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International Territorial Administration: Limits and Perspectives

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Declaration of Authorship

I hereby declare that thesis "International Territorial Administration: Limits and perspectives" has been composed by me and that no sources were used without due acknowledgement.

Rožnov pod Radhoštěm, 20th April 2018

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Table of Contents

List of abbreviations

GA	General Assembly of the United Nations
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for Former Yugoslavia
ITA	International Territorial Administration
League	League of Nations
PCIJ	Permanent Court of International Justice
SC	Security Council of the United Nations
UN	United Nations
UN Charter	Charter of the United Nations
UN ITA	Direct plenary or partial administration over territories performed by the UN
UNMIK	United Nations Mission in Kosovo
UNTAES	United Nations Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium
UNTAG	United Nations Transition Assistance Group
UNTAET	United Nations Transitional Administration in East Timor
UNTEA	United Nations Temporary Executive Authority

Introduction

"We are not interested in a legacy of cars and laws, nor are we interested in a legacy of development plans for the future designed by [people] other than East Timorese. We are not interested in inheriting an economic rationale which leaves out the social and political complexity of East Timorese reality. Nor do we wish to inherit the heavy decision-making and project implementation mechanisms in which the role of the East Timorese is to give their consent as observers rather than the active players we should start to be."

Xanana Gusmão, October 2000

This quote of prime minister and later also president of East Timor partly represents one of the dilemmas connected to the international administration of foreign territories. ITA is an instrument by which an international community collectively contributes to international to peace, human rights and democracy crisis, self-determination efforts and other topics often connected to state sovereignty. It goes without saying that recently number of territories possibly fall into scope of such characteristics. In past, UN as an administrator also served as a "bridge over troubled waters" of separation and following accession of territory from one state entity to another. With number of more or less disputed territories starting from Crimea as a part of Ukraine, Israeli/Palestine claimed territories and ending up with potential state of Kurds, topics of territorial sovereignty occur. At the same time, other occasions (like international engagement in Syria, Libya or Iraq) question the basic principles of non-intervention and raise new discussions over concepts like humanitarian intervention. Therefore, it is of upmost interest to examine a mandate and legal limits of an instrument that could potentially provide a solution to some of these concerns.

Defining the framework of the piece presented hereby, the author tends to narrow the understanding of international territorial administration as due to terminology ambiguity the term might potentially cover enormous number of situations and sovereignty disputes. Hence, the thesis focuses on the administration performed exclusively by the United Nation (respectively its organs established *ad hoc*) based on predominantly civil administration in narrow sense, meaning overlooking different forms of assistance or military presence. Special interest is given to

administrative bodies in Cambodia, Namibia, Eastern Slavonia, Kosovo and East Timor, as the most significant and recent cases – all dated to 1990s.

The choice of UN as a subject of research is fairly obvious – established in 1945 and recently gathering 193 member states, it holds a prominent role in the international law system due to its global character, goals and a proximity to rightful subjects of international law.[1] It already has an extensive experience with territory administration and provides certain legal frame to its execution. The aim of this work is to find out whether there is a persuasive legal basis for UN ITA. Hypothesis is that no written justification is found in the UN Charter. If this conclusion is correct, possible sources of legality are to be examined and conclusion should be reached whether the gap shall be resolved by amendment or interpretation of law. To achieve this, theoretical background is introduced at the beginning of the thesis as a general overview of the institution in its broadest sense possible. Consequently, chapter "Historical development" tends to describe particular cases in more detail and context. The last chapter gradually introduces two crucial fields of interest and their anchoring in the UN Charter, analyses threats of their application and elaborates on their limits and perspectives.

Due to focus on several issues of interest, the writing does not propose a full and complex historical overview of international administration as such, although it draws attention on the most significant cases and practices. Therefore, a further research might aim at other forms of administration and assistance provided to territories by UN exclusively or in cooperation with other actors. Similarly, a question of legitimacy of such interference is not a subject of this thesis and would deserve deeper examination.

The prevailing empirical method of research will build up firstly on the case review and secondly on the descriptive-evaluative analysis of available legal and paralegal documents, respecting their hierarchy and corresponding value. The submitted analysis can be framed as qualitative as it is based on several available cases of direct UN administration with predominantly civilian mandate (namely UNTAC in Cambodia, UNTAG in Namibia, UNTAES in Eastern Slavonia, Baranja and Western Sirmium, UNMIK in Kosovo and finally UNTAET in East Timor.) Despite that, complex work with constituent resolutions, UN Charter, number of judicial decisions, international agreements and other supportive sources together with expertise made on related topic enables to draw several valuable observations, considering that such work is, to author's knowledge and to date of publication, unique in Czech Republic.

[1] See *Reparation of Injuries Suffered in Service of the U.N., Advisory Opinion*, ICJ, 1949 ICJ Rep. p. 174 et seq., 11. 4. 1949 [*Reparation of Inuries*].

1 Theoretical background

The first issue concerning international territorial administration, international transitional administration or simply territorial administration[2] (ITA) necessarily needs to be defining the term of 'international territorial administration'. Neither in the international conventions and codified law, nor in the jurisprudence can we found a precise and uniform definition. As James Crawford concludes when elaborating on the status of dependent territories, "terminology in this field tends to be confused,"[3] not only because of the infinite variety of dependency/administrative levels covered by this term.

1.1 Definition

Several commonly accepted definitions may be presented. Although Chapter VII (in connection with Article 24) of UN Charter[4] is widely recognised as a legal basis for ITAs, it does not provide any definition of such concept here or elsewhere in the UN Charter. It can however be assumed that UN considers it to be an 'action with respect to threats to the peace.' However, labelling ITA as a typically peacekeeping operation would be too simplifying, although some authors point out that the peacekeeping phenomenon has undergone a continual substantive and qualitative development in the latest decades and highlight the variety of operations alternative to wars.[5] The UN Department of Peacekeeping Operations might still seem like an appropriate starting point too. Nevertheless, its definition is rather vague, claiming ITA to be "authority over the legislative, executive and judicial structures in the territory or country"[6] in one of its handbooks.

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[2] In this thesis, the terms are used interchangeably.
[3] CRAWFORD, James. *The Creation of States in International Law*. Oxford: Oxford University Press, 2006, p. 284.
[4] Charter of the United Nations (adopted 26. 6. 1945, entered into force 24. 10. 1945) UNTS vol. 1, no. 16 [UN Charter].
[5] FAIX, Martin. Rules of Engagement – Some Basic Questions and Current Issues. In ŠTURMA, Pavel (ed). *Czech Yearbook of International Law*, 2010, vol. 1, p. 140. Available at: <https://ssrn.com/abstract=2458884>. [accessed 20. 4. 2018]
[6] UN Department of Peacekeeping Operations. *Handbook on United Nations Multidimensional Peacekeeping Operations*, December 2003, p. 20. Available at: <https://peacekeeping.un.org/sites/default/files/peacekeeping-handbook_un_dec2003_0.pdf>. [accessed 20. 4. 2018]

Looking at those more precise definitions, the first ambiguity is found in the very first word – *international*. The *internationalised territories* may of course be understood as "subjects to the interim administration of a subsidiary organ of an international organisation."[7] However, not all the authorities follow the narrow understanding of 'international' as an abbreviation for 'performed by an international organisation or its organ.' More general approach is followed when defining ITA as "the exercise of administering territory by an international entity for the benefit of a territory that is temporarily placed under international supervision or assistance for a communitarian purpose."[8] Stahn complements this definition three purposes that ITA serves for - resolution of local disputes, decolonisation aftermath and the reconstruction following governance vacuums.[9]

Another valid approach admittedly resigns on the 'international aspect,' arguing that determination of actors may be decisive as for the particular questions (such as the issues of legality or accountability) but plays no significant role in number of others.[10] Therefore, while searching for more general conclusions, ITA may be perceived more as a territorial administration with variety of possible international actors when defined as "a formally-constituted, locally-based management structure operating with respect to a particular territorial unit, whether a state, a sub-state unit or a non-state territorial entity."[11] An eye-catching phrase *territorial unit* eliminates the relation of ITA with state or quasi-state territory – according to the author, it should also cover refugee and IDP camps.[12] By the enumeration *in fine*, he aptly underlines the transitional character of ITA as in number of cases, ITA performed its duties in places where a new state was emerging (East Timor) or in disputed territories (Eastern Slavonia).

Other authors highlight the state-building purpose or ITA, claiming that its "purpose is to facilitate the emergency of a new state, or at least to promote substantial autonomy"[13] and defining ITA as "the temporary assumption of responsibility of the principal governance functions of a state or territory by an international organization or organizations, often but not always led by the United Nations."[14]

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[7] KNOLL, Bernhard. *The Legal Status of Territories Subject to Administration by International Organisations.* New York: Cambridge University Press, 2008, p. 408.
[8] STAHN, Carsten. *The Law and Practice of International Territorial Administration. Versailles to Iraq and Beyond.* New York: Cambridge University Press, 2008, pp. 2-3.
[9] Ibid, p. 15.
[10] WILDE, Ralph. *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away.* Oxford: OUP, 2008, p. 11.
[11] Ibid, p. 10.
[12] WILDE, Ralph. From Danzig to East Timor and Beyond: The Role of International Territorial Administration. *American Journal of International Law,* 2001, vol. 95, iss. 3, p. 584.
[13] CAPLAN, Richard. *A New Trusteeship? The International Administration of War-torn Territories*. Oxford: OUP, 2001, pp. 13-16.
[14] CAPLAN, Ralph. Transitional Administration. In CHETAIL, Vincent (ed). *Post-Conflict Peacebuilding: A Lexicon*. Oxford: OUP, 2009, p. 359.

Indeed, although most authors do not directly connect ITA and state-building, one can hardly avoid such considerations when looking at two most recent plenary administrations of the UN, Kosovo and East Timor. The 2000 Report of the Panel on United Nations Peace Operations (also called "Brahimi report") defines peace-building as "activities undertaken on the far side of conflict to reassemble the foundations of peace and provide the tools for building on those foundations something that is more than just the absence of war."[15] The report continues with non-exhaustive list of such activities, most of them inherent to ITA: "reintegrating former combatants into civilian society, strengthening the rule of law (for example, through training and restructuring of local police, and judicial and penal reform); improving respect for human rights through the monitoring, education and investigation of past and existing abuses; providing technical assistance for democratic development (including electoral assistance and support for free media); and promoting conflict resolution and reconciliation techniques."[16]

Last but not least, more causalist approaches appear too, according to which international entities assume "some or all of the powers of the state on a temporary basis," performing "activities such as electoral assistance, human rights and rule of law technical assistance, security sector reform and certain forms of development assistance."[17] In this particular definition, the civil aspect of the administration stands out.

Perhaps one of the most persuasive definitions originates in conception of "the territory concerned is internationalized either fully or to a certain degree," where "governmental functions are exercised not by the territorial State, but by an entity mandated to do so under international law, i.e. an international organization, a single State, or a group of States under an international mandate."[18] Interestingly a temporary (or at least non-permanent) time scope is not enumerated as a characteristic of ITA here and also a division into transitory, permanent and open-ended administration occurs.[19] However referring to the specific aims of ITA that by their nature are contradictory to the idea of permanent administration,[20] it may be perceived as inherent to the institution.

Due to their universal character and the ability to properly reflect the reality of ITA, two lastly mentioned definitions seem as the most convenient, featuring above all (i) the exercise of

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[15] UN Doc. A/55/305–S/2000/809, *Report of the Panel on United Nations Peace Operations (Brahimi report),* 21. 8. 2000, § 13. Available at: <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/55/305>. [accessed 20. 4. 2018]
[16] Ibid.
[17] CHESTERMAN, Simon. *You, The People. The United Nations, Transitional Administration, and State-Building.* Oxford: OUP, 2004, p. 5.
[18] BENZING, Markus. International Administration of Territories. In *Max Planck Encyclopedia of Public International Law*, 2010 [online] § 1. [accessed 10. 2. 2018]
[19] Ibid.
[20] Determination of the final territorial status; filling a governmental vacuum; protection of human rights; resolving internal conflict. See ibid.

governance over (ii) territory by (iii) an international organisation, a state or a group of states for (iv) communitarian purpose. Through the exercise of governmental functions, the theory recognizes an ITA *sensu stricto,* differing from concepts of assistance, partnerships and consultations. Nonetheless, the purpose as referred to at point (iv) may not often appear in definitions. On the other hand, it is particularly evident in Chapters VI and VII of the UN Charter that such a higher interest needs to be present. Moreover, it is vital for the distinction between ITA and some other international law institutions.

1.2 Similar international law concepts

With this overview, it needs to be differed from several other concepts, namely trusteeship, protectorate and occupation. Nevertheless, as mentioned further on, some authors consider ITA as understood by UN Charter only to be another, new form of trusteeship or occupation.

1.2.1 Trusteeship

International trusteeship has its basis in chapter XII of the UN Charter. As seen in the Article 76 of the Charter, the basic objectives are similar to those of ITA, however it originates in so called mandate system and the specific situation of decolonization after World War II.[21] This is also reflected in Article 78 excluding member states of UN from the trusteeship system due to the relationship based on mutual respect and equality. Another difference compared to ITA is that the Charter presumes the existence of so-called trusteeship agreement. Not only that, unlike with ITA, articles 81, 82 and others quite precisely set the content of the agreement, measures and prerequisites for exercise of trusteeship that need to be agreed by interested parties, as ensured by article 79 of the Charter. Until the agreement is reached or in case it does not cover the particular situation, safeguards are included in chapters XII and XIII. Last but not least, the scope of administrative powers is precisely determined in Article 81 of the Charter – only state, states or UN itself can perform trusteeship over trust territory. As for the subjects of trust, the Charter strictly uses the term 'territory' with no reference to state-building whatsoever, among all, the non-self-governing territories. The argument that the trusteeship served rather as a post-colonial instrument is supported by the fact, that last trust territory, Trust Territory of Pacific Islands, has terminated in 1994. The last UN Trust territory, Palau, was exempted from the obligation by SC resolution and consequently also approved to join the UN to the organization in the same year.[22]

1.2.2 Protectorate and occupation

[21] RAUSCHNING, Dietrich. United Nations Trusteeship System. In BERNHARDT, Rudolf (ed). *Encyclopedia of Public International Law. Volume V*. Amsterdam: Elsevier Science Publishers, 1983. pp. 369-370.
[22] UN Doc. S/RES/956 (1994), *Resolution on the Conclusion of Trusteeship Agreement with respect to Palau,* 10. 11. 1994.

Despite its ancient historical roots, protectorate is not anchored in any recent convention. Almost four centuries ago, Hugo Grotius described the phenomenon of "unequal alliance" defining the fundamental signs of protectorate.[23] Other authors refer to a "relatively powerful State's promise to protect a weaker State from external aggression or internal disturbance, in return for which the protected entity yields certain powers to the protector." Crawford, although admitting the difficulties of attempts to define the term precisely, goes little further. In his view, "protectorates began with a consensual transaction between two or more subjects of international law, whereby the dependent entity surrendered to the protecting State or States at least the conduct of its foreign relations, and often responsibility for such relations together with various rights of internal intervention, without being annexed or formally incorporated into the territory of the latter."[24] Typically, the protected state will therefore entrust the control over foreign affairs to the protector on the legal basis of a treaty[25], while the protected state keeps control over interim administration and internal affairs.

The line made between ITA in the sense of Chapter XII of the UN Charter and historic concept of protectorate is thin and blurred. Indeed, some of the authors provocatively call the ITA being new form of protectorate.[26] The subsidiarity and dominance of one state over another one got more sophisticated shape through the centuries, the political interest got less transparent by engagement of international organizations. The overall aim of ITA as framed by Chapter XII of the UN Charter is to eliminate the threats to international peace and security, however it is difficult to argue both sides whether this element was still present in every situation and constantly when ITA was performed over a territory. The dispute over the two terms is rather academical.

Leave aside the negative connotation gained over time, a number of authors[27] also identifies UN ITAs as cases of so called "humanitarian occupation." According to the IV Hague Convention respecting the Laws and Customs of War on Land, "territory is considered occupied when it is actually placed under the authority of the hostile army."[28] It goes without saying that Hague Convention reflects the international customary law.[29] According to Benzing, the substantial

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[23] GROTIUS, Hugo. *The Rights of War and Peace. (1625*). Chapter XVI. Available at: <http://oll.libertyfund.org/titles/grotius-the-rights-of-war-and-peace-1901-ed>. [accessed 20. 4. 2018]

[24] CRAWFORD: *The Creation of States*, p. 287.

[25] Although Crawford notes that a case of Egypt after 1914 forms a precedent for a protectorate by a unilateral declaration, see Ibid, p. 321, footnote no. 24.

[26] See CHESTERMAN: *You, the People*, p. 82. See also WILDE: *From Danzig to East Timor*, p. 602.

[27] See FOX, Gregory H. *Humanitarian Occupation*. New York: Cambridge University Press, 2008, 320 p. See also RATNER, Steve R. Foreign Occupation and International Territorial Administration: The Challenges of Convergence. *European Journal of International Law*, 2005, vol. 16, iss. 4. pp. 695-719.

[28] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18. 10. 1907, entered into force 26. 1. 1910) Article 42.

[29] UN Doc. S/25704, *Report of the UN Secretary General pursuant to paragraph 2 of the SC resolution 808 (1993),* 3. 5. 1993, para. 41. Available at: <http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf.> [accessed 20. 4. 2018]

difference between both occupation and protectorate compared to ITA is that the latter serves to the interests of international community, international or regional organisations or (at least) a group of states and not only to the interests of a single state.[30]

It should also be noted that when examining ITA, the question of the relation between mere "assistance" and "administration" will arise. The decisive aspect is the depth of the cooperation or intervention into the state's affairs. To speak of an ITA *stricto sensu*, more than a simple consultation or assistance has to be provided, meaning at least some administrative competences given to the external entity.[31] The evolution of one form into the other is possible and natural.

1.3 Division

Even though the division does not play a significant role in the research questions raised above, at least few general remarks shall be made. In most complex approach, scholars recognize 5 different forms of ITA according to following aspects:

(1) the duration of internationalization (transitory, permanent, or open-ended);
(2) the nature of the administering entity (e.g, international or regional organization, group of States);
(3) the legal basis for the internationalization (e.g. treaty, UN Security Council resolution, military occupation);
(4) the degree or extent of governmental authority exercised by the administering entity (either full governmental powers, i.e. plenary administration, or limited competences, i.e. partial, functional, or co-administration, supervision and control, or mere administrative assistance or monitoring, which, according to the above definition, would not qualify as a genuine ITA);
(5) the purpose for which the territory is internationally administered.

Knowing that the fifth category cannot be exhaustively analysed, Benzing lists several typical purposes of ITA:

a) determination of the final territorial status
(e.g. in frontier disputes, decolonization, dissolution of a State, or the preparation of a territory for independence [State-building]);
b) filling a governmental vacuum, as well as economic and political reconstruction in fragile or failing States, including democratization;

[30] BENZING: *International Administration of Territories*, § 2.
[31] Ibid.

c) protection of human rights and rights of minorities;

d) resolving internal conflict (peacebuilding or community-building).[32]

Stahn's concept is close to Benzing's proposal, dividing administration into direct and indirect[33], with either exclusive or shared forms of authority and governance systems established either by consent or by unilateral acts.[34] Rüdiger Wolfrum also recognizes direct administration in opposition to the regime of states acting under the authority of the UN.[35] Jarat Chopra focuses more on the intensity of relationship between the administrative and administered authorities when dividing the operations in four categories: assistance, partnership, control and governance.[36]

[32] Ibid, § 4.

[33] Direct model is carried out by organs or subsidiary organs of international organisations, or by institutions directly appointed by the latter.

[34] STAHN: *The Law and Practice of International Territorial Administration,* p. 395.

[35] WOLFRUM, Rüdiger. International Administration in Post-Conflict Situations by the United Nations and Other International Actors. In A. von Bogdandy and R. Wolfrum, (eds). *Max Planck Yearbook of United Nations Law. Volume IX*. Leiden: Martinus Nijhoff Publishers, 2005, p. 656-665.

[36] CHOPRA, Jarat. *Peace-Maintantance: The Evolution of International Political Authority.* London: Routledge, 2012, pp. 16-17.

2 Historical development

If understood in the broadest concept possible, meaning a superior entity overtaking certain powers over a territory out of its own borders, the roots of ITA reach as far as the states start to fight, conquer and occupy other states. As this thesis focuses on the UN as a prominent actor in international relations, the examination shall start with its predecessor, the League of Nations.

2.1 League of Nations

The first international organisation seeking to maintain peace all over the world was founded in 1919 as a result of a Versailles Peace Conference. Alongside with setting the peace terms for the defeated Germany and its allies, the delegates of 32 countries drafted the first founding document in February 1919 and signed the final covenant[37] on June 28, 1919. In its article 22, the administration of territories, specifically abovementioned mandates find a remarkably precise framework.

"The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances. (…) In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge. The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council."

It is not without interest that the reports to the Council were in fact much more frequent than merely annual – the Council was reported about number of significant questions although not possessing any decisive power in these cases[38]. Apart from these lines, the article specifically enumerates several geographical areas (former Turkish Empire, states of Central and South-West

[37] Covenant of the League of Nations (adopted 28. 4. 1919, entered in force 28 4.1919).
[38] i.e. Informing report on the conclusion reached between Polish and Danzig representatives as for the representation of the Free City of Danzig at international conferences. 1923. Available at: <http://biblio-archive.unog.ch/Dateien/CouncilDocs/C-110-1923-I_FR.pdf>.

Africa and South Pacific Islands) and the specifics of their demands depending on their individual governmental deficiencies. It also envisaged certain extent and depth of administration for each of them, providing also the reasoning for such interference. A new body was set up for examination of annual reports provided by the administering authority.

Very soon, two territories became pioneers of this newly introduced concept. The first High Commissioner was according to the Treaty of Versailles appointed for Free city of Danzig[39] in today's Poland. The administration aimed to resolve the territorial dispute between Poland and Germany when seeking for the reconstitution of the "free city status."[40] After 19 years (being administered between 1920 and 1939) and no less than 10 high commissioners from 6 different countries, Hitler concluded the first League's mandate by invasion to Poland, giving the Swiss High Commissioner Carl Jacob Burckhardt two hours to leave Danzig.[41] This only contributed to the organization collapse in light of its inability to preclude another world war.

Between 1920 and 1935, the League of Nations also administered the German Saar Basin. A legitimate task of the international community to determine the status of the disputed territory however collided with the evident interest of the Allies to allow France to exploit mines in Saar territory as agreed in the Versailles treaty.[42] While French administration might face objections due to its territorial ambitions, international administration covered up the period necessary for exploiting and gaining compensation. After prescribed 15 years, local referendum decided to reunite Saar territory to Germany again.

Finally, the League of Nations shortly administered also Colombian district of Leticia. The sovereignty problem originated in 1933 occupation of Leticia by Peruvian irregulars backed up by the government of Peru.[43] Thanks to the international assistance, Peru and Colombia successfully negotiated wider border disputes and the League's mandate concluded in 1934.

2.2 United Nations (1945-1989)

Let aside the very establishment of the United Nations, no major development as for the topic of this piece occurred after World War II. Being officially established in 1945, the UN had to wait 15 more years to probe its own capabilities in this matter. The first instance close to administration

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[39] Rapport sur la ville libre et le territoire de Dantzig*, Societés de Nations-Journal Officiel*. 1920, vol. 1, pp. 53–55. Available at: <https://www.freecitysourcebook.com/uploads/2/6/1/2/26123343/1leagueofnationsoj53-55.pdf>. [accessed 20. 4. 2018]

[40] Treaty of Peace with Germany (adopted 28. 6. 1919, entered into force 10. 1. 1920) [hereinafter as *Versailles Treaty*], articles 100-102. Available at: <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf>. [accessed 20. 4. 2018]

[41] PARISH, Matthew: *A Free City in the Balkans: Reconstructing a Divided Society in Bosnia*. London: I. B. Tauris, 2010, p. 211.

[42] *Versailles Treaty*, articles 45-50, Annex.

[43] WILDE: *From Danzig to East Timor*, p. 587.

was a military assistance provided to newly decolonised Congo[44] (1960-1964) after (and in fact also *while*) withdrawal of Belgic troops from the territory of the Republic of Congo. Following the short and explicit text of the SC resolution, the UN was requested and subsequently pursued mostly military assistance.

The same decolonisation context led to a year-long administration of West New Guinea (or so-called West Irian, administered 1962-1963) following the divorce with Kingdom of Netherlands in 1962. The agreement[45] drafted and signed by the two parties describes the procedure indeed precisely. It foresees 2 phases of the cooperation: firstly, UNTEA was supposed to replace top Dutch officials and administrative and technical positions, preferably by West Irianese, secondly full administrative responsibility should had been transferred to Indonesia at which moment UNTEA's authority should have ceased and only a limited number of UN experts was supposed to stay for consultations. After slightly more than a month, the General Assembly of the UN took note of the agreement and authorized Secretary General to the tasks included in it.[46] The second phase lasted several hours at best, the deployment of Indonesian troops and transfer of full administrative control concluded UNTEA's mission in West New Guinea on 1 May 1963. However short the period of UN administration was (and however unfortunate the development on the island became after UNTAE left) we can consider this task to be a "game changer" for UN in the territory of ITA – enjoying full administrative powers and even introducing new laws[47].

More complicated situation was faced in the territory known today as Namibia. In 1967, UN Council for South West Africa (later renamed UN Council for Namibia) was established[48] as the administering authority until independence is reached. Nevertheless, with obstacles constantly being created by South Africa[49] it was not until 1988 that a real cooperation commenced. In 1989, UN Transition Assistance Group (UNTAG) was established for a year-long period with a central aim of *ensuring the early independence of Namibia through free elections under the supervision and control of the United Nations*[50]. UNTAG (1989-1990) can be considered a predecessor of the later UN ITAs as it was for the first time when not military, but the civilian mandate played an essential role.[51]

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[44] UN Doc. S/RES/143 (1960), *Resolution on the Congo Question,* 14. 7. 1960.
[45] Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (adopted 15. 8. 1962, entered into force 21. 9. 1962) UNTS vol. 437, no. 6311. Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%20437/v437.pdf>. [accessed 20. 4. 2018]
[46] UN Doc. A/RES/1752 (XVII), *Resolution on Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea,* 21. 9. 1962.
[47] Agreement between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea, Article XI.
[48] UN Doc. A/RES/2248(S-V), *Resolution on Namibia,* 19. 5. 1967.
[49] UN Peacekeeping Missions. United Nations Transition Assistance Group [online]. Available at: < https://peacekeeping.un.org/mission/past/untagFT.htm>.
[50] UN Doc. S/RES/435 (1978), *Resolution on Namibia,* 29. 9. 1978.
[51] BENZING: *International Administration of Territories*, § 7.

2.3 United Nations (since 1990)

After long-term struggles in Namibia, 90s appeared to be a crucial decade for UN engagement in ITA and witnessed a number of peace-building projects. Among them, UN mission in Cambodia (administering 1992-1993) represents a flag ship of the narrowly-understood, *stricto sensu* ITA.[52] Following decades of civil war and intrusions of Vietnam, five permanent members of the Security Council (China, France, the Soviet Union, the United Kingdom and the United States) created a plan evoking transitional administration for Cambodia which was agreed both by Vietnam and Cambodia itself. The agreement[53] authorized the United Nations Transitional Authority in Cambodia (established by SC resolution[54]) to supervise the ceasefire as well as the withdrawal of foreign forces on Cambodian territory; to mentor local administrative structures (including the police); to disarm armed forces of the Cambodian parties and lastly to guarantee a respect for human rights including organization of fair elections. Free elections in May 1993 accomplished the main goal of the mission.

The collapse of Yugoslavia brought several challenges to the international community and organisations. While the EU as the first regional organization took administrative responsibility of the city of Mostar, the regions of Eastern Slavonia and Kosovo were both under auspices of the UN. Eastern Slavonia (administered 1996-1998) became the first instance of the Security Council invoking Chapter VII of the UN Charter[55]. Earlier so-called Erdut agreement[56] between the government of the Republic of Croatia and the local Croatian Serb authorities requested the UN to establish transitional administration and to provide assistance with peaceful integration of Eastern Slavonia, Baranja and Western Sirmium (all of them former Serb-controlled Republika Srpska Krajina regions) into Croatia. Despite the continuing presence of armed paramilitary troops, the UN Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium (UNTAES), the overall task was to return refugees to the region and to protect them, restore the property rights and most importantly reconciliate all ethnic communities in the area. In order to do so (and profiting from an extensive military deployment), UNTAES closely cooperated with International Criminal Tribunal for the former Yugoslavia, for instance when arresting former

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[52] Ibid, § 8.

[53] Agreement on the Comprehensive Political Settlement of the Cambodia Conflict (adopted 23 10. 1991, entered into force 23. 10. 1991) UNTS vol. 1663, no. 28613. Available at: <https://peacemaker.un.org/sites/peacemaker.un.org/files/KH_911023_FrameworkComprehensivePoliticalSettlementCambodia.pdf>. [accessed 20. 4. 2018]

[54] UN Doc. S/RES/745 (1992), *Resolution on Cambodia*, 28. 2. 1992.

[55] UN Doc. S/RES/1037 (1996), *Resolution on the situation in Croatia,* 15. 1. 1996.

[56] Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium (adopted 12. 12. 1995, entered into force 15. 1. 1996). Available at: <https://peacemaker.un.org/sites/peacemaker.un.org/files/HR_951112_ErdutAgreement.pdf>. [accessed 20. 4. 2018]

president of Vukovar municipality Slavko Dokmanovic[57] or during an exhumation of mass graves in Ovčara farm near Vukovar[58].

After the situation in Kosovo started deteriorating rapidly during 1990s, the Security Council established an interim resolution by adopting a resolution no. 1244[59]. As in the case of Eastern Slavonia, also this administration was legitimized by the authorities of both host state and administered territory. So-called Kumanovo Agreement[60], between the International Security Force ("KFOR") and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia, was signed on 9 June 1999. Neither the Agreement, nor the resolution did include any specific date when the transitional administration should be concluded, which seems to be rather odd considering relatively broad and unclear content of UN mandate. Initial appointment of the end of the administration goes hand in hand with more diligence on the side of the administrator when regular reports and evaluations needed for the prolongation naturally demand persuasiveness about results and future goals. Written as it was, the resolution opened the door for the longest era of foreign territory administration performed by the UN, starting in 1999 and ending in 2008.

As for those ambitions listed in the resolution, UNMIK was supposed to build-up substantial autonomy of Kosovarians, however *within* the borders of Federal Republic of Yugoslavia, "*establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo".*[61] Nevertheless, in reality the administration was much more directive, relying mostly upon the personnel deployed than local capacities. This issue will however be discussed further in the thesis.

Last situation falling into the scope of this thesis as determined above is UN Transitional Administration in East Timor (1999-2002). UNTAET became unique at least in a sense that it was for the first time that UN brought a brand-new state to life. After a United Nations Mission in East Timor (UNAMET) organised public consultation on separation from Indonesia, where Timorese persuasively spoke in favour of the separation, pro-Indonesian militias burst into destruction and killings in the second half of 1999. Order was restored few weeks after by multinational military force INTERFET, however withdrawal of Indonesian administration, police and armed forces created a vacuum that was difficult to fill by INTERFET and UNAMET, both carrying their own

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[57] CASSESE, Antonio et al: *International Criminal Law: Cases and Commentary*. Oxford: OUP, 2011, p. 553.
[58] UN Department of Public Information. UNTAES: Recent Developments [online]. UN Peacekeeping, 22. 12. 1997. Available at: <https://peacekeeping.un.org/mission/past/untaes_r.htm>. [accessed 20. 4. 2008]
[59] UN Doc. S/RES/1244 (1999), *Resolution on the situation relating Kosovo*, 10. 6. 1999.
[60] The Military Technical Agreement between the International Security Force and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (adopted 9. 6. 1999, entered into force 9. 6. 1999). Available at: <https://peacemaker.un.org/sites/peacemaker.un.org/files/990615_MilitaryTechnicalAgreementKFORYugoslavia Serbia.pdf>. [accessed 20. 4. 2018]
[61] UN Doc. S/RES/1244 (1999), *Resolution on the situation relating Kosovo*, 10. 6. 1999, para. 10.

tasks. On 25 October 1999, the Security Council established UN Transitional Administration in East Timor[62] (UNTAET) responsible for administration of East Timor during the transition to independence through ensuring law and order, security and humanitarian assistance to people as well as assistance in development of administrative structure, capacity-building and restoration of civil services.[63] Initial intent to conclude the administration at the end of January 2001 (as provided by the resolution) faced a difficult reality of a territory suddenly left by most of their competent Indonesian authorities. The Constituent Assembly and the first East Timorese Government were elected during 2001 while the constitution came into force in March 2002 and the president (former prime minister Xanana Gusmão) was elected in April of the same year. The transformation of Constituent Assembly into Timorese parliament on 20 May 2002 concluded the era of the UN administration as the world could welcome a new independent state.[64]

[62] UN Doc. S/RES/1272 (1999), *Resolution on the situation in East Timor*, 25. 10. 1999.
[63] Ibid, § 2.
[64] JACOB, Daniel. *Justice and Foreign Rule. On International Transitional Administration*. Basingstoke: Palgrave Macmillan, 2014, p. 11.

3 Legal basis of the UN ITA

In spite of a number of forms and types of ITA, there is at least one common feature present and that is an actual interference of a third party (whether it is a state, an international organisation or a group of states) into interim affairs of a territory, assuming some of the crucial administrative, often governmental functions. Such an action always deserves an attention, not exclusively among academics and scholars. And for a valid reason, considering that a territorial sovereignty is one of the leading principles of the international law and even nowadays when we can no longer find any blank spaces on the political map of the world, several disputed territories or controversial interferences are present almost on a daily basis. It is thus relevant to discuss various aspects of the legal instruments that break this principle, their legitimacy and legal basis.

In this context, UN as a territorial administrator acts in two different roles. First of them is the role of a temporary administrator in territories where the government is either absent or not themselves capable to secure a proper governance and human rights conditions to its people. It goes without saying that providing the assistance and help in cases where the peace or security of people might be endangered by absenting or paralysed governance is a legitimate instrument, widely practised after decolonisation in 1960s. However, it needs to be reiterated that as part of the second role, such an assistance from its very nature consists of the influence on local politics, legal system and public life of people. In case of UN ITA, such influence is performed by the UN – and international organisation, entity with its own interests, aims and procedures including those vote procedures mostly based on majority vote of member states. Vigilant as one can be, not much can be found in UN Charter that would properly frame the preconditions and execution of the UN ITA. Notably, it is not without interest that unlike trusteeship, very similar and thus comparable concept, there is no equivalent of "trusteeship council." If the substantive difference between trusteeship and UN ITA is merely the scope of states where it may be revoked, similar overlooking organ would only be logic and expected for this instance, too.

For abovementioned reasons, the author considers legal mandate of the UN to be a subject of high interest and thus this chapter has ambition to cover possible sources of legality of UN,

more specifically two of the most widely discussed and persuasive. Article 24 of the UN Charter, addressing SC as an organ primarily responsible for the maintenance of the international peace and security, only serves as a signboard to Chapters VI, VII, VIII and XII (although different opinion is presented below.) The order of the possible sources listed below follows as such: First and foremost, it needs to be reflected that until now, most of the analysed cases originated in a multilateral agreement of interested parties. Therefore, it seems genuinely convenient to begin with so-called Chapter VI ½, metaphorical part of the UN Charter that is arguably encompassing powers enlarging (under certain circumstances) the scope of peacekeeping operations with administration of the UN over a territory. Secondly and most extensively, the existing Chapter VII and particularly the articles 39 and 41 are analysed as perhaps the most comprehensive basis for such operation (at least *prima facie)*, taking into account the explicit mentions in constitutive resolutions as well as the wide discussion and support among academics. Here, however, we equally do not find any explicit provisions addressing ITA directly, therefore the attention is drawn to the concept of implied powers. The concept itself, its evolution through jurisprudence and also applicability for UN ITA is thoroughly analysed.

For reasons already described above, Chapter XII and the trusteeship system are not a subject of this analysis and could not serve as a legal basis for any of the examined administrations as its applicability is limited only to three specific scenarios: (i) former mandate territories, (ii) territories detached after World War II and (iii) territories voluntarily placed under administration by their administrator. The conclusion of this chapter shall be made on whether the actual practice is appropriately reflected in the legal system, if not, then where are the limits and how to face them.

3.1 Mysterious Chapter VI ½ of the UN Charter

Unlike Chapter VII, Chapter VI (Pacific settlement of disputes) is not directly referred to in any of the analysed cases of UN ITA (Cambodia, Namibia, Eastern Slavonia, Kosovo, East Timor) respectively their constituent documents. Despite that it is a regular topic of discussion concerning the source of legality and legitimacy of the UN ITA. Indeed, distorting the image of UN ITA into separate features, we may find an institution just on the edge of peaceful settlement and authoritative measure. The claim that there actually is a valid legal space between Chapter VI and Chapter VII is supported by the fact that the traditional peace-keeping developed inside of the same grey zone of the UN Charter and even some of the authors consider ITA to be an inherent part of the peace-keeping operation.[65] Others subordinate UN ITA under so-called peace-

[65] i.e. SHUSTOV, Vladimir. Transitional Civil Administration within the Framework of UN Peacekeeping Operations. *Journal of International Peacekeeping,* vol. 7, iss. 1, pp. 417-423.

enforcement operations, actions putting an end to conflict and settling peace on the territory. These are however linked to Chapter VII.[66]

It is not so unimaginable to amend and amplify this space by a consensual abandonment and assumption of severe governmental (administrative, executive or legislative) functions of the state in order to prevent or settle a dispute endangering the maintenance of international peace and security. From this point of view, at least the administrations of UNTAC in Cambodia and UNTAG in Namibia might found its legal origin here rather than in following Chapter VII, considering their contractual basis. The subordination of the other examined administrations is disputable. On one hand, there were equally based on a contract which makes them different from other measures under Article 41, although a consent of authorities in case of Kosovo is widely disputed and often considered as void[67] while the consent for the administration of East Timor was given by illegal occupant, Indonesia.[68] In contrast, all of them are explicitly linked to Chapter VII in their constituent documents, so is a number of other UN engagements originating in an invitation or request to the Secretary General, which makes the orientation in terms even more difficult.[69] Above that, likewise in peacekeeping missions, the administrator is equally not accountable to the people of the territory and their overall character is civil, although it does not preclude a presence of military personnel, too.

The idea of such grey zone covering hybrid missions of the UN is not anyhow modern or even ground-breaking. In 1956, UN Secretary General Dag Hammarskjöld admitted that the traditional structure of the UN Charter might not be sufficient to accommodate some measures and that maybe Chapter VI ½ reflects the current practice best.[70]

For if Chapter VII provides the most persuasive description of measures taken towards states, possibly covering ITA too, it represents enforcement actions, lacks the consensual character that is typical for the ITAs as we know them today and hence is considerably distant by its nature. Even so, the author acknowledges that despite the legal unnecessity for a consent of parties concerned by the dispute (i. e. the state and the people of the territory), the UN sought for an agreement, perhaps also because the case of Namibia showed that a mere resolution without local support is destined to failure. It is the consensus precisely is why many authors find the power to occur in

[66] ONDŘEJ, Jan et al. *Mezinárodní humanitární právo*. Praha: C. H. Beck, 2010, p. 53.
[67] See FOX: *Humanitarian Occupation*, pp. 178-179.
[68] See Agreement Between the Republic Of Indonesia And The Portuguese Republic On The Question Of East Timor (adopted 5. 5. 1999, entered into force 5. 5. 1999) UNTS vol. 2062, no. 8. Available at: <https://peacemaker.un.org/timorleaste-agreement99>. [accessed 20. 4. 2018]
[69] STAHN: *The Law and Practice of International Territorial Administration,* p. 433.
[70] UN text on 60 Years of United Nations Peacekeeping. Available at: <http://www.un.org/en/events/peacekeepersday/2008/60years.shtml>. [accessed 20. 4. 2018]

a framework of customary law developed beside Chapter VI rather than among implied powers of the Security Council derived from articles 39 or 41 of Chapter VII.[71]

The articles of Chapter VI do not provide UN with authorisation to active, participatory measures similar to ITA, therefore the concept of implied powers may hardly be observed here and is only analysed in connection with Chapter VII where more appropriate basis may be found. On the other hand, customary law is highly relevant to look at as the history of the international actor administering a foreign territory is extensive and even the UN acts in this field for more than six decades already. Following chapter firstly introduces the customary rules as a source of international law and points to main differences between them and implied powers described below. It concludes with author's observations on ITA as a legitimate customary power and how this framing fits on the actual practice.

3.1.1 Customary law

As a source of the international law, customary law is particularly helpful in cases the phenomenon originates in history. Two elements are determinative for an emergence of an international custom as a normative circumstance creating international customary law. First of them is *usus,* simply put, an actual behaviour of states. Discussions may be raised elsewhere, whether *general usus* or *usus longeus* reflects the substance more conveniently. For it is not quite correct to speak either about long-term or even ultimately practiced behaviour, although with some exceptions both characterize the overall nature of this prerequisite.[72] What is quite clear is that such *usus* itself does not suffice if not supplemented by the second, independent normative element. The international customary law is created only by *usus* that is accompanied by the states' conviction about social necessity of such a behaviour and their awareness of the negative effect of the opposite behaviour.[73] This second element is called *opinio necessitatis, opinio juris* or *opinio necessitatis/juris generalis*. The former normative element can be considered as an objective, material factor while the latter can be called a subjective, mental factor. Together they constitute a custom in sense of binding rule of international law.

After clarifying the substance of the international custom and customary law, it is highly important to distinguish it from the concept of implied powers. The substantial difference lays on

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[71] DE WET, Erika. The Direct Administration of Territories by the United Nations and its Member States in Post-Cold War Era: Legal Bases and Implications for National Law. In VON BOGDANDY, Armin, WOLFRUM, Rüdiger (eds). Max Planck Yearbook of United Nations Law, 2004, vol. 8, iss. 1 [online] p. 314. Available at: <http://www.mpil.de/files/pdf1/mpunyb_dewet_8.pdf>. [accessed 20. 4. 2018]

[72] See *Colombia v. Peru (Asylum Case), Judgment,* ICJ, 1950 ICJ Rep. case no. 266, 20. 11. 1950; *Portugal v. India (Right of Passage Case), Judgment,* ICJ, 1960 ICJ Rep. p. 6 et seq., 12. 3. 1960; *United Kingdom v. Norway (Fisheries Case), Judgment,* ICJ, 1951 ICJ Rep. p. 116 et seq., 18. 12. 1951.

[73] DAVID, Vladislav et al. Mezinárodní právo veřejné s kazuistikou. 2nd edition. Praha: Leges, 2011. p. 111.

a fact whether such power is "new," meaning given to the organisation after the adoption of the founding document (customary power), or whether it originates in the already existing power and merely develops (never adds) its meaning adapting it to the present circumstances (implied power). Customary power emerges (as thoroughly described above) from practice notwithstanding its link to the constituent document and unlike implied powers, it is not anyhow bound to the explicit powers of the organisation. In fact, as explained further, it can even trump traditional tools of grammatical interpretation such as *argumentum a contrario, a simili* etc. On the other hand, implied powers represent a guarantee of intertemporal usefulness of treaty, providing perhaps infinite space for amplification of existing written rules according to the present circumstances and environment. Still, they need to be directly linked to explicit powers given by the constitution.[74] As for their mutual relation, it is now understandable why it may be tricky to distinguish one from another. It is clear that the implied power can never be based on a customary power as these are not explicit nor do they origin in the founding document. Customary power may, however, raise as a supplement of practiced implied power there where we the origin cannot be found in the work of the treat framers. Likewise, in cases an international judicial body such as ICJ examines whether an organisation possesses a particular power, the proper procedure would be to look at the explicit powers first, implied powers second and finally also to customary powers.

With this in mind, the author wonders whether the appointment of civil administrations by the SC of the UN if perceived as an emerging customary power needs to fit into the values of Chapter VI. Being not entirely persuaded about generally dispute-settling character of administrations adopted so far, certain relief may be found in fact that such power does not necessarily need to be bound to any specific provision. For instance, looking at the case of East Timor, it may be well argued that the situation to which the UN forces stepped into was hardly a dispute in need of the UN settlement at the moment of the decision. In fact, is an internal humanitarian crisis, although based on "the reports of "systematic, widespread and flagrant violations of international humanitarian and human rights law" and the "large scale displacement and relocation of East-Timorese civilians,"[75] sufficient source of ITA legitimacy? Despite the existence of number of such SC decisions,[76] some authors doubt that.[77] Nonetheless, such

[74] BLOKKER, Niels. Beyond 'Dili': On the Powers and Practice of International Organizations. In: KREIJEN, Gerard et al. *State, Sovereignty, and International Governance.* Oxford: OUP, 2012, pp. 307-308.
[75] UN Doc. S/RES/1264 (1999), *Resolution on East Timor,* 15. 9. 1999, preambular § 3.
[76] e.x. UN Doc. S/RES/808 (1993), *Resolution on establishment of an International Tribunal,* 22. 2. 1993; UN Doc. S/RES/929 (1994), *Resolution on establishment of a temporary multinational operation for humanitarian purposes in Rwanda,* 22. 6. 1994; UN Doc. S/RES/955 (1994) *Resolution on establishment of an International Tribunal and adoption of the Statute of the Tribunal,* 8. 11. 1994.
[77] i. e. LEPARD, Brian D. *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions*. University Park: Penn State University Press, 2002, p. 154.

customary power would still not appear entirely out of the UN Charter's spirit and principles even if not subordinated under dispute-settling measures. A solid basis may of course be found in articles 24 and 29 of the UN Charter, presuming the active engagement of the UN SC in protection of international peace through both measures and establishment of subsidiary organs. This argument seems to be generally accepted as sufficient when proceeding to specific theories such as that of an emerging international custom.[78]

Considerably long history of the UN might enable it to evolve its own customary powers. Following what was written above, the constituent elements would generally be persuasive practice and acceptance and consent of the Member States. We can already see several examples of adopting such powers among the framework of the UN activities, although not directly linked to the concept of ITA. Article 27 para. 3 of the UN Charter provides the exact procedure for voting on questions of non-procedural character. Unlike with the procedural question, here the Security Council not only needs 9 votes in total, but at the same time the 5 votes of all permanent members and only if deciding upon chapter VI, Article 52 para. 2[79], the state subject to the decision abstains. But at least since 1970, it is not a unique situation anymore that one or more permanent member states may also *abstain* from non-procedural decision-making instead of an actual *vote,* even if not being a party to dispute. By its advisory opinion, ICJ stated that both elements of emerging custom are present, noting that the practice has been followed consistently by the SC while also generally accepted by member states.[80]

Question arises whether similar circumstances are present and if the conclusion might may be *mutatis mutandis* applied also to the practice of ITA. The two cases of UNTAC and UNTAG speak for the affirmative conclusion as they were not explicitly connected to Chapter VII and still need to be based on a mandate based in the UN Charter. But as extensively argued in following chapter, neither the rest of the cases are firmly connected to a specific measure in Chapter VII. As legitimate as all these three cases may be, their legal mandate is disputable and because the voting procedure of the Security Council is indifferent to particular articles, the customary law might serve as a necessary safety net due to the fact that the adopted resolutions might serve as an evidence of both practice and persuasion about their social necessity. Also, when looking at the practice, one

[78] Some authors also operate with UN ITA as a power implied in Article 24 of the UN Charter. See STAHN: *The Law and Practice of the International Territorial Administration,* p. 434. The author of this thesis does not find this scenario a way to go due to the general character of a provision, still she elaborates on possible implied power under Article 41, see below.

[79] „The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council."

[80] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, ICJ, 1971 ICJ Rep. p. 16 et seq., 21. 6. 1971.

needs not to see a quantity of individual ITAs, but also the number of years they were enabled to perform their functions. Hereby, an affirmative opinion may be reached as for the preconditions of emerging custom.

Nevertheless, should the mere fact that the resolutions were successfully adopted mean that there is an overall general acceptance of such a practice? On one hand, the UN is a uniquely global international organisation gathering almost 200 states across the continents and political systems. There is no group of states that could possibly better represent an opinion of the international community of such. However, looking at the hierarchy of the UN and its bodies, it is General Assembly who can provide a universal representation of all member states. Still, their voting on the important questions demands two-thirds majority of the present and voting members, while there is no quorum for presence.[81] Due to the decision-making procedure of the SC, only five permanent and ten temporary members vote for or against the assumption of power and decide about the content, timeframe, rules and the period of administration.

Interestingly, the absence of a resistance declared by non-existence of UN member states' objections has already been confirmed as an expression of affirmation,[82] even if the state was abstaining during the vote. This ICJ opinion perhaps surprised those who wondered how a requirement of "general acceptance" can be reached in Security Council, non-representative body with voting procedures enabling majority vote.

Specific remarks may be perhaps excluded for the scope of a potentially new custom, namely ITA with no pre-agreed date of termination and first of all administrations with clearly absenting consent of affected parties. Apart from that, the author concludes that the concept of international administration of foreign territory consented by both UN and the authority over territory in question finds not much opposition among international community, gained quite concrete shape and acceptance throughout years and thus may be validly perceived as a newly emerging custom based on the treaty and adjusting its content.

3.2 Less mysterious Chapter VII of the UN Charter

Unlike both Platform 9 ¾ on King's Cross and Chapter VI ½, Chapter VII of the UN Charter can be easily found there where one would expect it. Following Chapter VI called "*Pacific Settlement of Disputes",* it largely builds up on the protection of the same values, outlining the protective steps and measures in case of endangerment of peace and security.[83] It is not without interest that although allegedly enabling an administrative regime well comparable to the trusteeship system

[81] UN Charter, Article 18.
[82] *Legal Consequences for States of the Continued Presence of South Africa in Namibia,* §§ 23-25.
[83] Compare UN Charter, articles 33 and 39.

profiting from no less than two whole chapters, no separate chapter for ITA is included in the UN Charter.[84] Carrying a name "*Action with respect to threats to the peace, breaches of the peace, and acts of aggression,"* Chapter VII refers to further unspecified number of actions aiming to maintain or restore international peace and security.[85] Without naming any of the actions particularly, it divides the actions into non-armed (article 41) and armed (articles 42-47), while the latter are designed as subsidiary and admissible only in case the former would be inadequate or have proved to be inadequate.

To illustrate the utilization of Chapter VII: while until 2015 the [Security] Council did not explicitly invoke Article 39 of the Charter in any of its decisions;[86] Article 41 was only recalled several times only between 2014-2015[87] and expressly mentioned in no more than seven resolutions out of 67 SC resolutions adopted in 2014-2015 "acting under Chapter VII."[88] Only two of them imposed new non-military measures, neither of them concerned a set-up of administration body similar to those examined in this thesis. The rest of the resolutions covers the missions of multilateral forces, peacekeeping missions or (perhaps most evidently) coercive procedures for the abovementioned breaches throughout the continents.

On the other hand, in 1990s, Article 41 was invoked in numerous significant occasions of the modern history. Beside the establishment of International Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda, ITA found its place too. To underlay this, one may refer to Resolution 1244 (1999) constituting an international administration regime over region of Kosovo and deploying personnel under UN auspices. First, the last paragraph of the preamble is framing the purposes, motives and background of the resolution, claims the SC to be acting "under Chapter VII of the Charter of the United Nations."[89] Further on, it also underlines that one of the principles aiming to move towards a resolution of the Kosovo crisis is the deployment of international civil and security presences acting as may be decided under Chapter VII of the Charter. Secondly, the same reference may also be found in the final wording of Resolution 1272 (1999) authorizing the transitional administration in East Timor[90] and Resolution 1037 (1996) for Eastern Slavonia[91] In case of Cambodia, the SC reiterated its support for the previously gained

[84] In fact, the trusteeship benefits from an extensive Chapter XII on the subjects, rules and limits of trusteeship as well as from Chapter XIII setting up a framework for trusteeship councils.
[85] UN Charter, Article 39.
[86] UN Department of Political Affairs - Security Council Affairs Division: Repertoire of the Practice of the Security Council, 19th Supplement, 2014-2015 [online] p. 7. Available at: <http://www.un.org/en/sc/repertoire/2014-2015/Part_VII/2014-2015_Part_VII.pdf>. [accessed 20. 4. 2018]
[87] Ibid, p. 30.
[88] Ibid, p. 31.
[89] UN Doc. S/RES/1244 (1999), *Resolution on the situation relating Kosovo,* 10. 6. 1999, preamble.
[90] UN Doc. S/RES/1272 (1999), *Resolution on the situation in East Timor,* 25. 10. 1999, preamble.
[91] UN Doc. S/RES/1037 (1996), *Resolution on the situation in Croatia*, 15. 1. 1996, preamble.

peace agreement[92] (already presuming the establishment of UN administering body) instead. As for Namibia, Resolution 435 (1978) [93] establishing UNTAG was also a result of negotiation as reiterated in the preamble, thus (despite deeply problematic realisation) no reference to Chapter VII was necessary.

Indeed, non-differentiation between particular articles of Chapter VII does not seem to be a problem even for the European Court of Human Rights (as showed in the case concerning the accountability of ITA authorities in Kosovo). Pointing at articles 41, 42 and also implied powers under the Charter, it concludes that "in any event, the Court considers that Chapter VII provided a framework for the above-described delegation of the UNSC's security powers to KFOR and of its civil administration powers to UNMIK."[94] Subordination under chapter instead of particular article nevertheless does not say much about the provision that carries the *ratio* under the adopted measure. As previously stated, nowhere in the chapter can a verbatim support for measure imposing administration over a territory be found. If in spite of this fact such practice exists, the potential source of legality shall be searched among so called implied powers. Following subchapter will firstly examine the very substance of implied powers, subsequently the jurisprudence of international bodies and finally the limits and perspective of implying ITA to Article 41.

3.2.1 On the Concept of Implied powers

Arguing by implied powers, it firstly needs to be clarified what can be understood by such term. Researching *implied* powers, one can hardly avoid a comparison to *inherent* powers. As thoroughly discussed among academics,[95] the two terms are often used interchangeably, although part of the scholars links the *implied powers* to international organizations and saves the term *inherent powers* rather for judicial bodies,[96] encompassing also powers related to no specific provision of the treaty, but merely to statutory purposes. Thus, the presented thesis waives the commitment to firmly decide on the more persuasive approach and follows the term *implied powers.* Saying this, author refers to the additional, not expressly stipulated powers that are essential for (a) the achievement of the purposes of the organization or (b) purely for the effective exercise of the

[92] UN Doc. S/RES/745 (1992), *Resolution on Cambodia*, preamble.
[93] UN Doc. S/RES/435 (1978), *Resolution on Namibia,* 29. 9. 1978.
[94] *Behrami and Behrami v. France and Sarmati v. France, Germany and Norway,* ECHR, Applications. no. 71412/01 and no. 78166/01*,* Decision as to the admissibility of applications, GCH, 2. 5. 2007, § 130.
[95] See SVAČEK, Ondřej. Applicable law, interpretation, inherent and implied powers – A Brief Rendezvous with the ICC. In ŠTURMA, Pavel (ed). *Czech Yearbook of Public & Private International Law*, 2016, vol. 7, pp. 360–372.
[96] GAETA, Paola. Inherent Powers of International Courts and Tribunals. In VOHRAH, Lal Chand: Men's Inhumanity to Man: *Essays on International Law on Honour of Antonio Cassese*. The Hague: Kluwer Law International, 2003, p. 362.

competences expressly granted to it. The former situation can be considered as broad definition, the latter as more narrow definition.[97]

It seems to be of an upmost importance at this place to look back at the drafting process of UN Charter, namely at the San Francisco conference in 1945 that led to the adoption of the Charter. How did an administration of a state or territory by the Security Council resonate there? An amendment to the Chapter VII was proposed during the conference by Norwegian delegation, demanding to explicitly incorporate a competence to "take over on behalf of the Organization the administration of any territory of which the continued administration by the state in possession is found to constitute a threat to the peace" into the body of the chapter. The proposal was however withdrawn plainly arguing that such a specific empowerment for a particular procedure would lead to the conclusion that those powers that are not explicitly included in the text are *a contrario* excluded and out of concern.[98] Such argument might mean that the drafters implicitly approved this particular measure and only refused to enlist it, although a list is already included in Article 41.

Nonetheless, early after adoption of the UN Charter an opinion was articulated suggesting that the existence of Chapter XII and a legal status of a trust territory preclude the UN from exercising a territorial sovereignty anywhere else apart from those trusts.[99] Arguing that Article 2 para. 7 of the UN Charter points to the measures under Chapter VII as to the only conceivable exception from the abolition of UN takeover of territorial sovereignty. Most of the authors however disagree[100] and also extensive practice of UN ITAs shows that this perhaps conservative approach is outdated. Where the experts are not unit in their opinions, international case law might appear helpful to the reader.

3.2.2 International jurisprudence concerning implied powers

A relevant jurisprudence may be presented since 1923 already. In so-called *Wimbledon case* the Permanent Court of International Justice ruled as follows:

"The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them

[97] MARTINES, Francesca. Legal Status and Powers of the Court. In: CASSESE, Antonio et al. (eds.) *The Rome Statute of the International Criminal Court. Volume I.* Oxford: OUP, 2002, pp. 215-218.
[98] Documents Of The United Nations Conference On International Organization. Volume XI. San Francisco, 1945, p. 20. Available at: <https://archive.org/details/documentsoftheun008818mbp>. [accessed 20. 4. 2018]
[99] KELSEN, Henrik. *The Law of the United Nations*. New York: Frederick A. Praeger, 1950. p. 651.
[100] See STAHN: *The Law and Practice of International Territorial Administration*, p. 420.

to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."[101]

Though it is crucial to note that in this case and two other cases analysed in the reasoning of this ruling, the subject of examination in all three cases was the right of a passage for a foreign vessel despite an existence of a contractual consent (in this particular case, an English steamship *Wimbledon* was not allowed to pass through German Kiel canal). However significant this ruling might be for the international jurisprudence on sovereignty, in author's view such precedent *per se* would not be sufficient if not supplemented by the relevant argumentation on the admissibility of unwritten competences of the UN. Such argumentation was firstly provided by PCIJ in its advisory opinion on competences of the International Labour Organisation three years later.

"It results from the consideration of the provisions of the Treaty that the High Contracting Parties clearly intended to give the International Labour Organization a very broad power of co-operating with them in respect of measures to be taken in order to assure humane conditions of labour and the protection of workers. It is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end."[102]

Soon advisory opinions of the ICJ followed, namely *The Reparation for Injuries Suffered in the Service of the United Nations*[103] and *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal.*[104] The former advisory opinion presents a milestone in recognition of the doctrine of implied powers.[105] Judges accepted the existence of implied powers without extensive comments, foreseeing that by its nature, it was impossible for the international organisations and framers of their constituent documents to foresee a rapidly changing world and therefore it does not seem to be efficient to rigidly stick to the powers explicitly addressed decades ago.[106]

Indeed, it shall be noted that in the context of drafting the UN Charter, the challenges of international peace and security were indisputably different from those that the international

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[101] *S.S. Wimbledon (U.K. v. Japan*), PCIJ, 1923 PCIJ Reports ser. A, no. 1, 17. 8. 1923, § 35.
[102] *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, *Advisory opinion*, PCIJ, 1926 PCIJ Publications, Series B, no. 13, 23. 7. 1926, p. 18.
[103] *Reparation of Injuries Suffered in Service of the U.N.*
[104] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory opinion,* 1954 ICJ Rep. p. 47 et seq., 13. 7. 1954. [*Effect of Awards of Compensation*]
[105] For more on the doctrine see RAMA-MONTALDO, Manuel. International Legal Personality and Implied Powers of International Organizations. *British Yearbook of International Law,* 1970, vol. 44. pp. 111-155 or *Prosecutor v. Duško Tadić,* ICTY, IT-94-1-T, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, ACH, 2. 10. 1995, paras. 18-21.
[106] *Reparation of Injuries Suffered in Service of the U.N.,* p. 180.

community struggles with today, starting from international terrorism to democracy crises, raising extremism or various human rights threats. Should it be questioned whether the aim of drafters was for example to enable UN to undertake measures against a widespread outbreak of Ebola,[107] the first case of the SC appointing an outbreak of disease as a threat to international peace and security? Or even earlier, to establish a threat to international peace and security on a failure to extradite a person suspected from sabotaging a commercial flight?[108]

In the opinion of author of this thesis, it definitely should. More than half a century passed by and a number of unprecedented challenges emerged in fields, where not everyone could imagine a potential threat to the international security could come from. This can however speak in favour of both sides. Similarly, it is valid to argue that the standard of international security and peace was postponed to a way new dimension since 1945. The Cold War brought new issues different from previous interstate conflicts and aggression, as seen in the headlines on a daily basis, international cyber security, medical security, oil supplies, peaceful cohabitation of minorities or even an access to food and potable water are those hot topics today. In the opinion of author, it should be duly considered whether the individual breach of today's level of peace and security is of the same gravity as those resumed by the drafters, considering more than half a century passed by and a number of unprecedented challenges emerged in fields like cyber security.

What is also interesting about *Reparation for Injuries Suffered in the Service of the United Nations* advisory opinion is that while defending the necessity to amplify powers of the UN by implied powers necessary for achieving tasks and purposes of the organisation, it also acknowledges the existence of implied purposes and functions of the organization.[109] Accepting this, is there a door open for deducing implied powers serving for the achievements of tasks framed by equally implied purposes and functions? The question arises what exactly these implied purposes could be, if excluding partial purposes subordinated under those explicitly mentioned in the Charter. In author's opinion, the drafters did not intent to go that far. The rank of partial functions possibly contributing to the general purposes of securing international peace and security is infinitely wide and operating with them out of context of the general purposes would be dangerous for the trust between member states, predictability and last but not least credibility of the organization.

Slightly more distant link can be found in the second mentioned advisory opinion of ICJ on the constitution of the UN administrative tribunal.[110] More than to the opinion itself, which recognised the power of the General Assembly to establish an administrative tribunal for the staff

[107] UN Doc. S/RES/2177 (2014), *Resolution on Peace and Security in Africa*, 18. 9. 2014.
[108] UN Doc. S/RES/748 (1992), *Resolution on Libya,* 31. 3. 1992.
[109] Ibid, p. 180. „…the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified *or implied* in its constituent documents and developed in practice. " [emphasis added]
[110] *Effect of Awards of Compensation.*

of the UN, it is interesting to take a closer look at the dissenting opinion of Judge Hackworth. He stressed, that "the doctrine of implied powers is designed to implement, within reasonable limitations, and not to supplant or vary, expressed powers."[111] To him, Article 22 of the Charter authorizing GA to form subsidiary organs necessary for its own functions hardly justifies the formation of a judicial body making binding decision. If GA does not possess or perform any judicial powers under UN Charter, it can hardly delegate any in accordance with principle *nemo plus iuris ad alium transferre potest quam ipse habet.*[112] This seems to be highly reasonable and well-argued opinion on limited application of implied powers. Turning back to the issue presented in this thesis, is the Security Council also overlooking the express legal framework and giving precedence to what she considers to be implied powers? Reading through Chapter VII and particularly through its Article 41, its overall conception suggests that the character of anticipated procedures and measures is rather unilateral, proposing measures to assert international peace in mostly coercive manner. In the author's view, ITA, which fundamental principle up to now has been the cooperation with local authorities and consent of the parties, does not fit in here and might present what Hackworth articulated as "variation of expressed power." The thesis further elaborates on the Article 41 and the allocation of implied powers within this article.

3.2.3 Applicability for ITA

Being familiar with the decisions of international judicial bodies concerning implied powers of international organisations and particularly UN, analysis may proceed to specifics and concrete aspects of the ITA as a potential implied power of the UN. Referring first to the broad approach and thus deriving the power from the statutory purposes of the organization and not an express power, two facts shall be noted. Firstly, this broad approach (due to unclear terminology often called "inherent powers approach") has been facing extensive critique since decades ago, notably after ICJ an advisory opinion supportive in this sense.[113] Unlike with implied powers based on existing norms of treaty, those powers bound to purposes do not find an equal support. Secondly, the more abstract the basis for any legal rule is, the more attention should be drawn to individual consideration of each case. Therefore, following lines do not have ambition to find or neglect a legal basis of ITA, it rather highlights some crucial aspects that shall be taken in account in looking at individual case.

[111] Ibid, Dissenting opinion of Judge Hackworth, pp. 80-81.
[112] No one can transfer more rights (to another) than he himself has.
[113] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion*, ICJ, 1962 ICJ Rep. p. 151 et seq., 20. 7. 1962, p. 168.

First of all, it seems only reasonable to examine the preamble of the Charter, giving the necessary ideological framework and context to the body of the text.[114] Already the second goal that UN claims to be determined to may become a relevant part of discussion. To "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" underlines the overall human rights background of ITA as only the state administration that provides such human rights standard may be considered legitimate. However, would it alone form a sufficient basis for such a serious interference to state's sovereignty by assumption of governmental functions? To compare, much higher level of gravity is (at least in theory) demanded for recalling disputed humanitarian intervention,[115] although there are numerous reasons why the latter is much more controversial.[116]

The next listed goal, the establishment of "conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained" suitably mirrors the operative nature of UN ITA (as seen in case of UNMIK reviving the collapsed judicial system in Kosovo or similar tasks of UNTAET in East Timor) and thus may also serve as a support for implication of power such as ITA. Likewise, the construction of the sentence fits to the idea of temporary UN administration *establishing* certain conditions so that they *can be maintained* by primary actors of the international law, the states. Both of these ideas or perhaps values expressed in the preamble are however very general and could serve for justification of nearly any UN procedure.

Proceeding to the first article, more specific purposes are articulated here. Still, it can be persuasively argued that any of the listed aims may be (perhaps not globally, but in particular cases) achieved through the international civil administration of UN or its organs, although ITA can also be performed without significantly contributing to a single one of them or sometimes even having a deteriorating effect on another one. A case to point at is the second paragraph of Article 1 of the UN Charter, listing one of the UN purposes:

"To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."

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[114] Vienna Convention on the Law of Treaties (adopted 23. 5. 1969, entered into force 27. 1. 1980) UNTS vol. 1155, p. 331 et seq., Article 31 para. 2.

[115] FAIX, Martin. *Law of Armed Conflict and Use of Force. Part One. Securing International Peace and Security: International Law on the Use of Fo*rce. Olomouc: Univerzita Palackého, 2013, p. 89: „This term can be generally understood as a threat or use of force against another state that is motivated by humanitarian considerations, or more precisely, as a threat or use of armed force with the aim to protect people of another state from gross and systematic violations of human righs, when their own state is unwilling or unable to provide protection."

[116] See HENKIN, Louis. Kosovo and the Law of "Humanitarian Intervention." *American Journal of International Law,* vol. 93, iss. 4, pp. 824-828.

Looking at the cases presented in the chapter 2 of the presented thesis, the "development of friendly relations" was often more idealistic or at least long-term aim of the missions. On the other hand, the interest in preservation of friendly relations (as well as all the other declared purposes) should also act like a limitation for ITA and the way it is performed. The achievement of international co-operation[117] is not as disputed as the co-operation of UN with the locals. The present practice shows that gradual transfer of governmental powers back to local authorities suffers by non-sufficient interconnection with them, notwithstanding whether there is an authority vacuum (East Timor) or there is some local authority present (Kosovo). The absence of specific procedure for UN administering foreign territories causes, among others, non-existence of separate item in the UN budget or special apparatus or units trained and prepared for performance of overall administration of territories. In conclusion, the personnel are selected *ad hoc* for every mission and often sent without detailed instructions or even persuasive practice and competences for the positions they are about to assume.[118] All of it makes the overhanding of powers to locals at least complicated.

Additionally, the first paragraph of article 1 is a precursor of the same value reiterated in the beginning of Chapter VII – maintenance of international peace and security. Chapter VII perhaps refers to ITA more clearly, when addressing in article 39 to the measures taken to maintain *or restore* international peace and security [emphasis added]. At this point, it does not however elaborate on the term "measures," only refers to articles 41 and 42.

Finally, Article 2 para. 7 reinforces the impression that only under Chapter VII can the UN ITA be found legal and not violating there provided principle of non-intervention. While there is a number of arguments against (some of them described hereby), some scholars see this particular article as a specific reference to transitional administrations endowed by member states themselves and a precise exception from principle of non-intervention, adding that the exercise of governmental powers may hardly contravene the protection of sovereignty since it was designed to restore sovereignty over a territory.[119] At the same time, this article and chapter referred to both operate with enforcement measures (*mesures de coercition* in French version of the UN Charter), which does not entirely fit to the presented cases as discussed above. When speaking about UN Intervention to interim affairs, it shall also be noted that until today it is not entirely clear whether

[117] UN Charter, Article 1 para. 3.
[118] Richard Caplan thoroughly describes these human resources difficulties in number of his works, i.e. CAPLAN, Richard. Partner or patron? International civil administration and local capacity-building. *International Peacekeeping,* vol. 11, iss, 2, pp. 229-247.
[119] STAHN: *The Law and Practice of International Territorial Administration,* p. 421.

the UN can be bound by the norms of international humanitarian law[120] or international human rights obligations.[121]

Due to the universal character of the UN as a global organization with enormously wide range of powers, duties and procedures, not much can be deduced from its declared purposes. Still it enjoyed a wide support among authorities in the past. While discussing a SC mandate for a partial administration of Free City of Trieste, objections were articulated against relying on Article 24 exclusively. The defence provided by Polish delegation was indeed rather vague, claiming that "it would be entirely within the general spirit of the Charter" and that "since it is the matter which involves peace and security, (…) the SC is the logical organ to carry out these functions."[122] The Secretary General supported this with statement that "the Council had a power to maintain peace and security conferred upon it by Article 24, which was wide enough to enable it to assume the responsibilities arising from the agreements relating to Trieste. (…) The only limitation were those imposed by the stipulations contained in the fundamental Purposes and Principles to be found in Chapter I."[123] The SC responsibilities were accepted by 10 votes in favour, none against and Australia abstaining.

The principle of powers delegated to the organization would look slightly twisted if deducing the implied powers from the aims and purposes: the organization would not actually perform the powers entrusted to her and the statutory document by the will of its member states, but rather would come up with a power (in context of its purpose) that is only limited by those explicitly agreed provisions. In author's view, instead of building up on the rules agreed on in the statutory document, it turns the document into set of limits, moreover not designed for this particular institution. To conclude, the broadly defined implied powers (or alternatively inherent powers) shall not represent a legal basis for the acknowledgement of the UN ITA.

Closer link to the spirit of the UN constitution is the concept of the "genuine" implied powers, meaning non-explicit powers in framework of the Charter that are directly linked to the specific provision or provisions. Looking at the current practice where the documents (at least formally) establish the administration with reference to Article 41, this very article shall be analysed as for the potential basis of ITA.

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[120] ONDŘEJ: *Mezinárodní humanitární právo*, pp. 53-54.

[121] FAIX, Martin. Are International Organisations Bound by International Human Rights Obligations? In ŠTURMA, Pavel (ed). *Czech Yearbook of Public & Private International Law*. Praha: Czech Society of International Law, 2014, vol. 5, pp. 267-290.

[122] SEYERSTED, Finn. *Common Law of International Organizations*. Leiden: Martinus Nijhoff Publishers, 2008, p. 186, footnote 8.

[123] UN Repertory of Practice (1945–1954). Volume II. Article 24 [online] 10. 1. 1947, § 16 (Statement of the Secretary General). Available at: <http://legal.un.org/repertory/art24/english/rep_orig_vol2_art24.pdf>. [accessed 20. 4. 2018]

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

First of all, the question arises whether in all cases the UN ITA as a measure gave effect to any such presupposed decision. SC resolution 713 (1991) of 25 September 1991 recognizes Yugoslavia (including Eastern Slavonia, Baranja and Western Sirmium) as a threat to international peace and security, resolution 1199 (1998) of 23 September 1998 affirms the existence of such threat in region of Kosovo and finally resolution 1264 (1999) of 15 September 1999 determined a threat to international peace and security in East Timor. Eye-catching fact that in case of Eastern Slavonia the status of international threat is given to the whole territory of (former) Yugoslavia and no particular attention is given to the region where a later resolution arranges an ITA, may easily be rejected here as this particular administration was based on local agreement too. The author however declares that to her point of view, if that was not the case and the administration lacked a consent of the parties to the dispute, such general reference should not be sufficient as the threat might originate from particular regions while other territories of the same state are peaceful. The appointment of administrative authority for these territories would not be reasoned by legitimate purpose. Apart from this, all non-consensual decisions on administration find their basis in previous decision on the status of a threat to international peace and security.

Unfortunately, the rest of the preconditions prescribed by the article are rather blurred as for the circumstances of their application. The least controversies occur as for whether the list provided in the final line of the article is exhaustive or merely demonstrates part of the non-armed measures possibly imposed under this article. The generally accepted answer is that the provided list of non-military is non-exhaustive and rather illustrative.[124] Referring back to the drafting process described above, there is indeed not much space for argumentation in favour of the contrary. The question is rather how, in which direction and until what extent shall the list be enlarged, meaning the severity, manner and character of additional measures. At this point, the attention will of course be drawn directly on ITA.

Certain hint may be found in the line "*it may call upon the Members of the United Nations to apply such measures."* In case of the administration performed by the UN, it is the organisation exclusively who applies the measure, although the personnel are of course international and comes from

[124] SIMMA, B. (ed.) The Charter of the United Nations, A Commentary. Second edition. Oxford: OUP, 2002, p. 737.

various countries. That however does not mean that the administration is *applied* by these states. Enlisted examples might serve for a comparison. Interruption of economic relations and of different means of communication and the reflection into depth and overall condition of diplomatic relations – these measures may only be undertaken by Member States, whose dedication to the decision of the UN will also determine the impact and severity of the measure. In fact, some of the authors expressly label the measure as one of a collective character "for international peace and security are indivisible and cannot be a matter of the UN Member states only."[125] None of that fits to the case of UN ITA.

To be fair to the arguments, the same applies to the constitution of the International Criminal Tribunal for Former Yugoslavia by the SC resolution issued in 1993[126] and International Criminal Tribunal for Rwanda,[127] equally under Chapter VII. Neither here, the measure provides any space for the application of individual member states. Considering it preceded resolutions for administration of Eastern Slavonia, Kosovo and East Timor, it mostly served as a great encouragement to the UN SC. This particular question arose in front of ICTY and ICTR, too. Both *ad hoc* tribunals quite unsurprisingly confirmed this practice. In *Prosecutor v. Dusko Tadić,* the defence objected in the same line with the last paragraph: the measures enlisted are addressed to member states rather than to the international community, moreover they are all of political and economic character. The Court however objected the list does not exclude other measures including those judicial, saw the implementation by states rather as the second best option in case that the UN did not possess sufficient resources and concluded that the establishment of the ICTY "falls squarely" within the powers of this article.[128] The ICTR then plainly agreed to what was earlier stated by the ICTY.[129]

Unlike some,[130] the author of this text believes that the question of whether an action falls into the scope of Article 41 can and in fact, *does* depend also on the nature of the activity it regulates and even if the establishment of ICTY and ICTR opened the door for establishment of judicial bodies, the scope of the non-armed activities shall not be infinite.[131]

Not only the character of particular listed measures does not suggest that the list should embrace establishment of complex civilian administration taking responsibility over a territory. Reading through the chapter, it follows certain procedure with gradually coercive character

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[125] MALENOVSKÝ, J. Mezinárodní právo veřejné, 5th edition. Brno: Doplněk, MU, 1993, p. 377-378.
[126] UN Doc. S/RES/827 (1993), *Resolution on the Establshment of* the International Criminal Tribunal for former Yugoslavia (ICTY), 25. 5. 1993.
[127] UN Doc. S/RES/955 (1994), 8. 11. 1994.
[128] *Prosecutor v. Dusko Tadić,* §§ 34-36.
[129] *Prosecutor v. Kanyabashi*, ICTR, ICTR-96-15-T, *Decision on Jurisdiction*, TCH II, 18. 6. 1997, § 8.
[130] STAHN: *The Law and Practice of International Administration,* p. 426.
[131] See SEYERSTED, Finn. *United Nations Forces: In the Law of Peace and War*. Leiden: A. W. Sijthoff, 1966, p. 363.

culminating in armed intervention, an extraordinary and prominent exception from the *ius cogens,* namely the prohibition of use of force.[132] Articles 41 and 42 are by its very nature *means of enforcement* for the breach of values provided for in Article 39. These quasi-sanctions may or may not be preceded by negotiations and other peaceful solutions as peace is an umbrella value of the UN Charter and UN as such. However, is it really coercion or enforcement of anything in cases that we analyse that is imposed in form in UN ITA? The author argues that (if not resorting to the empty phrases like "enforcing the international peace and security") it is not, neither in the cases based on the SC resolutions and the more in the cases of Cambodia and Namibia. Despite the lack of a precise unified definition of ITA, by its natural purpose it cannot be reached without at least implicit consent at least. For the effectiveness of ITA, at least fundamental cooperation from local authorities anyway is demanded in all cases. Does this action of cooperation still find its place under Chapter VII? In light of the aforementioned, it does not seem so, although Carsten Stahn interestingly points to the fact that if insisting on the action infringing other entity's will, there would be no space for any such action in case of governmental vacuum.[133]

To conclude, the author opposes to the current practice of the Security Council that has recently been adopting the resolutions on administering foreign territories as an act under Chapter VII. Firstly, it does not occur to be conceptually correct as the chapter addresses enforcement measures of armed and non-armed force. Secondly, Article 41 is not very persuasive about encompassing such measures, firstly because of the inconsistency with expressly listed examples of admissible measures, secondly due to the presumed involvement of the Member States (both expressly and implicitly) that is however absent in practice of UN administrations.

[132] ČEPELKA, Čestmír., ŠTURMA, Pavel. *Mezinárodní právo veřejné.* Praha: C.H. Beck, 2008, p. 665.
[133] STAHN: *The Law and Practice of International Administration,* p. 429.

Conclusion

To conclude, there has never been and there is still no explicit mandate for an administration of territories in the UN Charter. Nonetheless, this fact was known and recognized during the drafting process already and it was assumed that no explicit power is needed for these purposes. The undeniable fact is that certain common features may be found in actions under Chapter VI and Chapter VII of the UN Charter. Arguably, the power might also steam either from the customary law or from the implicit powers. As for the latter, the most widely discussed origin of such power is Article 41. However, this theory still faces serious objections as for both the systematics of the chapter and the explicit content of the article. Even if the resolutions are not explicitly referring to this particular article, the author also opposes the current practice of the UN Security Council that is adopting the resolutions on administering foreign territories as an act under Chapter VII. The merit of ITA is not characterized by being imposed by any kind of force while the force is common feature of both articles 41 and 42, referred to in general article 39. Nowhere among these articles can a firm basis for such measure be found. Rather it carries signs of a consensual interference to interim affairs, not necessarily resolving a dispute.

It appears to the author that more convenient theory is subordinating the current practice under an emerging customary power evolved in the framework of "Chapter VI ½", meaning in the grey zone between chapters VI and VII bearing some signs of both of them. The explicit reference to Chapter VII in the SC resolutions however form an obstacle for considerations on *usus* and *opinio juris* as determinative preconditions for an international custom. Although non-enforcement measure would better reflect on the core of the international administration of territories, it seems difficult to find provisions establishing a persuasive basis for implied power. It is still also premature to speak about custom already emerged in international law.

Hence, this thesis does not propose any amendment of UN Charter provisions or an establishment of new international agreement. Rather it concludes that the proposed solution for the future would be to incline to present custom without a confusing reference to Chapter VII that (to the author) follows different aims, procedures and principles. Alternatively, an implied power

shall be searched for within Chapter VI or perhaps Chapter V (framing the SC powers more generally) rather than within the powers under Chapter VII.

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Abstract

Principle of non-intervention into interim affairs of states, territorial sovereignty and related Security Council powers. Hardly can we follow recent international affairs without coming across these terms. Even after more than 70 years of the UN existence, the powers of SC concerning the interference into states' sovereignty are still not clearly defined. This fact can be perceived as a by-product of the low number of such cases through which the international courts and scholars would develop knowledge in this field. It can also be approached as a undesirable effect of general definitions of powers provided in the UN Charter that causes uncertainty and might even be misused against its aims and purposes under certain circumstances. Thanks to its unclear anchoring in the UN Charter, the international territorial administration might serve as a tool for extensive interference into interim affairs of territories. In a time of tense atmosphere in the Security Council, it is of upmost use to analyse when and how to use this tool, which values it may disrupt and which values might it help to. For it is evident that it may serve both.

Shrnutí

Princip nevměšování se do vnitřních záležitostí států, územní suverenita a související pravomoci Rady bezpečnosti. Těžko lze dnes sledovat mezinárodní dění bez toho, abychom na tyto pojmy narazili. Po vice než 70 letech však pravomoci Rady v oblasti zásahů do suverenity států stále nejsou postaveny zcela najisto. Tuto skutečnost lze brát jako pozitivní průvodní jev nízkého počtu případů takového zásahu OSN, skrze něž by mezinárodní soudy a akademici rozvíjeli v této oblasti poznání. Lze na ni však také nahlížet jako nežádoucí efekt obecného vymezení práv v Chartě OSN, který způsobuje nejistotu a za určitých okolností by mohl být zneužit v neprospěch jejich hodnot. Mezinárodní územní správa by díky svému nejasnému ukotvení v Chartě mohla posloužit jako nástroj k rozsáhlým zásahům do vnitřního chodu území. V době napjaté atmosféry v Rady bezpečnosti je pak nanejvýš vhodné zkoumat, kdy a jak tento nástroj užívat, jaké hodnoty může narušit a kterým naopak může pomoci. Je totiž zřejmé, že způsobilý je k obojímu.

Keywords

international territorial administration, transitional, administration, ITA, peacekeeping, peacebuilding, implied powers, United Nations, Security Council, dispute settlement

Klíčová slova

mezinárodní územní správa, přechodná správa, dočasná správa, ITA, peacekeeping, peacebuilding, implicitní pravomoc, Organizace spojených národů, Rada bezpečnosti, řešení konfliktů