Chapter 6
UN Transitional Administration and the Status of the Territorial Sea*

[A] disturbing new phenomenon is emerging: the failed nation-state, utterly incapable of sustaining itself as a member of the international community... As those states descend into violence and anarchy – imperilling their own citizens and threatening their neighbours through refugee flows, political instability, and random warfare – it is becoming clear that something must be done.¹

– Gerald Helman and Steven Ratner

Introduction

There is nothing new in the UN, more particularly the UNSC, undertaking tasks or establishing protocols for the conduct of ‘domestic’ functions in post-conflict areas. This form of temporary UN control and governance has been an element in several UN peace operations,² evidenced in acts of political governance ranging from “reconvening” the Congolese parliament,³ through “restoring law and order” in East Timor,⁴ to establishing and monitoring election systems in Namibia, the Western

* An earlier version of this chapter was first published as “East Timor, Transitional Administration and the Status of the Territorial Sea” (2003) 4:1 Melbourne Journal of International Law 323.


² For example the Congo, Irian Jaya, Namibia, Kurdish Iraq, Somalia, Cambodia, Bosnia-Hercegovina, Kosovo, and East Timor – with the milestones arguably being UNSC Res 745 (28 February 1991) on Cambodia, and UNSC Res 1272 (15 September 1999) on East Timor. See, for further discussion, Michael Matheson, “United Nations Governance of Postconflict Societies” (2001) 95:1 American Journal of International Law 76, where Matheson briefly describes the UN’s involvement in trusteeships concerning territories that had been administered, until 1939, under League of Nations’ mandates. See generally, Simon Chesterman, You, the People: The United Nations, Transitional Administration, and State-Building, Oxford University Press, Oxford, 2004; chs 1 and 2.


Sahara, Bosnia-Hercegovina, East Timor, and Cambodia. At other times it has been manifested in a territorial sense – such as the establishment of “no-fly zones” in Iraq, and the promulgation of “UN safe areas” during the Balkans conflict. The current “high water mark” of UN transitional administration is probably represented by the UN Transitional Administration in East Timor (UNTAET), and the UN Interim Administration Mission in Kosovo (UNMIK). These were missions in which the UNSC, through appointed Special Representatives of the Secretary-


5 See Crawford, Democracy in International Law; p 16; As The Economist noted of the Constitutional Assembly election run by the UN Transitional Administration in East Timor, “the aim has been to produce an election which the Timorese can later repeat, at a time when they will be entrusted to conduct their own affairs without the UN as their protector” – “East Timor’s Election: On the Road to Independence”, The Economist, 1 September 2001; p 25.

6 Members of the UNSC were careful at the time to indicate – as the UK did - that “[o]ur aim is to create places and conditions in which the refugees can feel secure. We are not talking of a territorial enclave, a separate Kurdistan or a permanent UN presence. We support the territorial integrity of Iraq. But we have to get the refugees off the mountains”: UK, Parliamentary Debates, House of Commons, 15 April 1991, Vol. 182, 21 (Douglas Hurd, Secretary of State for Foreign and Commonwealth Affairs). See also Greenwood, “Is There a Right of Humanitarian Intervention?”; p 36; Weller, “The US, Iraq and the Use of Force in a Unipolar World”; pp 81. As Weller indicates, the no-fly zone and the temporary deployment of UN forces in the Kurdish area of Northern Iraq was an early example of the UN establishing temporary and limited control over the territory of a state without consent (pp 94-95).

7 On the tragic ‘safe areas’ experiment, see, for example, Silber and Little, Yugoslavia: Death of a Nation; pp 265-275; Noel Malcolm, Bosnia: A Short History, New York University Press, New York, 1996; pp 264-265.

8 Matthias Ruffert, “The Administration of Kosovo and East Timor by the International Community” (2001) 50:3 International and Comparative Law Quarterly 613 at 616; see also Hansjorg Strohmeyer, “Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor” (2001) 95:1 American Journal of International Law 46; and Simon Chesterman, “East Timor in Transition: Self-determination, State-building and the United Nations” (2002) 9:1 International Peacekeeping 45. The origins of UN transitional administration lie in three comprehensively planned, but never executed UN ‘trusteeships’. The first, the Free City of Trieste, was planned in accordance with the Treaty of Peace with Italy (Signed 10 February 1947) 49 UNTS 3, particularly Article 4 (delineating the frontier between Italy and Trieste), Articles 21-22 (on the establishment of the Free City of Trieste), and Annexes VI-X, including Annex VI (The Permanent Statute of the Free Territory of Trieste) and Annex VII (Instrument for the Provisional Regime of the Free Territory of Trieste). The second was the planned, but again unexecuted, UN trusteeship over Libya. This proposed trusteeship was also in accordance with the Italian Peace Treaty of 1947 - Treaty of Peace with Italy (1947), Article 23, and Annex XI. The third was the planned UN trusteeship over the City of Jerusalem, pursuant to UNGA Resolution 181 of 29 November 1947 on the partitioning of Palestine. See United Nations General Assembly Resolution 181, 29 November 1947 On the Future Government of Palestine, and Doc A/364, “Report of the Special Committee on Palestine”, Official Records of the Second Session of the General Assembly Supp. 1, Vols. I-IV. For a contemporary account of the political debates surrounding the formation and mandate of the Special Committee of Inquiry, see Jacob Robinson, Palestine and the United Nations: Prelude to Solution, Public Affairs Press, Washington D.C., 1947; pp 139-196, including - at p 184 - some of the “possible solutions” canvassed during the early stages of debate.