoy a democratic

[197] Ombudsperson Institution in Kosovo, Third Annual Report, 2002–2003.
[198] David Marshall, Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, «Harvard Human Rights Journal»,vol.16, Spring 2003,p.114.
[199] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.183.
[200] Ombudsperson Institution in Kosovo, Third Annual Report, 2002–2003.

mandate and should consequently confine the exercise of their powers to the purposes discussed in previous chapters.

In order to possess any semblance of democratic legitimacy a legislative process must be inclusive and transparent, but for the resulting legislation to be in conformity with international human rights standards, arguably the most important factor is that a systematic review of all legislation for human rights compliance is included as an integral part of the process. In this sense the practice of ITAs has been far from satisfactory. In UNMIK, for instance, a Joint Advisory Council on Legislative Matters (JAC), although lacking in any formal authority, was originally created in 1999 to advise the SRSG on the human rights compliance of all legislation; sharing this role with the Office of Human Rights and Community Affairs (OHRCA). However, the OHRCA was later stripped of its human rights advisory role and the JAC was quickly marginalised. By February 2001 there was no systematic consultation with the JAC on proposed legislation and from then on, until its officially being disbanded in late 2002, the JAC was provided with proposed regulations only as "a token gesture" [201], and for all practical purposes it had become "an empty shell"[202]. Furthermore the Senior Human Rights advisor to the mission left and was not replaced, all of which negatively impacted on the quality of the resulting legislation, which, according to some commentators, "knowingly and blatantly violated"[203] human rights standards.

Two of the areas in which ITAs, and especially UNMIK, have been most criticised for the lack of legislative compliance with human rights, are the rights to liberty and to a fair trial. UNMIK and KFOR's policy of executive detention, whereby suspects were held in captivity under executive orders without trial, occasionally even overriding judicial demands for their release from both local and international judges[204], was described by the Kosovo ombudsperson, and many other commentators, as reflecting "a disregard for human rights and the rule of law"[205]. Likewise numerous deficiencies

[201] David Marshall, Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, «Harvard Human Rights Journal»,vol.16, 2003, p.120.
[202] *Idem*,p.120.
[203] *Idem,p.*106.
[204] The most egregious case was that of Afrim Zeqiri, who was released almost 20 months after a judge ordered his release for lack of evidence.
[205] Ombudsperson Institution in Kosovo, Third Annual Report, 2002–2003.

of the criminal justice system, leading to potential breaches of the right to a fair trial, have been cited, such as a lack of clarity as to the applicable law, ethnic bias and inadequate translation facilities[206]. Furthermore, international judges, introduced into the system in order to combat ethnic bias and a lack of sufficiently trained personnel, are not subject to the same constraints and disciplinary proceedings as national judges and enjoy the power to select their cases, which provides for a very real danger of compromising the independence of the judiciary[207].

Further important qualities of the rule of law are that all legislation must be accessible, foreseeable and certain. Arguably in all these senses legislation promulgated by ITAs falls short of the required standards, yet the failure was once again most acute in Kosovo. The Kosovo ombudsperson noted serious problems with the accessibility of legislation, for which no hard copies were available to the public (although they were forwarded to courts after long delays) and publication on the UNMIK website was deemed to be sufficient; even in a country in which the vast majority of people have no access to the internet and most legal practitioners have only limited access[208]. Similar problems were faced in East Timor where, if anything, internet access was even more restricted. In all ITA situations regulations were passed with a considerable lack of *vacatio legis* (the period between the signing of a law and its entry into force), with the result that citizens could not be expected to know with certainty the details of the laws in force in their country.

The problem of translations has also been common to all ITAs. In East Timor the official language was Portuguese, despite only being spoken by a minority, and there were considerable delays in providing adequate translations of legislation into Tetum (the majority language) and Indonesian. In Kosovo, UNMIK ignored a recommendation from the OSCE that no regulation be passed without its being translated[209], and "the quality of translations of those laws that are, in fact, translated,

[206] David Marshall, Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, «Harvard Human Rights Journal»,vol.16, 2003. p.140.
[207] Initial Report of Serbia and Montenegro to the Human Rights Committee under the International Covenant on Civil and Political Rights, CCPR/C/SEMO/2003/1 2003.
[208] Ombudsperson Institution in Kosovo, Third Annual Report, 2002–2003.
[209] David Marshall, Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, «Harvard Human Rights Journal»,vol.16, 2003, p.118.

is so poor that legal practitioners working in Albanian or Serbian frequently cannot ascertain their meaning."[210]

Aside from their legislative record, international administrators have arguably fared no better in complying with the rule of law in their exercise of executive powers. Whilst these problems are by no means absent from Kosovo or East Timor, it is the case of Bosnia in which the "slide towards expediency"[211] is most evident. The so-called "Bonn" powers of the Bosnian OHR were introduced in an ad hoc fashion, without safeguards or guidelines on their usage, in order to monitor the implementation of a peace process, and yet the purposes for which they have since been employed arguably go far beyond this aim. Furthermore, whereas the intention of ITAs should be "to do themselves out of a job"[212] by gradually scaling back their activities, in Bosnia the complete opposite has occurred and with every successive HR resort to the use of the Bonn powers has become more frequent[213].

These powers have come to be used, not as a means of enforcing a peace agreement, but to address concerns such as corruption or economic reform (An example of this is the OHR's re-writing of legislation approved by the Republika Srpska (RS) Assembly in order to reduce unemployment benefits). Although these are certainly important issues they are arguably beyond the legitimate scope of an international administrator in cases such as Bosnia where democratic institutions exist that are, in theory at least, capable of dealing with these subjects. The negative consequences for the development of a responsible local political culture, in the event that local leaders are prohibited, or are permitted to abstain, from exercising ownership of political issues, is discussed in the next chapter.

Local political processes and the resulting democratic choices of the population, whilst not beyond the legitimate interest of an international administrator, are areas in

[210] Ombudsperson Institution in Kosovo, Third Annual Report, 2002–2003.
[211] Gerald Knaus, Felix Martin, *Lessons from Bosnia and Herzegovina: Travails of the European Raj*, «Journal of Democracy»,vol.14, No.3, July 2003,p.64.
[212] The Responsibility to Protect, International Commission on Intervention and State Sovereignty, 2001,art.5.31.
[213] Usage of Bonn powers: Carlos Westendorp (1997-99) 4 per month, Wolfgang Petrisch (1999-2002) 12 per month, Paddy Ashdown (2002-2006) 14 per month. (Source: Gerald Knaus, Felix Martin, *Lessons from Bosnia and Herzegovina: Travails of the European Raj*, «Journal of Democracy», vol.14, No.3, 2003).

which he or she should tread carefully in exercising executive powers as there is a high risk of such actions being deemed to be undemocratic. In Bosnia, efforts to marginalise extremist political elements and promote more moderate factions, have even gone so far as one HR (Carlos Westendorp) overruling the judgment of the RS Constitutional Court that the dissolution by the RS President (Biljana Plavsic) of the National Assembly was unconstitutional. Although it was claimed that the court's judgment was a result of political pressures, "to overrule a court's judgment in this manner represents a serious assault on the constitutional order that can hardly be said to serve as an object lesson in democratic governance."[214] Aside from being illegitimate such breaches of democratic principles in the short term for the sake of their preservation in the long-term, are likely to be counterproductive. In such cases of unrestrained usage of powers it is highly likely that "a people with little or no direct experience with democratic practice may draw the wrong lessons from the more peremptory methods employed by the high representative"[215]. Moreover, in this particular case a further irony was presented by Plavsic's later conviction by the ICTY for crimes committed during the Bosnian war, underlining the dangers of interference in local politics.

The area in which the executive powers of the OHR have proved to be most controversial, however, is the power to "dismiss presidents, prime ministers, judges and mayors without having to submit its decisions for review by any independent body [or] publicly present any evidence for its stance."[216] Between 1997 and 2003 the OHR dismissed over 100 officials (60 of them in 1999 and 2000 alone[217]) without providing any opportunity of review. Allegedly these dismissals even extended to persons who had committed the sole error of criticising the international mission too vocally[218]. Unsurprisingly, the OHR's possession of, and demonstrated willingness to

[214] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.183.
[215] Richard Caplan, *International Authority and State Building: the Case of Bosnia and Herzegovina*, «Global Governance», vol.10, 2004,p59.
[216] Gerald Knaus, Felix Martin, *Lessons from Bosnia and Herzegovina: Travails of the European Raj*, «Journal of Democracy»,vol.14, No.3, 2003,p.61.
[217] Source: Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.189.
[218] According to Knaus and Martin, the Mayor of Drvar, Mile Marceta, was replaced on the pretence of incompetence but in reality due to his criticism of the mission's lack of progress on the issue of minority returns: "Paradoxically, the OHR had dismissed an elected official not for blocking or ignoring the implementation of the Dayton Peace Agreement, but for trying too hard to implement it."

use, these powers has had a profound effect of Bosnian politics, and "whether or not it is intended in this way, the effect is highly intimidatory"[219]. Consequently, at least to some extent, open criticism of the OHR has been somewhat stifled; an outcome of questionable merit, to say the least, in a country struggling to establish a democratic political culture.

The power of dismissal has not simply been used in individual cases: in 2002 it was used in a blanket manner to compel all Bosnian judges and prosecutors to resign and reapply for their positions, despite protestations from the Council of Europe that this reversed the burden of proof and equated to "disguised disciplinary proceedings without any of the guarantees associated with such proceedings". The Council of Europe report concluded by asking "if the international community is not willing to abide by its own principles when faced by major difficulties, what can we expect from local politicians?"[220] It is therefore hardly surprising that many commentators have concluded that "arbitrary dismissal is so clearly contrary to European human rights standards that it is an embarrassment in a member state of the Council of Europe"[221], and hence called for the OHR's powers to be revoked, or at the very least to be subject to stricter oversight than is currently the case.

Whilst the issue of transferring competences to local institutions will be examined in the next chapter it should be noted that the use of these Bonn powers did not cease despite democratic elections bringing a moderate government to power or Bosnia's entry into the Council of Europe. In any country, removing elected but uncooperative officials "not only undermines the state's authority but also is clearly undemocratic"[222], but in such circumstances it is even less defensible.

Lessons from Bosnia and Herzegovina: Travails of the European Raj, «Journal of Democracy»,vol.14, no.3, 2003, p.66.

[219] Marcus Cox, Gerald Knaus, *Open Letter to Lord Ashdown: After the Bonn Powers*, European Stability Initiative, Sarajevo, 2003,p.3.

[220] Council of Europe, "Comments on the 'Discussion Paper on the Selection Process for the Interim High Judicial Council." Quoted in Gerald Knaus, Felix Martin, *Lessons from Bosnia and Herzegovina: Travails of the European Raj*, «Journal of Democracy», Vol.14, No.3, July 2003,p.65.

[221] Marcus Cox, Gerald Knaus, *Open Letter to Lord Ashdown: After the Bonn Powers*, European Stability Initiative, Sarajevo, 2003,p.5.

[222] Patrice McMahon, *Rebuilding Bosnia: a Model to Emulate or Avoid?* «Political Science Quarterly»,p.591.

It is clear then the lack of procedural safeguards does not present merely theoretical risks. If left to their own devices international administrators, even if acting in the best interests of the governed, are likely to disregard human rights standards for more effective law enforcement, promote political outcomes through undemocratic means, or succumb to temptations to expand their mandates to confront problems which could be more legitimately dealt with by local institutions. The emergency situations in which ITAs operate and the monumental tasks facing them, such as creating a functioning judiciary in a matter of weeks, will almost inevitably necessitate some curtailing of human rights. However this should be done in line with internationally recognised standards (such as the wealth of case-law relating to derogations to human rights conventions) and, most importantly, under supervision, in order to prevent well-intentioned breaches of human rights and the rule of law.

CONSULTATION AND OWNERSHIP

> *"It is not much to be wondered at if impatient or disappointed reformers, groaning under the impediments opposed to the salutary public improvements by the ignorance, the indifference, the intractableness, the perverse obstinacy of a people, and the corrupt combinations of private interests armed with the powerful weapons afforded by free institutions, should at times sigh for a strong hand to bear down all these obstacles, and compel a recalcitrant people to be better governed."*[223]

If international administrators are on occasion tempted to see consultation as a merely formalistic hurdle and local ownership as a soundbite to be repeated but not necessarily adhered to, then this is perhaps understandable. Consultation is time-consuming and potentially divisive in environments where important decisions need to be taken quickly and local parties are unwilling to cooperate and compromise, or lack the skills to contribute effectively. Likewise, promoting local ownership through devolving responsibility means, at best, empowering actors or institutions with little experience of governance; at worst those institutions and individuals will turn out to be totally incapable of fulfilling their functions effectively or will pursue narrow partisan agendas lacking in respect for human rights or the rule of law. In spite of this, successive authors have unanimously underlined the importance of consultation and local ownership. It is in fact vital for increasing the legitimacy of ITAs and the sustainability of the institutions they put in place and, furthermore, may actually enhance their effectiveness.

Four questions are intrinsic to a discussion on the importance of involving local parties in ITAs through the means of consultation and ownership: Why, with whom, how, and for what? For the purposes of analysing the legitimacy of ITAs perhaps the first of these questions, "why?", is the most relevant. However, even if international administrators recognise the importance of local involvement, if this is not translated into effective and legitimate processes, then the fundamental democratic-deficit of ITAs remains unmitigated. Consequently the following three questions are still relevant and each poses its own important questions of legitimacy.

[223] John Stuart Mill, Considerations on Representative Government, 1861.

Whereas the circumstances in which ITAs operate necessitate a temporary suspension of certain aspects of democracy, this does not completely absolve them of the duty to take the views of local communities into account, and, more significantly, allow those views to be accorded the weight which they deserve in a democratic society. Bearing in mind that interventions are carried out under the mantle of protecting human rights and promoting democracy, the "process of devolving responsibility back to the local community is essential to maintaining the legitimacy of intervention itself"[224]. From a practical viewpoint, local knowledge is essential for producing workable policies and those policies that are promulgated by ITAs without acceptance by local communities will not be effectively implemented. For these reasons "unilateral international action, or action that does not emerge from consultations with domestic stakeholders, will be ineffective in practice and will risk estrangement from allies in civil society."[225] A lack of adequate engagement with local communities at all stages of the transitional period will either lead to disillusionment with the mission itself or "a local population may not develop a sense of political responsibility"[226] with the result that local actors will be unable to fulfil governance functions successfully following the mission's withdrawal. The issue of sustainability is perhaps the most significant of all considerations regarding local empowerment, at least if one takes a long-term viewpoint: Local actors should be given the opportunity to "learn from their experiences under the watchful eye of international specialists who … may not be able to remain very long in a territory."[227] For all of the above reasons, therefore, consultation and ownership should be viewed as priorities of any ITA and as "the only way to guarantee the legitimacy and sustainability of the peacebuilding process."[228]

The first consultative task of ITAs is to identify suitable local interlocutors that will act as responsible and legitimate representatives of the local population. On occasion, such as in Bosnia, where independent governmental institutions pre-exist then these

[224] The Responsibility to Protect, International Commission on Intervention and State Sovereignty, 2001.
[225] Mark Baskin, *Review Essay: Between Exit and Engagement: On the Division of Authority in Transitional Administrations*, «Global Governance», vol.10, 2004,p.130.
[226] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.182.
[227] Richard Caplan, *A New Trusteeship? The International Administration of War-Torn Territories*, «Adelphi Paper 341», Oxford University Press, International Institute for Strategic Studies, 2002,p.51.
[228] Sylvain Vité, *Re-establishing the Rule of Law under Transitional Administration*, in Yearbook of the Geneva Centre for the Democratic Control of Armed Forces 2005,p.197.

represent the obvious forum for engaging with the population and obtaining local input. Although this does not necessarily preclude establishing further contacts among the local population the elected institutions should represent the primary interlocutor and representative of the local population, even if, as in Bosnia, "nationalist politicians on all sides remained in power"[229], because otherwise there is a strong risk of undermining the state, with detrimental long-term effects.

However, in the cases of East Timor and Kosovo the UN faced a much more complex challenge of identifying legitimate representatives in "a total institutional vacuum"[230]. In East Timor, in the search for a local interlocutor the coalition-group National Council for Timorese Resistance (CNRT) represented the "obvious choice … and enjoyed considerable de facto legitimacy"[231]. However, UN doctrine, following its established peacekeeping policy of impartiality, militated against its giving preferential treatment to anything less than a sovereign government so as not to marginalise other interest groups in society, and consequently relations with the CNRT were originally strained as it was not afforded the status it was arguably due[232]. The eventual decision to work exclusively with the CNRT, which "overwhelmingly represented pro-independence political perspectives"[233], was equally criticised for predictably promoting this grouping "at the expense of other sections of the population"[234]. Whilst the CNRT had the legitimating benefit of being a coalition group, comprising several previously antagonistic groups, its support for Timorese independence was not the only respect in which it was not entirely representative of the population. The fact that its leadership was comprised of elitist elements of Timorese society led to the adoption of Portuguese as the official language "although

[229] Elizabeth Cousens, Charles Cater, *Toward Peace in Bosnia: Implementing the Dayton Accords*, Boulder, 2001,p.82.
[230] Kai Eide, Special Envoy of the Secretary-General of the United Nations, Comprehensive Review of the Situation in Kosovo, 2005,p.1.
[231] Anthony Goldstone, *UNTAET with Hindsight: The Peculiarities of Politics in an Incomplete State*, «Global Governance»,vol.10, 2004,p.87.
[232] Paulo Gorjao, *The Legacy and Lessons of the United Nations Transitional Administration in East Timor*, «Contemporary Southeast Asia»,vol.24, 2002,p.316.
[233] Jarat Chopra, *The UN's Kingdom of East Timor*, «Survival»,vol.42, 2000,p.28.
[234] Simon Chesterman, East Timor in Transition: Self-determination, State-Building and the United Nations, International Peacekeeping 9, no.1, 2002,p.45.

it was understood by fewer than 10 percent of the population and by virtually no-one under the age of thirty."[235]

In Kosovo the UN faced a similar situation. The moderate Democratic League of Kosovo (LDK) and the militant Kosovo Liberation Army (KLA) constituted the only organised groupings of civil society and although they enjoyed the support of Kosovo's overwhelmingly-Albanian population, Serbs and other minorities were completely excluded. Furthermore, in view of the uncertainties over Kosovo's future status, over-reliance on these parties would have been interpreted by Belgrade and minorities within Kosovo as a prejudgment of Kosovo's independence. Despite the UN's cautious attitude Serb minorities felt that they were not sufficiently consulted and their views not respected by UNMIK[236]. A further complication is raised regarding the recognition of groups that have been accused of committing war-crimes, such as certain sections of the KLA, as this inadvertently bestows a certain legitimacy on the group. Despite being understandably controversial, co-opting such groups into working within democratic non-violent political processes can have positive overall effects, as has been demonstrated in Cambodia and Sierra Leone, and the KLA has been successfully demobilised and transformed into the Kosovo Protection Force.

One way of alleviating the problem of the limited representativeness of existing groups is to bypass them through processes of gauging local opinion and providing for local input at grassroots level. This can be achieved by various means such as nationwide consultations, meetings at village level to define "social contracts" whereby each group clarifies their role and their expectations of the other[237], or through information campaigns using television and radio, or even loudspeakers and leaflet drops; all of which have been conducted under ITAs. Given the centralisation of social structures around the church and religious near-homogeneity in places such as East Timor, the UN has been "curiously reluctant to engage with religious

[235] Mark Baskin, *Review Essay: Between Exit and Engagement: On the Division of Authority in Transitional Administrations*, «Global Governance»,vol.10, 2004,p.127.
[236] Milan Ivanovic, Head of Serbian National Council, interview with author, 2006.
[237] Sukanya Mohan Das, *Process issues: An argument for inclusion of grass-roots communities in the formulation of national and international initiatives in re-building Afghanistan*, «The Journal of Humanitarian Assistance», 2006,p.5.

organisations"[238], which can also provide a means of engaging directly with a subject population. Establishment of such direct links with local communities can have the positive effects of lowering levels of mistrust, increasing the credibility of ITAs in local eyes, and defusing tensions between local leaders and international administrators, as well as providing administrators with a means to monitor such issues as the participation of women or other vulnerable sections of the community[239]. On the other hand, established institutions or political parties may interpret such consultation mechanisms as a means of undermining their authority and resentment at this may complicate relationships between them and ITAs. In East Timor resistance to grassroots consultation was particularly strong: The Timorese National Council (NC) refused to accept a draft regulation proposed by the Council of Ministers to establish commissions to canvass grassroots opinions on constitutional issues (the resolution was later issued by the transitional administrator as a directive), on the grounds that it would undermine the authority of the NC. The reports of the resulting commissions, following 212 constitutional hearings attended by almost ten percent of the electorate, were not referred to once during the assembly's deliberations on the drafting of the constitution "in what looked like a deliberate snub to UNMIK"[240]. Nevertheless, attempts to provide for local input at all levels are praiseworthy and serve to decrease the inherent democratic deficit of ITAs, even if, as in this situation, they are not always effective.

A second method of ensuring local participation in the running and rebuilding of the state under ITAs is through either appointed bodies or elected institutions. Elections take time to organise and, as will be examined below, there can be good reasons for delaying their scheduling. Consequently, local bodies appointed by the transitional administrator constituted the primary forum for local-international interaction in both Kosovo and East Timor in the early stages of the mission.

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[238] Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, 2005,p.148.
[239] Sukanya Mohan Das, *Process issues: An argument for inclusion of grass-roots communities in the formulation of national and international initiatives in re-building Afghanistan*, «The Journal of Humanitarian Assistance», 2006,p.7.
[240] Anthony Goldstone, *UNTAET with Hindsight: The Peculiarities of Politics in an Incomplete State*, «Global Governance»,vol.10, 2004,p.94.

In East Timor considerations of effectiveness originally led to the creation of the National Consultative Council (NCC) in December 1999 with only ten members, which by Vierra de Mello's (the Special Representative of the Secretary-General - SRSG) own concession was "not representative enough of East Timorese Society and not transparent enough in its deliberations"[241]. In recognition of this the NCC was replaced by the National Council, with 36 members, in July 2000 and including a "broad cross-section of civil society" [242] but which still only enjoyed consultative status. Perhaps unsurprisingly therefore "from the point of view of the East Timorese, although it was more representative and constituted an attempt to facilitate their participation, it continued to be an unsatisfactory solution"[243]. Further efforts to include Timorese in the decision-making process were made with the creation of District Advisory Councils in April 2000, yet these were also only advisory bodies and all executive power remained with the international district administrator. All of these efforts failed to entirely satisfy the Timorese who sought greater ownership of the running of their country. The advice of the Timorese bodies was "accepted at de Mello's sufferance"[244] who retained the power to ignore or overrule, and consequently Xanana Gusmao, the head of the CNRT, echoed a commonly felt sentiment when he stated that "the role of the East Timorese is to give their consent as observers rather than the active players we should start to be."[245]

A reorganisation of the mission to increase Timorese participation, by the creation of an East-Timorese dominated Transitional Cabinet with responsibility for running the East Timor Transitional Administration (ETTA), only succeeded in temporarily placating local politicians. Despite a slight alleviation, the original problem of the limited empowerment of these bodies remained and consequently a majority of the Timorese leadership was "critical of the purely formal character of a consultative mechanism that seems to exist simply to ratify decisions taken by international

[241] Quoted in Paulo Gorjao, *The Legacy and Lessons of the United Nations Transitional Administration in East Timor*, «Contemporary Southeast Asia»,vol.24, 2002,p.319.
[242] The World Bank, United Nations Transitional Administration in East Timor and the World Bank. Background paper for Donors' Meeting on East Timor, Brussels, 2000.
[243] *Idem*,p.320.
[244] Jarat Chopra, *The UN's Kingdom of East Timor*, «Survival»,vol.42, 2000, p.32.
[245] Quoted in Simon Chesterman, *East Timor in Transition: Self-determination, State-Building and the United Nations*, International Peacekeeping 9, no.1, Spring 2002,p.67.

administrators"[246]. Such problems reached a head in December 2000 when the East Timorese members of the Transitional Cabinet threatened to resign unless UNTAET transferred greater responsibility to them: "More than any other, this episode showed the lack of satisfaction among the East Timorese owing to the fact that Timorization was mainly cosmetic"[247], but it also demonstrated that local actors, even if lacking in formal powers, may be able to successfully wield political power to influence the administration of their country under ITAs.

In Kosovo UNMIK followed a similar path, creating a half-local, half-international Interim Administration Council (IAC) in early 2000, to replace the existing Kosovo Transition Council. Although the IAC enjoyed a higher status than the Transitional Council, including the power to make recommendations, its role was also purely advisory and "no one was under the illusion that these bodies wielded any actual power"[248]. Interaction between UNMIK and the Kosovan bodies was largely conducted on an *ad hoc* basis with the result that there was a "failure to develop any legislative process, including ensuring meaningful consultation with local actors and transparency."[249] In order to facilitate engagement on a regional level municipal elections were organised in October 2000, although "UNMIK retained the power to intervene in all matters and to substitute decisions made by the Municipal Assembly.[250]" Despite consistent calls from Albanian Kosovans for a greater transfer of responsibility the hostility towards any moves that would serve to prepare Kosovo for independence, and general uncooperativeness, of Kosovan Serbs and Belgrade complicated the situation. As in East Timor local support for the international mission diminished rapidly as calls for local ownership grew louder and UNMIK, at least in the eyes of many locals, failed to meet those demands. The tendency towards authoritarian decision-making and a lack of meaningful consultation has resulted in "a local population disillusioned and cynical about human rights rhetoric and disengaged

[246] Fabrice Weissman, *In the Shadow of 'Just Wars': Violence, Politics and Humanitarian Action*, Cornell University Press, Ithaca, New York, 2004.
[247] Paulo Gorjao, *The Legacy and Lessons of the United Nations Transitional Administration in East Timor*, «Contemporary Southeast Asia»,vol.24, 2002,p.320.
[248] Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, 2005,p.133.
[249] David Marshall, Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, «Harvard Human Rights Journal»,vol.16, Spring 2003,p.103.
[250] Tobias Irmscher, *The Legal Framework for the Activities of the United Nations Interim Administration Mission in Kosovo: The Charter, Human Rights and the Law of Occupation*, «German Yearbook of International Law»,vol.44, 2001,p.361.

from legal institutions."[251] The fact that appointed bodies share the democratic deficit inherent in ITAs, combined with calls for greater local ownership, meant that in Kosovo, as in East Timor, pressure to hold national elections as soon as possible grew steadily and were seen by many as an essential step to be taken to facilitate and legitimise the devolution of power. Consequently in May 2001 the SRSG promulgated a Constitutional Framework for Provisional Self-Government, which provided for a Kosovan Assembly, President and Government, although the SRSG would retain all previously-held powers.

In many ways elections represent the obvious and most legitimate means of selecting national representatives. The idea that the authority to represent a people flows directly from the people themselves and thus they alone may legitimately confer that power, is taken for granted in most states and enjoys more or less universal acceptance. In ITA situations however that assumption has been questioned and it is now generally felt that the expression of the democratic will of a people should be contingent upon its conformity to liberal ideals that are conducive to sustainable peace and reconciliation. If the overall purpose of ITAs is to temporarily override concerns of sovereignty and democracy in favour of the long-term goals of preservation of peace and sustainability of democracy, then this sceptical attitude towards elections does not represent a huge conceptual leap, although it remains controversial.

On the one hand, elections are favoured by donors because they are viewed as a positive and tangible step on the road to fully-fledged democracy, and moreover they may represent the beginnings of an exit strategy. It may also be advantageous to a subject-people to hold elections whilst the state remains in the international spotlight, bearing in mind "the ephemeral nature of international interest in a crisis"[252]. Furthermore there is considerable evidence that elections can be conducive to sustainable peace. The report of the UN Secretary-General, "No exit without strategy", noted that peace becomes sustainable "when the natural conflicts of society can be resolved peacefully through … participatory governance. In many cases an effective strategy for realizing that objective is to help warring parties to move their

[251] David Marshall, Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, «Harvard Human Rights Journal»,vol.16, Spring 2003,p.97.
[252] Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, 2005,p.208.

political or economic struggles from the battlefield and into an institutional framework."[253] Consequently the goal of elections may not be to remove societal conflicts, but rather to change the nature of that conflict into one which is less harmful to society. In Kosovo, for instance, municipal elections "were intended less to determine the legitimate representatives of the population than they were to engage the Kosovars … in non-violent political activity."[254]

However, it has been demonstrated that elections should not be viewed as a panacea, and "post-election developments in Cambodia, Angola and elsewhere show that they should not be necessarily be regarded as the key to a lasting settlement."[255] In many cases, rather than promoting national reconciliation, they "only give legitimacy to the existing warlords, power brokers, and mafias."[256] The early holding of Bosnian elections is the example most often presented as evidence of why it may be prudent to wait "for moderate political leaders to emerge and organise their support."[257] The Bosnian elections are widely viewed as having been "counter-productive because they legitimated the nationalist governments responsible for the civil war in the first place"[258] and resulted in a perceived need to extend the powers of the OHR which henceforth expended much of its efforts going "to great lengths to promote electoral outcomes that they thought represented the best chance for advancing the international agenda for BiH, notably seeking to weaken the position of militant nationalists"[259].

Whilst holding elections early may represent the most democratic option, if this results "in non-liberal governments that hinder rule of law"[260] or has the "effect of turning generals into politicians, formalising ethnic divisions into political fault

[253] Secretary-General of the United Nations, "*No Exit without Strategy: Security Council decision-making and the closure or transition of United Nations peacekeeping operations*".
[254] Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, 2005,p.205.
[255] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005, p.213.
[256] Derek Boothby, *The Political Challenges of Administering Eastern Slavonia*, «Global Governance», vol.10, 2004, p49.
[257] *Idem.*
[258] James Dobbins, *America's Role in Nation-building: From Germany to Iraq*, «Survival»,vol.45, 2003–4, p.94.
[259] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005, p.182.
[260] Patrice McMahon, *Rebuilding Bosnia: a Model to Emulate or Avoid?* «Political Science Quarterly»,p.589.

lines"[261] then the benefits are questionable. The Brahimi report also noted that "elections merely ratify a tyranny of the majority"[262] until democratic values have taken root in a country, and "the experiences of recent international territorial administrations would seem to suggest that this lesson, at least, has now been learned"[263]. Consequently, in Kosovo and East Timor elections were not held immediately but rather were delayed, despite growing calls from all sections of society for greater local ownership, until civil society was deemed ready and satisfactory results could be predicted or, in Eastern Slavonia, until the Croatian government ensured that all Serbs had been issued with voting papers. In this area therefore, the international community seems to come down again in favour of long-term sustainability, arguably at the expense of short-term legitimate process.

An important means of empowering a local population, other than political engagement with locally-controlled bodies, is to recruit local people to executive roles in the governing structures. As well as being essential to the creation of autonomous institutions, the employment of locals can also serve to increase a sense of local ownership of national governance. ITAs have generally sought to create parallel institutions and gradually transferred power to those institutions, rather than incorporating local people into their existing structure and scaling back the numbers of international staff, but this has not always been for the same reasons. In Bosnia the OHR was charged with supervising governance functions, rather than actually performing those functions, a role which would not eventually need to be devolved to local institutions. Consequently "arguments in favour of the 'Bosnianization' of the OHR are somewhat misguided. While it might seem desirable to increase the degree of local responsibility for the execution of OHR tasks, a truly Bosnianized OHR would represent something of an unelected parallel Bosnian government, which would clearly be unacceptable."[264] On the other hand, in East Timor the reasoning was based on more financial concerns, bearing in mind the huge discrepancy between salary scales in UNTAET and ETTA. In Kosovo this concern was also relevant but

[261] Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, 2005,p.208.
[262] Brahimi Report, Report of the Panel on United Nations Peace Operations.
[263] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005, p.213.
[264] *Idem*,p.192.

the desire to remain unpartisan in the ethnic conflict[265] was arguably more compelling as a reason for constructing separate structures.

Building local capacity represented, in the cases of Kosovo and East Timor, a monumental task. In both territories the vast majority of the population had been excluded from official posts or educational establishments for over a decade and consequently there existed an acute lack of qualified personnel. In such cases ITAs face a difficult choice between short-term effectiveness through reliance on international staff, or long-term sustainability brought about through early empowerment of locals. These concerns are quite apart from other impediments to local capacity building that frequently occur in ITA situations such as "the high turnover rate, where trained civil servants depart for jobs elsewhere"[266]. The vast differences in salary scales create almost irresistible incentives for local employees to leave national institutions in favour of work with the UN or international NGOs: For instance, in Afghanistan local employees were paid between 15 to 400 times more working for international organisations than national pay scales, with the result that such positions were far more desirable "even if it means a judge is working as a driver, or an electrical engineer as a guard."[267]

Whilst the difficult choices involved in building local capacity are perhaps only peripheral to a wider debate on legitimacy and accountability, they deserve to be mentioned, as this represents perhaps the primary task facing ITAs, and effectiveness of governance functions and sustainability of their institutional legacy are viewed by many as the sole criteria for judging ITAs. In the political sphere it is clear that an over-zealous use of powers by international administrators can have the effect that "a local population may not develop a sense of political responsibility"[268] if there is no incentive to build consensus on contentious issues. Equally, the introduction of internationals into the judiciary, despite helping to ensure fair judicial process and

[265] 'Nationalising' UNMIK would inevitably have meant employing Kosovan Albanians in vastly superior numbers to other minorities, delegitimising the administration in the eyes of Serbs and Belgrade and opening the door for allegations of political and ethnic bias.
[266] The World Bank, *United Nations Transitional Administration in East Timor and the World Bank*. Background paper for Donors' Meeting on East Timor, Brussels, 2000,p.10.
[267] Simon Chesterman, *Walking Softly in Afghanistan: The Future of UN State Building*, «Survival»,vol.44, 2002,p.43.
[268] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.182.

thus greater credibility and faith in the system[269], does not necessarily "favour capacity building of the local judiciary, as they are not given the opportunity to take on sensitive and difficult cases to build their competence, prove their impartiality and, ultimately, gain respect."[270] On the other hand, a rapid transfer of responsibility to local actors does not inevitably ensure greater sustainability and, by empowering under-qualified actors, it can have the negative effects of creating "a risk of weak state capacity and the re-emergence of corruption"[271]. The nationalising of the Kosovo ombudsperson, for instance, was opposed by the internationally-appointed ombudsperson himself, on the grounds that a longer period of international tutelage was needed, an international official would have greater influence with UNMIK, and that only an international institution could command the trust of all sections of Kosovan society[272].

Aside from building local capacity and organising elections, drafting a constitution represents the third important hurdle that must generally be crossed in ITA situations before a population is deemed ready for self governance. This is perhaps the area in which international interference is least legitimate and the importance to the subject population of controlling the means of designing their state means that "genuine 'ownership' is essential, understood here to mean actual control of both process and substance by a representative group of local officials, who themselves engage in consultations with a wide cross section of the community."[273] Nevertheless, despite general acceptance of this principle, the international community has on occasion imposed a constitution on a subject population (Bosnia), imposed limits within which the constitution is to be drafted (Kosovo) or defined the means whereby it will be drawn up (East Timor); all of which represent significant interferences with the drafting process, even if they may be unavoidable or legitimated by the prevailing circumstances.

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[269] See Kai Eide, Special Envoy of the Secretary-General of the United Nations, *Comprehensive Review of the Situation in Kosovo*, 2005,p.8.
[270] Human Rights Commissioner of Council of Europe, quoted in Sylvain Vité, *Re-establishing the Rule of Law under Transitional Administration*, in Yearbook of the Geneva Centre for the Democratic Control of Armed Forces 2005,p.196.
[271] The World Bank, *United Nations Transitional Administration in East Timor and the World Bank*. Background paper for Donors' Meeting on East Timor, Brussels, 2000,p.10.
[272] Christopher Waters, *Nationalising Kosovo's Ombudsperson*, unpublished paper.
[273] Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, 2005,p.213.

In Bosnia, the Dayton accords created the governing structures that remain in place today and although the accords were locally agreed to, they were drafted by international officials who applied considerable pressure on all parties to accept this forced compromise. The agreements were crafted on a consociational basis, attempting to provide incentives for power sharing among ethnic groupings yet the result was "immobilism, the inability to get anything accomplished through governmental decision making."[274] The consensus building that had been hoped for never emerged as parties on all sides lacked the commitment to work together within existing structures and consequently the extension of the powers of the OHR was seen as necessary to achieve progress on even minor issues. In view of this it is unlikely that any other constitutional arrangements could have been agreed to without outside imposition, although the existing situation does not bode well for a sustainable and autonomous state, including a scaling back of the powers of the OHR, as "there is no reason, at present, to believe that, without this international arbiter, the factions would cooperate more fully."[275]

In Kosovo an interim constitution exists but the final version has not yet been drafted as the final status of the territory remains uncertain. The constitution will therefore depend on the final-status talks between Pristina and Belgrade and in this respect the international community has imposed three limits upon negotiations: No return to the pre-war situation; no union of Kosovo with any other country (i.e. Albania); and no partition of Kosovo. The fact that this may run contrary to the democratic wishes of the people of Kosovo and, as far as they are relevant, Serbia, seems to be a secondary concern to that of regional stability. As a majority of Kosovans would be content with an independent state and probably now see it is as preferable to a union with Albania the stipulation of no union with another country does not present a major problem. Likewise a return to direct rule from Belgrade would be completely unpalatable from the point of view of Kosovan Albanians and would have the likely result of the country descending back into civil war. It is the third condition, that of

[274] Samuel Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, «American Journal of International Law»,vol.95, 2001,p.94.
[275] *Idem,p.*94.

no partition, that represents potentially the most restrictive of the limits laid down by the international community.

In Kosovo, as in much of the rest of the former Yugoslav republic "in a pragmatic, rather than legally compelling solution the internal (federal) boundaries became boundaries of the successor states even when the relevant borders had been drawn not much time before and, in part, arbitrarily."[276] Consequently Kosovo contains a significant Serb enclave, North Mitrovica, bordering Serbia proper in the north of the country, in which basic services are still (illegally) provided by Serbia and a vast majority of the people have no wish to fall under the rule of Pristina, where, quite apart from any symbolic concerns, they feel they "will become a decoration to any central-level political institution with little ability to yield tangible results"[277]. The reason this may be an important concern is that it is conceivable that partition of Kosovo would allow Belgrade to agree to an independent Kosovo, although the most likely solution is that this will not be necessary to ensure Belgrade's acceptance, and in any case the vast majority of Kosovan Albanians are against partition. However, bizarrely, the inclusion of North Mitrovica in an eventual Kosovan state was defended by some high ranking UNMIK officials as being beneficial and necessary for creating a multi-cultural Kosovo[278], as if the inclusion of large groups of people who have no affinity for the state and no wish to be part of it is a positive development. More convincingly, given the recent history of the area, it may have the effect of "legitimizing ethnic cleansing, [and] would almost certainly undermine the stability of neighbouring Macedonia"[279], not to mention Bosnia. It would therefore seem that the international community's reasoning for the application of *uti posidetis* in the decolonisation of Africa, that creating weak ethnically-riven states is preferable to the risk of civil war and regional instability, remains unchanged.

In East Timor, whilst the international community noticeably did not interfere in the drafting of the constitution, except in a consultative role, it has been criticised for the

[276] Peter Hilpold, *Humanitarian Intervention: Is there a need for a legal reappraisal?* «European Journal of International Law»,vol.12, No.3, 2001,p.439.
[277] Kai Eide, Special Envoy of the Secretary-General of the United Nations, *Comprehensive Review of the Situation in Kosovo*, 2005,p.1.
[278] Jens Modvig, OSCE Deputy-Head of Mission, interview with author, 2006.
[279] Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, 2005,p.213.

process it created for the drafting. The fact that the drafting was conducted by the constituent assembly after its members had been elected in national elections meant that the process arguably had the benefit of democratic legitimacy. However, on the other hand the strong majority that the political party FRETILIN received meant that this party clearly dominated the drafting process, and, according to some, this "means that sooner or later the document's legitimacy will be questioned"[280]. In view of the fact that "a dominant party may be the last thing one wants when drafting a constitution"[281], it has been contended that "a better constitution-making process would have been a non-elected Constitutional Commission with broad representation and including non-party people, to draw up a constitution, to be ratified later in a referendum"[282].

Transfer of sovereignty normally follows a phased strategy, with power being gradually devolved to institutions as they become capable of executing the tasks delegated to them. The completion of the mission and, generally, its subsequent transformation into an assistance mission, will be achieved according to a timetable that is agreed through a mixture of political and technical factors. Mounting pressure from local politicians and donor states will often be the overriding concerns in specifying dates for transfer of competences, and delays therefore "carry a heavy penalty in a politically sensitive timetable."[283] Where the timetable for withdrawal is agreed beforehand, as in Eastern Slavonia, ITAs may find their work hindered by local actors who know that if they hold out for a certain period the mission will be unable to enforce its mandate. The UN was thus unable to achieve many of its goals and ensure the continued cooperation of the Croatian government in Eastern Slavonia regarding discriminatory legislation, reconciliation and economic revitalisation[284] following the withdrawal of UNTAES. On the other hand a withdrawal strategy based on more technical criteria (i.e. the achievement of local parties and institutions

[280] Paulo Gorjao, *The Legacy and Lessons of the United Nations Transitional Administration in East Timor*, «Contemporary Southeast Asia»,vol.24, 2002,p.326.
[281] Simon Chesterman, You, the People: The United Nations, Transitional Administration, and State-Building, Oxford University Press, 2005,p.232.
[282] Paulo Gorjao, *The Legacy and Lessons of the United Nations Transitional Administration in East Timor*, «Contemporary Southeast Asia»,vol.24, 2002,p.326.
[283] The World Bank, *United Nations Transitional Administration in East Timor and the World Bank*. Background paper for Donors' Meeting on East Timor, Brussels, 2000.
[284] Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building*, Oxford University Press, 2005,p.219.

of specified targets) may face the criticism that, as the targets are set by the transitional administrator "the goal posts can be moved indefinitely."[285] Furthermore local actors may have a "tendency to see standards implementation as an exercise imposed from the outside and that they have to go through in order to reach the status process"[286], without actually subscribing to the values underlying that process. Although the financial constraints of donor states, local pressure for greater ownership, and standards completion are all legitimate concerns relevant to a decision on setting the date for withdrawal, the example of Bosnia seems to suggest that decisions on the date of withdrawal should not rest with the transitional administrator alone. Although the OHR, in response to local pressure, outlined a process for the scaling back of the powers of this office in the Mission Implementation Plan, according to the completion by local actors of certain goals, there is no mechanism for citizens to challenge the OHR's assessment of progress: according to some commentators, "like Proteus in the Greek myth, every time it appears to have been defeated, the problem with Bosnia changes shape"[287] allowing the OHR to constantly set higher and more demanding standards.

It seemed self-evident to Mill "that leading-strings are only admissible as a means of gradually training the people to walk alone."[288] Sadly, Mill's 21st century successors still struggle to achieve this laudable objective.

[285] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.190.
[286] Kai Eide, Special Envoy of the Secretary-General of the United Nations, *Comprehensive Review of the Situation in Kosovo*, 2005,p.3.
[287] Gerald Knaus, Felix Martin, *Lessons from Bosnia and Herzegovina: Travails of the European Raj*, «Journal of Democracy»,vol.14, no.3, 2003,p.69.
[288] John Stuart Mill, Considerations on Representative Government, 1861, Chapter II.

CONCLUSIONS AND RECOMMENDATIONS

> *"The Secretariat faces an unpleasant dilemma: to assume that transitional administration is a transitory responsibility, not prepare for additional missions and do badly if it is once again flung into the breach, or to prepare well and be asked to undertake them more often because it is well prepared. Certainly, if the Secretariat anticipates future transitional administrations as the rule rather than the exception, then a dedicated and distinct responsibility centre for those tasks must be created somewhere within the United Nations system."*[289]

Are ITAs legitimate institutions?

1. In recent years the international community, influenced not only by self-interest but also by concerns of morality, has taken on an *ever more active role in support of peace, respect of human rights and ensuring human security*, which has in turn had the effect of raising the expectations of the peoples of the world. It is clear that where states are on the point of collapse and countless lives are in danger the "United Nations, the only institution still truly representative of the international community as a whole"[290], will face situations "which the international community simply cannot ignore"[291] and will have to react accordingly.

2. Whilst such situations of impending state collapse are evidently, therefore, a legitimate interest of the international community, and arguably create a moral duty to react, this does not necessarily imply that it is legitimate for the international community to assume the sovereign powers of a state. However, it is the view of this paper that is *legitimate to confer these powers on ITAs*, as a "solution of last resort"[292] if, in the circumstances, it is the best way of ensuring sustainable peace, and protecting human rights and human security. Whereas the use of ITAs to fill a complete political vacuum is comparatively

[289] Report of the Panel on United Nations Peace Operations, *the "Brahimi Report"*,sec.78, 2001.
[290] Francesco Francioni, *Of War, Humanity and Justice: International Law After Kosovo*, «Max Planck Yearbook of International Law UNYB», 2000, p.126.
[291] The Responsibility to Protect, International Commission on Intervention and State Sovereignty, sec.5.24, 2001.
[292] Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, «American Journal of International Law»,vol.95, 2001,p.591.

uncontroversial, its use in situations where local actors are capable of performing governance functions but are deemed to be lacking in the necessary commitment to democratic values will always be contentious, but again this paper takes the view that it may in some circumstances be legitimate.

3. Where it is possible to identify and appoint, or elect, local actors with the necessary skills to undertake the running of the state, who may be trusted to adhere to human rights norms and who have the necessary will to cooperate both between themselves and with the international community, then an assistance mission (i.e. the *"light footprint" approach*) rather than an ITA should be the appropriate tool. It is unavoidable that determining whether these criteria are met will remain a controversial and politically sensitive task, yet it is these issues, rather than budgeting considerations, that should ultimately be given precedence.

4. If it is deemed necessary to bestow powers on ITAs then this should be done *within prescribed limits* and the scope of those powers should not be allowed to constantly expand. In general these powers should be used solely, or at least primarily, for the creation of a sustainable democracy, including capacity building and protection of human rights. The assumption of any goals beyond this should only be undertaken if absolutely necessary, particularly if long-term effects are likely, and then with the full participation of locals and according to supervised guidelines.

Should the UN be fulfilling this function?

5. In many ways the UN is "ill-suited to administering territories in transition"[293], due to its bureaucratic inefficiencies, the ambiguities of Security Council mandates, its lack of intelligence capacity, and the allocation of resources according to political priorities, and posts according to equitable geographical distribution[294]. On the other hand, the UN's recent experience in this area and its "ability to draw on personnel with broad cultural understanding and

[293] Jarat Chopra, *The UN's Kingdom of East Timor*, «Survival», vol.42, 2000,p.35.
[294] David Harland, *Legitimacy and Effectiveness in International Administration*, «Global Governance»,vol.10, 2004,p.16.

experience of a wide range of administrative systems, including in the developing world"[295] mean that in other respects it has unique capabilities for running ITAs. More importantly, however, for the purposes of this paper, is the UN's "ability to monopolise the image of legitimacy"[296], making it the "the *least illegitimate of all possible outside actors*"[297].

6. Although some academics have supported the idea of future ITAs being run by a single state, or group of interested states, for the sake of increased efficiency, this would necessarily be at the expense of legitimacy and should therefore be avoided as "invariably such missions will be criticised as vehicles for individual nations seeking regional hegemony"[298]. On the other hand, a stronger case may be made for *regional organisations playing a greater role*, as they have the benefit of increased local knowledge and potentially increased local acceptance: "Lightening the footprint is one idea, but changing the shoe altogether may be a better option."[299]

The Trusteeships Council

7. It is clear that existing bodies (the UN Secretariat and Security Council, and the PIC in the case of the OHR) are unsatisfactory as mechanisms for holding international administrators to account. With this in mind, there seems to be a "strong case for reassessing the role of the Trusteeship Council"[300] to act as a *supervisory body at the international level*. Despite the difficulties involved in affecting the necessary changes in the UN Charter to make this possible some now believe that this "may soon be politically viable"[301]. The duties of such an institution should include the review of decisions of international administrators,

[295] High-level Panel on Threats, Challenges and Change, 2004, sec.262.
[296] Jarat Chopra, *The UN's Kingdom of East Timor*, «Survival»,vol.42, 2000,p.35.
[297] David Harland, *Legitimacy and Effectiveness in International Administration*, «Global Governance»,vol.10, 2004,p.17.
[298] Jarat Chopra, *The UN's Kingdom of East Timor*, «Survival»,vol.42, 2000,p.35.
[299] Graham Day, Christopher Freeman, Civitas, *From Policekeeping to Peace: Intervention, Transitional Administration and the Responsibility to Do It Right*, Working Paper, 2003.
[300] UK Government Report quoted in David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention*, Pluto Press, 2002.
[301] *State Building and the United Nations*, «Strategic Survey», 2002/3.

laying down guidelines for the exercise of powers, hearing appeals against ITAs and giving a higher profile voice to complaints.

Legal Constraints

8. It seems clear that, despite never being foreseen in the UN Charter, the Security Council has the *legal authority to create ITAs* either through the implied powers doctrine or through an evolution in customary international law, bearing in mind the lack of state objections to the creation of recent ITAs. The UN Charter may imply some limitations to the setting-up and functioning of ITAs but these are probably secondary to the overriding power to act for the protection of peace and security.

9. ITAs should be bound by *human rights and international humanitarian law*. Although a case may be made to say that neither regime is necessarily legally applicable, the majority of academic opinion concludes otherwise. Furthermore, legal issues aside, the ethical case for its application is almost incontestable. With this in mind SC mandates creating ITAs should clarify the status of these legal regimes, stipulating that they are superior in the legal hierarchy even to decisions of the international administrator. If this is not made clear in the mandate then it should be done so by the ITA itself in its first act upon the territory.

10. *Mandates for ITAs* should be made under Chapter VII as standard in order to remove doubts about the authority of ITAs, although this does not diminish the imperative also to seek local consent for the creation of the administration. Mandates should further specify whether the ITA is to have legislative powers and for what purposes these may be used.

11. The *law of occupation* should be re-examined with regard to ITAs. As it stands, according to a strict application of the law it should be applicable to ITAs and many of their actions would therefore be in breach of some of its provisions. If, as is likely, there are good reasons for exempting ITAs from some aspects of the law of occupation then the relevant changes should be made, but a proper debate

on the subject would first be needed, as the issue has received remarkably little attention to date.

Accountability

12. ITAs at present suffer from a *chronic accountability deficit*, which should be addressed as a matter of priority both for the purposes of standard-setting to peoples and governments around the world and to legitimise the institution as a whole. The non-democratic nature of ITAs means they will never be entirely legitimate, but guaranteeing a minimal level of accountability will serve at least to minimise this shortfall: "peace maintenance will win legitimacy only if global governors lead by example."[302]

13. ITA *immunity in domestic courts* should be immediately revoked. The underlying logic for applying it elsewhere, to protect the UN from unwarranted interference by governments, does not apply where the UN and the government are one and the same actor. Furthermore it has negative consequences for standard setting regarding the separation of powers, and promoting trust in both the judiciary and the ITA itself.

14. Where available the possibility of allowing appeals against ITAs to *regional human rights bodies* (such as the European Court of Human Rights) should be examined, although legal technicalities may present obstacles.

15. *Internal complaints procedures* should be revised to adhere to standards of fair trial, including allowing legal representation and an adequate appeals procedure, as this is especially important where no alternative exists in domestic courts. The UN should also reserve a portion of its budget for paying compensation claims.

16. *Ombudsperson Institutions* should be set up in all ITA situations. They should have full power to investigate ITAs for human rights abuse and jurisdiction

[302] Jarat Chopra, *The UN's Kingdom of East Timor*, «Survival»,vol.42, 2000,p.27.

against ITAs, which should not be cancelled in the event of nationalisation of the ombudsperson institution.

Use of Powers

17. ITAs should seek to achieve a *greater separation of powers* than is currently the case, although a certain overlap in powers will be inevitable. One obvious measure would be to take control of the judiciary out of the hands of the international administrator and place it under the supervision of another agency.

18. Compliance with human rights standards is essential to maintaining the legitimacy of the intervention itself and the record of ITAs in this area is far from unblemished. Consequently all ITA-proposed legislation should be subjected to *human rights impact assessments* before being promulgated.

19. Respect for human rights should be maintained even at the expense of less-effective law enforcement: If it is deemed necessary to deviate from international human rights standards then this should be done in compliance with the *established rules on derogations*.

20. Any "slide towards expediency"[303] should be avoided. Whilst it may be tempting to increase the scope of powers to overcome impediments to progress, this approach "implicitly teaches that technocratic rule at arm's length from the people is perfectly good governance after all"[304] and consequently a *minimalist approach to the use of powers* should be adopted and such powers should only be used for the reasons they were originally conferred, unless there exist exceptionally strong arguments to the contrary.

21. *Certain actions are so undemocratic* and represent such "a serious assault on the constitutional order"[305] that despite being justifiable in individual cases, such as

[303] Gerald Knaus, Felix Martin, *Lessons from Bosnia and Herzegovina: Travails of the European Raj*, «Journal of Democracy»,vol.14, no.3, 2003,p.64.
[304] *Idem*,p.70.
[305] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.183.

the overruling of a supreme court judgment, they should never be taken due to the overall message that they send.

22. The *power to dismiss officials* without any the legal requirement to give reasons or any possibility of review is "clearly undemocratic"[306] and where it currently exists appropriate safeguards should be put in place and past dismissals subjected to review.

23. Whether it remains appropriate for an ITA to possess extraordinary powers should be subjected to *regular and systematic review* by an outside body, such as the Trusteeships Council, as "no mission should be relied upon to impose limits on itself."[307]

Consultation and Ownership

24. Consultation is almost universally acknowledged to be a *fundamentally important task of ITAs* at all levels of governance, yet it is equally clear that it may be impossible to satisfy local demands for sufficient inclusion in the governing process. Despite this, consultation should not be seen as a merely formalistic hurdle and genuine substance should take priority over presenting an image of commitment to engage with a subject population.

25. Efforts to *include all elements of civil society in a consultative process* should be begun as soon as feasibly possible. A "judicious determination as to which parties are legitimate"[308] will need to be made in the early stages in order to select local interlocutors, but care should be taken not to marginalise less-well represented sections of society.

26. *Grassroots consultation* should take place wherever feasible, alongside consultation at higher levels, even if such consultation is unpopular with elitist

[306] Patrice McMahon, *Rebuilding Bosnia: a Model to Emulate or Avoid?* «Political Science Quarterly»,p.591.
[307] Gerald Knaus, Felix Martin, *Lessons from Bosnia and Herzegovina: Travails of the European Raj*, «Journal of Democracy»,vol.14,no.3, 2003,p.73.
[308] Jarat Chopra, *The UN's Kingdom of East Timor*, «Survival», vol.42, 2000,p.36.

elements of local society, as democratic input should be facilitated at all levels of society.

27. Awareness campaigns should be conducted throughout the mission, using all available media, in order to *increase local knowledge* of the processes affecting their country and to increase trust in the administration.

28. An *official consultative body* should be established as soon as possible, to constitute the primary interlocutor with the local population, and should thus be as representative as possible, even at the expense of efficiency. Consultation with this body should be transparent and conducted on a systematic, rather than ad hoc, basis. It is at present difficult to ensure that adequate consideration is given to local views, and that consultative bodies do not become merely cosmetic, and a possible supervisory role to ensure whether these goals are being met should be considered for a body such as the Trusteeships Council.

29. In order to create a truly representative body, elections are a necessary next step, but in certain circumstances, where they will serve to entrench national divisions rather than promote reconciliation, it may be *legitimate to delay the holding of elections*. The setting of a date for elections should be dictated by the needs of the state, rather than pressure from donors.

30. In *drafting a constitution* it is essential that local actors control both process and substance, although it may be preferable for a group of local experts and representatives to agree a draft and have it ratified by parliament than for the process to be controlled by a single dominant political party. In extreme cases where agreement between factions is impossible, pressure may be applied to local actors to accept an internationally-drafted model, but this should be viewed as a short term solution until a locally-drafted constitution is made possible. Limitations on the provisions of the constitution may be applied by the international community as a matter of last resort for the purposes of regional stability or protection of human rights, yet the individual interests of donor states should not be allowed to interfere with the process.

31. If *transfer of sovereignty* is subject to technical criteria then the achievement of these criteria should be judged by an outside actor, such as the Trusteeships Council, rather than the ITA itself to avoid the phenomenon of the "moving goalposts". If transfer of sovereignty is determined by political agreement with local actors then little can be done to affect the timescale but it should be noted that after the withdrawal of ITAs it may be more difficult to affect progress on issues such as minority rights or other previous commitments of local actors.

Conclusion

ITAs represent a useful tool of the international community for helping to guide war-torn societies towards a sustainable peace based on the values of human rights and a functioning democracy. Whilst their non-democratic nature prevents them from achieving a legitimacy equivalent to that of a democratic government, in many circumstances they may represent the least-illegitimate option open to the international community. Although the "chronic democratic deficit"[309] inherent in ITAs may never be fully overcome it may certainly be mitigated through the means of increased accountability. This paper has explored the ways in which ITAs fall short of the standards of accountability and legitimacy that subject citizens should in theory be entitled to expect of them, and has attempted to offer suggestions for ways in which future missions may alleviate past and present shortcomings. We cannot know whether another ITA will ever be created, but these issues deserve serious attention because "if intervention is sometimes inevitable then it is our responsibility to make sure it is done right"[310] and this means ensuring that powers exercised by ITAs are not used "arbitrarily and unfairly, without accountability, transparency, or predictability – in contravention of the meaning of justice and the rule of law"[311].

[309] Richard Caplan, *International Governance of War-Torn Territories*, Oxford University Press, 2005,p.184.
[310] Civitas Working Paper, Graham Day and Christopher Freeman, *From Policekeeping to Peace: Intervention, Transitional Administration and the Responsibility to Do It Right*, 2003.
[311] David Marshall, Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, «Harvard Human Rights Journal»,vol.16, 2003,p.104.

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