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Assumptions of Legitimacy: And the Foundations of International Territorial Administration

Keywords

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ASSUMPTIONS OF LEGITIMACY: AND THE FOUNDATIONS OF INTERNATIONAL TERRITORIAL ADMINISTRATION

HOLLIN K. DICKERSON¹

I. INTRODUCTION

In his 2000 Millennium Declaration, U.N. Secretary-General Kofi Annan stated that the United Nations is “the only global institution with the legitimacy and scope that derive from universal membership, and a mandate that encompasses development, security and human rights as well as the environment. In this sense, the United Nations is unique in world affairs.”² In the same address, Annan also emphasized that “[w]eak states are one of the main impediments to effective governance today, at national and international levels alike.”³ Indeed, the post-Cold War phenomenon of an increasingly active United Nations portrays the Organization as one both willing and able to act upon its Charter-endowed powers of securing international peace and security to provide such governance, even if doing so involves the administration of an independent territory.

The role that international organizations, and in particular the United Nations, play in response to the problem of “weak states” is the very subject of international territorial administration (ITA). Since the colonial era, the administration of territory by outside actors has become a well-established practice.⁴ The first instance, however, of *international* territorial administration was the League of Nations’ partial governance of the Free City of Danzig after World War I.⁵ Subsequent missions have included the League’s administration of the Saar territory and Leticia; United Nations operations in places such as the Congo, West Irian, Cambodia, Somalia, Eastern Slavonia and, most recently, Kosovo and East Timor; the Office of the High Representative (OHR) in Bosnia; and the European Union (EU) in Mostar.⁶ These projects stand in contrast to other instances of

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2. The Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century*, at 49, U.N. Doc. A/54/2000 (2000) [hereinafter Millennium Declaration].

3. *Id.* at 7.

4. Ralph Wilde, TERRITORIAL ADMINISTRATION BY INTERNATIONAL ORGANIZATIONS 10 (2004) [hereinafter WILDE, ADMINISTRATION] (manuscript on file with author).

5. Ralph Wilde, *Representing International Territorial Administration: A Critique of Some Approaches*, 15 EUR. J. INT’L L. 71, 76 (2004). [hereinafter Wilde, Critique].

6. See WILDE, ADMINISTRATION, *supra* note 4, at 29, for a chart illustrating the dates of each administration, its location, the administering actor, and the type of governance.

foreign territorial administration that involve individual states as the administrative actors (as seen during the age of colonialism and under both the Mandate and Trusteeship systems). While ITA has been ongoing for decades at the level of both plenary and partial administration, some have taken to calling the post-Cold War missions as exceptional in the practice's overall history.⁷ This in turn has raised concerns by some as to whether or not this practice has given rise to a new form of colonialism, albeit one conducted by international organizations in lieu of states.⁸ Others, however, offer these operations as examples of international liberalism at its best.

Commentators often differentiate administration projects by the identity of the actor conducting the operations. Some have remarked that ITA projects are "so exceptionally difficult and politically sensitive that only a body with broad international legitimacy stands a chance of success."⁹ The demise of colonialism and the subsequent rise of international organizations (IOs) have contributed to the development of an assumption that international organizations are somehow inherently more legitimate for undertaking territorial administration than are individual states.¹⁰ The result is that states and international organizations have been placed at opposite ends of a legitimacy continuum, whereby states are associated with imposed rule and self-interested motives—thereby making them illegitimate—and international organizations are viewed as benevolent, selfless, and thus, legitimate.¹¹

7. See, e.g., Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT'L L. 76 (2001) (noting that the role of the United Nations in governing postconflict societies has "substantially expanded"). However, Matheson is incorrect that this somehow constitutes a new practice by international organizations; for example, the United Nations took over full governance of the Congo following the exit of Belgium as a colonial power in order to handle the resulting power vacuum in the 1960's. See, e.g. PAUL F. DIEHL, *INTERNATIONAL PEACEKEEPING* 50 (1994). Similarly, the League of Nations was present in the Saar territory for some fifteen years before handing over final sovereignty to Germany. During that time, it was involved in plenary administration. Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L L. 583, 589-90 (2001) [hereinafter Wilde, *From Danzig*]. See also STEVEN R. RATNER, *THE NEW UN PEACEKEEPING: BUILDING PEACE IN LANDS OF CONFLICT AFTER THE COLD WAR* 16-17 (1996).

8. Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 345-46 (1995) (noting legal and political difficulties in reinstating a trusteeship model); Jacob S. Kreilkamp, Junior Fellow's Note, *U.N. Postconflict Reconstruction*, 35 N.Y.U. J. INT'L L. & POL. 619, 621 (2003) (portraying the United Nations as engaging in a form of neocolonialism); Joel C. Beauvais, Note, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT'L L. & POL. 1101, 1177-78 (2001) (arguing for increased local participation during transitional governance); Kristen Boon, *Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers*, 50 MCGILL L.J. 285 (2005) (examining *jus post bellum* in light of the United Nations' plenary assumption of legislative activities in East Timor and Kosovo).

9. Kirsti Samuels & Sebastian von Einsiedel, *The Future of UN State-Building: Strategic and Operational Challenges and the Legacy of Iraq* 12, International Peace Academy, Nov. 2003 available at http://www.ipacademy.org/PDF_Reports/FUTURE_OF_UN_STATE_BUILDING.pdf.

10. INIS L. CLAUDE, *STATES AND THE GLOBAL SYSTEM: POLITICS, LAW AND ORGANIZATION* 148 (1988).

11. WILDE, *ADMINISTRATION*, *supra* note 4, at 263. See also Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 16 EUR. J.

I argue that this normative bifurcation is oversimplified and masks very real concerns that do exist regarding the legitimacy of international organizations to carry out territorial administration, while at the same time highlighting preexisting tensions within international law as a whole. In the end, by presenting states and IOs as polar opposites with respect to territorial administration, the formulation merely legitimizes activities undertaken by IOs that are considered illegitimate when done by states.¹² A recent example of the blurring that can occur in distinguishing states from IOs has been seen in the Côte d'Ivoire. The U.N.'s mission there (UNOCI) stated that the mandate of the Côte d'Ivoire National Assembly should not be extended. Local residents saw the statement as "an affront to Ivorian sovereignty," and engaged in violent protests demanding the United Nations leave the country.¹³ As one protestor put it, "[w]e want the complete liberation of Ivory Coast. I won't go home until the U.N. and France leave my country."¹⁴

This article begins where previous discussions of ITA have left off by examining whether or not legitimacy can be assumed on behalf of international organizations as an administrative actor. In doing so, it explores the legitimacy of IOs as administrative actors with respect to some of the characteristics that scholars, nations, and local populations most commonly focus upon when questioning an outside actor's validity to assume territorial control. Three aspects of legitimacy will be discussed: first, the legal authority of international organizations to conduct territorial administration; second, the accountability of IOs within the context of ITA; and third, relevant factors related to certain personality traits of international organizations, specifically their reputations for selflessness and impartiality. By attempting to break ITA legitimacy down into some of its primary components, my hope is that a more honest and principled approach to future administration mandates may be realized that capitalizes on the strengths of IOs while at the same time consciously compensating for their weaknesses. This article does not seek to answer the question of whether any given ITA project was or was not legitimate and does not attempt to answer whether, in the end, international organizations themselves are wholly legitimate or illegitimate. Instead, by creating a framework for assessing the legitimacy of IOs to carry out the specific task of territorial administration, future ITA mandates can be drafted that take into account a wider variety of players, processes, and considerations than before. This, in turn, will help international organizations—and particularly the United Nations in this era of reform—to start asking themselves

INT'L L. 695, 696 (2005).

12. WILDE, ADMINISTRATION, *supra* note 4, at 262-63; (quoting Wilde "[j]ust as territorial administration by foreign states was presented as essentially unjust in the era of decolonization, so this activity performed by international organizations is sometimes considered essentially legitimate because it is conducted by international organizations. At the very least, the presumption is reversed; what was presumed to be illegitimate is now presumed to be legitimate.").

13. Lydia Polgreen, *Ivorian Leader Urges Youths to End Anti-U.N. Protests*, N.Y. TIMES, Jan. 20, 2006, at A8.

14. *Id.* (emphasis added).

the right questions with respect to these missions by examining them through a more nuanced approach.

Part II of this article defines ITA by depicting its usages in response to so-called sovereignty and governance problems, which will be defined below. Part III examines the historical basis for the state/IO distinction by briefly tracing the evolution of territorial administration through colonialism, the League of Nations, the early activities of the United Nations, and up to the current post-Cold War setting. Part IV then analyzes an ITA actor's legitimacy through the three separate lenses of legal authority, accountability, and reputation. Lastly, Part V concludes by showing that while there are reasons to doubt that international organizations are the best administration actor, by acknowledging the gaps that currently exist, efforts can now be made to bridge them.

II. AN INTRODUCTION TO INTERNATIONAL TERRITORIAL ADMINISTRATION

ITA is a subset of the larger activity of foreign territorial administration. At a basic level, foreign territorial administration can be thought of as local governance of a territory (whether it be a state, nonstate, or substate unit) conducted by an outside actor.¹⁵ According to Ralph Wilde, the move from individual state administration under colonialism to administration by international organizations following World War I constitutes a distinct practice, both in terms of the role performed by international organizations as well as their very identity as international—as opposed to local—actors.¹⁶ Beginning with the League of Nations' administration of the Free City of Danzig, ITA has been used in response to essentially two types of operations, what Wilde terms sovereignty problems and governance problems.¹⁷ Depending on which type of situation is at issue, an IO's legitimacy for undertaking a particular ITA project will be affected.

Sovereignty problems concern the identity of who is in control and the basis upon which that control is exercised. When ITA is used to manage a sovereignty problem, it seeks to answer a larger question regarding the status of a territory.¹⁸ In such situations, IOs are brought in to administer because they are "seen as 'neutral' as compared with the local actors to whom the sovereignty problem relates."¹⁹ Thus, the League of Nations took control of the Saar region following World War I because it was contested territory between France and Germany.²⁰ Similarly in Leticia, the League responded when a group of Peruvians invaded and occupied

15. WILDE, ADMINISTRATION, *supra* note 4, at 17; see Wilde, *From Danzig*, *supra* note 7, at 585 (explaining that administrations can be partial (concerned only with certain matters) or plenary (exercising full governmental powers)).

16. WILDE, ADMINISTRATION, *supra* note 4, at 18, 33–84 (thoroughly discussing the meaning of "international organization").

17. *Id.* at 164.

18. *Id.*

19. *Id.*

20. The Versailles Treaty, arts. 45, 49, June 28, 1919, Consol. T.S. 188 [hereinafter Versailles Treaty].

the Colombian town—the League exercised control for a one-year period in order to serve as a neutral buffer before turning administrative control back over to Colombia.²¹ The United Nations played the same role with respect to West Irian in the 1960s by conducting plenary administration for a seven-month period before the transfer of authority from the Netherlands to Indonesia.²²

The second type of ITA operations, those involving governance problems, occur when the basis for outside involvement is the manner of governance being exercised in a territory, rather than the identity of the actor in control.²³ The recent U.N. operations in Kosovo (United Nations Mission in Kosovo, or UNMIK) and East Timor (United Nations Transitional Assistance in East Timor, or UNTAET) are both representative of this type of administration.²⁴ In Kosovo, UNMIK was established following mass human rights violations by Serb leaders against Kosovar Albanians; the goal of the mission was to effect a change in the existing local governance (the Serbs), not to answer a question of who that governance was.²⁵ In East Timor, because the local people were not deemed to be ready or capable of assuming the responsibilities of self-governance themselves at the time of independence, UNTAET actively engaged in plenary governance in East Timor for a period of three years.²⁶

Aside from the sovereignty- and governance-problem model, another manner in which ITA can be viewed is as a mechanism for promoting self-determination entitlements. According to Wilde, by looking at ITA from the perspective of self-determination, the focus shifts away from the territory itself and onto the people.²⁷ IOs promote the right to self-determination by assisting in referenda (as in the Saar and West Irian) or by promoting a particular territorial outcome based on an existing right to either internal or external self-determination (as in Kosovo).²⁸

21. Wilde, *From Danzig*, *supra* note 7, at 587; *see id.* at 588 (“For Colombia, it was a staging post in between control by the Peruvian irregulars and control by Colombian authorities. For Peru, however, it ensured that the territory would not be transferred to Colombia until the wider border dispute between the two countries was resolved.”).

22. The Netherlands’ claim for control had failed to garner the necessary two-thirds support needed in the General Assembly. Acting to save itself from embarrassment, the Netherlands said it was for the local population to decide, and the interim period of administration under UNTEA (U.N. Temporary Executive Authority) again provided a convenient buffer. *Id.* at 588; John Saltford, *United Nations Involvement with the Act of Self-Determination in West Irian (Indonesian West New Guinea) 1968 to 1969*, at 1,2, available at <http://www.fpcn-global.org/downloads/act-of-free-choice-papua/un-papua-1968-69.pdf>.

23. Wilde, *From Danzig*, *supra* note 7, at 592.

24. *Id.* at 593.

25. Kosovo presents a unique situation in that the final status of the territory has not yet been determined. In the preceding examples of Leticia and West Irian, the underlying issue of who would ultimately govern had already been resolved, and an international organization merely provided interim administration. *See* WILDE, ADMINISTRATION, *supra* note 4, at 177.

26. Wilde, *From Danzig*, *supra* note 7, at 600. UNTAET’s mandate under Resolution 1272 included providing security and maintaining law and order, in the development of civil and social services, and supporting East Timor’s capacity for self-government. *See* S.C. Res. 1272, at 2, ¶ 2, U.N. SCOR, 54th Sess., 4057th mtg., U.N. Doc. S/RES/1272 (Oct. 25, 1999).

27. WILDE, ADMINISTRATION, *supra* note 4, at 199.

28. *Id.* at 201. In West Irian, Indonesia received assistance from the U.N. representative to carry

Arising out of a rejection of the colonial approach, the right to self-determination continues to form much of the background to modern-day international administration prerogatives.

Thus, territorial administration as conducted by international organizations is characterized by certain activities and by certain purposes.²⁹ It is important to differentiate ITA from peacekeeping, which is commonly (though variously) defined as the deployment of military intervention forces designed to prevent existing disputes from reemerging.³⁰ ITA more closely fits with the idea of postconflict peacebuilding as endorsed by former U.N. Secretary-General Boutros Boutros-Ghali in his *An Agenda for Peace*.³¹ According to Boutros-Ghali, peacebuilding includes efforts to advance economic and social development while fostering the type of confidence in local institutions that is fundamental for a lasting peace.³²

The basic connection between all administration projects, whether conducted by states (foreign territorial administration) or by international organizations (ITA), is that in each case local actors are displaced by an outside administration. Who precisely is conducting the administration and that actor's legitimacy in doing so is the focus of the remainder of this article.

III. THE BASES FOR LEGITIMACY ASSUMPTIONS

The story of ITA is fundamentally one of sovereignty³³ and self-determination. A chronological look at the history of foreign territorial administration reveals a pattern closely aligned with prevailing notions of state

out the plebiscite. RATNER, *supra* note 7, at 111.

29. See WILDE, ADMINISTRATION, *supra* note 4, at 191–227 (discussing how ITA implements international law in the areas of international dispute settlement and prevention; resolution of certain areas of public policy, such as territorial status outcomes and liberal governance; and the promotion of international peace and security).

30. Charles W. Kegley, Jr., *Thinking Ethically about Peacemaking and Peacekeeping*, in PEACEKEEPING AND PEACEMAKING 17, 18 (Tom Woodhouse et al. eds., 1998); Interview with Sir Brian Urquhart, Former Undersecretary General of the U.N., in Berkeley, Cal. (Mar. 19, 1996), <http://globetrotter.berkeley.edu/UN/Urquhart/urquhart6.html> (last visited Sept. 26, 2004) [hereinafter Urquhart Interview].

31. The Secretary-General, *Agenda for Peace Preventative Diplomacy, Peacemaking and Peacekeeping*, para. 55, 56, delivered to the Security Council and the General Assembly, U.N. Doc. A/47/277, S/24111 (June 17, 1992), <http://www.un.org/Docs/SG/agpeace.html> [hereinafter *Agenda for Peace*].

32. See *id.* at para. 5; Many commentators continue to use the language of peacekeeping when describing ITA without carefully distinguishing between the two. See, e.g., RATNER, *supra* note 7, at 40–41; Alexander Orakhelashvili, *The Legal Basis of the United Nations Peace-Keeping Operations*, 43 VA. J. INT'L L. 485 (2003) (discussing ITA projects, including the U.N. Operations in the Congo (ONUC) and UNTAET, under the mantle of peacekeeping).

33. The use of this term is not without its problems. Ian Brownlie has noted its frequent invocation by statesmen acting pursuant to political motivations. In addition, he finds that its usage by lawyers tends to obscure complex considerations of “the rights, duties, powers, liberties, and immunities of states.” IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 106 (Oxford Univ. Press 2003) (1973); However, Brownlie also finds that over time a consistency of use has developed, such that “[t]he normal complement of state rights, the typical case of legal competence, is described commonly as ‘sovereignty.’” *Id.* It is this latter meaning that I intend here.

responsibility vis-à-vis international law at given points in history. As pure positivism gradually declined in influence and a growing recognition of self-determination entitlements came into existence, a belief in international organizations as a viable alternative to imposed colonial regimes took hold. The following historical discussion sets forth the normative bases upon which foreign territorial administration as conducted by individual states and as conducted by international organizations are distinguished.

A. Colonialism

"Colonies, by definition, lack sovereignty."³⁴ Today, scholars cite to economic, strategic, religious, and psychological factors as the motivations behind colonialism.³⁵ Antony Anghie notes that the confrontation that occurred between the European nations and their colonies was not seen as one between sovereign nations, but rather as between sovereign European nations and uncivilized ones lacking in sovereignty.³⁶ For example, Jules Ferry, prime minister of France during the 1880s, once emphasized that "the superior races have a right because they have a duty. They have a duty to civilize the inferior races...."³⁷

Based upon such sentiments, Anghie persuasively argues that international law legitimized such conquests and that therefore, the very notion of sovereignty was established and shaped through the practice of colonialism.³⁸ Therefore, prior to World War I, the world was essentially divided into the civilized and the uncivilized, with only the civilized possessing full sovereignty.³⁹ Because colonies were not considered politically independent, individual states were able to use their superior military and economic power to control individual territories and impose plenary administration upon them.⁴⁰ At the same time, the colonial powers were themselves held unaccountable for abuses perpetuated during their time in power.⁴¹ The imposition of forced foreign rule, the presence of self-interested motives, and the overall lack of accountability are among the characteristics that *international* territorial administration seeks to overcome.

34. Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. & POL. 513, 513 (2002) [hereinafter Anghie, *Colonialism*].

35. Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903, 932-33 (1997).

36. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*, 40 HARV. INT'L L.J. 1, 3 (1999) [hereinafter Anghie, *Peripheries*].

37. Jules François Camille Ferry, Speech Before the French Chamber of Deputies (Mar. 28, 1884) in

DISCOURS ET OPINIONS DE JULES FERRY (Paul Robiquet ed., 1987), available at <http://www.fordham.edu/halsall/mod/1884ferry.html>.

38. Anghie, *Peripheries*, *supra* note 36, at 6.

39. *Id.* at 3.

40. Gordon, *supra* note 8, at 339-340.

41. See Giselle Reid, *The Legacy of Colonialism: A Hindrance to Self-Determination*, 10 TOURO INT'L L. REV. 277, 286-90 (2000) (discussing the more harmful aspects of colonial regimes).

B. The League of Nations

The establishment of the League of Nations following World War I reflected a new-found internationalist spirit among the world community.⁴² The post-World War I period witnessed a dramatic rethinking in the principles of sovereignty and collective security, leading to the creation of a new international body devoted to the prevention of international conflict.⁴³ The League of Nations challenged the prevailing positivist model of international law by focusing on international cooperation, something that necessarily entailed a diminution in state sovereignty in a world where working together rather than fighting against became the new norm.⁴⁴ In addition, President Wilson's endorsement of a right to self-determination exerted a powerful influence over postwar thinking, which in turn influenced the manner in which the post-colonial territories were treated, both legally and politically.⁴⁵ The League's response to anticolonial sentiment and the presence of newly independent territories as a result of the post-World War I decolonization movement was the Mandates system, which placed territories "not yet able to stand by themselves" under the "tutelage" of "advanced nations."⁴⁶ Anghie states that the Mandate system "attempted to do nothing less than to promote self-government and, in certain cases, to integrate previously colonized and dependent peoples into the international system as sovereign, independent nation-states."⁴⁷ This was intended to be in juxtaposition to the colonial vision that had excluded non-European people (i.e., those living under colonial regimes) from the international system.⁴⁸ The Mandates system, although still administered by individual states, differed from colonialism in at least one important respect—the authority for the Mandates issued forth from the League Covenant rather than from coercion as exercised by individual states.⁴⁹

42. DIEHL, *supra* note 7, at 15.

43. LEAGUE OF NATIONS COVENANT pmbi.

44. *See id.* arts. 10, 11; HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 93–94 (2004).

45. STEINER & ALSTON, *supra* note 44, at 93.

46. LEAGUE OF NATIONS COVENANT art. 22, paras. 1, 2; Article 22 embodied two sets of obligations: substantive ones to help the former colonies "stand alone" and procedural ones that required nations to submit annual reports to a permanent League Commission acting in a supervisory role. *Id.*; While the Mandate system did confer equivalent legal status upon the administered territories and charged the League with supervising the undertakings of the administering nations, in practice Article 22 provided for three different levels of administration according to the degree of independence a territory had thus far attained. Gordon, *supra* note 8, at 340.; "A" Mandates were those whose "existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory. . ."; "B" Mandates required administration in a way that would guarantee certain fundamental rights, prohibit the slave trade, and secure equal economic opportunities; and "C" Mandates were to be administered "under the laws of the Mandatory as integral portions of its territory. . . ." LEAGUE OF NATIONS COVENANT art. 22.

47. Anghie, *Colonialism*, *supra* note 34, at 515.

48. *See id.* at 516.

49. Edward Marks, Commentary, *Transitional Governance: A Return to the Trusteeship System?*, AM. DIPL. COMMENTARY (Am. Dipl., Chapel Hill, N.C.) Feb. 1999, at 4, http://www.unc.edu/depts/diplomat/AD_Issues/amdipl_10/marks2.html.

The League marked an important shift in the purpose of territorial administration by attempting to provide for the eventual independence of the Mandates and, during the entire period of its existence, the League itself only conducted three ITA projects—the Free City of Danzig, the Saar, and Leticia.⁵⁰ Still, the choice for an international organization as the administering body remained the exception, and individual state administration the rule.

C. The United Nations

The successor to the League, the United Nations, inherited the League's focus on collective security and faith in international organizations. With respect to territorial administration, the U.N. Charter marked another evolution in the concept of sovereignty, as primarily seen in Article 1's focus on the maintenance of international peace and security, equality among nations, and its enshrinement of the principle of self-determination.⁵¹ The dual goals of promoting self-determination and collectively ensuring international peace and security have together provided the bases for U.N. ITA projects.

With respect to the colonies, the Charter sought to finish what the League had started: ending colonialism's final vestiges by making the former colonies full members of the international community.⁵² The long-term goal of the Charter's Non-Self-Governing Territories and the Trusteeship Council was to lead these territories to the point where they could freely choose for themselves their own political status, which would presumably be independence.⁵³ The Charter's commitment to self-determination fundamentally rejected individual state administration altogether, and the effect was that all such existing projects were made contingent upon the expressed will of the local populations as a manifestation of a self-determination entitlement.⁵⁴ Wilde points out the incongruity in the decolonization agenda:

Because of the historical denial of self-administration, a people were entitled to decide how their internal administrative arrangements, and external status, were to operate in the future. However, this legacy of external administration also meant that the local population was not in a position to carry out the process through which its entitlement would be realized.... The use of ITA both to implement the obligations of the administering authority, and enable the 'act of self-determination' is, then, ultimately consistent with the self-determination agenda of preventing a repeat of the colonial activity in

50. Wilde, *From Danzig*, *supra* note 7, at 586.

51. U.N. CHARTER art. 1, para. 1, 2, 4.

52. See U.N. CHARTER arts. 73–85, available at [http://www.un.org/aboutun/charter/Chapter XIII](http://www.un.org/aboutun/charter/Chapter%20XIII) created the Trusteeship Council to oversee the trust territories by considering reports submitted by the administering authority, accepting petitions, and conducting periodic visits at times agreed upon with the administering authority. *Id.* art 87, para. 1., available at <http://www.un.org/aboutun/charter/chapt13.htm>.

53. Gordon, *supra* note 8, at 319.

54. WILDE, ADMINISTRATION, *supra* note 4, at 247–48.

the future. Ironically involving a form of this activity, it was necessary to bring the activity to a permanent end.⁵⁵

ITA continued during the post-World War II decolonization period while administration projects conducted by states were phased out and eventually discarded altogether.⁵⁶ Throughout the Mandate and Trusteeship systems, individual state administration and ITA existed side-by-side;⁵⁷ after World War I, the desire of victorious states to assume control prevailed over League administration, and the continuation of this model in the United Nations provided a strong precedent for state administration.⁵⁸ Over time, however, the illegitimacy that came to be associated with individual state administration in the wake of colonialism and the corresponding rise of self-determination entitlements created the normative space necessary for international organizations to assume these functions.⁵⁹

D. Post-Cold War

Today's critics of international organizations have been prompted in part by the United Nations' increased use of Charter operations in the post-Cold War environment. In his 1992 *An Agenda for Peace*, then-Secretary-General Boutros Boutros-Ghali set forth an expansive vision of a newly activated United Nations that would play a leading role in "post-conflict peace-building."⁶⁰ Boutros-Ghali emphasized the importance of respecting the sovereignty of each state while simultaneously encouraging the Security Council to use the full range of Charter provisions for ensuring international peace and security.⁶¹ In March 1993, for the first time, the Security Council declared that a purely internal civil war was a threat to international peace and security and, acting under Chapter VII of the Charter, established the United Nations Operations in Somalia (UNOSOM II).⁶² UNOSOM II's mandate included not only the unprecedented request for humanitarian assistance from U.N. organs, but also the administrative goals of reestablishing national and regional governmental institutions and conducting civil affairs throughout the entire country.⁶³

Those who view ITA in generational terms commonly see the more recent U.N. operations in places such as Cambodia, Somalia, Kosovo, and East Timor as

55. *Id.* at 250–51.

56. *Id.* at 251.

57. See Wilde, *From Danzig*, *supra* note 7, at 603.

58. See *id.* at 604.

59. See WILDE, ADMINISTRATION, *supra* note 4, at 263.

60. *An Agenda for Peace*, *supra* note 31, para. 5.

61. See *id.* at para. 35.

62. S.C. Res. 814, U.N. Doc. S/RES/814 (Mar. 26, 1993).

63. See *id.* at para. 4(a), (c), (g); More recently, Secretary-General Annan's 2005 report pursuant to the recommendations of the High-Level Panel on Threats, Challenges and Change stated that "the United Nations now has more missions on the ground than ever before." The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, para. 111, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom*].

marking a new high point of U.N. activity.⁶⁴ This, in turn, has led to accusations that the United Nations is usurping the power of its Member States, becoming too involved in matters of domestic concern, and, in short, taking over a neocolonialist role in the world.⁶⁵ Nevertheless, the modern-day choice of international organizations as the actors conducting territorial administration seems to have largely displaced foreign state administration as “the device of choice.”⁶⁶

IV. THE LEGITIMACY INQUIRY

Up until now, this article has set forth the historical basis for the state/IO divide with respect to territorial administration actors by briefly tracing the chronological evolution of concepts such as sovereignty, self-determination, and decolonization. The question remains, however, whether in light of the basis for the distinction, legitimacy on the part of international organizations can be assumed when it comes to ITA.

Of late, much scholarly discussion has revolved around the legitimacy of international organizations, in particular the United Nations.⁶⁷ Yet legitimacy itself is an intangible concept with significant political, legal, historical, and social dimensions. One definition describes legitimacy as “the process through which political differentiation—the fact there are people who govern and others who are governed—is justified.”⁶⁸ David Caron points out that legitimacy is based on “subjective conclusions, perhaps based on unarticulated notions about what is fair and just, or perhaps on a conscious utilitarian assessment of what the process means for oneself.”⁶⁹ Jean-Marc Coicaud is one commentator who has been particularly critical of U.N. legitimacy. He believes, however, that ultimately, the concept of legitimacy on the international level is still in its infancy because the process of true global integration has only just begun.⁷⁰

Since the end of World War I, the overwhelming majority of territorial administration projects have been conducted by either the League of Nations or the United Nations.⁷¹ Whereas formerly, international organizations were seen as more or less beholden to their Member States, many believe that today’s IOs are seeking

64. See, e.g., Matheson, *supra* note 7, at 76; See Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* 2, International Peace Academy, Nov. 2003 available at http://www.ipacademy.org/PDF_Reports/YOU_THE_PEOPLE2.pdf.

65. Veijo Heiskanen, *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 8 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001); see Kreilkamp, *supra* note 8, at 667.

66. Wilde, *From Danzig*, *supra* note 7, at 605.

67. See generally The Secretary-General, *A More Secure World: Our Shared Responsibility*, delivered to the General Assembly, U.N. Doc. A/59/565, (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf> [hereinafter High-Level Panel Report].

68. Jean-Marc Coicaud, *International Democratic Culture and its Sources of Legitimacy: The Case of Collective Security and Peacekeeping Operations in the 1990s*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 256, 259 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

69. David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552, 557 (1993).

70. Coicaud, *supra* note 68, at 260.

71. See WILDE, *ADMINISTRATION*, *supra* note 4, at 29.

to become independent actors in their own right, complete with their own agendas and goals.⁷² An important related shift in international relations theory now concentrates upon weaker states as a source of international problems, as opposed to more traditional views that focused upon the larger, more powerful nations.⁷³ As mentioned, accusations that the United Nations is acting *ultra vires* when it comes to operations like UNMIK and UNTAET are becoming more widespread today.⁷⁴ In response, the United Nations has resisted "the equation of the post-colonial ITA missions with the earlier state-conducted manifestations of foreign territorial administration...."⁷⁵ The need for this intentional distancing from the image of colonialism raises questions as to whether the legitimacy of international organizations truly can be assumed in today's political and legal environment.

This section begins by examining the legal authority for ITA and then turns to an analysis of IO accountability, followed by a discussion of certain aspects of an IO's identity as they relate to an IO's legitimacy to undertake territorial administration. Despite an overlap in many areas, the overall framework serves as a useful basis upon which legitimacy can be mapped and analyzed within the specific context of territorial administration.

A. Legal Authority

The rejection of colonial rule stems in part from its forced imposition, and the collective security system that served as a basis for the creation of both the League and the United Nations implies precisely what was lacking under colonialism—consent. While it remains true that the League did not enjoy universal membership, much of the belief underlying U.N. action is based on the premise that it serves as an expression of international will that is itself properly reflective of the consent of those involved.⁷⁶ When examined in the context of ITA, the question becomes one of whose consent matters: the Member States, the host state, or the local population. Because ITA has largely grown out of a rejection of imposed colonial rule, the existence of meaningful consent is necessary to transform what is illegitimate administration when done by individual states into legitimate administration when conducted by IOs.⁷⁷

Gene Lyons has said that "[i]ntervention must be collective and subject to

72. Jan Klabbers, *The Changing Image of International Organizations*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS*, 221, 226 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

73. See CLAUDE, *supra* note 10, at 33; For example, Gerald Helman and Steven Ratner both propose a model of U.N. conservatorship with respect to the problem of so-called failed states without addressing why the U.N. is the ideal actor chosen for this. See Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 *FOREIGN POL'Y* 3, 12–18 (1993).

74. See generally Symposium, *The Security Council: Its Authority and Legitimacy*, 87 *AM. SOC'Y INT'L L. PROC.* 300 (1993); How a society feels about such "laudable hyper-activity" largely depends on its political realist versus internationalist orientation. Kegley, *supra* note 30, at 18.

75. WILDE, *ADMINISTRATION*, *supra* note 4, at 255.

76. See Michael Ottolenghi, *The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation*, 72 *FORDHAM L. REV.* 2177, 2194 (2004) (describing three models of U.N. governance: the Trusteeship system, Chapter VII operations, and a consent-based model dependent upon the consent of the parties involved).

77. WILDE, *ADMINISTRATION*, *supra* note 4, at 262–63.

broadly accepted rules through which the international community, through the UN or other recognized means, authorizes intervention in the common cause. . . .⁷⁸ In terms of legality, modern (i.e. post-Cold War) ITA projects are authorized by the Security Council acting under Chapter VII of the Charter.⁷⁹ In terms of relevant Charter provisions, Article 24 gives the Council the primary responsibility for ensuring international peace and security⁸⁰ and, under Article 39, the Council is charged with determining the existence of any threat to the peace.⁸¹ Thus, when acting pursuant to Chapter VII to authorize an ITA project, it must be the case that the Security Council has deemed the situation—either between two states or within a single one—to pose such a threat.

Caron argues that perceptions of IO legitimacy principally arise in “that space between the promises of the preamble to the charter of the organization and the realities of the compromises in the text that follows, a space where there is discretion regarding the use of authority.”⁸² He notes that too great a discrepancy between the ideals of an organization and its eventual actions is one source of illegitimacy.⁸³ Indeed, the *Agenda for Peace* has today become largely discredited for its overreaching idealism concerning the expansive manner in which the Charter should be read to allow for increased U.N. involvement in individual states.⁸⁴ In Kosovo and East Timor, for example, the Security Council invoked Article 41, concerning nonmilitary means of enforcing international peace and security (and listing as examples interruption of the means of communication and severance of diplomatic relations), to authorize plenary territorial administration.⁸⁵

Related to the *ultra vires* claims, some argue that internal Charter limits restrict the use of territorial administration, pointing specifically to Article 2(7)’s prohibition on intervention in matters that are within the domestic jurisdiction of a state.⁸⁶ The counterargument holds that the erosion of sovereignty since World War II makes the limits imposed by Article 2(7) largely irrelevant and that today, there could exist an emerging “legitimate ‘right’ to intervene in the domestic affairs of member states in the name of community norms, values, or interests[.]”⁸⁷

78. Gene M. Lyons, *The United Nations, International Security, and the National Interest*, in PEACEKEEPING AND PEACEMAKING 75 (Tom Woodhouse et al. eds., 1998).

79. U.N. Charter arts. 39–42.

80. *Id.* art. 24.

81. *Id.* art. 39.

82. Caron, *supra* note 69, at 560.

83. *Id.*

84. WILDE, ADMINISTRATION, *supra* note 4, at 209. One example of such an expansive reading is the Somalia intervention. See discussion *supra* Part III.D.

85. U.N. Charter art. 41; see Ottolenghi, *supra* note 76, at 2197.

86. U.N. Charter art. 2, para 7; The more legalistic viewpoints of Jonathan Charney and Bruno Simma in the context of Kosovo are set forth in A. Mark Weisburd’s, *International Law and the Problem of Evil*, 34 VAND. J. TRANSNAT’L L. 225, 238 (2001); See also Ratner & Helman, *supra* note 73, at 9; Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1 (1999); MANFRED NOWAK, INTRODUCTION TO THE INTERNATIONAL HUMAN RIGHTS REGIME 34 (2003).

87. Gene M. Lyons & Michael Mastanduno, *Introduction: International Intervention, State Sovereignty, and the Future of International Society*, in BEYOND WESTPHALIA? STATE SOVEREIGNTY

Therefore, underlying the legal authority of ITA as a function of consent is a more elemental debate as to whether ITA is *ever* appropriate under the U.N. Charter.⁸⁸

1. Member State Consent

As Steven Ratner has stated,

"[t]o avoid the stigma of being seen as occupiers, [international organizations] have developed their own legal and political coping mechanisms. They have, I believe, assumed that the approval of these missions by the organization's competent organs insulates them from the problems of occupiers and have refused to apply the term to these missions."⁸⁹

With regard to Member State consent, the decision-making process in the Security Council has also been the source of much critique, primarily due to the fact that its membership is not democratically elected and is dominated by a few powerful states.⁹⁰ In order for a resolution to pass, an affirmative vote of nine Members is needed, with all permanent members concurring.⁹¹ Any resolution passed by the Security Council is legally binding on all Member States and prevails over any other law.⁹² Whether or not the Security Council serves as an accurate proxy of international will and the problems inherent in its structure will be discussed in Part C below, but suffice it to say here that when the Council authorizes an ITA mandate, it provides the necessary legal authority for the Organization to administer a territory.

Much of the rationale for seeking Member State consent grows out of a theory of international public power that requires that the conditions of governance must be acceptable both to those exercising the power as well as those affected by it.⁹³ The Security Council purports to give rise to an implied international consent for the projects it authorizes; in other words, collective security "implies action under authority of the world community as a whole...."⁹⁴ However, the voting results for past ITA missions reveal a somewhat lopsided record, which tends to lend these

AND INTERNATIONAL INTERVENTION 3 (1995).

88. I do not attempt to resolve that debate here, but for a good discussion on the controversies underlying Charter authority for "old" and "new" peacekeeping (a definitional approach that encompasses ITA operations) see RATNER, *supra* note 7, at 56–61.

89. Ratner, *supra* note 7, at 697.

90. See High-Level Panel Report, *supra* note 67, para. 248 ("[i]ncreasing both the effectiveness and the credibility of the Security Council] requires greater involvement in Security Council decision-making by those who contribute most; greater contributions from those with special decision-making authority; and . . . a firm consensus on the nature of today's threats . . .").

91. U.N. Charter art. 27.

92. *Id.* art. 25.

93. Philip Allot, *Intergovernmental Societies and the Idea of Constitutionalism*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 70 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

94. QUINCY WRIGHT, *INTERNATIONAL LAW AND THE UNITED NATIONS* 15 (1960); It should be noted that because Chapter VII resolutions are legally binding under the Charter, by virtue of having ratified the Charter a state therefore consents to be bound by determinations of the Security Council. U.N. Charter art. 103.

resolutions less authoritative weight than a unanimous, unambiguous voice would.⁹⁵ Caron points out that the potential for a veto by any one of the permanent members has a detrimental effect on the sense of participatory democracy that is meant to give authority to Security Council resolutions.⁹⁶ From the realist perspective of international relations theory, it is not entirely clear that the legal authority that emanates from the Security Council reflects the United Nations' universal membership and overall "collectiveness" by taking into account a broader range of states with no effectual voice in the Council's decision making.⁹⁷ This in turn raises questions as to the true existence of Member State consent for U.N.-authorized ITA projects.

2. Host-State Consent

Turning to host-state consent, Lyon uses the Security Council to invoke the colonial image of the strong overbearing the weak by stating that "[i]ntervention... cannot be an extension of the practice of strong states intervening into the domestic affairs of the weak on their own initiative in terms of their own assessment of what international security requires."⁹⁸ Because Article 2(4) of the Charter expressly prohibits the use of force against the territorial integrity or political independence of any state, in order to make military interventions legal the consent of the host state has traditionally been required for peacekeeping operations.⁹⁹ According to David Wippman, "That [host-state] consent may validate an otherwise wrongful *military* intervention... is a generally accepted principle."¹⁰⁰ It is less clear, however, the degree to which this principle extends to ITA, where the intervention is not military action but rather civilian administration. Article 2(7) does not contain a corresponding limitation to only uses of force, yet from the perspective of those who argue for its irrelevancy, host-state consent is not necessary to transform nonmilitary intervention from illegal to legal.¹⁰¹ Others, however, continue to maintain that host-state consent remains vital to any exercise of power under Chapter VII, whether it be military or civilian in nature.¹⁰²

Problems of host-state consent may only be relevant in the context of the aforementioned governance problems, where ITA is often conducted precisely to

95. See Caron, *supra* note 69, at 563; see Claude, *supra* note 10, at 154; see, e.g., S.C. Res 143, U.N. Doc. S/RES/143 (July 14, 1960); S.C. Res. 435, U.N. Doc. S/RES/435 (Sept. 29, 1978); S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999). China abstained from ONUC's authorization, China and Russia both abstained from UNTAG's authorization, and China and France abstained from UNMIK's authorization.

96. See Caron, *supra* note 69, at 566.

97. See, e.g., Stephen D. Krasner, *Sovereignty and Intervention*, in *BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION* 229 (1995).

98. Lyons, *supra* note 78, at 75.

99. U.N. Charter art. 2, para. 4; see Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VAND. J. TRANSNAT'L L. 485, 510 (2004) (referring to a statement by Oscar Schachter).

100. David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209, 209 (1996) (emphasis added).

101. Lyons & Mastaduno, *supra* note 87, at 14.

102. Ratner, *supra* note 7, at 26 (finding that ITA operations "must start with the consent of the parties to the conflict."); Orakhelashvili, *supra* note 32, at 518–19.

go against the wishes of the host state in order to effect a change in the local government. In these situations, in place of host-state consent, there is, instead, Security Council authorization. UNMIK in Kosovo was such a case.¹⁰³ While U.N. administration was provided for in the Peace Plan signed by the Federal Republic of Yugoslavia (the FRY), the FRY was not considered to be a member of the U.N. when Resolution 1244 was passed, thus negating the aforementioned effects of any sort of implied consent via the operation of Chapter VII.¹⁰⁴ On the other hand, the U.N. Operations in the Congo (ONUC) presents a classic case of host-state consent with respect to a governance problem: following Belgium's withdrawal, the fledgling Congolese government requested U.N. assistance to help it maintain law and order and provide effective governance.¹⁰⁵ By contrast, in Namibia the Security Council intended for UNTAG to engage in direct governance yet, due to South Africa's resistance following complex peace negotiations, it only performed election monitoring in the end, despite determinations by the International Court of Justice and General Assembly that South Africa's continued presence was illegal.¹⁰⁶

When, however, ITA has been conducted in response to sovereignty problems, host-state consent has invariably been sought prior to the IO's presence. For example, the League's presence in the Saar was included in the Versailles Treaty,¹⁰⁷ both Indonesia and the Netherlands consented to the U.N.'s role in West Irian, and Croatia and the Serb militias invited the U.N. to administer Eastern Slavonia during the interim handover period.¹⁰⁸ A distinction must therefore be made between governance problems that require changes of certain local governmental actors and those that operate to assist a struggling state or to serve as an interim buffer; the legal relevance of host-state consent in the former appears to stand on weaker footing than in the latter. The substitution of Security Council authorization in place of host-state consent is in and of itself problematic due to flaws in the Council's decision-making processes and the composition of its members. Nevertheless, when the attainment of host-state consent is possible, the U.N. in practice seeks it, showing that such consent can continue to serve a legitimizing function, even if only on a political or normative level.

3. Local Consent

Even if host-state consent has been present, additional concerns have arisen with respect to whether or not the consent of those most affected by territorial administration has been obtained. In terms of local consent, as discussed in Part II, one way in which ITA projects can be conceived of is as promoting self-determination entitlements, and one of the primary mechanisms for achieving this goal is through the use of local referenda that allow a population to decide the

103. See discussion *infra* Part II.

104. U.N. Doc. S/1999/649, para. 3, 5 (1999); Penelope Mathew et al., *The Role of State Protection in Refugee Analysis*, 15 INT'L J. REFUGEE L. 444, 457 (2003).

105. Diehl, *supra* note 7, at 50.

106. S.C. Res. 629, U.N. Doc. S/RES/629 (Jan. 16, 1989); Ratner, *supra* note 7, at 118–21.

107. The Versailles Treaty, *supra* note 20, art. 16.

108. Wilde, *From Danzig*, *supra* note 7, at 588–89.

future of their territory. The law of self-determination requires that the inhabitants of a territory be able "freely to determine, without external interference, their political status and to pursue their own economic, social, and cultural development."¹⁰⁹ Simon Chesterman seeks legitimacy for territorial administration by looking to the consent of the local population.¹¹⁰ However, Chesterman also explains that it would be inaccurate and counterproductive:

to assert that transitional administration depends upon the consent or 'ownership' of local populations. It is inaccurate because if genuine local control were possible then a transitional administration would not be necessary. It is counter-productive because insincere claims of local ownership lead to frustration and suspicion on the part of local actors.¹¹¹

Wilde too looks to the consent of local populations. According to him, the need for a popular consultation to determine the status of a territory has its roots in the rejection of colonialism as an imposed regime not consented to by the local population.¹¹² In its *Western Sahara Advisory Opinion*, the International Court of Justice stated that in order for something to serve as an act of self-determination, it requires "a free and genuine expression of the peoples of the Territory."¹¹³ Ian Brownlie notes that territorial administration by the U.N. is not inconsistent with the view that the U.N. cannot have territorial sovereignty, and in conjunction Wilde emphasizes the fact that the U.N. makes not claim to title over the areas it administers.¹¹⁴ When ITA is conducted with respect to a territory (whether a state or nonstate) that enjoys an external self-determination entitlement, Wilde argues that such areas, by virtue of that entitlement, take on a distinct legal personality.¹¹⁵ In order to legitimize a territory's juridical status and give meaning to the concept of self-determination as a human right, the consent of local populations is required for ITA because "determinations of external status... are quintessentially public decisions."¹¹⁶

109. Gordon, *supra* note 8, at 320-21.

110. See Chesterman, *supra* note 64, at 3; see WILDE, ADMINISTRATION, *supra* note 4, at 154 (arguing that a similar situation existed in 1975 in East Timor when two competing factions made claims for statehood in the absence of a referendum involving the entire population).

111. *Id.* This was arguably the situation in 1975 when two competing factions made claims for statehood in the absence of a referendum involving the entire population. See Wilde Administration, *supra* note 4, at 154.

112. WILDE, ADMINISTRATION, *supra* note 4, at 139.

113. Western Sahara, Advisory Opinion, 1975 I.C.J. 12, 32 (Oct. 16).

114. BROWNLIE, *supra* note 33, at 167 (noting that administrative powers rest legitimately on the principle of necessary implication).

115. WILDE, ADMINISTRATION, *supra* note 4, at 136.

116. *Id.* at 140; The Canadian Supreme Court has famously distinguished the rights to external and internal self-determination. A right to external self-determination exists when a people are prevented from meaningfully exercising their right to self-determination within an existing state, thereby giving rise to a potential right of secession. Internal self-determination, however, is defined by the Court as "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state." Reference re Secession of Quebec, [1998] S.C.R. 217.

Both the League and the United Nations have played a significant role in giving a voice to local populations,¹¹⁷ yet doubts have arisen as to the true validity of at least some of these consultations. On the one hand, the plebiscite held in the Saar under League auspices gave the people the option of union with France, union with Germany, or continued League administration; the people's choice of Germany reflected the outcome of a democratic process aimed at ensuring a then-emerging right to self-determination.¹¹⁸ In contrast to the Saar plebiscite, in West Irian, Indonesia and the Netherlands reached an agreement to transfer control of the territory to UNTEA (United Nations Temporary Executive Authority), and, following the U.N.'s exit, a consultation took place to determine whether the people wished to remain or sever ties with Indonesia.¹¹⁹ The consultation was largely viewed as corrupted and controlled by the local elite to ensure the resulting decision to remain with Indonesia. The consultation was nonetheless endorsed by the United Nations in the end.¹²⁰ The area was incorporated into Indonesia, and the local people have continued to press for their full independence ever since.¹²¹ In East Timor, the autonomy proposal was rejected by 78.5% of the voters, expressing the popular will for exercising self-determination in the form of independence.¹²² However, only if the locals had read the May Agreement would they know that a vote for independence was also a vote for U.N. administration.¹²³ Because the question was never properly put before the people, approval for UNTAET cannot be inferred from the people's vote for full independence.

The legality of ITA missions as based upon the consent of relevant actors rests on somewhat shaky grounds. While the universal membership of IOs gives rise to the idea that there exists an identifiable international community that can adequately express its will, the uneven distribution of power in the Security Council raises concerns as to the effectiveness of implied international consent. In some cases, the very fact of universal membership has worked against the United Nations. For example, the choice for EU administration of Mostar under EUAM in 1994 can best be understood as a preference for a regional, rather than international, organization that was more representative of the territory in question.¹²⁴ In addition to this, going into nations without their prior consent runs

117. See David J. Scheffer, *U.N. Engagement in Ethnic Conflicts*, in INTERNATIONAL LAW AND ETHNIC CONFLICT 156 (David Wippman ed., 1998) ("[T]he United Nations is fusing self-determination and democratization through organization, supervision, verification, coordination, or other support of elections.").

118. Versailles Treaty, *supra* note 20, pt. III Annex, para. 34. The plebiscite, in turn, prevented a potential territorial dispute from arising between France and Germany over the Saar. See Wilde, *From Danzig*, *supra* note 7, at 589-90.

119. Wilde, *From Danzig*, *supra* note 7, at 591.

120. *Id.*

121. See RATNER, *supra* note 7, at 111. Today, there continues to exist an as yet unresolved self-determination claim for many of the local Papuan population, many of whom viewed the U.N. involvement as more harmful than helpful. See Saltford, *supra* note 22, at 19-20.

122. STEINER & ALSTON, *supra* note 44, at 673.

123. See *id.*

124. See WILDE, ADMINISTRATION, *supra* note 4, at 48; The essential purpose of EUAM was to solve both a sovereignty and a governance problem. The city of Mostar was contested between the new

against Charter norms¹²⁵, and instances of a corresponding lack of meaningful consent by local populations seemingly violate embedded principles of self-determination. In the end, many ITA projects suffer from the same imposed nature that came to characterize colonial administration. This presents one area that the emerging body of *jus post bellum* needs to account for.

The U.S.- and U.K.-led Coalition Provisional Authority (CPA) in Iraq did much to increase IO legitimacy in this regard. From the beginning, the now-defunct CPA was primarily regarded as a military occupation that existed without international, host-state, or local consent, despite a mandate that was directed expressly at transitional administration and eventual self-governance.¹²⁶ Its association with a single state (the United States) and its forced imposition upon the people of Iraq has given rise to strong associations with imperialism.¹²⁷ While the Security Council subsequently recognized both the United States and the United Kingdom as the occupying powers in Iraq, the mere fact of *ex post* U.N. approval did little to “internationalize” perceptions of the CPA.¹²⁸ The example of Iraq shows that in certain situations, the voice of fifteen nations could be preferable to one state acting alone.

B. Accountability

The International Law Association (ILA)’s 2004 Report, *Accountability of International Organisations*, states that accountability “is linked to the authority and power of an IO. Power entails accountability; that is the duty to account for its exercise.”¹²⁹ International organizations have traditionally been seen as beholden to their Member States, yet today, some have claimed that bodies such as the United Nations are acting independently with a will all their own.¹³⁰ The ability of

state of Herzog-Bosna and Croatia, and EUAM’s purpose was to overcome the city’s ethnic divide through physical reconstruction and social reunification. See Wilde, *From Danzig*, *supra* note 7, at 593-94; SARAH REICHEL, WISSENSCHAFTSZENTRUM BERLIN FÜR SOZIALFORSCHUNG, TRANSITIONAL ADMINISTRATIONS IN FORMER YUGOSLAVIA: A REPETITION OF FAILURES OR A NECESSARY LEARNING PROCESS TOWARDS A UNIVERSAL PEACE-BUILDING TOOL AFTER ETHNO-POLITICAL WAR? 4 (2000) available at <http://skylla.wz-berlin.de/pdf/2000/p00-305.pdf>; The Memorandum of Understanding creating EUAM gave the EU civil authority over the city, with the ultimate goal of self-sustaining and multiethnic local governance. Memorandum of Understanding of the European Administration of Mostar art. 2.

125. Christopher M. Tiso, *Safe Haven Refugee Programs: A Method of Combating International Refugee Crises*, 8 GEO. IMMIGR. L.J. 575, 576 (1994).

126. See, e.g., Ottolenghi, *supra* note 76, at 2201-2203; Coalition Provisional Authority Regulation 1 §1, para. 2, CPA/REG/16 May 2003/01 available at http://www.cpa-iraq.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf (also giving the CPA “all executive, legislative and judicial authority necessary to fulfill its objectives”).

127. See, e.g., *Coalition Laws and Transition Arrangements During Occupation of Iraq*, 98 AM. J. INT’L L. 601, 605 (2004) (Sean D. Murphy ed.).

128. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003); Ottolenghi, *supra* note 76, at 2177-78 (2004) (noting that Jerry Bremer, the head of the CPA, was appointed by U.S. president George W. Bush).

129. INT’L L. ASS’N, 2004 REPORT OF THE SEVENTY FIRST CONFERENCE ON THE ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS 5 (2004) [hereinafter ILA Report].

130. See Klabbers, *supra* note 72, at 226.

Member States to control "their" organization, the organization's commitment to upholding international law, and the ability of a local population to have recourse for potential abuses all factor heavily into an IO's legitimacy to perform territorial administration. There are two primary components to the question of accountability vis-à-vis ITA operations: the accountability that exists between the IO and its Member States and that which exists between an ITA project and the local population.

In response to claims that the Security Council acts beyond its legal authority when authorizing ITA mandates,¹³¹ Neils Blokker has stated, "When a member feels that an organization is not acting as it should, or is not acting at all, it is likely that sooner or later the member may accuse the organization of not being 'accountable.'"¹³² While the League of Nations remained relatively weak and inactive, the accountability of the United Nations has become a major focus of reform proposals, including one put forth by the Working Group on the Equitable Representation On and Increase In the Membership of the Security Council and another in the December 2004 Report of the High-Level Panel on Threats, Challenges and Change.¹³³ Significantly, there exist no institutional limits on the Security Council in the Charter. The General Assembly may make nonlegally binding resolutions that are often reflective of international will, but it has no ability to consider questions concerning international peace and security if they are already being discussed by the Security Council.¹³⁴ In terms of Charter limitations, however, the International Criminal Tribunal for Yugoslavia (ICTY) stated in *Tadić*:

The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations . . .¹³⁵

One area of current debate is the relationship between the ICJ and the Council, specifically whether or not the ICJ may review decisions of the Security

131. See discussion *infra* Part III.A.

132. *Exploring the Evolution of Purposes, Methods and Legitimacy: Accountability of Intergovernmental Organizations*, 94 AM. SOC'Y INT'L L. PROC. 204, 205 (2000).

133. See U.N. General Assembly, *Report of the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council*, para. 7, annex IV paras. 57-8, U.N. Doc. A/58/47 (2004) (suggesting improved transparency, higher participation of the nonpermanent members, and increasing the relationship between the Security Council and the General Assembly); See High-Level Panel Report, *supra* note 67, annex I, para. 74-7 (presenting two separate proposals for a restructured Security Council).

134. U.N. CHARTER arts. 10-12.

135. *Prosecutor v. Dusko Tadić a/k/a "Dule"*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Oct. 2, 1995), <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

Council. The Court itself has rejected the argument that Security Council determinations made under Article 24 are the exclusive province of the Council.¹³⁶ In the *Libya* case, the Court held that Chapter VII resolutions prevail over other legal obligations under Article 103 of the Charter but, in so holding, did not address specifically whether or not there existed limits upon the Council's ability to override the legal rights of states.¹³⁷ Thus, accusations by the international community that the Security Council is acting *ultra vires* when authorizing complex ITA projects may or may not find recourse at the ICJ. The larger issue of whether or not the ICJ *should* exercise judicial review is a question beyond the scope of this article.¹³⁸

At the second level of accountability, that which exists between the organization's ITA mission and the local population, the discussion here will focus upon the United Nations' legal accountability, with UNTAET and UNMIK presenting compelling case studies.¹³⁹ The perpetration of human rights abuses by U.N. officials as well as a lack of firm political controls over administrative projects has given a renewed sense of urgency to the question of IO accountability. As set forth below, while the law in this area remains complex, its evolving nature has shown a move toward increased responsibility for both peacekeeping and ITA activities.¹⁴⁰

In terms of general legal accountability, the United Nations is afforded privileges and immunities under Article 105 of the Charter and is endowed with legal personality under the 1946 Convention on the Privileges and Immunities of the United Nations.¹⁴¹ In the *Reparations Case*, the ICJ notably implied that the United Nations enjoys legal personality, not as a collection of individual legal personalities of the its Member States but as a separate entity altogether;¹⁴² this conclusion further implies a conferral of rights and duties upon the Organization as

136. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1984 I.C.J. 392, 433 (Nov. 26, 1984).

137. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. U.S.*), 1992 I.C.J. 114, 126-27 (Apr. 14, 1992); see Thomas M. Franck, *The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519, 521-22 (1992).

138. For a thorough discussion of ICJ review of Security Council decisions, see José E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996).

139. Whether or not the League enjoyed a distinct legal personality capable of assuming rights and obligations is less clear than with the United Nations. For example, because the League operated by consensus, there seemed to be no distinct body capable of acting independently of Member States who did not agree with a particular course of action. However, the League appears to have taken on the characteristics of a distinct actor in other respects, as seen in the enjoyment of privileges and immunities by League officials and the inviolability of League property. See WILDE, ADMINISTRATION, *supra* note 4, at 46-47.

140. See ILA Report, *supra* note 129, at 250-53.

141. Convention on the Privileges and Immunities of the United Nations, art. I, § 1, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15; U.N. CHARTER art. 105; Article II of the 1946 Convention likewise accords the United Nations "immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity."

142. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 178-80 (Apr. 11) [hereinafter *Reparations Case*].

a whole based upon the notion of functional necessity.¹⁴³ The idea of functional necessity allows the United Nations to carry out the functions implied in its purpose, functions that often "mirror the functions of a State."¹⁴⁴

Within the context of military force, the United Nations has recognized certain principles of legal accountability, primarily through the Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, which renewed the United Nations' commitment to international responsibility for damage to life and property caused by the activities of U.N. forces.¹⁴⁵ It has also implemented a policy decision to establish third-party liability, albeit with temporal and financial limitations, which, together with the Bulletin, represents the framework of the United Nations' internal doctrine for legal responsibility with respect to military actions.¹⁴⁶ Military members of national forces, who are not covered under the 1946 Convention, are afforded privileges and immunities in the various status of forces agreements (SOFAs) entered into between the United Nations and that country,¹⁴⁷ and contributing countries have adopted internal peacekeeping codes of conduct promulgated by the U.N.'s Department of Peacekeeping Operations.¹⁴⁸ Under the model SOFA adopted by the General Assembly and endorsed by the Security Council, military personnel are subject to the criminal authority of the contributing nation.¹⁴⁹

The legal standards that apply to territorial administration are, however, much less clear and much more complex.¹⁵⁰ Under the 1946 Convention, U.N. personnel

143. WILDE, ADMINISTRATION, *supra* note 4, at 41; see also Elizabeth Abraham, Comment, *The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo*, 52 AM. U. L. REV. 1291, 1310 (2003).

144. Abraham, *supra* note 143, at 1311.

145. See Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law, para. 1.1, U.N. Doc. ST/SGB/1993/13 (Aug. 6, 1999), available at http://www.un.org/peace/st_sgb_1999_13.pdf.

146. See, e.g., The Secretary-General, *Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces Headquarters; and Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations: Financing of the United Nations Peacekeeping Operation*, delivered to the General Assembly, U.N. Doc. A/51/389 (Sept. 20, 1996); see Daphna Shrager, *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage*, 94 AM. J. INT'L L. 406, 406 (2000).

147. The Secretary-General, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All of Their Aspects: A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations*, para. 19, delivered to the General Assembly, U.N. Doc. A/59/710 (Mar. 24, 2005) [hereinafter *Comprehensive Strategy*].

148. *Id.*

149. It should be noted, however, that it has become the practice of the United Nations to fail to obtain specific guarantees regarding the willingness of nations to exercise such jurisdiction. *Id.* at para. 78.

150. *Id.* at para. 14 ("A United Nations peacekeeping operation may have a civilian component, a military component and a civilian component. The components are governed by different rules and disciplinary procedures because they each have a distinct legal status. The 2003 Secretary-General bulletin [promulgating detailed rules prohibiting sexual exploitation and abuse that are mandatory for all United Nations staff] does not, of its own force, apply to all three categories. This is a serious

are granted privileges and immunities for acts committed within their official duties;¹⁵¹ the aforementioned SOFAs provide that civilian staff members of U.N. missions are deemed to be officials under the 1946 Convention.¹⁵² If an act is within an individual's official duties, the Secretary-General has "the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations."¹⁵³ The determination as to whether or not a staff member was acting within his or her official duties is made by the Secretary-General acting upon the advice of the U.N.'s Office of Legal Affairs.¹⁵⁴ Thus, a functional approach to the issue of accountability is the practice of the Organization.

In the context of ITA, however, because the United Nations makes no claim to sovereignty over the territory it administers, two legal persons come into being: the United Nations and the territorial unit that is part of a larger legal person, such as a state.¹⁵⁵ This has given rise to the concept of functional duality, as enunciated by the Constitutional Court of Bosnia and Herzegovina in a case involving a decision made by the OHR to implement a new Law on the State Border Service.¹⁵⁶ The OHR was a *sui generis* international organization provided for in the Dayton Peace Agreement responsible for carrying out the civil administration of Bosnia and Herzegovina (BiH) following the conflict in the Balkans throughout the 1990s.¹⁵⁷ Under its elusive mandate, the High Representative has interpreted its powers to include the passing of laws as well as the dismissing of elected officials from office.¹⁵⁸ The Court recognized the immunity of the High Representative with respect to his ability to interpret his mandate yet also recognized that the acts performed by the foreign authorities on behalf of a sovereign state were on a

shortcoming.").

151. Convention on the Privileges and Immunities of the United Nations, *supra* note 141, arts. V § 18, VI § 22.

152. This is so because not all Member States have themselves acceded to the 1946 Conventions. *Comprehensive Strategy*, *supra* note 147, annex para. A.2.

153. Convention on the Privileges and Immunities of the United Nations, *supra* note 151, at arts. V § 20, VI § 23.

154. *Comprehensive Strategy*, *supra* note 147, annex para. A.3; In addition, a 2002 Secretary-General bulletin entitled "Status, Basic Rights and Duties of United Nations Staff Members" requires all staff to uphold the highest standards of integrity and act "in a manner befitting their status as international civil servants..." The Secretary-General, *Secretary-General's Bulletin: Status, Basic Rights and Duties of United Nations Staff Members*, ch. IV, art. I, reg. 1.2(f), U.N. Doc. ST/SGB/2002/13 (Nov. 1, 2002); these are, significantly, merely guideposts rather than legally binding rules. *id.* ch. I, para. 7.

155. Ralph Wilde, *The Complex Role of the Legal Adviser When International Organizations Administer Territory*, 95 AM. SOC'Y INT'L L. PROC. 251, 252 (2001) [hereinafter Wilde, *Complex Role*].

156. See Case U 09/00, Official Gazzette of Bosn. & Herz., paras. 13-14, (Nov. 3, 2000) [hereinafter Case U 09/00].

157. *The Situation in Bosnia and Herzegovina: General Framework Agreement for Peace in Bosnia and Herzegovina*, annex 10, art. 1, delivered to the Security Council and General Assembly, U.N. Doc. S/1995/999, A/50/79C (Dec. 14, 1995) [hereinafter Dayton Peace Accords].

158. Wilde, *Complex Role*, *supra* note 155, at 252-53. For a detailed discussion of the OHR and its legal authority, see WILDE, ADMINISTRATION, *supra* note 4, at 63-77.

different footing.¹⁵⁹ For this reason, it found a situation of "functional duality: an authority of one legal system intervenes in another legal system, thus making its functions dual."¹⁶⁰ In accordance with this principle, whereas those acts performed with respect to the High Representative's role as an international actor were immune from prosecution, those performed with respect to his role as an agent for the territorial entity were not.¹⁶¹

Under the United Nations' functional approach of accountability, ITA projects simultaneously invoke the two separate legal regimes of the law applicable to states and the law applicable to international organizations.¹⁶² Therefore, when international organizations perform acts that are the acts of a national government, "as agents of that state, the UN officials must comply with the international legal norms applicable to it. Moreover, these norms, and the norms applicable to international organizations, are not just both in play—they are both in play with respect to the same acts."¹⁶³

Human rights violations by international officials have been particularly problematic in both East Timor and Kosovo, and much literature exists cataloguing examples of serious crimes committed by U.N. officials and the contingent problems related to uncertain privileges and immunities.¹⁶⁴ One prominent example has been the issuing of executive orders of detention by UNMIK, a practice that has received widespread criticism as a clear violation of international human rights standards but which has continued.¹⁶⁵ Other abuses have included rape, trafficking in women, solicitation of prostitution, and the destruction and repossession of privately owned buildings and land.¹⁶⁶

Under this framework, the applicability of international human rights standards to ITA officials must be examined with respect to whether an individual is acting in his role as an international or as a governmental actor.¹⁶⁷ In the context of human rights, some have criticized the functional approach, pointing out that the existence of privileges and immunities for the United Nations without reciprocal obligations under human rights law is inequitable and that, when

159. See Case U 09/00, *supra* note 156, para. 5.

160. *Id.*

161. See Wilde, *Complex Role*, *supra* note 155, at 255.

162. *Id.*

163. *Id.* at 256.

164. See, e.g., Frederick Rawski, *To Waive or Not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations*, 18 CONN. J. INT'L L. 103, 118-24 (2002).

165. *Id.* at 121-22. In the case of Afrim Zeqiri, an ethnic Albanian arrested for murder, the Ombudsperson in Kosovo required a legal clarification of the basis for his continued detention that had been authorized under an executive order. The director of the Department for Judicial Affairs stated that executive order detentions were lawful under a broad interpretation of Resolution 1244, which permitted the Special Representative of the Secretary-General to ensure public safety and the administration of justice. In the end, Zeqiri was released for a lack of evidence, but not before spending two years in detention. Abraham, *supra* note 143, at 1328-29.

166. *Id.* at 121.

167. Wilde, *Complex Role*, *supra* note 155, at 255.

conducting territorial administration, the United Nations—acting as a state—should be expected to follow the same obligations of a state.¹⁶⁸ Succinctly put,

the question is increasingly put about the extent to which international organizations, qua international organizations, are bound by international human rights law.... [W]hat needs to be considered is that the norms of international human rights law applicable to states can also be in play when a governmental role is performed.¹⁶⁹

The ILA has supported this proposition by stating that an IO is responsible for an internationally wrongful act committed by an organ of a state over which it exercises authority and effective control.¹⁷⁰

In practice, the international aspects of an official's conduct – and the resulting immunities – have tended to eclipse the local ones. In the 2005 Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations, the United Nations itself addressed the application of the 1946 Convention in civilian operations. According to the report:

In the great majority of cases the application of the tests in the Convention is clear. What was not anticipated at the time the General Convention was drafted was that the United Nations would, on occasion, be operating in areas where there was no functioning legal system or where the legal system was so devastated by conflict that it no longer satisfied minimum international human rights standards. In such cases it would not be in the interests of the United Nations to waive immunity because its Charter requires it to uphold, promote and respect human rights. In other words, it would not be in the interest of the Organization for the Secretary-General to permit a staff member to be subjected to a criminal process that did not respect basic international human rights standards.¹⁷¹

Because of this approach, in many cases the full extent of an international actor's accountability has gone unrecognized.

In addition to the uncertain legal framework, Ombudsperson officers established in East Timor and Kosovo were largely ineffective in providing recourse to the local populations due to various constraints on their authority and a

168. Abraham, *supra* note 143, at 1304-05; The ILA's 2004 Report lists the ways in which human rights law can become binding on international organizations: through the terms of their constituent instruments, as customary international law, or through general principles of public international law. The Report explicitly states that "IO-s should incorporate basic human rights obligations into their operational guidelines, policies and procedures, particularly when exercising governmental authority in the conduct of temporary administration of a territory." ILA Report, *supra* note 129, at 22-23.

169. Wilde, *Complex Role*, *supra* note 155, at 255-56. A separate question that I do not address here is under what circumstances and the extent to which principles of international humanitarian law should apply to ITA. See Ratner, *supra* note 11, at 705-12.

170. ILA Report, *supra* note 129, at 28.

171. Comprehensive Strategy, *supra* note 148, at para. 88.

lack of material support.¹⁷² Officials working within UNTAET's Human Rights Unit reported feeling hampered by their belief that international human rights norms were not binding upon the mission or its personnel.¹⁷³ Moreover, because international officials rather than contingents of a multinational peacekeeping force or the ones involved in the abuses, there is no obligation upon a contributing nation to exercise any form of domestic jurisdiction. Therefore, in combination with the uncertain legal framework is a lack of effective enforcement mechanisms.

One reason cited for such abuses is the lack of adequate structural checks, including those posed by an independent judicial body, upon the powers of both the Transitional Administrator (TA) in East Timor and the SRSG in Kosovo. In East Timor, the TA was given full legislative, executive, and judicial authority over the territory¹⁷⁴ and had the sole authority to appoint local representatives to successive phases of East Timorese self-governance, from the National Consultative Council to the National Council, the Council of Ministers, and the Second Transitional Government.¹⁷⁵ The overall lack of separation of powers and the final voice of the TA in all administrative matters created a confusing picture that ultimately meant the U.N. officials were not subject to the same sorts of political pressures that would, in a democratic society, have made them more accountable to the local population.¹⁷⁶ In Kosovo, a similar conflation of legislative and executive power in the SRSG has also raised concerns of undue influence over judicial affairs and a lack of checks and balances.¹⁷⁷ For example, Regulation 1999/1 gives the SRSG all legislative and executive authority, administration over the judiciary, and the power to appoint or remove any person in the civil administration in Kosovo.¹⁷⁸ This in part allowed the SRSG in Kosovo to promulgate Regulation 2000/47, giving absolute immunity to all personnel

172. Rawski, *supra* note 164, at 116; Abraham, *supra* note 143, at 1325.

173. Carla Bongiorno, *A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor*, 33 COLUM. HUM. RTS. L. REV. 623, 652 (2002).

174. U.N. Transitional Admin. in East Timor [UNTAET], *Regulation No. 1999/1 on the Authority of the Transitional Administrator in East Timor*, §§ 1.1, 1.2, UNTAET/REG/1999/1, (Nov. 27, 1999) (prepared by Sergio Vieira de Mello).

175. U.N. Transitional Admin. in East Timor [UNTAET], *Regulation No. 2000/24 on the Establishment of a National Council*, §§ 1.1, 1.2, UNTAET/REG/2000/24 (July 14, 2000) (prepared by Sergio Vieira de Mello); U.N. Transitional Admin. in East Timor [UNTAET], *Regulation No. 2001/2 on the Election of a Constituent Assembly to Prepare a Constitution for an Independent and Democratic East Timor*, §§ 1.1, 2.1, UNTAET/REG/2001/2 (Mar. 16, 2001) (prepared by Sergio Vieira de Mello); U.N. Transitional Admin. in East Timor [UNTAET], *Regulation No. 2001/28 on the Establishment of the Council of Ministers*, §§ 1, 3.1, UNTAET/REG/2001/28 (Sept. 19, 2001) (prepared by Sergio Vieira de Mello); U.N. Transitional Admin. in East Timor [UNTAET] *Regulation No. 2002/7 on the Organic Structure of the Second Transitional Government of East Timor and to Amend UNTAET Regulation No. 2001/28*, §§ 1.1-1.5, UNTAET/REG/2002/07 (May 18, 2002) (prepared by Sergio Vieira de Mello).

176. Beauvais, *supra* note 9, at 1169.

177. See U.N. Mission in Kosovo, *Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo*, § 1.1 (July 25, 1999) (prepared by Dr. Bernard Kouchner); David Marshall & Shelley Inglis, *Human Rights in Transition: The Disempowerment of Human Rights--Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 114 (2003).

178. Regulation No. 1999/1, *supra* note 174, § 1.2.

affiliated with KFOR (the NATO-led military security force) and extending absolute immunity to the SRSg and the four Deputy SRSgs.¹⁷⁹

Hans Corell, the former Legal Counsel for the United Nations, once stated that the relationship between the U.N. Secretariat and the Special Representative in East Timor provided adequate checks and balances on any abuses of power.¹⁸⁰ However, this type of oversight is not readily visible to the local population and runs the risk of being constrained by other unrelated political factors within the United Nations.¹⁸¹ In addition, the lack of personnel at the Secretariat “makes it impossible to keep the operations on a short leash.”¹⁸² There have, however, been indications of movement in a positive direction. For example, Frederick Rawski, a former staff member of UNTAET’s Human Rights Unit, has written that with respect to some serious crimes (such as unlawful property damage, sexual harassment, and rape), the United Nations has waived its immunity.¹⁸³ In addition, in his 2005 *In Larger Freedom* report Secretary-General Annan stated that “United Nations peacekeepers and peacebuilders have a solemn responsibility to respect the law themselves, and especially to respect the rights of the people whom it is their mission to help.”¹⁸⁴ In the same report, Annan also announced his enactment of a policy of “zero tolerance” for offenses committed by “all personnel engaged in United Nations operations” without differentiating between military and civilian operations.¹⁸⁵

Overall, the patchwork applicability of privileges and immunities to U.N. officials has left large lacunae in ITA legal, and political, accountability. Rawski correctly points out that these missions are fundamentally different from peacekeeping operations and that, for this reason, “[s]tatements by UNTAET and UNMIK personnel about immunity expose an unwillingness or inability to recognize that transitional administration brings with it a different set of legal, political and ethical realities.”¹⁸⁶ Moreover, he observes that the source of much of the problems concerning legal accountability for ITA missions has been the fact that the “application of the Convention has been inconsistent and UN rhetoric has been confused.”¹⁸⁷ This lack of enforceable and cognizable limits upon the United Nations’ actions in Kosovo and East Timor has helped foster damaging perceptions that international organizations are somehow above the law, perceptions reinforced by the fact that cases in which U.N. officials had been

179. U.N. Mission in Kosovo, *Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo*, §§ 2, 3.2, UNMIK/REG/2000/47 (Nov. 18, 2000) (prepared by Dr. Bernard Kouchner); The Regulation also granted the operation complete immunity from suits arising out of operational necessity. *Id.* § 7; The Ombudsperson in Kosovo released a report that was highly critical of Regulation 2000/47. Rawski, *supra* note 164, at 122.

180. See Kreilkamp, *supra* note 8, at 669–70.

181. *Id.* at 670.

182. Ratner, *supra* note 11, at 715.

183. Rawski, *supra* note 164, at 121.

184. In *Larger Freedom*, *supra* note 63, para. 113.

185. *Id.*

186. Rawski, *supra* note 164, at 126.

187. *Id.* at 123.

suspected of committing criminal offenses (for example, East Timor) have not been brought to trial.¹⁸⁸ Significantly, the 2005 Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations peacekeeping operations recognizes the differing legal standards that currently apply to military and civilian components of U.N. missions and the problems that this has created.¹⁸⁹ Such reports represent at a minimum a growing self-consciousness on behalf of the United Nations that it cannot persist in taking an ad hoc approach to the question of accountability in the context of ITA.

C. Reputation

1. Selflessness

Largely because the League of Nations and the United Nations were founded upon the premise of collective security, there is an inherent notion of global cooperation in their constitutions that removes the focus from individual states and places it onto the international community as a whole. This lends itself to the idea that when an IO administers territory, it is acting not out of its own self-interest, but rather for the greater good – creating, in other words, a “benevolent foreign autocracy.”¹⁹⁰ However, the U.N. Charter also reflects a political balance between the major powers of the world, giving them what some would argue to be a disproportionately larger role in the organization’s decision making.¹⁹¹ If an international organization is seen as merely a front for powerful states’ agendas, then despite global membership, Lyons’ fear of the strong overpowering the weak becomes more pronounced.¹⁹² Encouragingly, the U.N. has recently taken more concrete, forward-moving steps toward complete institutional reform as presented in the December 2004 Report of the High-Level Panel on Threats, Challenges and Change.¹⁹³ Secretary-General Annan has himself pushed forward several dramatic recommendations in his 2005 *In Larger Freedom* report, and the General Assembly responded with a Draft Outcome document directed at widespread institutional change.¹⁹⁴

188. AMNESTY INTERNATIONAL, *East Timor: Justice Past, Present and Future*, § 5.4, A.I. Doc. ASA/57/001/2001 (2001); See also Carla Bongiorno, *supra* note 173, at 692 (noting that “the U.N. has obligations under international human rights law, that the U.N. has not formally acknowledged, when its peacekeeping operations undertake governmental functions”).

189. Comprehensive Strategy, *supra* note 147, at § 2, para. 14.

190. Chesterman, *supra* note 64, at 1.

191. See Obiora Chinedu Okafor, *The Global Process of Legitimation and the Legitimacy of Global Governance*, 14 ARIZ. J. INT'L & COMP. L. 117, 129–30 (1997); See also Peter Vale, *Engaging the World's Marginalized and Promoting Global Change: Challenges for the United Nations at Fifty*, 36 HARV. INT'L L.J. 283, 284 (1995) (“In its present configuration, the U.N. means little to those outside the mainstream—those excluded from global society as a result of its existing discriminatory structure.”).

192. See generally Lyons, *supra* note 78.

193. See High-Level Panel Report, *supra* note 67, at 1, 4–5 (addressing security concerns, their causes, and how the United Nations can be more effective in the twenty-first century).

194. See *In Larger Freedom*, *supra* note 63, at 2. See also, G.A. Res. 60/1, U.N. Doc. A/Res/60/1 (Sept. 16, 2005).

As seen in Part III.A, Security Council critiques most often reflect the perceptions that (1) it is dominated by a few powerful states and (2) the veto is unfair.¹⁹⁵ José Alvarez has observed that the United Nations is largely based on a statist ideal, making it an “‘undemocratic’ hierarchical scheme dependent upon the hegemonic power of a handful of powerful states.”¹⁹⁶ A former Japanese U.N. ambassador once remarked that four of the five permanent members are from Europe and America, but that today, “[t]here are other civilizations in other parts of the world whose peoples are now more assertive than before.”¹⁹⁷ From this perspective, the idea of legitimation by collective action in the Security Council may merely serve to mask the motives of individual states pursuing their own prerogatives.¹⁹⁸ Echoing these concerns, Jan Klabbers has stated that perhaps “international organizations have in the end fallen victim to their own success [P]erhaps partly because the idea of their inherent goodness held sway for such a long time, they may have succumbed to the arrogance of power.”¹⁹⁹

In the last decade, much focus has been placed on the concept of humanitarian intervention as a form of “enlightened” self-interest, whereby the reasons for intervention are claimed to be so compelling as to make the means legitimate.²⁰⁰ Nevertheless, humanitarian intervention continues to be attacked for resting upon dubious legal grounds and for being selectively employed around the world.²⁰¹ The hurdles posed by Articles 2(4) and 2(7) have led to stretched justifications for humanitarian intervention that have been criticized as putting the protection of human rights above the Charter-endorsed principle of state sovereignty.²⁰² This has been said to create a situation whereby “what is illegitimate unilaterally may be

195. Caron, *supra* note 69, at 562; see also Coicaud, *supra* note 68, at 272 (arguing that the flawed decision making of the Security Council is one of the principle reasons for what he argues to be the organization’s overall (as opposed to ITA-specific) demise in legitimacy.).

196. José E. Alvarez, *Constitutional Interpretation in International Organizations*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 104, 108 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

197. Chusei Yamada, *The United Nations at its Turning Point: A Japanese Perception*, in *THE UNITED NATIONS AT AGE FIFTY: A LEGAL PERSPECTIVE* 185, 191 (Christian Tomuschat ed., 1995); Yamada goes on to note that the lack of faith in the Security Council is due to a perception that “the permanent members only make use when such action suits them.” *Id.*

198. Caron, *supra* note 69, at 558 (listing five side effects that a perception of illegitimacy may have on the effectiveness of the Security Council: (1) failure to pass a resolution due to a suspicion of where it will lead, (2) refusal to adopt a strong resolution, (3) difficulty for a state to build domestic support necessary to act under a resolution, (4) slow movement on the part of states in complying with a resolution, and (5) actions and strategies that either intentionally or accidentally weaken the Council); see also David D. Caron, *Strengthening the Collective Authority of the Security Council*, 87 AM. SOC’Y INT’L L. PROC. 300, 305 (1993).

199. Klabbers, *supra* note 72, at 245.

200. See Richard Falk, *The Complexities of Humanitarian Intervention: A New World Order Challenge*, 17 MICH. J. INT’L L. 491, 492 (1996).

201. See Christine Chinkin, *NATO’s Kosovo Intervention: Kosovo: A “Good” or “Bad” War?*, 93 AM. J. INT’L L. 841, 846-47 (1999).

202. See Louis Henkin, *NATO’s Kosovo Intervention: Kosovo and the Law of “Humanitarian Intervention,”* 93 AM. J. INT’L L. 824, 824-25 (1999).

legitimate if it is the subject of a collective decision of the United Nations.”²⁰³ Thus, the fact that the Kosovo bombing, which ultimately led to administration of the region by UNMIK, did not receive Security Council authorization due to the threat of a veto posed by Russia and China has prompted many to examine the underlying legality of the NATO bombing, despite the imperative for intervention.²⁰⁴ This situation (a needed response thwarted by political motivations) has been extended to implicate the United Nations’ ability as a whole to effectively provide security.²⁰⁵

Notably, the OHR was created to administer the BiH precisely because of U.N. failure in the region and its discredited reputation for protecting the population.²⁰⁶ One problem with the pursuit of selfless goals could be that the United Nations is poorly constructed to effectively pursue those goals on a consistent basis due to inherent political factors and technocratic limitations.²⁰⁷ In the words of the 2004 High-Level Panel Report, “[the Security Council] has not always been equitable in its actions, nor has it acted consistently or effectively in face of genocide or other atrocities. This has gravely damaged its credibility.”²⁰⁸ Therefore, irrespective of whether or not IOs are seen as over-acting (i.e., *ultra vires* criticisms) or under-acting (failing to prevent mass human rights atrocities), claims of illegitimacy may arise.

The inability of the U.N. to act in a truly selfless way finds further support in the claim that humanitarian intervention continues to reflect the interests of individual states, a claim that takes two sides. On the one hand, commentators point to the fact that less developed states express strong opposition to humanitarian intervention and continue to rely on state sovereignty as an unassailable and permanently overriding principle.²⁰⁹ On the other hand are those who claim that the West uses humanitarian intervention to promote its own specific vision of world order, something Christine Chinkin has forcefully argued elsewhere.²¹⁰

203. Ralph Zacklin, *Beyond Kosovo: The United Nations and Humanitarian Intervention*, 41 VA. J. INT'L L. 923, 932 (2001).

204. Henkin, *supra* note 202, at 825-27.

205. *Id.* at 827 (noting that “as Kosovo illustrated, the Council, as presently constituted and under prevailing procedures, remains seriously defective and may sometimes be unavailable for that awesome responsibility”).

206. WILDE, ADMINISTRATION, *supra* note 4, at 63-64.

207. The 2000 Brahimi Report gives a discussion of technocratic limitations, which are beyond the scope of this article. *Report of the Panel on United Nations Peace Operations*, para. 77, U.N. Doc. S/2000/809, A/55/305 (Aug. 21, 2000) available at http://www.un.org/peace/reports/peace_operations [hereinafter Brahimi Report].

208. High-Level Panel Report, *supra* note 67, para. 246.

209. See Zacklin, *supra* note 203, at 935.

210. Chinkin, *supra* note 201, at 846 (stating “the Kosovo intervention shows that the West continues to script international law, even while it ignores the constitutional safeguards of the international legal order. The instances since 1990 that are most frequently cited as evidence that humanitarian intervention is evolving as a doctrine of post-Charter international law were initiated by the West and involved action in non-Western states The alleged doctrine seems to exemplify international lawmaking by the West for its own application, in the name of its “civilizing” mission”).

Aside and apart from perceptions that the United Nations only serves to promote Western action, the mandates for many ITA missions have themselves been seen as strongly promoting Western ideals.²¹¹ The 'standards before status' approach toward the administration of Kosovo is reflective of this. Under Resolution 1244, Kosovo is to enjoy substantial autonomy within the FRY; part of ensuring the region's right to substantial autonomy is, therefore, putting into place local actors supportive of this outcome.²¹² In order to achieve this goal, the same Resolution gives UNMIK the power to secure the population's international human rights by helping to install a democratic form of liberal government that is instrumental in promoting and protecting these rights.²¹³ UNMIK is one example where ITA has been used, not only to fill a power vacuum, but instead to "engineer a fundamental change in government policy" that is largely in line with prevailing Western thought.²¹⁴

In Kosovo and East Timor, the basis for the United Nations' continued presence has been the Organization's insistence that the local populations are (or in East Timor, were) unable to perform administration themselves.²¹⁵ The aforementioned problems with Security Council decision making and the use of the veto power have the ability to turn even ostensibly "selfless" missions into perceived self-interested ones. While the United Nations' initial goals of protecting international human rights and enabling self-determination claims are in the interest of the common good,²¹⁶ its prolonged presence in certain cases seems suspiciously paternalistic and based largely upon Western ideals of what constitutes good governance. Importantly, the promotion of liberal democratic principles does not find universal support in all nations of the world.²¹⁷ However, UNMIK and UNTAET must also be examined alongside the CPA, which was strongly associated with the national security and economic interests of the United States as a result of the war in Iraq and, as such, was largely discredited from its

Nevertheless, David Rieff remarks that "it may prove impossible to intervene in the world's gravest crises without arousing fears of imperial agendas." David Rieff, *A Nation of Pre-emptors?*, N.Y. TIMES, Jan. 15, 2006, at Magazine 12.

211. Wilde identifies a variety of policy objectives of ITA projects, the most relevant here being the promotion of the institution of the state (i.e., "state building") and the imposition of liberal governance and a market economy. WILDE, ADMINISTRATION, *supra* note 4, at 203-207. Other objectives include the promotion of territorial status and self-determination outcomes and the exploitation of natural resources. *Id.* at 199, 208.

212. S.C. Res. 1244, para. 10, U.N. Doc. S/RES/1244 (June 10, 1999); see Paul R. Williams, *Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status*, 31 DENV. J. INT'L L. & POL'Y 387, 409-10 (2003).

213. WILDE, ADMINISTRATION, *supra* note 4, at 206.

214. Wilde, Critique, *supra* note 5, at 85.

215. WILDE, ADMINISTRATION, *supra* note 4, at 186.

216. This assumes that the initial purposes of the administration were not pleaded in bad faith to cover up more objectionable aims. See *id.* at 12.

217. See Bilhari Kausikan, *Asia's Different Standard*, FOREIGN POL'Y, FALL 1993 (accusing the West of hypocrisy, and stating that "the hard core of rights that are truly universal is smaller than many in the West are wont to pretend." Continuing, Kausikan argues that some Asian nations do not seek "democracy"—a value-laden term for him—but instead seek "good government" that is effective and efficient and able to secure basic needs.) *Id.* at 34, 37-38.

inception. The experience of the CPA shows that foreign territorial administration not conducted by IOs still has the potential to prove equally problematic with respect to perceptions of selflessness.

2. Impartiality

Whereas the previous discussion of selflessness analyzed the potential for self-interest leading up to a decision to intervene, here the discussion of impartiality looks at the role IOs play after intervention has already occurred. The vision of U.N. impartiality rests on the same principles of multinationality as the vision of U.N. selflessness described above. The Charter endorses impartiality in Article 100, which states that the staff of the Secretariat "shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization."²¹⁸

According to the ILA, "[a]n IO should conduct its institutional and operational activities in a manner which is objective and impartial and can be seen to be so."²¹⁹ Impartiality, like host state consent, has always been a cornerstone of peacekeeping operations.²²⁰ The very first peacekeeping missions mandated that military observers be absolutely impartial at all times and serve as a buffer zone between two sides to a conflict, and the 2000 report from the Panel on United Nations Peace Operations reaffirmed the Organization's commitment to this so-called "bedrock principle."²²¹ An assumption exists that international organizations are better suited for providing this type of impartiality than an independent state would be. However, this assumption is made largely in the context of pure peacekeeping and observer missions rather than ITA.²²² Despite the differences between peacekeeping and ITA, the same presumption of impartiality continues to apply to ITA and, particularly, to ITA missions aimed at solving sovereignty problems.

The ability of an international organization to defuse a potentially divisive sovereignty problem by serving as a buffer was the primary reason for the League's administration in the Saar and Leticia and the U.N.'s administration of West Irian.²²³ When placed between two opposing sides, the ability to remain impartial is relatively easy. As Jane Boulden has remarked, "[s]uch mandates are impartial, because all that they do is commit the UN to overseeing terms or arrangements already agreed to by the parties."²²⁴ It is when the international

218. UN Charter art. 100.

219. ILA Report, *supra* note 129, at 14.

220. RATNER, *supra* note 7, at 51.

221. Brahimi Report, *supra* note 207, para. 48; *see also* Urquhart Interview, *supra* note 30 (Ralph Bunche said that: "[b]eing popular is not the point, being fair is the point").

222. DIEHL, *supra* note 7, at 64.

223. Jane Boulden, *Mandates Matter: An Exploration of Impartiality in United Nations Organizations*, 11 GLOBAL GOVERNANCE 147 (2005).

224. *Id.* at 151.

organization is actively involved in local governance, however, that maintaining true impartiality has posed a more difficult task.²²⁵

With respect to governance problems, ITA actors tend to take on a larger role that is more intermixed with local populations and local institutions.²²⁶ The U.N.'s experience in Somalia is particularly illustrative of this because the reconciliation and rebuilding of the country was performed by the same forces that were exercising military control over it.²²⁷ In identifying General Aidid as a war criminal and general hindrance to the peace process, the U.N. itself became another party to the conflict, a situation that eventually led to the collapse of UNOSOM II.²²⁸ In Kosovo, the U.N. has repeatedly made substantive decisions regarding the appointment of individuals to the civil administration and has exercised the power to remove elected people from posts in pursuit of the goals set forth in Resolution 1244.²²⁹ Similarly in Cambodia and East Timor, the U.N. was placed in a position to further certain policy agendas by retaining ultimate control over local governance during its time in administration.²³⁰

Another important aspect of IO impartiality is the aforementioned dual role that international officials play when serving an ITA mission.²³¹ Although functional duality was previously examined in the context of accountability, the fact that international actors will be playing a direct role in local governance proves the point that there will be times when such actors can definitively not be neutral.²³² Because governments are, by their very nature, biased toward the best interests of the state, international actors are forced to promote individual state interests when, as in Kosovo and East Timor, an international organization is playing the very role of that government.²³³ One example of this was seen in the negotiations over joint exploration between East Timor and Australia of oil and gas resources in the zone known as the Timor Gap.²³⁴ UNTAET was actively engaged in trying to gain the best deal for East Timor, a position that runs contrary to its role as an international organization designed to represent the interests of all states equally.²³⁵ As Wilde points out, "officials cannot possibly combine these two contradictory roles. They cannot treat all states equally and advocate on behalf of one state in particular."²³⁶

225. See Urquhart Interview, *supra* note 30.

226. See discussion *supra* Part II.

227. Kreilkamp, *supra* note 8, at 636.

228. *Id.* at 637–38.

229. Regulation No. 1999/1, *supra* note 174, § 1.2.

230. See Kreilkamp, *supra* note 8, at 631–32, 655.

231. See discussion *supra* Part III.B.

232. Wilde, *Complex Role*, *supra* note 155, at 257.

233. *Id.*

234. *Id.* at 257–258; Tania Voon, *Closing the Gap Between Legitimacy and Legality of Humanitarian Intervention: Lessons from East Timor and Kosovo*, 7 UCLA J. INT'L L. & FOREIGN AFF. 31, 53–54 (2002).

235. Wilde, *Complex Role*, *supra* note 155, at 257–58.

236. *Id.* at 258.

Winrich Kühne argues that the U.N. Charter itself and Security Council mandates are neither impartial nor passive.²³⁷ Consequently, he believes that when the U.N. undertakes to execute a mandate, it is not necessarily equivalent to "taking sides" but that instead, a fine line exists between fulfilling a mandate in evenhanded way and avoiding the so-called "Mogadishu line" of Somalia.²³⁸ But this argument becomes less plausible the further a mandate moves away from peacekeeping and the closer it moves toward ITA. While IO impartiality worked well in the Saar, Leticia, and West Irian, these operations were all instances of partial administration and involved no direct governance by the IO. As seen in the Congo, Somalia, UNMIK and UNTAET, invasive exercises of plenary administration carry a strong potential to negate an international organization's reputation as a neutral, impartial, or evenhanded actor.²³⁹

V. CONCLUSION

Attacks against U.N. peacekeepers in the Côte d'Ivoire show the extent to which local populations can fail to distinguish an international presence from a colonial one.²⁴⁰ By looking at IO legitimacy through the lenses of legal authority, accountability, selflessness, and impartiality, it becomes clear that there are good reasons for doubting assumptions that international organizations are inherently more suited for territorial administration than states. The United Nations' more recent "light footprint" approach to Afghanistan could present a picture of future U.N. ITA projects.²⁴¹ This contrasts with the intrusiveness that has come to be associated with the missions in Kosovo and East Timor, not to mention those conducted by other international actors (e.g., the OHR).

Overall, legitimacy on behalf of international organizations cannot be assumed. But the question that remains is whether international organizations, and particularly the United Nations, are perhaps the least illegitimate of all outside actors.²⁴² It may be the case that international administration will never be fully legitimate or supportable on a normative level due to the tensions that are inherent in using outside rule to bring about internal change. Yet proceeding from the presumption that these types of activities will continue in the future, as evidenced by the recent establishment of the Peacebuilding Commission within the U.N.,

237. Winrich Kühne, *The United Nations, Fragmenting States, and the Need for Enlarged Peacekeeping*, in *THE UNITED NATIONS AT AGE FIFTY: A LEGAL PERSPECTIVE* 91, 101 (Christian Tomuschat ed., 1995).

238. *See id.* at 102.

239. Describing the United Nation's dilemma in the Congo during the 1960's, Jane Boulden remarked, "[d]eployed in a country in the midst of civil war, now without a government, every move the UN made inevitably, if advertently, favored one group or the other [E]ach decision the UN took (especially the determination not to accept the secession or Katanga, albeit in pursuit of the need to restore law and order and to prevent civil war as the mandate directed, had an impact on one or more of the parties struggling for control." Boulden, *supra* note 223, at 153. She describes UNOSOM II in similar terms. *Id.* at 154.

240. Polgreen, *supra* note 13.

241. U.N. Doc. S/2002/278, para. 98(d) (2002).

242. David Harland, *Legitimacy and Effectiveness in International Administration*, 10 *GLOBAL GOVERNANCE* 15, 17 (2004).

mandates must now be constructed in a way that takes into account a more diverse range of actors and interests.²⁴³ Despite all of its other faults, UNMIK has done precisely this by incorporating different bodies with specialized competencies into its mandate. Specifically, the OSCE has assumed responsibility for promoting democratization and institution-building, the UNHCR has led a humanitarian component, and the EU has developed a reconstruction component that devises economic and social policies for the region.²⁴⁴

The establishment of the Peacebuilding Commission is itself progress. The stated purpose of the Commission, as set forth in the General Assembly's September 2005 Draft Outcome Document from the Millennium Summit, will be "to bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post-conflict peacebuilding and recovery."²⁴⁵ Included in this is the goal that the Commission "should provide recommendations and information to improve the coordination of all relevant actors within and outside the United Nations...."²⁴⁶ The Draft Outcome Document also provides for an Organizational Committee that will consist of representatives from the country under consideration; countries in the affected region; and the major financial, troop, and civilian police-donating countries.²⁴⁷ In December 2005, a draft resolution was circulated in an effort to implement these suggestions,²⁴⁸ and as of this writing progress continues to be made in this direction.

The UNMIK model could continue to be usefully deployed in other situations to ensure that some of the problems discussed above, such as a lack of local involvement and problems with impartiality, might be eliminated.²⁴⁹ And the goals of the Peacebuilding Commission certainly go far in adding more voices to the decision-making chorus. However in other areas, such as legal authority and accountability, the law has not yet caught up to the situation on the ground with respect to ITA.

As Ruth Gordon has stated, "to rebuild 'failed states,' perhaps we should start at the bottom rather than the top by focusing on the peoples themselves, without preconceived ideas of the answers or the solutions."²⁵⁰ At a minimum, by

243. On the contrary, some believe that in the future the United Nations' activities will be far more constrained. Edward Luck has stated, "'In the late '90s and the beginning of this century, it got overly zealous in building norms, setting international law and trying to regulate state behavior. Now they have to step back in an attempt to do both.'" Warren Hoge, *U.N. is Transforming Itself, but Into What is Unclear*, N.Y. TIMES, Feb. 28, 2005, at A3.

244. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, U.N. Doc. S/1999/779, paras. 79–109 (1999).

245. World Summit Outcome, *supra* note 194, at paras. 97, 98.

246. *Id.*

247. *Id.* at para. 100.

248. U.N. Doc. A/60/L.40.

249. Proposals have also been made to revitalize the Trusteeship Council to oversee ITA projects. Saira Mohamed, Note, *From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council*, 105 COLUM. L. REV. 809 (2005). An additional, unexplored idea is to take the lessons learned from ITA and use them to improve state administration.

250. Gordon, *supra* note 35, at 973.

recognizing and acknowledging the gaps in IO legitimacy to undertake such projects, steps can now be made to improve upon existing weaknesses. In keeping with Gordon's philosophy, international organizations should now begin aiming for a new form of ITA that serves equally both the international and local communities.