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UNITED NATIONS GOVERNANCE OF POSTCONFLICT SOCIETIES

*By Michael J. Matheson**

Since the end of the Cold War a decade ago, the United Nations has exercised authority in significant new ways to address various aspects of resolving conflicts and dealing with their consequences. These new approaches have included the use of force to end interstate and internal violence,[1] the resolution of boundary issues and other disputes that might prolong the conflict,[2] the elimination of threatening weapons capabilities,[3] the prosecution of violations of international humanitarian law,[4] and the compensation of victims of the conflict.[5] These actions have been taken either with the consent of the state or states involved, or pursuant to the authority of the Security Council under Chapter VII of the UN Charter, or both.

In addition, the role of the United Nations has substantially expanded during this period with respect to the governance of societies affected by conflicts. This expansion has assumed particular significance during the past two years with respect to the UN involvement in the conflicts in Kosovo and East Timor. The following commentary outlines this development of law and practice concerning UN governance of postconflict societies and addresses some of the legal issues presented by it.

I. PREVIOUS UN INVOLVEMENT IN GOVERNANCE OF POSTCONFLICT SOCIETIES

Prior to the end of the Cold War, the United Nations had frequently been involved in the monitoring of borders and cease-fires, and in the conduct or monitoring of elections, but had relatively little experience in the actual governance of territories. Under Article 77 of the UN Charter, the international trusteeship system applied to territories previously placed under League of Nations mandate, detached from "enemy states" as a result of World War II, or voluntarily committed to the system by "states responsible for their administration." These territories included island groups in the South Pacific that had been heavily affected by combat operations in World War II.[6] However, the UN role with respect to such territories was prescribed by agreement with the states involved, and typically amounted only to very general supervision, as actual governance was carried out by the state granted the trusteeship.[7]

* Of the Board of Editors.

[1] *See, e.g.*, SC Res. 678, UN SCOR, 45th Sess., Res. & Dec., at 27, UN Doc. S/INF/46 (1990), *reprinted in* 29 ILM 1565 (1990) (Iraqi invasion of Kuwait); SC Res. 929, UN SCOR, 49th Sess., Res. & Dec., at 10, UN Doc. S/INF/50 (1994) (protection of civilians in Rwanda); SC Res. 940, *id.* at 51 (intervention in Haiti); SC Res. 1031, UN SCOR, 50th Sess., Res. & Dec., at 18, UN Doc. S/INF/51 (1995), *reprinted in* 35 ILM 251 (1996) (enforcement of Dayton Accords in the former Yugoslavia).

[2] *See* SC Res. 687, UN SCOR, 46th Sess., Res. & Dec., at 11, paras. 2–4, UN Doc. S/INF/47 (1991), *reprinted in* 30 ILM 847 (1991) (boundary between Iraq and Kuwait).

[3] *See, e.g., id.*, paras. 7–14 (Iraqi weapons of mass destruction).

[4] *See* SC Res. 827, UN SCOR, 48th Sess., Res. & Dec., at 29, UN Doc. S/INF/49 (1993), *reprinted in* 32 ILM 1203 (1993) (International Tribunal for the Former Yugoslavia); SC Res. 955, UN SCOR, 49th Sess., *supra* note 1, at 15, *reprinted in* 33 ILM 1602 (1994) (International Tribunal for Rwanda).

[5] *See, e.g.*, SC Res. 687, *supra* note 2, paras. 16–19 (compensation for victims of Persian Gulf conflict).

[6] The Marshall, Caroline, and Mariana Islands, formerly mandated to Japan, were placed under the UN trusteeship system in 1947 as a strategic trust territory, with the United States as administering authority. *See* Termination of Mandates, 1 Whiteman, DIGEST §36, at 705–06.

[7] *See, e.g.*, BRUNO SIMMA, THE CHARTER OF THE UNITED NATIONS 933–72 (1994).

The United Nations did administer Irian Jaya (western New Guinea) for seven months during the transition from Dutch colonial rule to Indonesian control in 1962–1963, pursuant to an agreement between Indonesia and the Netherlands.[8] The General Assembly created the United Nations Temporary Executive Authority for this purpose, which rapidly passed the territory from Dutch to Indonesian administrators.[9]

The United Nations also asserted the right to govern the territory of Namibia after the General Assembly terminated the trusteeship that South Africa had first acquired under the League of Nations, and for this purpose created a Council for Namibia that was theoretically to have carried out the functions of governance.[10] However, South Africa declined to yield the territory to UN administration and the council never exercised these functions in any substantial way. In the end, when South Africa finally agreed to withdraw from Namibia, the United Nations Transition Assistance Group was created to monitor the agreed cease-fire and withdrawal of forces, as well as the election process, but the United Nations did not engage in governance.[11]

The first major UN exercise in governance came with the 1991 Agreement on a Comprehensive Political Settlement of the Conflict in Cambodia.[12] This Agreement established a Supreme National Council—composed of representatives of the contending Cambodian factions—that delegated various governmental functions to the United Nations, which were to be exercised by a UN Transitional Authority in Cambodia (UNTAC) to be created by the Security Council.[13] Specifically, UNTAC was given direct control over Cambodian agencies in the areas of foreign affairs, national defense, finance, public security, and information; supervision over other agencies that could influence the outcome of elections; and the right to investigate various other government organs to determine whether they were undermining the accords and, if so, to take corrective measures.[14] This authority was limited by the requirement that UNTAC follow any "advice" approved by a consensus of the factions represented in the Supreme National Council, to the extent that it did not conflict with the Agreement.[15] All of these aspects of UNTAC's role were added to the more traditional UN functions of enforcing a cease-fire and military demobilization,[16] and conducting elections to establish a permanent national government.[17]

The Security Council did not authorize these UNTAC functions pursuant to its mandatory powers under Chapter VII of the Charter; rather, the Council acted under its authority to make recommendations to states for the settlement of disputes. Therefore, the consent of the Cambodian factions was an essential ingredient of the legal basis for UNTAC's mandate. In subsequent crises during the 1990s, however, the Council regularly acted under Chapter VII, which gave its decisions the force of international obligation, with or without the consent of the states in question (or other entities).

Between the signing of the 1991 Cambodian accords and the eruption of the 1999 Kosovo crisis, the Council exercised its Chapter VII authority on many occasions to end conflicts, disarm hostile forces, restore order, punish war criminals, and the like, but it did not attempt to directly govern territories affected by a conflict. For example, the mandate of the UN force introduced into Haiti included replacement of the military regime with the

[8] Agreement Concerning West New Guinea (West Irian), Aug. 15, 1962, Indon.-Neth., 437 UNTS 274.

[9] GA Res. 1752, UN GAOR, 17th Sess., Supp. No. 17, at 70, UN Doc. A/5217 (1962); *see* D. W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY 255–61 (1964).

[10] GA Res. 2248, UN GAOR, 5th Spec. Sess., Supp. No. 1, at 1, UN Doc. A/6657 (1967).

[11] *See* Self-Determination, 1978 DIGEST §1, at 38–54.

[12] For an excellent description and analysis, see Steven R. Ratner, *The Cambodia Settlement Agreements*, 87 AJIL 1 (1993).

[13] Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Oct. 23, 1991, Art. 6 & Annex 1, 31 ILM 183, 184 (1992).

[14] *Id.*, Annex 1, §B.

[15] *Id.*, Annex 1, §A(2)(a).

[16] *Id.*, Annex 1, §C.

[17] *Id.*, Annex 1, §D.

elected Aristide government but not UN governance of the country.[18] The NATO-led force introduced into Bosnia with the endorsement of the Security Council was broadly authorized to enforce the cease-fire and the redeployment of forces required by the Dayton Accords, but governance was left to the Bosnian political entities.[19] Clearly, the United Nations was reluctant to assume the functions of governing the territory of a sovereign state if indigenous institutions were available for that purpose.

II. UN GOVERNANCE OF KOSOVO

The Kosovo conflict presented a radically different situation from those described above. The NATO air campaign had begun in March 1999 after the collapse of negotiations on the status of Kosovo between Serb officials and representatives of the Kosovar Albanians. On May 6, the Group of Eight Foreign Ministers adopted a set of "general principles on the political solution to the Kosovo crisis," which included, among other things, an immediate and verifiable end to violence and repression in Kosovo; withdrawal from Kosovo of Serb military, police, and paramilitary forces; and the deployment in Kosovo of effective international civil and security presences. These principles were endorsed and adopted by the United Nations[20] and ultimately accepted by the Federal Republic of Yugoslavia (FRY) as a basis for ending the Kosovo conflict.[21]

By the conclusion of the NATO campaign, the province was in a state of economic and social chaos. Out of a total population of about 1.7 million, 800,000 Kosovars had fled or been driven out of the province and as many as 500,000 others had been internally displaced; most of these refugees followed NATO troops back into Kosovo, but many found their homes and possessions destroyed or stolen.[22] At the same time, economic activity in much of the province had come to a halt as a result of Serb repression, war damage, the collapse of financial services and investment, and the departure of key personnel.[23] Serb officials and technical personnel had largely abandoned Kosovo and the FRY had ceased funding municipal governments, causing schools, public transport, the courts, and other vital services essentially to shut down.[24] Relations between the Albanian and Serb residents of Kosovo were in serious disrepair, punctuated by widespread reprisals, looting, and seizures of homes and other property, with no functioning law enforcement system to provide justice.[25]

Clearly, the international community had to establish a system of governance, at least for an interim period. Without such governance, the chaotic situation would present a continuing, acute threat of escalating violence and regional instability, as well as a serious humanitarian crisis.

[18] SC Res. 940, *supra* note 1.

[19] General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, Annex 1–A (Agreement on the Military Aspects of the Peace Settlement), Art. VI; Annex 4 (Constitution of Bosnia and Herzegovina), Art. III, 35 ILM 75, 97, 120 (1996). At Dayton, the parties also agreed to request the designation of a high representative to facilitate the parties' own efforts to implement the accords. Security Council Resolution 1031, *supra* note 1, a Chapter VII resolution, endorsed these arrangements. Over time and without objection from the parties, the high representative has interpreted the scope of his mandate as including the authority to make binding decisions on interim measures where the parties are unable to reach agreement, and to remove officeholders, including elected officials, who are found by the high representative to be in violation of legal commitments made under the Peace Agreement or the terms for its implementation.

[20] Statement by the Chairman on the Conclusion of the Meeting of the G–8 Foreign Ministers Held at the Petersberg Centre, May 6, 1999, SC Res. 1244, Annex 1 (June 10, 1999), 38 ILM 1451, 1454 (1999).

[21] *See* SC Res. 1244, *supra* note 20, paras. 1–2.

[22] *See* Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/779, paras. 8–9 (July 12, 1999). The Secretary-General's reports on UNMIK are available online at <http://www.un.org/peace/kosovo/pages/kosovo1.htm>.

[23] *See* Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, *supra* note 22, para. 16.

[24] *See id.*, paras. 11–15.

[25] *See id.*, paras. 5–6.

On June 10, 1999, the Security Council adopted Resolution 1244, a binding decision under Chapter VII. Among other things, the resolution:

- decided on the deployment in Kosovo "under United Nations auspices, of international civil and security presences";[26]
- authorized member states and relevant international organizations to establish the international security presence "with substantial North Atlantic Treaty Organization participation" and "under unified command and control," and empowered the security presence to use "all necessary means" to establish a safe environment and facilitate the safe return of all displaced persons;[27]
- authorized the Secretary-General to establish "an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions";[28] and
- enumerated the main responsibilities of the international civil presence, which included promoting the establishment, pending a final settlement, of substantial autonomy and self-government; performing basic civilian administrative functions; supporting economic reconstruction; maintaining civil law and order; and facilitating a political process designed to determine Kosovo's future status.[29]

The mission of the international security presence—the Kosovo Force or KFOR—was similar to the traditional role of UN-authorized forces in restoring and maintaining order and removing or demilitarizing contending forces. The mission of the international civil presence, on the other hand, was unprecedented in scope and complexity.

The Secretary-General promptly created the international civil presence—known as the United Nations Interim Administration Mission in Kosovo, or UNMIK—and appointed a special representative to direct it. The special representative then assumed "all . . . executive authority with respect to Kosovo," including the right to appoint "any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person."[30] He likewise asserted the authority to administer all funds and property of the FRY and the Republic of Serbia in the territory of Kosovo.[31]

The structure he created for UNMIK reflected the heavy dependence of the operation on the efforts and resources of various states and international organizations. The mission was divided into four main components, each led by a different organization. First, a civil administration component, led by the UN Organization, was created to handle public administration and civil affairs (in particular, to revive health, education, and other public services); police (both to carry out police functions in the short term and to train and develop an indigenous force for the longer term); and judicial affairs (to reconstitute the law enforcement system, including by selecting and training judges, prosecutors, and prison personnel from all ethnic groups).[32]

Second, an institution-building component, led by the Organization for Security and Cooperation in Europe (OSCE), assumed the tasks of promoting democratization and institution building (including the training of local administrators, the development of local political and professional organizations, and the creation of independent news media);

[26] SC Res. 1244, *supra* note 20, para. 5.

[27] *Id.*, para. 7 & Annex 2, para. 4.

[28] *Id.*, para. 10.

[29] *Id.*, para. 11.

[30] UNMIK Regulation 1999/1 on the Authority of the Interim Administration in Kosovo §1 (July 25, 1999). All the regulations promulgated by UNMIK are available online at <http://www.un.org/peace/kosovo/pages/regulations>.

[31] *Id.*, §6.

[32] *See* Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, *supra* note 22, paras. 54–78.

elections (including voter registration and the development of provisional institutions for self-government); and human rights (particularly ensuring compliance with international norms by police, courts, and detention authorities).[33]

Third, a humanitarian component, led by the UN High Commissioner for Refugees, took responsibility for humanitarian assistance (including coordination of efforts by various international organizations to provide food, shelter, and medical treatment for the many displaced Kosovars, as well as to revive agricultural production) and mine action (to identify and remove land mines and unexploded ordnance).[34]

Fourth, a reconstruction component, led by the European Union (EU), was put in charge of the reconstruction of key infrastructure and other economic and social systems, including the development of a market-based economy, the coordination of international financial assistance, and the resolution of trade, currency, and banking matters.[35]

The performance of all these functions required that UNMIK identify the law that would govern in Kosovo and make new law as needed, which was done through the promulgation by the special representative of a series of regulations. The first of these regulations asserted that "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General."[36] It then stated that "[t]he laws applicable in the territory of Kosovo prior to 24 March 1999"—that is, the laws imposed by the FRY prior to its withdrawal from Kosovo—"shall continue to apply in Kosovo insofar as they do not conflict with" the mandate given to UNMIK by the Security Council or any regulations issued by UNMIK.[37]

Later the special representative specifically repealed certain FRY legislation that had been adopted in 1991 concerning property rights and housing, which he found to be discriminatory.[38] However, this action did not go far enough for Kosovar Albanians and the newly appointed Kosovar judges, who considered FRY laws to have been "part and parcel of the revocation of Kosovo's prior autonomous status and an instrument of oppression since then."[39] Ultimately conceding this point, the special representative decided that, in addition to his own regulations, the law applicable in Kosovo would be the law in force in Kosovo on March 22, 1989—that is, the law of Kosovo before the FRY stripped away its autonomy.[40]

In any event, the special representative has continued to make law for Kosovo where existing law did not suffice. By regulation, he has promulgated new law on such subjects as customs duties and taxes;[41] currency use and regulation;[42] the importation and sale of petroleum and other products;[43] and the regulation of telecommunications services,[44] banks,[45]

[33] *See id.*, paras. 79–90.

[34] *See id.*, paras. 91–100.

[35] *See id.*, paras. 101–09.

[36] UNMIK Regulation 1999/1, *supra* note 30, §1.

[37] *Id.*, §3.

[38] UNMIK Regulation 1999/10 on the Repeal of Discriminatory Legislation Affecting Housing and Rights in Property (Oct. 13, 1999).

[39] *See* Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/1250, para. 55 (Dec. 23, 1999).

[40] UNMIK Regulation 1999/24 on the Law Applicable in Kosovo (Dec. 12, 1999). The regulation further provides that if a situation is not covered by these sources of law, but is covered by nondiscriminatory law in force after March 1989, that law will be applied as an exception.

[41] UNMIK Regulation 1999/3 on the Establishment of the Customs and Other Related Services in Kosovo (Aug. 31, 1999).

[42] UNMIK Regulation 1999/4 on the Currency Permitted to be Used in Kosovo (Sept. 2, 1999).

[43] UNMIK Regulation 1999/9 on the Importation, Transport, Distribution and Sale of Petroleum Products (Petroleum, Oil and Lubricants) for and in Kosovo (Sept. 20, 1999).

[44] UNMIK Regulation 1999/12 on the Provision of Postal and Telecommunications Services in Kosovo (Oct. 14, 1999).

[45] UNMIK Regulation 1999/20 on the Banking and Payments Authority of Kosovo (Nov. 15, 1999); UNMIK Regulation 1999/21 on Bank Licensing, Supervision and Regulation (Nov. 15, 1999).

and nongovernmental organizations.[46] He has created new court structures, defined their jurisdiction, and provided for the appointment and duties of judges and prosecutors.[47]

In effect, UNMIK has functioned as a general lawmaking authority over a wide range of subjects, and will undoubtedly continue to do so as further needs and gaps in existing law are discovered. This additional activity will likely include the promulgation of new codes of criminal law and procedure to fill gaps in previous law and to ensure the availability of a fully functioning legal system to control interethnic violence as well as common crimes. New law may also be needed to enable UNMIK to administer or privatize state-owned and socially owned property with a view to encouraging economic revival and development.

Finally, UNMIK's mandate from the Security Council includes "the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo," and "[f]acilitating a political process designed to determine Kosovo's future status," taking full account of the Rambouillet accords.[48] Those accords, which had been elaborated prior to the NATO air campaign, would have adopted an "interim Constitution" for Kosovo if the FRY had been willing to sign.[49] Although the accords recognized that Kosovo was and would continue to be part of the FRY, that constitution would have given substantial governmental powers to a Kosovar political structure, with the exception of certain reserved areas such as monetary policy, defense, and most aspects of foreign policy. It will now fall to UNMIK to implement this aspect of the Security Council's instruction to provide for an interim autonomous political structure for Kosovo, and then to pursue an undefined "political process" to reach a "final settlement." This would be no small achievement.

III. UN GOVERNANCE OF EAST TIMOR

Within months after assuming the task of pacifying and governing Kosovo, the United Nations faced a task of comparable scope and complexity in East Timor. (In some ways it was more difficult, in that the United Nations did not have the assistance of such institutions as NATO, the EU, and the OSCE.)

East Timor had been subject to Portuguese control until 1975, when Indonesian forces occupied it over the protest of the Security Council.[50] After many years of negotiation, Portugal and Indonesia agreed in 1999 to ask the UN Secretary-General to conduct a "popular consultation" of the East Timorese to determine whether they wanted independence or autonomy within Indonesia.[51] This consultation took the form of a direct ballot in which the East Timorese rejected such autonomy.[52] When this result was announced, however, anti-independence militias engaged in an intense campaign of violence and intimidation that resulted in heavy destruction in East Timor and the displacement of hundreds of thousands of civilians.[53]

[46] UNMIK Regulation 1999/22 on the Registration and Operation of Non-Governmental Organizations in Kosovo (Nov. 15, 1999).

[47] *E.g.*, UNMIK Regulation 1999/5 on the Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor (Sept. 4, 1999); UNMIK Regulation 1999/7 on Appointment and Removal from Office of Judges and Prosecutors (Sept. 7, 1999); UNMIK Regulation 1999/18 on the Appointment and Removal from Office of Lay-Judges (Nov. 10, 1999).

[48] SC Res. 1244, *supra* note 20, para. 11(a), (e).

[49] Interim Agreement for Peace and Self-Government in Kosovo, Feb. 23, 1999, ch. 1 <http://www.state.gov/www/regions/eur/ksvo_rambouillet_text.html>.

[50] SC Res. 384, UN SCOR, 30th Sess., Res. & Dec., at 10, UN Doc. S/INF/31 (1975).

[51] *See* Report of the Secretary-General on the Question of East Timor, UN Doc. A/53/951– S/1999/513 (May 5, 1999) [hereinafter Report on Question of East Timor]. The Secretary-General's reports on East Timor are available online at <http://www.un.org/peace/etimor/docs/UntaetD.htm>.

[52] *See* Progress Report of the Secretary-General on the Question of East Timor, UN Doc. A/54/654 (Dec. 13, 1999) [hereinafter Progress Report on East Timor].

[53] *Id.*, para. 32.

In response, the Security Council acted under Chapter VII of the Charter to authorize the establishment of a multinational force empowered to use all necessary means to restore order and facilitate humanitarian assistance.[54] This Australian-led force, known as the International Force for East Timor, quickly restored order, but the violence had already destroyed a large number of homes and other buildings, caused the collapse of the civil administration and judicial systems, and damaged or destroyed much of the waterworks and other essential public services.[55]

As a result, the Security Council once again decided to entrust the United Nations with the burden of governance of a territory shattered by conflict. In Resolution 1272, again acting under Chapter VII, the Council established the United Nations Transitional Administration in East Timor (UNTAET), which was given "overall responsibility for the administration of East Timor" and empowered "to exercise all legislative and executive authority, including the administration of justice." The mandate of UNTAET included establishing an "effective administration," assisting in the "development of civil and social services," and supporting "capacity-building for self-government." UNTAET would be led by a special representative "who, as the Transitional Administrator, will be responsible for all aspects of the United Nations work in East Timor and will have the power to enact new laws and regulations and to amend, suspend or repeal existing ones."[56]

Once appointed, the transitional administrator rapidly exercised his authority through the issuance of regulations in much the same manner as the special representative for Kosovo. In the first of these regulations, he decreed that "[u]ntil replaced by UNTAET regulations or subsequent legislation of democratically established institutions of East Timor, the laws applied in East Timor prior to 25 October 1999 [would] apply in East Timor" insofar as they did not conflict with Resolution 1272 or UNTAET directives. At the same time, he ordered that a series of Indonesian security laws no longer be applied in East Timor.[57] In subsequent regulations, he promulgated rules for such matters as the appointment and removal of judges and prosecutors,[58] the regulation of fiscal and budgetary matters,[59] and currency transactions.[60]

Similarly to UNMIK in Kosovo, UNTAET adopted as immediate priorities (apart from the restoration of order) facilitating the return and care of refugees and displaced persons,[61] the restoration of public services through the reconstruction of essential infrastructure and the recruitment and training of administrators and civil servants,[62] and the rebuilding of the judiciary and the law enforcement system.[63] The revival of economic activity was also urgently required, since an estimated 80 percent of the population lacked any means of support.[64]

As to the political and economic future of East Timor, the situation is substantially different from that of Kosovo. The international community never accepted that East Timor was a part of Indonesia or lawfully subject to Indonesian control.[65] Further, under the ac-

[54] SC Res. 1264 (Sept. 15, 1999), 39 ILM 232 (2000).

[55] *See* Progress Report on East Timor, *supra* note 52, paras. 35–38; Report of the Secretary-General on the United Nations Transitional Administration in East Timor, UN Doc. S/2000/53, paras. 29–31 (Jan. 26, 2000) [hereinafter Report on UNTAET].

[56] SC Res. 1272 (Oct. 25, 1999), paras. 1–2, 6, 39 ILM 240 (2000).

[57] UNTAET Regulation 1999/1 on the Authority of the Transitional Administration in East Timor §3 (Nov. 27, 1999).

[58] UNTAET Regulation 1999/3 on the Establishment of a Transitional Judicial Service Commission (Dec. 3, 1999).

[59] UNTAET Regulation 2000/1 on the Establishment of the Central Fiscal Authority of East Timor (Jan. 14, 2000).

[60] *E.g.*, UNTAET Regulation 2000/2 on the Use of Currencies in East Timor (Jan. 14, 2000); UNTAET Regulation 2000/7 on the Establishment of a Legal Tender for East Timor (Jan. 22, 2000).

[61] *See* Report on UNTAET, *supra* note 55, paras. 38–39.

[62] *See id.*, paras. 40–42, 57–62.

[63] *See id.*, paras. 44–53.

[64] *See id.*, para. 43.

[65] *See* SC Res. 384, *supra* note 50 (calling on all states "to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination," deploring the Indonesian military occupation, and calling on Indonesia to withdraw its forces without delay).

cords concluded with Portugal and the United Nations in May 1999, if the Secretary-General determined that autonomy within Indonesia was not acceptable to the people of East Timor (as he did, following the "popular consultation"), Indonesia agreed to take the necessary steps to terminate its links with East Timor and transfer authority to the United Nations, which was to initiate the transition to independence.[66] Accordingly, the Secretary-General has stated that "fundamental and urgent policy decisions" must now be made for the purpose of "setting the foundations of an independent East Timor."[67]

IV. Legal Issues Presented by These Developments

The novel and complex undertakings in Kosovo and East Timor could represent a very considerable change in the degree to which the United Nations will assume responsibility for the governance of territories that have been severely affected by conflicts. Obviously, they raise serious policy questions about the practical capability of the United Nations to perform this role, the long-term political viability of relying on the United Nations to bear such burdens, and the availability of feasible alternatives to the United Nations for this purpose. Much will depend on whether the Organization is ultimately judged to have succeeded or failed in Kosovo and East Timor.

Some important legal questions must also be asked. First, is there adequate legal authority for UN action in such cases? With respect to Kosovo and East Timor, in my view the answer is clearly yes. Apart from the consent given by Indonesia and arguably by the FRY, UN action was based on the authority of the Security Council under Chapter VII of the Charter. That authority is predicated, of course, under Article 39, on the Council's determination of the existence of a "threat to the peace, breach of the peace, or act of aggression." It is therefore not necessarily available in every imaginable breakdown of governmental functions. But the Council has shown a willingness during the past decade to act on the basis of a robust and realistic appreciation of what might constitute a threat to the peace. It has used its Chapter VII authority when the conflict or humanitarian crisis in question might have been characterized by some as essentially internal.[68] 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. I believe that any situation—even if occurring within a single state—that threatens the peace through such elements as cross-border violence, substantial refugee flows, serious regional instability, or appreciable harm to the nationals of another state could lawfully form the basis for a determination by the Council under Chapter VII. The Council has the right to judge that such effects may flow from a severe humanitarian catastrophe of the sort presented by the situations in Kosovo and East Timor.

Second, does the United Nations have adequate legal authority for the character and scope of the governance functions it has assumed? Once again, the Council acted in Kosovo and East Timor under Chapter VII of the Charter, and the scope of the measures it may take under that chapter is very broad. Article 41 provides that the Council may decide what measures are to be employed to give effect to its decisions, without limiting the types of steps that may be chosen; it then recites a list of possible measures that does not include governance functions, but the list is clearly exemplary and not exclusive.[69]

[66] Agreement on the Question of East Timor, May 5, 1999, Indon.-Port., Art. 6, *in* Report on Question of East Timor, *supra* note 51, Annex I.

[67] Report on UNTAET, *supra* note 55, para. 71.

[68] *E.g.*, SC Res. 794, UN SCOR, 47th Sess., Res. & Dec., at 63, UN Doc. S/INF/48 (1992) (Somalia); SC Res. 940, *supra* note 1 (Haiti).

[69] UN Charter Art. 41. Article 41 states:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, 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.

On several occasions during the past decade, the Council has taken measures that affect legal relationships or may be characterized as governance functions but that do not appear on the Article 41 list, including the creation of judicial bodies with authority to try and punish individuals,[70] and the sequestration of government assets and the creation of a body to distribute the proceeds to persons and entities with claims against that government.[71] As the appeals chamber of the International Tribunal for the Former Yugoslavia held, in rejecting a challenge to the legality of the establishment of that Tribunal by the Security Council:

> As with the determination of the existence of a threat to the peace, a breach of the peace or an act of aggression, 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 measures chosen . . . .
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> . . . The establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Articles 41 and 42.
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> It is evident that the measures set out in Article 41 are merely illustrative *examples* which obviously do not exclude other measures.
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> . . . Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can *a fortiori* undertake measures which it can implement directly via its organs, if it happens to have the resources to do so.
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> . . . .
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> Plainly, the Security Council is not a judicial organ and is not provided with judicial powers . . . .
>
> . . . The establishment of the International Tribunal by the Security Council does not signify, however, ... that the Security Council was usurping for itself part of a judicial function which does not belong to it . . . . The Security Council has resorted to the establishment of a judicial organ . . . as an instrument for the exercise of its own principal function of maintenance of peace and security . . . .[72]

There is no reason in principle why the Council cannot authorize other measures of governance that it believes necessary to restore and maintain the peace, including the creation of administrative and judicial structures, the promulgation of laws and regulations, and the imposition of taxes and other financial measures.

Third, does the exercise of governance represent an impermissible interference with state sovereignty? I believe it does not. The exercise by the Security Council of functions under Chapter VII does not derogate from the sovereignty of any UN member affected by its decisions. In adhering to the UN Charter, member states accept the authority of the Council under Chapter VII, and this acceptance of the Council's authority is not a derogation from their sovereignty but an exercise of it. Article 2(7) of the Charter, which precludes UN intervention "in matters which are essentially within the domestic jurisdiction of any state," expressly excludes enforcement measures under Chapter VII from this principle.

Whenever the Security Council, acting under Chapter VII, determines that some form of UN governance is necessary to deal with an immediate threat to or breach of the peace, the

[70] SC Res. 827, *supra* note 4 (creation of International Tribunal for the Former Yugoslavia); SC Res. 955, *supra* note 4 (creation of International Tribunal for Rwanda).

[71] SC Res. 687, *supra* note 2, paras. 16–19 (compensation for victims of Persian Gulf conflict).

[72] Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT–94–AR72, paras. 32–38 (Oct. 2, 1995), *reprinted in* 35 ILM 32 (1996).

Charter obliges member states to comply with that decision. Article 25 states that UN members agree to accept and carry out the decisions of the Council. Article 48 requires that such decisions be carried out both directly by member states and through international agencies to which they belong.

Fourth, what are the limits to the Council's authority to make decisions providing for the governance of a territory? This is perhaps the most difficult of these issues. May the Council change the final political status of a territory—for example, by recognizing its independence, transferring it from one state to another, or giving it permanent autonomy? May the Council make permanent changes in the legal system of a territory—for example, by promulgating a permanent constitution?

Chapter VII itself does not expressly limit the measures the Council may take pursuant to its determination of a threat to or breach of the peace. (Article 51 preserves the right of states to individual or collective self-defense, but makes clear that the exercise of this right does not affect the Council's authority to maintain or restore international peace and security.) Article 103 provides that obligations under the Charter—presumably including those resulting from Chapter VII decisions of the Council—prevail over obligations under any other international agreement. Article 2 does require the United Nations to act in accordance with a set of principles, which include the "sovereign equality" of all member states, and the Council would be bound to discharge its responsibilities in good faith compliance with these principles. Moreover, the Council would naturally need to comply with the procedural requirements of the Charter that apply to decisions under Chapter VII.

All that said, I believe 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 international peace and security. To suggest some hypothetical examples: the Council might reasonably find that a change in the boundaries of a state is necessary to give its neighbors better security against a repetition of armed attack; or that a guarantee of autonomy to a particular part of a state's territory or population is necessary to avoid a repetition of civil conflict that would threaten the peace of the region; or that the permanent nullification of discriminatory restrictions on one population group is necessary to bring such a conflict to an end. Of course, such measures may or may not be prudent in any particular case, should never be lightly taken, and, if taken, should always be exercised in good faith observance of Charter principles.

At any rate, the Council's authority to require measures of the sort already taken in Kosovo and East Timor cannot be doubted. These measures were plainly necessary to avoid a serious resumption of conflict, and took the form of an interim administration designed to last until the peace was securely restored and the future of these territories could be determined through other political processes. As such, this type of UN governance is likely to find a prominent place in the international community's inventory of tools for dealing with conflict situations and postconflict societies.