

THE UNITED NATIONS ADMINISTRATION OF EAST TIMOR

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ABSTRACT

In October 1999, the Security Council adopted Resolution 1272 (1999) which established under chapter VII of the UN Charter the United Nations Transitional Administration in East Timor (UNTAET). Together with the United Nations Interim Administration in Kosovo (UNMIK) UNTAET is unprecedented in the history of UN peacekeeping operations with respect to the scope of the responsibilities and the range of the mandate granted to the mission. Resolution 1272 empowered UNTAET to take over all branches of government on East Timor, namely to exercise all legislative and executive authority, including the administration of justice. The purpose of this article is to examine the practice of the UN's administration of East Timor and to discuss the various legal issues arising from it. After providing an overview of the development of international peacekeeping, the article turns to the relationship between East Timor and the United Nations. The next sections deal with the mandate and structure of UNTAET and its predecessors. Then the author discusses the legal basis of the establishment of such administrations and the legal constraints on the power of the Security Council, such as human rights law and international humanitarian law. Finally, the article concludes with remarks on the UN administration of East Timor.

1 INTRODUCTION

For most of their history, United Nations peacekeeping operations¹ have been deployed in situations of international conflict with a mandate to monitor cease-fire agreements and buffer zones. These operations have been referred to as the first generation of UN peacekeeping missions.² The operations were based on the

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¹ For general information on UN peacekeeping operations see for example, M. Bothe, 'Peace-Keeping', in B. Simma (ed.), *The Charter of the United Nations* (1996) 565–603; O. Ramsbotham/ T. Woodhouse, *Encyclopedia of International Peacekeeping* (1999), United Nations (ed.), *The Blue Helmets, A Review of United Nations Peacekeeping* (3rd ed., 1996).

² The UN Charter does not explicitly authorize peacekeeping operations and does not even mention peacekeeping. However, it is generally accepted that the legal basis for peacekeeping operations falls between chapter VI and chapter VII. Under chapter VI the Security Council can adopt various techniques in pursuit of peaceful settlement of disputes (mediation, negotiation, etc.). Under chapter VII the Security Council may take enforcement measures to maintain or restore international peace and security.

principle that the consent of the parties was required and they did not constitute enforcement measures under chapter VII of the UN Charter. That meant the use of force was only allowed in self-defence.

This traditional concept of international peacekeeping has changed to a great extent. Since the end of the cold war most of the conflicts the UN has to face are domestic rather than international. Increasingly, the UN has become engaged in more complex missions; providing civilian administrators and policemen, as well as soldiers, to oversee the implementation of peace plans negotiated by parties in conflict that have agreed to resolve their disputes at the ballot box. Examples of these operations, known as the 'second generation' of peacekeeping operations, were the missions in Cambodia (UNTAC), Namibia (UNTAG) and Mozambique (ONUMOZ).³ Common to all of these missions was the fact that they were still based on the consent of the parties.

Another development in the field of peacekeeping was the deployment of peacekeeping troops authorized to enforce actions taken pursuant to chapter VII of the UN Charter. The consent of the parties to the conflict is not needed for chapter VII operations. Examples include the missions UNPROFOR implemented in the former Yugoslavia and UNOSOM II in Somalia. In recent years the Security Council has also granted particular states or groups of states, such as NATO or INTERFET, a mandate to undertake specific enforcement actions. In some cases these enforcement operations were supplemented by a UN peacekeeping presence, as with UNMIK and KFOR in Kosovo, for example.

A further new mechanism is represented by the United Nations governance in East Timor and Kosovo.⁴ On 10 June 1999, the Security Council established the United Nations Interim Administration in Kosovo (UNMIK) by Resolution 1244 and on 25 October 1999 the United Nations Transitional Administration in East Timor (UNTAET) by Resolution 1272. The UN was authorized to exercise all legislative and executive powers over both territories including the administration of justice.⁵ The scope of the responsibilities and the range of the mandate in these cases were unprecedented in the history of UN peacekeeping operations. Missions of this type, which also acquire a broad legal dimension, have been called 'new trusteeships' or the fourth generation of peacekeeping.⁶

³ F.E. Hufnagel, *UN Friedensoperationen der zweiten Generation* (1996).

⁴ On the administration of Kosovo see R. Billesbach, 'Aufgaben öffentlicher Sicherheit für KFOR Soldaten im Kosovo' (2001) 14 *Humanitäres Völkerrecht-Informationsschriften* 83; P. Dreist, 'Rechtliche Aspekte des KFOR Einsatzes' (2001) 43 *Neue Zeitschrift für Wehrrecht* 1; M. Matheson, 'United Nations Governance of Postconflict Societies' (2001) 95 *AJIL* 78–81; M. Ruffert, 'The Administration of Kosovo and East Timor by the International Community' (2000) 50 *ICLQ* 613; C. Stahn, 'International Territorial Administration in the former Yugoslavia: Origins, Developments and Challenges Ahead' (2001) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 108; M. Wagner, 'Das erste Jahr der UNMIK' (2000) 47 *Vereinte Nationen* 132.

⁵ In the case of UNMIK see UNMIK/REG/1999/1.

⁶ W. Kühne, 'Zukunft der UN – Friedenseinsätze Lehren aus dem Brahimi Report' (2000) *Blätter für deutsche und internationale Politik* 1355.

The following article describes the law and practice related to the administration of East Timor, and discusses various problems flowing from it, such as the legal basis for the Security Council to set up such interim administrations.

2 THE RELATIONSHIP BETWEEN THE UNITED NATIONS AND EAST TIMOR

East Timor's struggle for independence has been on the agenda of the United Nations for a long time.⁷ East Timor became a Portuguese colony in the 18th century while West Timor was under Dutch control at that time. West Timor became a part of Indonesia when the country gained independence in 1949. In 1960, the General Assembly decided that Timor and Dependencies were a non-self-governing territory⁸ according to chapter IX of the UN Charter⁹ and to which the General Assembly Resolution on the Granting of Independence to Colonial Countries and Peoples¹⁰ applied. East Timor remained under Portuguese administration till 1975. After Portugal's withdrawal Indonesia occupied East Timor by military force and integrated it as its 27th province. The General Assembly passed several resolutions from 1975 to 1982, calling upon Indonesia to withdraw from the territory. The Security Council reacted in the same manner with Resolutions 384¹¹ and 389,¹² demanding that Indonesia withdraw its troops from East Timor, but neither condemned the invasion as an act of aggression nor as a breach of article 2 (4) of the UN Charter prohibiting the use of force. Although Indonesia did not comply, no further steps were taken by the Council.

Since the eighties, the United Nations tried to resolve the issue together with Indonesia and Portugal. In June 1998, Habibie, the new President of Indonesia, proposed a special status for East Timor which, at that time, excluded full independence. The talks continued and finally a set of agreements was reached between Indonesia and Portugal on 5 May 1999,¹³ entrusting the United Nations to organize a 'popular consultation', giving the citizens of East Timor the choice to

⁷ For a very detailed overview see D.C. Turack, 'Towards Freedom: Human Rights and Self-Determination in East Timor' (2000) 2 *Asia Pacific Journal on Human Rights and the Law* 55 and additionally R.S. Clark, 'East Timor Indonesia and the International Community' (2000) 14 *Temple ICLJ* 75; C. Schreuer, 'The United Nations and East Timor' (2000) 2 *International Law Forum du droit international* 18; The United Nations and East Timor: A Chronology, <http://www.un.org/peace/etimor99/chrono/body.html>.

⁸ T.D. Grant, 'East Timor, the U.N. System, and Enforcing Non-Recognition in International Law' (2000) 3 *Vanderbilt Journal of Transnational Law* 273.

⁹ GA Res. 1542.

¹⁰ GA Res. 1514, 15 UN GAOR, Supp. (No.16), UN Doc. A/4686 (1960) 66.

¹¹ SC Res. 384 (1975).

¹² SC Res. 385 (1976).

¹³ Agreement between Indonesia and Portugal (5 May 1999); with an Appendix Regarding a Constitutional Framework for a Special Autonomy for East Timor, Agreement Regarding the Modalities for the Popular Consultation of the East Timorese through a Direct Ballot, reprinted in (1999) 5(4-5) *International Peacekeeping* (Kluwer Law International) 149-155.

decide either to become an autonomous province of Indonesia or an independent state.¹⁴

In July 1999, the Security Council established by Resolution 1246 the United Nations Missions in East Timor (UNAMET)¹⁵, the task of which was to organize and conduct the popular consultation.¹⁶ The referendum was held on 30 August 1999 where 78.5 per cent of the votes were cast in favour of independence. As a result the Indonesian military and pro-Indonesian militias started terrorizing the people of East Timor by looting, killing and expelling the Timorese from their homes. More than 500,000 people were displaced. As the situation escalated most of UNAMET's personnel had to be evacuated.

Relatively quickly by United Nations standards the Security Council acted by adopting Resolution 1264 on 15 September 1999,¹⁷ determining that the situation in East Timor constituted a threat to peace and security and authorizing under chapter VII the establishment of a multinational force until replaced by a UN peacekeeping mission. The Australian led coalition, called INTERFET¹⁸ was authorized 'to take all necessary measures' to fulfil its mandate, namely to restore peace and security, protect and support UNAMET, and facilitate humanitarian assistance operations. Due to INTERFET's presence UNAMET's personnel could return. A few weeks after INTERFET's arrival only less than half of the East Timorese population returned to their homes and the situation remained critical without a functioning administration and with the imminent collapse of essential services.

On 25 October 1999, shortly after formal recognition by the Indonesian People's Consultative Assembly of the outcome of the consultation, the Security Council established by Resolution 1272¹⁹ the United Nations Transitional Administration in East Timor (UNTAET). Its task is to administer the territory until it is strong and stable enough to become fully independent. On 28 February 2000, the handover of command of military operations from INTERFET to UNTAET was completed. By Security Council Resolution 1338 of 31 January 2001,²⁰ the mandate of UNTAET

¹⁴ A.J.J. de Hoogh, 'Some Random Remarks on Complaints Regarding the East Timor Popular Consultation' (2000) 13 *LJIL* 997.

¹⁵ SC Res. 1246 (1999) reprinted in (1999) 5 *International Peacekeeping* (Kluwer Law International) 113.

¹⁶ For an analysis on UNAMET see J. Toole, 'A False Sense of Security: Lessons Learned from the United Nations Organization and Conduct Mission in East Timor' (2000) 16 *American University ILR* 199.

¹⁷ SC Res. 1264 (1999) reprinted in (1999) 5 *International Peacekeeping* (Kluwer Law International) 147.

¹⁸ For more information on INTERFET and the legal issues involved in particular from the Australian perspective see M.J. Kelly, T.L. McCormack, P. Muggleton, B.M. Oswald, 'Legal Aspects of Australia's Involvement in the International Force for East Timor' (2001) 83 *ICRC Review* 101; for a comment on collective action in regard to East Timor see L. H. Miller, 'East Timor, Collective Action, and Global Order' (2000) 14 *Temple ICLJ* 89.

¹⁹ SC Res. 1272 (1999) reprinted in (1999) 5 *International Peacekeeping* (Kluwer Law International) 148.

²⁰ SC Res. 1338 (2001).

has been extended until January 2002, bearing in mind the possible need for adjustments related to the independence timetable.

3 THE MANDATE AND STRUCTURE OF UNTAET

UNTAET's mandate consists of the following elements:

- to provide security and maintain law and order throughout the territory of East Timor,
- to establish an effective administration,
- to assist in the development of civil and social services,
- to ensure the co-ordination and delivery of humanitarian assistance, rehabilitation and development,
- to support capacity-building for self government,
- to assist in the establishment of conditions for sustainable development.²¹

UNTAET is headed by the Transitional Administrator, who is currently the Special Representative of the Secretary General, Sergio Vieira Del Mello, from Brazil. As of 31 July 2001 the operation has an authorized strength of 7,969 military, 1,428 civilian police and 123 military observers, which are supported by 1,033 civilian personnel and 1,933 local civilian staff.²²

Where necessary UNTAET issues legislative acts²³ in the form of regulations.²⁴ It has to the present day promulgated 51 regulations (4 in 1999, 36 in 2000 and 22 in 2001). At the beginning the problem of the applicable law, defining the law enforcement functions of UNTAET, arose from a conflict with the local law. According to the very first regulation the Dutch based Indonesian law applicable to East Timor remains in force unless it conflicts with UN human rights standards or with the UNTAET mandate.²⁵ In practice the UN regulations and the municipal law complement each other. Certain Indonesian laws, such as the 'Law on Subversion', are explicitly excluded from application by UNTAET Regulation 1999/1. The way the United Nations set up a legal framework for East Timor is certainly one of the weak points of the administration. Up to now there is no central record or archive of the laws applicable to East Timor by UNTAET. There is a lack of review of the

²¹ SC Res. 1338 (2001).

²² <http://www.un.org/peace/etimor/Untaet.htm>.

²³ For a closer examination of legislative acts by UN administrations see J. Frowein, 'Die Notstandsverwaltung von Gebieten durch die Vereinten Nationen' in Arndt/Knemeyer/Kugelman/Meng/Schweitzer (eds.), *Völkerrecht und Deutsches Recht* (2001) 43.

²⁴ UNTAET/REG/1999/1.

²⁵ UNTAET/REG/1999/1.

remaining Indonesian law and its compatibility with international law. This proved to be very problematic in respect to Indonesian Criminal Law and the Indonesian Criminal Procedure Code. An example is the case of Takeshi Kashigawa. The Japanese national was arrested for criticizing Xanana Gusmao, the leader of the independence movement. He was released after 18 days in detention. The Transitional Administrator reacted by issuing an executive order stating that defamation was not a criminal offence and should never be the basis for criminal charges.²⁶

Progress has been made by the establishment of a Legislation Committee in autumn 2000 which includes representatives from the Cabinet, the Office of the Principal Legal advisor, the Judicial Affairs Department, the Human Rights Unit and the Gender Affairs Department of the National Planning Department. The committee reviews draft regulation and advises the Cabinet on necessary changes.

At the beginning of its work UNTAET failed to consult and involve the people of East Timor in the decision-making process although Security Resolution 1242 stressed '... the need for UNTAET to consult and cooperate closely with the East Timorese people in order to carry out its mandate effectively with a view to the development of local democratic institutions . . .'. The growing criticism of the policy not to consult the East Timorese led UNTAET to set up the National Consultative Council composed of a third of UN-representatives and two thirds East Timorese. The Council provided the East Timorese with the possibility to express their opinion in the legislative process, although the Transitional Administrator could ignore its advice.²⁷ The National Consultative Council was later replaced by the National Council which consists of 36 members coming from local parties and social groups.²⁸ The Council can also initiate or modify regulations but the final decision is made by the Transitional Administrator. Furthermore, a cabinet was established which acts as a quasi-government and is led by the Transitional Administrator. A very important task will be performed by the Constituent Assembly,²⁹ which is the first democratically elected body in the history of East Timor. Its primary task is to draft a constitution for an independent and democratic East Timor. It can also consider draft regulations as may be referred by the National Administrator. The Constituent Assembly will become the legislature in an independent East Timor.

The widespread violence which destroyed most private homes and governmental buildings, and the fact that most civil servants, being faithful to the Indonesian government and fearing repression, left East Timor, led to the collapse of the entire administrative and judicial system.³⁰ That made it necessary for

²⁶ S. Linton, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor' (2001) 25 *Melbourne University Law Review*, <http://www.austlii.edu.au/au/journals/MULR/2001/5.html>, Amnesty International, East Timor: Justice past, present and future, ASA 57/001/2001.

²⁷ UNTAET/REG/1999/2.

²⁸ UNTAET/REG/2000/24, UNTAET/REG/2000/33.

²⁹ UNTAET/REG/2001/2.

³⁰ H. Strohmeyer, 'Building a New Judiciary for East Timor: Challenges of a Fledgling Nation' (2000) 11 *Criminal Law Forum* 259; H. Strohmeyer, 'Collapse and Reconstruction of A Judicial System: The United Nations Missions in Kosovo and East Timor' (2001) 95 *AJIL* 46.

UNTAET to establish by its regulations a judicial system, a fiscal authority, a tax regime, a civil service, and a currency. Another important regulation created a panel of judges with exclusive jurisdiction to deal with serious criminal offences (see 5.2.5).³¹ Except in the case of the Serious Crimes Panel the composition of the judiciary is to be wholly East Timorese. An important decision in the peace-building process was the approval by the National Council on 20 June 2001 of the UNTAET regulation establishing a Commission for Reception, Truth and Reconciliation³² in East Timor. The Commission has a threefold task; providing a truth-telling mechanism, facilitating community reconciliation and recommending further action to the government. An interesting aspect is that the Commission will inquire into human rights violations committed during the entire East Timor conflict from 1974 to 1999.³³ Amnesties may be provided for minor offences such as theft or minor assault if the offender agrees to perform within a time limit an act of reconciliation, which may include community service, reparation, public apology and /or other acts of contrition. The Commission is expected to start work in the final quarter of 2001.

4 PREDECESSORS TO THE UNITED NATIONS ADMINISTRATIONS IN KOSOVO AND EAST TIMOR

There are various examples in history where a single state, a group of states, an international organization or an individual state mandated by an international organization as a foreign power, exercised certain administrative functions on a territory.³⁴ The Saar territory³⁵ was administered by the League of Nations in 1920–1935, and, after a plebiscite in 1935, was reunited with Germany. Another example is the occupation of Germany after the second world war when Germany was divided by the Allied Powers into four occupation zones. In this case the Control Council acted on behalf of Germany, for example by concluding legal arrangements. The United Nations itself had very little experience in the administration of territories until the end of the cold war. Only a supervisory function was given to the United Nations under the trusteeship system of the United Nations.³⁶ According to article 77 of the United Nations Charter the system applied to territories previously placed under the mandate system of the League of Nations, detached from enemy states as a result of the second world war or voluntarily

³¹ UNTAET/REG/2000/15.

³² UNTAET/REG/2001/10.

³³ Fact Sheet by UNTAET Press Office, Reconciliation Commission, 7 July 2001.

³⁴ A comprehensive overview is provided by C. Stahn, *op. cit.*, 121–137.

³⁵ F. Münch, 'Saar Territory', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV (2000) 334.

³⁶ In all, eleven territories have been placed under the Trusteeship System. Ten former Mandates of the League of Nations have been transmuted (British and French Cameroons, British and French Togoland, Tanganyika, Rwanda-Urundi, Samoa, New Guinea, Nauru, the Pacific Islands) and the former Italian colony, Somaliland, as the only territory detached from an enemy state had been transmuted.

committed to the system by states responsible for their administration. However, the actual governance was carried out by the state that granted the trusteeship and acted on behalf of the United Nations. The idea of bringing back the various forms of trusteeship has been raised in recent years in respect of failed states and self-determination disputes.³⁷ But in fact, the United Nations never used the trusteeship system again. The legal reason for not using it was that article 78 of the UN Charter precludes the application of the trusteeship administration in the case of member states. From a political point of view the application could be criticized as an act of neo-colonialism because it used to be common practice that the former colonial powers administered the trust territory.

The first precedent for a non-trusteeship United Nations administration of a territory was the United Nations Temporary Executive Authority (UNTEA), which governed West New Guinea from 1962–1963.³⁸ After a long dispute over the territory, Indonesia and the Netherlands concluded a treaty transferring the administration to the UN in the form of UNTEA³⁹ and the General Assembly then authorized the Secretary General to carry out the tasks entrusted to him in the Agreement. According to the agreement UNTEA was empowered to legislate, to appoint government officials and to guarantee law and order in West New Guinea. Furthermore, UNTEA established a court system and regional councils. During the operation which helped the transfer from Dutch to Indonesian rule, Dutch officials were replaced by UN officials. UNTEA must be distinguished from the later experiences of the United Nations to administer a territory, such as UNTAET in the case of East Timor. UNTEA was established as a response to the dispute between the Netherlands and Indonesia concerning the status of West New Guinea. The main purpose of the mission was the peaceful handing over from one country to another and not to building a state machinery for an independent West New Guinea. The establishment of an administration was therefore a necessary side effect but not the main objective of UNTEA.⁴⁰

The very first occasion when the United Nations had been entrusted to take over key aspects of the administration of a member state was the United Nations Transitional Authority (UNTAC) in Cambodia.⁴¹ The unprecedented role of UNTAC was laid down in the 1991 Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia.⁴² UNTAC's tasks were to directly control 'all administrative agencies, bodies and offices acting in the field of foreign affairs, national defence, finance, public security and information' and to supervise other

³⁷ R.E. Gordon, 'Some Legal Problems with Trusteeship' (1995) 28 *Cornell ILJ* 301; E. Franckx, A. Pauwels & S. Smis, 'An International Trusteeship for Kosovo: Attempt to find a Solution to the Conflict' (1999) 52 *Studia Diplomatica* 155.

³⁸ See N. Schrijver, 'Some Aspects of UN involvement with Indonesia, West Irian and East Timor' (2000) 2 *International Law FORUM du droit international* 26.

³⁹ Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), 15 August 1962, 437 UNTS, 273.

⁴⁰ F-E. Hufnagel, *op. cit.*, 31–33.

⁴¹ S.R. Ratner, 'The Cambodia Settlement Agreements' (1994) 87 *AJIL* 1.

⁴² Reprinted in (1993) 31 *ILM* 180.

agencies that could influence the outcome of the elections. Furthermore, UNTAC had to repatriate the refugees, disarm the Cambodian factions, monitor and enforce human rights, train the police, as well as prepare and oversee the elections.

Another recent example is the UN Transitional Administration for Eastern Slavonia (UNTAES) established by Security Council Resolution 1037⁴³ under chapter VII of the UN Charter on 15 January 1996. The UN Transitional Administrator, Jaques Paul Klein, had comprehensive control over civil affairs and the multi-national military component. The military component had to oversee the demilitarization of Eastern Slavonia, the return of refugees and internally displaced persons as well as to facilitate the maintenance of stability. The civilian component was mandated, *inter alia*, to set up a temporary police force, to supervise the judicial system, to facilitate a functioning civil administration and to assist in the supervision and organization of the election. The mandate ended after two years on 15 January 1998 when the administration achieved its goal, which was the peaceful transition of the territory from Serb to Croatian administrative rule.⁴⁴

If one compares the UN administration in East Timor and Kosovo with the old trusteeship system, it becomes apparent that both concepts serve similar purposes. According to article 76 of the UN Charter one of the main objectives of the trusteeship system was 'to promote . . . (the) progressive development towards self-government or independence'. Security Council Resolution 1244 established the international civilian presence in Kosovo 'in order to provide an interim administration . . . under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia while establishing and overseeing the development of self governing institutions . . .'. Security Council Resolution 1272 laid down that UNTAET 'was endowed with overall responsibility for the administration of East Timor . . . and to support capacity building for self government.' Both concepts also share objectives to further international peace and security and to promote the well being of the inhabitants in the respective territories.

However, the United Nations administrations in East Timor and Kosovo are different from earlier experiences of the organization in governing a territory. On the one hand, they are based on chapter VII of the United Nations Charter and not on the consent of the parties involved, on the other hand, Security Council Resolutions 1244 and 1272 vested the United Nations with mandates unprecedented in scope and complexity and empowered it to exercise all legislative and executive authorities including the administration of justice. For the first time, the United Nations functions as the direct administrator of a territory, taking over all governmental branches. The latter aspect distinguishes the administrations in Kosovo and East Timor from all previous peacekeeping missions. This concept of conflict management has been characterized by some commentators as a 'trusteeship administration'.⁴⁵ The

⁴³ SC Res. 1037 (1996), reprinted in M. Bothe/T. Dörschel (eds.), *UN Peacekeeping – A Documentary Introduction* (1999) 219.

⁴⁴ See in detail Ramsbotham & Woodhouse (eds.), *op. cit.*, 61–68.

⁴⁵ M. Bothe/T. Marauhn, 'The United Nations in Kosovo and East Timor – Problems of a Trusteeship Administration' (2000) 6 (4–6) *International Peacekeeping*, 26.

United Nations has not used this terminology but has chosen to use the terms interim and transitional administrations.

5 THE LEGAL BASIS OF INTERIM UN ADMINISTRATIONS

Jarat Chopra, the former head of UNTAET's office of district administration described the administration as the UN's 'Kingdom of East Timor'. According to him, 'the organisational and juridical status of the UN in East Timor is comparable of a pre-constitutional monarch in a sovereign kingdom'.⁴⁶ Does this mean there are no legal constraints to this type of UN administration? Are there legal limitations on the Security Council when it decides to establish such mechanisms? This will be discussed in the next paragraph.

5.1 Chapter VII as the Legal Basis for the UN Administration

When establishing the UN administrations in Kosovo and East Timor, the Security Council has based the decision on its chapter VII powers. Chapter VII provides the framework under which the Security Council may act to maintain or restore international peace.

It may be questioned whether chapter VII can serve in this case as a legal basis. Hans Kelsen wrote in 'The Law of Nations',⁴⁷ although without elaboration, that 'the organisation is not authorised by the Charter to exercise sovereignty over a territory which has not the legal status of trust territory'. His argument would be correct if the UN Charter allows only UN governance under the trusteeship system regulated in chapters XII and XIII of the UN Charter. Article 78 of the UN Charter only precludes the application of the trusteeship system to Members of the United Nations but does not prohibit the establishment of another mechanism allowing UN governance.

Could the principle of non-intervention bar the Security Council from establishing a UN administration under chapter VII? Article 2 (7) states the principle of non-intervention, meaning that states should refrain from intervening in matters which international law recognizes as solely within domestic jurisdiction. However, article 2 (7) cannot bar action under chapter VII as the article makes an express exception to the general prohibition allowing intervention for 'enforcement measures under Chapter VII'.

Therefore the creation of the UN administration in East Timor would be legitimate if it complied with the conditions under chapter VII.

⁴⁶ J. Chopra, 'The UN's Kingdom of East Timor' (2000) 42 *Survival* 27.

⁴⁷ H. Kelsen, *The Law of Nations* (1951) 651.

5.1.1 Article 39 of the UN Charter

Before adopting measures under chapter VII, two preconditions have to be fulfilled. Firstly the Security Council must have determined in accordance with article 39 of the UN Charter 'the existence of a threat to peace or breach of peace or an act of aggression', and secondly the measures to be taken should serve 'to maintain or restore international peace and security'. The Charter provides no restrictions on the Security Council's discretion to determine the existence of a threat to the peace, breach of the peace, or act of aggression.

The humanitarian catastrophe and not the infringement of the right of self-determination in East Timor appears to be the decisive element in the Council's decision to determine the existence of a threat to peace. In Resolution 1272, according to which UNTAET was established, the Security Council expressed its deep concern '... at reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed...'. The very same wording had been used in Resolution 1264 authorizing the deployment of INTERFET.

It was the third time in the history of the United Nations that the Security Council characterized grave human rights abuses and humanitarian emergencies in an internal conflict as the sole reason to determine the existence of a threat to peace. In all other cases, the transnational consequences of the internal human rights violations, for example the flow of the Kurdish refugees towards the border caused by the Iraqi repression, must be regarded as the decisive element why the Security Council considered these situations as threats to peace.⁴⁸ Only the resolutions passed in response to the conflicts in Rwanda and Somalia⁴⁹ can be cited as further examples where the Security Council viewed massive but purely internal human rights violations, without transboundary effect, as a threat to the peace. Nevertheless, one may conclude from recent practice that the Council is currently more inclined to find that gross violations of human rights and humanitarian emergencies constitute threats to peace.

As the Security Council possesses very broad discretion to determine what constitutes a threat to international peace, the determination that the circumstances in East Timor constituted a threat to peace must be considered as a proper exercise of its article 39 powers.

⁴⁸ SC Res. 688 of 5 April 1991. Another example is SC Res. 1199 of 23 September 1998 in regard to the Kosovo crisis, stating on the one hand deep concern for the rapid deterioration in the humanitarian situation throughout Kosovo and on the other hand deep concern regarding the flow of refugees into northern Albania, ... and other European countries.

⁴⁹ SC Res. 734 of 3 December 1992 concerning the situation in Somalia; SC Res. 918 of 17 May 1994 concerning the situation in Rwanda.

5.1.2 Articles 41 and 42 of the UN Charter

Resolution 1272 did not specify which article of the Charter authorized the Security Council to establish UNTAET. Under chapter VII the Security Council has two forms of enforcement action available to it. According to article 41, action not involving the use of armed force and according to article 42 military action by air, sea and land forces. Article 42 serves as the legal basis for the military component of UNTAET but a closer analysis is required to see whether article 41 is the precise legal basis concerning the civilian component of UNTAET.

Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decision, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

The list of possible measures and actions is illustrative and not exhaustive. Therefore, the Council can take other measures and actions than those found in article 41. This interpretation has also been confirmed by the Appeals Chamber of the International Tribunal for the Former Yugoslavia in the *Tadic Case*⁵⁰ and reaffirmed by the practice of the Security Council in the last decade when it imposed a variety of new mechanisms under chapter VII. Examples are certain subsidiary organs created pursuant to Security Council Resolution 687,⁵¹ which Iraq had to accept to end the second Gulf War. The UN Boundary Commission was the first organ in the history of the United Nations to demarcate the border between two member states. The United Nations Special Commission (UNSCOM) deals with the destruction of Iraq's weapons of mass destruction and the United Nations Compensation Commission addresses the compensation of victims of Iraqi aggression. Another innovative step was the establishment of the International Criminal Tribunal for the Former Yugoslavia by Resolution 827⁵² and the International Tribunal for Rwanda by Resolution 955.⁵³ Both tribunals are responsible for the prosecution of persons who have committed serious violations of international humanitarian law in these territories. The creation of international criminal tribunals with primacy over national jurisdiction strongly indicates that the Security Council has the power to override structures of national and local government.

Therefore one can conclude that the Security Council can take, under article 41

⁵⁰ *Prosecutor v Tadic*, Appeal on Jurisdiction, No. IT-94-AR72, paras 32–38 (2 Oct. 1995), reprinted in (1996) 35 ILM 32.

⁵¹ SC Res. 687 reprinted in (1991) 29 ILM 847.

⁵² SC Res. 827 reprinted in (1993) 32 ILM 1203.

⁵³ SC Res. 955 reprinted in (1994) 33 ILM 1602.

of the UN Charter, non-military measures such as the UN administrations for Kosovo and East Timor.

5.2 Legal Limitations on the Security Council to Establish Interim UN Administrations under Chapter VII

The next question to be considered is whether, under international law, there are any substantive limits of the Security Council's power to set up an interim administration.

Some might argue that the Security Council can act above international law and therefore no legal limits exist to the Council's measures which are adopted within the framework of chapter VII. This interpretation is based on the wording of articles 103 and 25 of the UN Charter. Article 103 of the UN Charter states that 'in the event of a conflict between the obligation of the Members of the United Nations under the present Charter and their obligation under any other international agreement, their obligation under the present Charter shall prevail'. Under article 25 of the UN Charter the Members of the United Nations 'agree to accept and carry out the decisions of the Security Council in accordance with the Charter.' However, this interpretation cannot be accepted on the following grounds:

- (i) According to article 24(1) read together with articles 1 and 2 of the UN Charter the Council's decisions must be in accordance with the purposes and principles of the United Nations. Promoting and encouraging respect for human rights and fundamental freedoms are among these purposes, therefore the Council always has to take them into account when acting under chapter VII. Since, as argued by some legal commentators,⁵⁴ humanitarian law can be perceived as 'human rights in armed conflicts', the Council is also bound by rules of international humanitarian law.
- (ii) Another limitation is imposed by legal norms which are considered to be *jus cogens*. The doctrine of *jus cogens* was developed in the late 1960s and can be found in article 53 of the Vienna Convention 1969. The effect of norms regarded as *jus cogens* is that states cannot derogate from them and it is commonly accepted that these standards also apply to Security Council enforcement measures taken under chapter VII of the UN Charter.⁵⁵ As the hard core of human rights and international humanitarian law do amount to *jus cogens*, these limits also apply to measures imposed by the Security Council under chapter VII.

⁵⁴ L. Doswald-Beck, S. Vite, 'International Humanitarian Law and Human Rights Law' (1993) No.293 *ICRC Review* 94.

⁵⁵ T.D. Gill, 'Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter' (1995) 26 *NYIL* 33, 79.

- (iii) This view is also supported by Justice Weeramantry of the International Court of Justice stating that, ‘the history of the United Nations . . . corroborates the view that a limitation on the plenitude of the Security Council’s power is that those powers must be exercised in accordance with the well-established principles of international law.’⁵⁶
- (iv) The role of the Security Council, as laid down in articles 24–26 of the UN Charter is to bear responsibility for the maintenance of international peace and security. It would be clearly contrary to its role if the Council disregarded the rule of law⁵⁷ because a peaceful world order can only be based and maintained on the rule of law.⁵⁸

5.2.1 The Duty to Respect Human Rights Law

Since the UN Charter contains only vague references to Charter principles and rights it is necessary to define more specifically the Council’s power in the present context, firstly by addressing human rights.

Like the trusteeship system which was aimed at encouraging respect for human rights in the trust territory (see article 76(c) of the United Nations Charter), the UN administrators have to guarantee the human rights of the inhabitants of East Timor.⁵⁹ This duty has been reaffirmed by the first UNTAET regulation, which stated that ‘everybody undertaking public duties or holding public office in East Timor shall recognize international human rights standards’.

It must be noted in the present context that all major human rights instruments allow derogation of certain rights in times of public emergency. However, some rights, including the right of life, the right to be free from torture or cruel, inhuman or degrading treatment cannot be derogated from and therefore must be respected at all times.⁶⁰

⁵⁶ *Order with regard to request for the Indication of Provisional Measures in the Case Concerning Questions of Interpretations and Application of the 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v United States)*, ICJ (1992); (1992) 31 ILM 694–696.

⁵⁷ Other authors have also suggested that the principle of good faith constitutes a limit to the enforcement powers of the Security Council, see V. Gowlland-Debbas, ‘Security Council Enforcement Action and Issues of State Responsibility’ (1994) 43 *ICLQ* 93–94.

⁵⁸ H-P. Gasser, ‘Collective Economic Sanctions and International Humanitarian Law-An Enforcement Measure under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals’ (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 880–881.

⁵⁹ See section 2 of UNTAET/REG/1991/1.

⁶⁰ To the author’s knowledge the United Nations has not derogated from human rights in East Timor.

5.2.2 The Duty to Respect International Humanitarian Law

The next issue to be addressed is whether international humanitarian law imposes any limitation on the UN administration in East Timor. International humanitarian law can be defined as 'those international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international and non-international armed conflicts and which for humanitarian reasons, limit the right of the parties to a conflict to use methods and means of warfare of their choice or protect persons and property that are or may be affected by the conflict'.⁶¹

For a long time there has been a debate regarding the extent to which peacekeeping forces are bound by international humanitarian law.⁶² According to the Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law⁶³ of 1999, not the whole set but the fundamental principles and rules of international humanitarian law are to be applied by the United Nations forces. As for the application of international humanitarian law it appears that with the latest arrival of UNTAET there was no armed conflict in East Timor, thus heralding an end to the ordinary application of the laws of war.

However, common article 2 to the Geneva Conventions does not limit its application to an armed conflict – it extends to 'all cases of partial or total occupation . . . even if said occupation meets without armed resistance'. From a theoretical point of view one might therefore argue that there are analogies between traditional occupation and the UN administration in East Timor, as both exercise authority on a foreign territory and therefore, UNTAET should be subject at least to the principles derived from the law of belligerent occupation, as laid down in the Regulations annexed to the 1907 Hague Convention No. IV on the Laws and Customs of War on Land, and that of the 1949 Geneva Convention No. IV. For example, the Australian Defence Force, which was the leading contingent of INTERFET and was deployed before the establishment of UNTAET, applied the law of military occupation only by way of guidelines. The legal application of the law of armed conflict was rejected on the following grounds. Firstly there was no armed conflict between INTERFET and Indonesia, secondly there was no armed conflict between UNTAET and the militia and thirdly no armed conflict between UNTAET and the people of East Timor.⁶⁴

⁶¹ H-P. Gasser, *International Humanitarian Law* (1993) 16.

⁶² On the application of international humanitarian law to United Nations Peacekeeping Forces see for example M. Bothe, 'Peacekeeping and International Humanitarian Law: Friends or Foes' (1996) 3(4–6) *International Peacekeeping* (Kluwer Law International) 91; C. Greenwood, 'International Humanitarian Law and the United Nations Military Operations' (1998) 1 *Yearbook of International Humanitarian Law* 3; D. Shrager, 'UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-related Damage' (2000) 94 *AJIL* 406; M. Zwanenburg, 'The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: Some Preliminary Observations' (1999) 5(4–5) *International Peacekeeping* (Kluwer Law International) 133.

⁶³ ST/SGB/1999/13 of 6 August 1999, reprinted in (1999) 5(4–5) *International Peacekeeping* 160.

⁶⁴ Kelly, McCormack, Muggleton, Oswald, *loc. cit.*, 113–115.

In respect to UNTAET international humanitarian law is also not applicable from a legal point of view as UNTAET and the people of East Timor are not belligerent parties. Too many nations would also deny the application of international humanitarian law *de facto* in times of peace as a matter of customary international law on the ground of national sovereignty. Another fundamental difference is that under the law of belligerent occupation the authority of the occupying authority is a *de facto* authority while UNTAET's authority is based on a chapter VII mandate, therefore on a *de jure* authority. That means if peacekeepers on East Timor get involved in situations which cannot be regarded as an armed conflict but might involve the use of force, they have to observe internationally recognized human rights standards and not international humanitarian law.

5.2.3 The Duty to Respect the Right of Self-Determination

Another limitation flows from the right of self-determination, which is one of the founding principles of the UN Charter and is well recognized as a legal right under international law. Its precise scope and application was and is still under debate. It is almost undisputed, that it does not entail the right of groups to secede from the state to which they belong⁶⁵ or the right of third parties to implement the principle.⁶⁶ It may suffice to say in the present context that the principle of self-determination postulates the right of a people to determine its own political status in a democratic way.⁶⁷

In respect of UN administrations⁶⁸ it means that the United Nations cannot impose a particular form of government upon the population of a territory or a state by means of invoking the enforcement provisions of the UN Charter against the will of the people concerned.⁶⁹ In the present case, the United Nations has not violated the right of self-determination of the East Timorese when it organized the referendum. By organizing the popular consultation it has left the decision to become independent or to become an autonomous province to the people of East Timor. Furthermore, the subsequent establishment of UNTAET must be seen in the light of the atrocities and human rights violations committed after the ballot as helping to end the conflict and providing peaceful living conditions by creating a functioning administration.

If we regard self-determination as the right of people to determine their own political system freely without any kind of external domination in the political decision making process,⁷⁰ one may argue that the way the East Timorese can participate in the legislature, for example by leaving the Transitional Administrator

⁶⁵ D. Thürer, 'Self-Determination', in R. Bernhardt, *Encyclopaedia of Public International Law*, Volume 8 (1985) 474.

⁶⁶ P. Malanczuk, 'The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War' (1991) 2 *EJIL* 124.

⁶⁷ T.M. Frank, 'The Emerging Right to Democratic Governance' (1992) 86 *AJIL* 52.

⁶⁸ H.R. Richardson, 'A Critical Thought on Self Determination for East Timor and Kosovo' (2000) 14 *Temple ICLJ* 101.

⁶⁹ T.D. Gill, *loc. cit.*, 74–79.

⁷⁰ R.E. Gordon, *loc. cit.*, 320–321.

a veto right in the legislative process, is an infringement of the East Timorese right to self-determination.

5.2.4 Time Limitation

Another important issue to be addressed is for how long can UNTAET undertake governmental functions over the people of East Timor?

The question 'How long can the Security Council uphold enforcement measures adopted under Chapter VII' is frequently asked. In particular, the issue has arisen concerning the durability of the sanctions regime imposed on Iraq. The answer has always been the same: as long as a threat to peace and security exists, the Council can keep the enforcement measures in force. Neither in Kosovo nor in East Timor did the United Nations want to install a permanent presence. Both administrations are only interim as in the case of UNMIK or transitional as in the case of UNTAET. Like all peacekeeping missions their mandate is only limited for a period of time. If the United Nations wants to continue their mission on East Timor the mandate has to be prolonged.

5.2.5 The Duty to Prosecute Serious International Crimes

One may raise the question whether there is a duty upon the United Nations to prosecute persons who have been accused of crimes against humanity and other serious crimes⁷¹ committed in the aftermath of the referendum in East Timor. Under international law a duty to extradite or prosecute exists, for example in respect of genocide and torture, based on the Genocide Convention of 1948 and the Torture Convention of 1984. Although the United Nations is not a party to the above mentioned conventions it is undisputed that the United Nations has legal personality,⁷² which implies that the United Nations can be bound *mutatis mutandis* by customary international law. In the present case the United Nations is also bound by the *aut dedere aut judicare* obligation laid down in the Genocide and Torture Conventions, as the conventions constitute customary international law and the United Nations takes over the functions of a state.⁷³ However, it is

⁷¹ The crimes committed on East Timor are well documented, see the report of the International Commission of Inquiry on East Timor UN Doc. A/54/726, S/2000/59 of 31 January 2000; the report of the Indonesian Commission of Investigation into Human Rights Violations in East Timor (KPP-HAM), <http://www.jsmp.minihub.org/Reports/KPP%20Ham.htm>. and the report of the UN Special Rapporteur James Dunn, Crimes Against Humanity in East Timor, January to October 1999: Their Nature and Causes of 14 February 2001, <http://www.etan.org/news/2001a/dunn1.htm>.

⁷² See the advisory opinion of the ICJ in *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ-Reports, 1949, 174.

⁷³ *Reservation to the Convention on Genocide*, 1951, ICJ 23 (advisory opinion); *Prosecutor v Anto Furundzija*, Judgment (IT-95-17/1-T) para.156 et seq.

questionable whether such a duty exists in respect of crimes against humanity and in particular of war crimes in an internal conflict.⁷⁴ In respect of crimes against humanity there is no treaty imposing a duty to prosecute. In the absence of such a treaty, the universal jurisdiction of crimes against humanity is generally regarded as permissive but not mandatory.⁷⁵ The same arguments apply to war crimes committed in an internal conflict. Irrespective of the existence of such a legal duty, the United Nations recognized its special obligation to see justice done for East Timor, as UNTAET established a 'Serious Crimes Investigation Unit', investigating primarily in ten priority cases⁷⁶ and the 'Serious Crimes Panel' within the District Court of Dili with exclusive jurisdiction over serious criminal offences⁷⁷ exercising jurisdiction over international crimes such as genocide, war crimes, crimes against humanity, torture as well as murder and sexual offences as they are defined in the Indonesian Criminal Code.⁷⁸ The panel consists of one East Timorese and two international judges. The temporal jurisdiction of the panels is limited to offences committed in the period between 1 January and 25 October 1999. Despite the indictment of approximately 50 persons and the first judgments⁷⁹ the Serious Crimes Investigation Unit has been criticized for the slow pace of its investigations. According to NGO reports the Crimes Unit lacks financial and material resources, educated and experienced personnel as well as a clear strategy to bring perpetrators to justice.⁸⁰ Another obstacle to justice is the lack of co-operation by Indonesia, although the United Nations and Indonesia had signed a Memorandum of Understanding⁸¹ on 6 April 2000 according to which the parties would assist each other in investigations and court proceedings. The transfer of suspects to East

⁷⁴ In more detail see K. Ambos, 'Völkerrechtliche Bestrafungspflichten bei schweren Menschenrechtsverletzungen?' (1999) 37 *Archiv des Völkerrechts* 318; B. Kondoch/R. Silek, 'Special Court for Sierra Leone' (2001) 1 *Conflict Trends* 28; A.J.M. McDonald, 'Sierra Leone's Uneasy Peace: The Amnesties Granted in the Lome Peace Agreement and the United Nations' (2000) 13 *Humanitäres Völkerrecht-Informationsschriften* 18.

⁷⁵ M.P. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) *Cornell ILJ* 519.

⁷⁶ UNTAET Press Office, Justice and Serious Crimes, 6 July 2001.

⁷⁷ UNTAET/REG/2000/15.

⁷⁸ In more detail see B.C. Alexander, 'East Timor: Will There be Justice?' (2000) 1 *Human Rights Brief* 5; B. Kondoch, 'Neueste Entwicklungen im Völkerstrafrecht aufgezeigt am Beispiel Sierra Leone, Kambodscha und Ost-Timor' (2001) 19 *Vierteiljahresschrift für Sicherheit und Frieden* to be published; S. Linton, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor' (2001) 25 *Melbourne University Law Review*, <http://www.austlii.edu.au/au/journals/MULR/2001/5.html>.

⁷⁹ For further information on the cases see Judicial System Monitoring Programme, <http://www.jsmp.minihub.org/>. Worth mentioning is a lawsuit brought against the Indonesian General Lumintang, on 28 March 2000 in a District of Columbia federal court, see Indonesia Generals on Trial in US Courts, <http://etan.org/news/2000a/11suit.htm>.

⁸⁰ Amnesty International, East Timor: Justice past, present and future, ASA 57/001/2001.

⁸¹ Memorandum of Understanding Between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Co-operation on Legal, Judicial and Human Rights Related Matters, <http://etan.org/et2000c/december/10-16/14mou.htm>.

Timor is one of the major problems for UNTAET since most of the military leaders and members of the militias are currently in Indonesia.

Indonesia, on the other hand, has started its own investigations. In January 2001, the Attorney General presented a list with 22 suspects, but none of the people accused of crimes has yet stood for trial. In April 2001, former President Wahid decided to set up a Human Rights Court for East Timor by a presidential decree (Keppres 53/2001). However, the court's jurisdiction was limited to post ballot crimes. This would have meant that crimes committed before the referendum, such as the massacre at the Liquica Church where more than 50 people had been killed, would have gone unpunished. In summer 2001, his successor, Megawati Sukarnoputri, corrected the decision by extending the court's jurisdiction to crimes committed in April and September but not to the entire period between April and September 1999. The proceedings are expected to start in October 2001.⁸² The court will have jurisdiction over serious human rights violations including genocide and crimes against humanity.⁸³

However, the failure of Indonesia to deliver justice and the slow pace of the investigations by the Serious Crimes Unit has led to the call upon the international community to set up an international tribunal.⁸⁴ The Security Council has already established two ad hoc tribunals, the ICTY and the ICTR. As explained above such powers are granted to the Security Council by article 41 under chapter VII. In order to establish such an international tribunal for East Timor, the Security Council has to determine 'the existence of a threat to peace or breach of peace or an act of aggression'. However, it appears to be doubtful that under the present circumstances any of the required conditions is met. On the one hand, a threat to the peace occurred in East Timor two years ago, and this has been determined by the Security Council in several resolutions.⁸⁵ Finally, the presence of INTERFET and UNTAET brought an end to the gross violations of human rights and humanitarian law. Therefore, the current situation cannot be regarded as a threat to peace anymore. On the other hand, one may point out that even after two years the situation is still inherently unstable because of the continuing lack of accountability for these serious crimes, which breeds instability for East Timor and the region. Such a precarious situation might be regarded as a threat to peace.

Since UNTAET has already been granted full authority over the territory, including the administration of justice, the question is whether UNTAET could establish an international tribunal. This possibility must be rejected as UNTAET's mandate only extends to East Timor and not to Indonesia.

⁸² 'Ad hoc tribunal starts in October?', *The Jakarta Post*, 9 August 2001.

⁸³ Law on Human Rights Courts (Law No. 26/2000); Amnesty International, Amnesty International's Comments on the Law on Human Rights Courts (Law No. 26/2000), ASA 21/005/2001; Amnesty International, Indonesia: Comments on the draft law on Human Rights Tribunals, ASA 21/025/2000; International Crisis Group, Indonesia: Impunity versus Accountability for Gross Human Rights Violations, ICG Asia Reports No. 12.

⁸⁴ See NGOs' statement on justice for East Timor, <http://etan.org/et2001b/june/10-16/13justice.htm>; UN Official Calls For War Crimes Tribunal for East Timor, *Associated Press* of 13 July 2001, <http://www.pcug.org.au/~wildwood/01julun.htm>.

⁸⁵ SC Res.1264, 15 Sep.1999; SC Res. 1272, 22 Oct.1999.

5.2.6 *The Duty to Respect the Right to Good or Democratic Governance*

One of the issues at the heart of the current agenda of the United Nations is the issue of global governance. The commitment to global governance has been, for example, reflected in the Agenda for Peace,⁸⁶ in which the former Secretary General of the United Nations, Boutros Boutros Ghali, pointed out ‘there is an obvious connection between the democratic practices – such as the rule of law and transparency in decision making and the achievement of true peace and security in any new and stable political order. These elements of good governance need to be promoted at all levels of international and national political communities.’

His successor, Secretary General Kofi Annan, has stated:

UN Programs now target virtually all the key elements of good governance, safeguarding the rule of law, verifying elections, training police, monitoring human rights, fostering investments; and promoting accountable administration. Good governance is also a component of our work for peace. It has a strong preventive aspect; it gives societies sound structures for economic and social development. In post conflict settings, good governance can promote reconciliation and offer a path for consolidating peace.⁸⁷

It is questionable whether there is an obligation under international law that the United Nations or states must practise good governance. The issue has increasingly been debated by legal scholars.⁸⁸ Thomas M. Franck has argued for example that there is an emerging right to democratic governance⁸⁹ but he did not come to the conclusion that such a right already exists.⁹⁰ It is true that neither the UN Charter nor conventional law deal with good governance or provide a precise definition of it. However, certain components which could be part of the right to good governance, such as the right of self-determination, are well established under international law. Article 25 of the International Covenant on Civil and Political Rights provides that every citizen has the right to take part in the conduct of public affairs, directly or through freely chosen representatives. Similar provisions can be found in the European Convention on Human Rights and the American Convention on Human Rights. Certain principles are also mentioned in the Charter of Paris of the CSCE of 1990, such as the commitment to the rule of law and human rights. On the

⁸⁶ ‘An Agenda for Peace’, reprinted in M. Bothe/T. Dörschel (eds.), *UN Peacekeeping – A Documentary Introduction* (1999) 19.

⁸⁷ K. Annan, ‘The Quiet Revolution’ (1998) 4 *Global Governance* 123.

⁸⁸ For example, B. Bauer, *Der völkerrechtliche Anspruch auf Demokratie* (1998); J. Crawford, ‘Democracy and International Law’ (1993) 64 *BYIL* 113; G.H. Fox/ B.R. Roth (eds.), *Democratic Governance and International Law* (2000).

⁸⁹ T.M. Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 *AJIL* 45.

⁹⁰ A. Cassese argues in a very similar way by stating that ‘it may be argued that a general norm is currently in process of coming into being which grants a right to democracy’ but it ‘... has not yet taken root either as a human right ... or as a legal entitlement accruing to any state ...’ see A. Cassese, *International Law* (2001) 371.

other hand, customary international law has not yet developed to the point that there is a constant and uniform usage of states, which they consider as a legally binding minimum standard of good governance.

In any case, the United Nations is well advised to take the concept of good governance as a moral imperative by developing structures of self-governance, organizing free and fair elections, taking into account the political aspirations of the people of East Timor and assisting them in the development of political institutions.

6 CONCLUDING REMARKS

For the very first time in United Nations history the organization attempted to build and manage an entire state. The main achievement of UNTAET is that it created a stable and secure environment for a nation which has not lived in peace for decades. The Constituent Assembly was the first elected body in the history of East Timor. After independence the United Nations will not leave behind a completely effective administration⁹¹ but a structure which enables the East Timorese to organize their state on their own. To the present day many problems are unresolved. One may mention the weak infrastructure, the problems of the educational system, approximately 80,000 refugees remaining in camps and the above mentioned problems of the judicial system. Many mistakes made by UNTAET appear to be excusable because of a lack of experience and the chaotic situation UNTAET met upon arrival.

The East Timor Model could also be applied to other scenarios, for example, at the request of governments and parties to a conflict. The take-over of all governmental functions *in toto* by the United Nations could increase the chance of bringing to an end certain conflicts by re-establishing a functioning state machinery based on the rule of law. However, several lessons must be learnt from UNTAET's experience. The local population should be consulted from the beginning. The capabilities of the United Nations in building a transitional system, in particular a criminal justice system have to be increased.⁹² Less power should be vested in the hands of a transitional administrator and a more sophisticated system of checks and balances must be installed. Whether such enterprises could be financed and whether parties to a conflict would be willing to hand over the entire administration of a territory or state is another matter.⁹³

⁹¹ S.V. de Mello, 'Here is a Big Day for East Timor', *International Herald Tribune*, <http://www.iht.com/articles/30693.htm>.

⁹² The problem has also been identified by the Report of the Panel on United Nations Peace Operations (The Brahimi Report), UN doc. A/55/305, S/2000/809, 21 August, paras 76–83.

⁹³ For an assessment of UNTAET's work see Reports of the Secretary General on the United Nations Transitional Administration in East Timor: S/2001/436 (2001); S/2001/142 (2001), S/2000/738 (2000); J. Chopra, *loc. cit.*, 27; C. de Coning, 'The UN Transitional Administration in East Timor (UNTAET): Lessons Learned from the First Hundred Days' (2000) 6 *International Peacekeeping* 83; K. Ishizuka, 'UNTAET: Some Current Issues' (2000) 29(5–6) *Peacekeeping and International Relations* 5; L. Richards, 'UNTAET: Cooperation and Community Policing in East Timor' (2000) 62(2) *Gazette* 14; J. Traub, *Inventing East Timor* (2000) 75.