EAST TIMOR, TRANSITIONAL ADMINISTRATION AND THE STATUS OF THE TERRITORIAL SEA

ROB MCLAUGHLIN*

CONTENTS

I INTRODUCTION

There is nothing new in the United Nations, more particularly the UN Security Council ('UNSC'), undertaking tasks or establishing protocols for the conduct of 'domestic' functions in post-conflict areas. This form of temporary UN control and governance has been an element in several UN peace-support operations,[1] evidenced in acts of political governance ranging from attempts to reconvene the Congolese Parliament,[2] through to 'restoring law and order' in

* BA (Hons), LLB (Hons) (Queensland), MA (Brown), LLM (ANU), MPhil (Cantab); Seaman and Legal Officer, Royal Australian Navy. The author wishes to thank the anonymous reviewers for their helpful and constructive comments. Responsibility for the contents of this article remains, of course, with the author alone. Similarly, the opinions expressed are those of the author and should not be inferred as reflecting the position of the Australian Defence Force.

1 For example the Congo, Irian Jaya, Namibia, Kurdish Iraq, Somalia, Cambodia, Bosnia-Herzegovina, Kosovo, East Timor: see, eg, Christopher Greenwood, 'Is There a Right of Humanitarian Intervention?' (1993) 49 *The World Today* 34, 35–9. See also Michael Matheson, 'United Nations Governance of Postconflict Societies' (2001) 95 *American Journal of International Law* 76, where Matheson briefly describes the UN's involvement in trusteeships concerning territories that had been administered, until 1939, under League of Nations mandates.

2 Paul Diehl, *International Peacekeeping* (1993) 51.

places like the Congo and East Timor,[3] to establishing and monitoring election systems in Namibia, the Western Sahara, Bosnia-Herzegovina, East Timor and Cambodia.[4] At other times UN control and governance has been manifested in a territorial sense — such as the establishment of no-fly zones in Iraq,[5] and the promulgation of UN safe areas during the Balkans conflict.[6] The current 'high water mark'[7] of UN transitional administration is to be found in the recently completed operations of the UN Transitional Administration in East Timor ('UNTAET') and in the ongoing operations of UN Interim Administration Mission in Kosovo ('UNMIK'). These are missions in which the UNSC, through appointed Special Representatives of the Secretary-General, has exercised or continues to exercise unprecedented power and authority over the people and territory under administration. One issue that has not been widely examined, however, is the practical effect of such mature transitional administration on the status of any waters attached to that territory; waters which would otherwise be characterised as a 'territorial sea'.

This short article aims to outline several potential approaches to characterising the legal status of the territorial sea of an entity under UN transitional administration. To do this, it will first briefly outline the context of transitional administration in East Timor by distinguishing it from that of the contemporaneous UN transitional administration in Kosovo. It will then employ the East Timor example as a lens through which to examine three possible options for characterising the territorial sea of UN-administered entities. The first

---

[3] Hilaire McCoubrey and Nigel White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996) 52; Alan Ryan, *Primary Responsibilities and Primary Risks: Australian Defence Force Participation in the International Force East Timor* (2000) 24–5. See also UNTAET, *Regulation No 2000/11 on the Organisation of Courts in East Timor*, UN Doc UNTAET/REG/2000/11 (6 March 2000); UNTAET, *Regulation No 2000/30 on Transitional Rules of Criminal Procedure*, UN Doc UNTAET/REG/2000/30 (25 September 2000); UNTAET, *Regulation No 2001/22 on the Establishment of the East Timor Police Service*, UN Doc UNTAET/REG/2001/22 (10 August 2001); UNTAET, *Regulation No 2001/23 on the Establishment of a Prison Service in East Timor*, UN Doc UNTAET/REG/2001/23 (28 August 2001); UNTAET, *Regulation No 2001/24 on the Establishment of a Legal Aid Service in East Timor*, UN Doc UNTAET/REG/2001/24 (5 September 2001).

[4] See, eg, James Crawford, *Democracy in International Law* (1994) 16. As *The Economist* noted of the Constitutional Assembly election run by the UNTAET, 'the aim has been to produce an election which the Timorese can later repeat, at a time when they will be entrusted to conduct their own affairs without the UN as their protector': 'East Timor's Election: On the Road to Independence', *The Economist* (London, UK), 1 September 2001, 25.

[5] Members of the UNSC, including the UK for example, were careful at the time to indicate that '[o]ur aim is to create places and conditions in which the refugees can feel secure. We are not talking of a territorial enclave, a separate Kurdistan or a permanent UN presence. We support the territorial integrity of Iraq. But we have to get the refugees off the mountains': UK, *Parliamentary Debates*, House of Commons, 15 April 1991, vol 189, 21 (Douglas Hurd, Secretary of State for Foreign and Commonwealth Affairs); see also Greenwood, above n 1, 36; Marc Weller, 'The US, Iraq and the Use of Force in a Unipolar World' (1999) 41(4) *Survival* 81. As Weller indicates, the no-fly zone and the temporary deployment of UN forces in the Kurdish area of northern Iraq were early examples of the UN establishing temporary and limited control over the territory of a state without consent: 94–5.

[6] Noel Malcolm, *Bosnia: A Short History* (1996) 250. See also Laura Silber and Allan Little, *Yugoslavia: Death of a Nation* (1997) 265–75.

[7] Matthias Ruffert, 'The Administration of Kosovo and East-Timor by the International Community' (2001) 50 *International and Comparative Law Quarterly* 613, 616.

two of these options are the sovereignty-based possibilities of residual colonial sovereignty and immediate vestment in the state-in-waiting (the entity under transitional administration). The third is an alternative possibility of temporary UN control of the territorial sea-designate. The article will then conclude with a few brief comments on the status of the territorial sea of entities under some degree of UN transitional administration, but in non-self-determination situations.

II BACKGROUND: THE EAST TIMOR CONTEXT

Several core aspects of the context of the UNTAET can be conveniently illustrated by comparison with that of the contemporaneous UN operation in Kosovo. Although similar in execution, the context of UNTAET, in which UNSC-mandated power and authority in the entity was exercised until its full independence on 20 May 2002,[8] differs from that of UNMIK in three significant ways.

Firstly, given Portugal's poor colonial development record until it abdicated the territory in 1975, there was little in the way of recent indigenous experience or institutions of self-governance in East Timor. Further, the subsequent 25 years of Indonesian occupation (1975–99) saw East Timor governed essentially as a military zone, again with heavily constrained local participation.[9] Kosovo, on the other hand, had had recent local experience and the memory of a significant degree of self-rule and autonomy within the Socialist Federal Republic of Yugoslavia, despite the fact that this autonomy was in abeyance in the decade 1989–99.

Secondly, while it was a relatively sudden escalation in violence that sparked involvement by the North Atlantic Treaty Organisation ('NATO'), and subsequently the UN, in Kosovo,[10] East Timor had been subject to 25 years of atrocities and resource stripping. Approximately 200 000–250 000 East Timorese (between one-quarter and one-third of the population) died in violence and famines during 1975–99.[11] This was further compounded by rampages that occurred after the August 1999 East Timorese referendum recorded a 78 per cent vote for independence. During the rampages, integrationist militia and others

---

8 *Resolution 1272*, SC Res 1272, UN SCOR, 54th sess, 4057th mtg, [1], UN Doc S/RES/1272 (1999) respecting East Timor endowed the UN Transitional Administration with 'overall responsibility for the administration of East Timor' and tasked it to 'exercise all legislative and executive authority, including the administration of justice'.

9 See William Maley, 'Australia and the East Timor Crisis: Some Critical Comments' (2000) 54 *Australian Journal of International Affairs* 151, 151–2; Coral Bell, 'East Timor, Canberra and Washington: A Case Study in Crisis Management' (2000) 54 *Australian Journal of International Affairs* 171, 172; Thomas Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (1999) 134–7.

10 Michael Byers, 'Kosovo: An Illegal Intervention' [1999] *Counsel* 16, 17.

11 'Leaders: Terror in Timor', *The Economist* (London, UK), 1 May 1999, 13; Stephen Collinson 'US Approved Invasion of East Timor', *The Age* (Melbourne, Australia), 8 December 2001, 25; John Martinkus records that, under Indonesian occupation, 'of a population of 750,000, more than 250,000 had died. This was the highest per capita death toll of any conflict in the 20th century': John Martinkus, *A Dirty Little War* (2001) xv.

inflicted further atrocities upon the populace and destroyed most remaining infrastructure.[12]

Thirdly, East Timor has long been 'one of the unfinished items on the world's post-colonial agenda',[13] recognised by the UN since 1960 as a non-self-governing territory still (technically) under Portuguese administration.[14] During its short period of declared independence — from 28 November 1975 until the Indonesian invasion, eight days later, on 7 December 1975 — 15 states recognised East Timor as independent.[15] Then, during Indonesia's annexation from 1975 to 1999, the UN recognised Indonesia's actions as secondary colonialism; that is, the imposition of a new colonial rule (Indonesia) after the end of a previous colonial rule (Portugal). Hence the UN asserted that such occupation did not eliminate East Timor's continuing right to self-determination.[16] Conversely, the majority of the International Court of Justice in *East Timor (Portugal v Australia)*[17] held that no rule of recognition or non-recognition regarding the status of East Timor exists at international law.[18] However, this decision did not detract from international acceptance of the

---

12 William Shawcross, *Deliver Us From Evil: Warlords and Peacekeepers in a World of Endless Conflict* (2000) 355–8; 'Asia: In Search of Truth and Justice' *The Economist* (London, UK), 5 February 2000, 24, 'Asia: Waiting for Wahid' *The Economist* (London, UK), 12 February 2000, 25.. In the UN-sponsored 'independence or autonomy' referendum, the East Timorese people comprehensively rejected any further political association with Indonesia. Of the 98 per cent of eligible voters who cast a ballot, 78 per cent voted for independence, despite rampant intimidation and harassment: Martinkus, above n 11, 332.

13 'Leaders: Terror in Timor', above n 11, 13.

14 GA Res 1542 (XV), UN GAOR, 15th sess, 948th plen mtg, [1], UN Doc A/RES/15/1542 (XV) (1960); *UN Charter* art 73. See generally Ruffert, above n 7, 621; Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47 *International and Comparative Law Quarterly* 537, 540.

15 Angola, Albania, Benin, Cape Verde, China, Congo (Brazzaville), Cambodia, Guinea, Guinea-Bissau, Laos, Mozambique, North Korea, Sao Tome and Principe, Tanzania and Vietnam: Grant, above n 9, 146.

16 See, eg, Marc Weller, 'Access to Victims: Reconceiving the Right to "Intervene"' in Wybo Heere (ed), *International Law and The Hague's 750th Anniversary* (1999) 360; GA Res 3485 (XXX), UN GAOR, 30th sess, 2439th plen mtg, UN Doc A/RES/3485 (XXX) (1975); *Resolution 384*, SC Res 384, UN SCOR, 30th sess, 1869th mtg, UN Doc S/RES/384 (1975). The UN General Assembly passed seven subsequent resolutions on East Timor between 1976 and 1982 recognising 'the inalienable right of all peoples to self-determination and independence': *Question of East Timor*, GA Res 31/53, UN GAOR, 31st sess, 85th plen mtg, UN Doc A/RES/31/53 (1976); *Question of East Timor*, GA Res 32/34, UN GAOR, 32nd sess, 83rd plen mtg, UN Doc A/RES/32/34 (1977); *Question of East Timor*, GA Res 33/39, UN GAOR, 33rd sess, 81st plen mtg, UN Doc A/RES/33/39 (1978); *Question of East Timor*, GA Res 34/40, UN GAOR, 34th sess, 75th plen mtg, UN Doc A/RES/34/40 (1979); *Question of East Timor*, GA Res 35/27, UN GAOR, 35th sess, 57th plen mtg, UN Doc A/RES/35/27 (1980); *Question of East Timor*, GA Res 36/50, UN GAOR, 36th sess, 70th plen mtg, UN Doc A/RES/36/50 (1981); *Question of East Timor*, GA Res 37/30, UN GAOR, 37th sess, 77th plen mtg, UN Doc A/RES/37/30 (1982). The UNSC, prior to 1999, had passed two resolutions calling for an end to Indonesia's occupation of East Timor: *Resolution 384,* above this note; *Resolution 389*, SC Res 389, UN SCOR, 31st sess, 1914th mtg, UN Doc S/RES/389 (1976). *Resolution 384*, for example, 'deplore[d] the intervention of the armed forces of Indonesia in East Timor'; 'regret[ted] that the Government of Portugal did not discharge fully its responsibilities as administering power of the Territory under Chapter XI of the *Charter*'; and 'call[ed] upon all states to respect the territorial integrity of East Timor as well as the inalienable right of its people to self determination in accordance with General Assembly resolution 1514 (XV)': preamble, [1].

17 [1995] ICJ Rep 90.

18 Grant, above n 9, 136.

former colony's entitlement to a future exercise of its deferred right of self-determination.

These factors, and others, place East Timor in a significant and distinctive legal position. Kosovo, on the one hand, is currently experiencing a rather ambiguous existence as a UN protectorate whilst also being an entity that is still formally recognised as part of the state of Serbia and Montenegro. Its future status is, at best, a deferred issue. On the other hand, East Timor's post-colonial status has always been recognised as entailing a right to independence, should that be the choice of its people. This is important because of the generous scope of international assistance which former colonial entities striving for self-determination are entitled to receive.[19] It also holds potentially significant implications for the relationship between the *Charter of the United Nations* and the *United Nations Convention on the Law of the Sea*[20] ('*Charter–UNCLOS* relationship'), for the status and legal character of the 'territorial sea' of a transitionally administered coastal entity (such as East Timor is, and Kosovo is not), and for the conduct of peace operations within this territorial sea.

III THE STATUS OF A TERRITORIAL SEA-DESIGNATE DURING TRANSITIONAL ADMINISTRATION

Determining the legal character of East Timor's territorial sea whilst under UN transitional administration is important for two reasons. Firstly, the *UNCLOS* territorial sea regime contains rights and responsibilities that are vested in the coastal state. In terms of rights, this regime entitles the coastal state to enforce applicable domestic laws, powers of arrest, the right to payment for access to its resources, and to seek compensation for environmental damage

---

19 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, UN Doc A/RES/15/1514 (XV) (1960); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the* Charter of the United Nations, GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625 (XXV) (1970). See also Weller, 'Access to Victims', above n 16, 359–60. As Conforti notes, UN practice with respect to a post-colonial entity's right to self-determination has effectively 'swept away' the limits on non-interference in a colonial power's domestic jurisdiction over such entities, creating a concept of very wide jurisdiction — albeit with a limited sphere of application: Benedetto Conforti, *The Law and Practice of the United Nations* (1996) 246−51. Self-determination enjoys the status and protection of a right afforded directly in the *UN Charter*: arts 1(2), 55; in core international instruments such as the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, arts 1, 25 (entered into force 23 March 1976); and as a building block of viable democracy (one of the fundamental tenets of the modern international system): Conforti, above this note, 249; Crawford, *Democracy in International Law*, above n 4, 6–7. However, as Helman and Ratner note, the inalienable nature of the right has often meant that '[s]elf-determination, in fact, was given more attention than long-term survivability': Gerald Helman and Steven Ratner, 'Saving Failed States' (1992–93) 89 *Foreign Policy* 3, 4. See generally James Crawford, 'The Rights of Peoples: "Peoples" or "Governments"?' in James Crawford (ed), *The Rights of Peoples* (1988) 55, 55–63; James Crawford, 'The Rights of Peoples: Some Conclusions' in James Crawford (ed), *The Rights of Peoples* (1988) 159, 159–75; Quane, above n 14, 537–48.

20 Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) ('*UNCLOS*').

inflicted in the territorial sea.[21] In terms of responsibilities, the regime obliges the coastal state to make provisions for the suppression of piracy, search and rescue, hydrographic survey, maintenance of navigational safety aids, and taking action in cases of environmental catastrophes (such as occurred with the *Torrey Canyon* oil spill, where 'action' included towing the offending vessel out to sea and sinking her).[22] Even during transitional administration, someone must be vested with, or at least be the focus of, these rights and responsibilities.

Secondly, different possible schemes of 'ownership' of the territorial sea imply different limitations, freedoms and duties for naval peace-operations forces. This article will therefore examine three possible regimes of territorial sea 'ownership', using the East Timor situation as a case study. These regimes are: the sovereignty-based possibility of residual Indonesian sovereignty, the sovereignty-based possibility of immediate East Timorese sovereignty, and the non-sovereignty-based possibility of temporary UN 'ownership' of the territorial sea-designate. Each approach has significant implications for the jurisdiction and freedom of action of naval peace-operations forces.

A *Sovereignty: Residual Colonial Sovereignty*

The first possibility is that the territorial sea-designate of the state-in-waiting remains with the previous occupying power until the entity achieves full independence. This sovereignty could take the form of a 'sovereignty-minus' or 'residual sovereignty' regime where, in the case of East Timor, Indonesia would retain nominal sovereignty over the territorial sea. Such sovereignty would be subject to the requirements of the UN peace operation, and would remain only until East Timor achieved full independence. This solution is less than satisfactory on several counts.

Firstly, as noted above, 'ownership' of a territorial sea implies certain responsibilities. An abdicating or disgruntled former colonial power is unlikely to be interested in fulfilling such duties in an area of ocean space over which it is about to lose sovereignty.

Secondly, an irresponsible colonial power left with residual sovereignty over the territorial sea-designate of a former colony could, whilst ignoring its responsibilities, continue to strip resources from that territorial sea in a last gasp of exploitation prior to relinquishing ownership.

Thirdly, residual colonial sovereignty over a former colony's territorial sea-designate would greatly complicate relations between the UN transitional administration and the former colonial power. It would create fractious and probably unworkable divisions of responsibility and allow scope for misunderstandings as to who is empowered to enforce certain laws and undertake certain actions in the territorial sea. Under such a scheme, the potential

---

21 See, eg, ibid arts 21–22, 25–27, 31, 220. For a discussion of limitations on these rights, see, eg, Bernard Oxman, 'Human Rights and the *United Nations Convention on the Law of the Sea*' (1997) 36 *Columbia Journal of Transnational Law* 399, 420–2; Bernard Oxman, 'The Regime of Warships under the *United Nations Convention on the Law of the Sea*' (1984) 24 *Virginia Journal of International Law* 809, 854.

22 See, eg, *UNCLOS*, above n 20, arts 24, 28, 198, 211, 221. See also Oxman, 'Human Rights and *UNCLOS*', above n 21, 414; Oxman, 'The Regime of Warships under *UNCLOS*', above n 21, 857.

for 'incidents' between the UN naval force and the naval forces of the former colonial power is enormous. Indeed, in the case of East Timor, the original intention was that the UN-sanctioned International Force in East Timor ('INTERFET') would gradually assume responsibility for security from the Indonesian forces.[23] This led to several stand-offs between INTERFET and Indonesian forces, and left a zone of physical, political and legal ambiguity in which other 'incidents' could occur. These incidents included looting by Indonesian forces and their repeated unwillingness to halt militia violence.[24] Ultimately, this arrangement proved so unworkable that the INTERFET force commander assumed responsibility for security at the first available opportunity. This allowed the commander to effectively implement his mandate, thereby rendering the Indonesian forces superfluous and able to be shipped out of East Timor as quickly as possible.[25]

Fourthly, such a regime would be at odds with legal and operational practice in UN transitional administration. The current practice of basing UN transitional administration mandates in Chapter VII of the *UN Charter* entails, as Ruffert notes, 'the suspension of all residuary powers of both Yugoslavia and Indonesia during international administration'.[26] On a *legislative* level, practice in East Timor and Kosovo has indicated that the law applicable during the period of administration is an amalgamation of pre-existing law, international law, and UN regulations.[27] However, as this practice also clearly indicates, the force of any residual colonial law is not dependent in any way upon the sovereignty of the former colonial power; rather such law enjoys force only because it has been declared extant by the UN transitional administration. It remains valid only until amended, abolished or found inconsistent. As UNTAET's *Regulation 1999/1 on the Authority of the Transitional Administrator in East Timor* made clear, residual Indonesian law applied in East Timor during the transitional period only because the Transitional Administrator had so declared.[28] Further, it applied only insofar as it was in accordance with the Transitional Administrator's further regulations and directives. Thus residual sovereignty plays no role in such interim legal schemes and it is consistent that a similar regime would also apply over any associated territorial sea-designate. On an *operational* level, practice in East Timor (Kosovo not possessing a coastline) was for UN naval forces to operate in the territorial sea-designate to the exclusion of Indonesian (and indeed all other unauthorised) naval forces.

Finally, a regime of temporary residual sovereignty would generally be antithetical to the intention of UN transitional administration and, in the case of East Timor, self-determination. Quite clearly, that intention is to assist the entity to express its own political, social and economic will, allow it to pursue its own chosen future, and equip it with the human, material and institutional capacity to do so. To leave a former colonial power or occupier — avaricious, disgraced or

---

23 *Resolution 1264*, SC Res 1264, UN SCOR, 54th sess, 4045th mtg, UN Doc S/RES/1264 (1999).

24 See, eg, Ryan, above n 3, 71–2.

25 See generally ibid 68–76.

26 Ruffert, above n 7, 620.

27 Ibid 624.

28 UN Doc UNTAET/REG/1999/1 (27 November 1999).

otherwise — with any form of temporary sovereignty over, or any residual rights in, the entity would be politically unacceptable to the vast majority of the entity's people, the UNSC and the wider international community.

B *Sovereignty: The Territorial Sea Vests Immediately in the State-in-Waiting*

Sovereignty over the territorial sea attaching to the land territory of a former colonial entity will eventually vest in that entity. This is uncontentious, and an immediate investiture in a state-in-waiting of sovereignty over its territorial sea-designate is thus an attractive possibility. However, it is also premature and problematic for several reasons. Firstly, the state-in-waiting is *not a state*, and although it eventually enjoys all of the status, attributes and access to sovereignty accorded to full statehood, the state-in-waiting does not enjoy these benefits under UN transitional administration. This is clear in the case of East Timor, but not yet clear in the case of Kosovo. Further, in contexts such as that of East Timor, it must be remembered that self-determination does not automatically translate into independence. Indeed, self-determination can result in association with, or outright incorporation into, another state.[29] These are choices which have significant and quite limiting implications for both sovereignty generally, and independent ownership of a territorial sea in particular.

Secondly, a regime of immediate investiture of sovereignty over a territorial sea-designate requires that a precise moment of vesting be established. This is important because it determines when the colonial power loses the rights and responsibilities of the coastal state, and when the state-in-waiting gains them. Similarly, this moment of transfer of ownership holds significant implications for the liability of a coastal state for breaches of its duties in the territorial sea, entitlements to compensation, and other enforcement rights which flow to the coastal state as a result of breaches of the territorial sea regime by other states. However, there is no easily definable point at which this transfer of 'ownership' takes place. The moment of investiture would ultimately be situational rather than certain in international law. The possibilities include the date of a ballot endorsing the choice for independence, the date of declaration of full independence, or even the date from which effective control is established over the capital or over the territorial sea itself.

Thirdly, where a UN transitional administration is necessary to facilitate the progress of a former colonial entity towards independence, it is generally because the entity itself does not yet possess the institutions, capacity or resources to realise this independence. In such situations, as with East Timor, it is unlikely that the state-in-waiting would have the ability to enforce its authority, protect its rights, or fulfil its responsibilities vis-a-vis its territorial sea. Although the linkage between the *right* to govern and the *ability* to govern ocean space is not necessarily strong in *UNCLOS*, neither is it non-existent.[30]

Finally, as with the prospect of residual colonial sovereignty (and hence legitimate naval activity) in a territorial sea, the operational and legal

---

29 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, [57] (Opinion of the Court).

30 Oxman, 'Human Rights and *UNCLOS*', above n 21, 402.

complications of having two differently authorised and differently empowered naval forces operating in the same territorial sea are legion. The presence of both an authorised UN naval force and a nascent but independent local naval force, operating separately but simultaneously in the territorial sea-designate, using different procedures, operating in accordance with different guidelines, and attempting to exercise jurisdiction over similar issues, is fraught with danger. Again, such a scheme promises the possibility of demarcation disputes, the probability of misunderstandings and the potential for dangerous 'incidents'. Indeed, this issue arose in East Timor, where an indigenous defence force — *Forcas de Defensa de Timor Lorosae* ('*FDTL*') — was raised and armed (including a maritime element) and commenced deploying to its future operational bases during the period of transitional administration. UNTAET approached the issue of the *FDTL*'s coexistence with the UNTAET peacekeeping force through a Transitional Military Arrangement backed up by localised coordinating procedures to cover activities on the ground.[31] These localised procedures involved some degree of phased withdrawal of UN forces, timed to correlate with the *FDTL*'s move into each area.[32] However, such 'friendly on friendly' operations involving forces sharing or passing through the same territory can be very complex and problematic, requiring detailed coordinating arrangements, geographical cantonment, adjustments to rules of engagement and a very strictly defined command and control network.[33]

C *An Alternative Approach: Temporary UN Control of the Territorial Sea-Designate*

The UN is not a state, and UN transitional administrations do not draw their authority from the concept of sovereignty. Rather, they draw it from the functional authority of the UNSC, as mediated through the relevant UNSC mandate, to maintain international peace and security. However, UN transitional administrations do act for and on behalf of the territories and peoples they administer.[34] Therefore, an alternative to a sovereignty-based approach to territorial sea 'ownership' might be to grant the UN temporary control over the territorial sea-designate. Several legal and operational arguments support this approach.

Firstly, just as UN transitional administration 'law' applies as the interim domestic legal order throughout the territory of the entity, it is logical that any attached territorial sea should also come under the same legal regime. Practice supports this argument on two levels. First, as was the case during the

---

31 Interview with Scott Gilmore, Office of the National Security Adviser, UNTAET (Dili, East Timor, 6 February 2002).

32 Ibid.

33 Interview with Major-General Ian Gordon, Deputy Force Commander, Peacekeeping Force, UNTAET (Dili, East Timor, 2 February 2002). Gilmore similarly notes that *geographical* separation of the forces (ensuring minimal contact) aims precisely to avoid both the potential for incidents and problems, and thus also the need to plan comprehensively for their resolution: ibid. As both Gordon and Gilmore observe, the alternative solution (to divide responsibilities between the two forces by *issue*) is not only effectively unworkable, but would also require geographical cohabitation. This would create an environment in which incidents and misunderstandings would almost inevitably occur.

34 Ruffert, above n 7, 627.

transitional administration in East Timor, it was UNTAET, under the delegated authority of the UNSC, which had the power to bind the future state to international treaties and to other international agreements (such as the *Timor Gap Treaty*)[35] negotiated on its behalf.[36] Second, as was indicated in *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)*,[37] 'the International Court seems to have accepted the principle of review of the acts of a trustee affecting the beneficiary prior to the independence of the territory concerned'.[38] Although this case dealt specifically with Australia's UN-sanctioned trusteeship over Nauru, similar fiduciaries, such as the UNSC (while exercising UN transitional administration), should also clearly be liable for such harm. Similarly, it seems widely accepted that the UN should be held liable for breaches of international law by its transitional administrations. This indicates that responsibility for acts that take place within the entity and its territorial sea-designate during transitional administration lies with the UN, not with the entity itself; where responsibility lies, associated power should also reside.

Secondly, the UN, although not a state, can and has possessed temporary authority over both land and sea territory. UN transitional administrations hold authority by virtue of the UNSC's role as the protector of international peace and security — particularly through the powers accorded the UNSC under Chapter VII of the *UN Charter*. These powers include any 'measures' that the UNSC believes necessary to stabilise a situation and restore international peace and security. These include temporary authority over territory, transitional administration or the suspension of other 'sovereign' rights such as national self-defence (once the UNSC is seised of the issue). International organisations generally, and the UN in particular, are bound by the *UN Charter*, the wider principles it embodies and the practice it supports.[39] This must include the law and practice of peace operations, the maintenance of international peace and security, and the responsibilities inherent in assisting entities to achieve post-colonial self-determination. With respect to *UNCLOS* specifically, the UN itself, and relevant UN agencies such as the International Maritime Organisation,

---

35 *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, opened for signature 11 December 1989, Australia–Indonesia, [1991] ATS 9 (entered into force 9 February 1991) ('*Timor Gap Treaty*').

36 *Exchange of Notes Constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) Concerning the Continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989*, [2000] ATS 9 (entered into force 10 February 2000, with effect from 25 October 1999). On the Timor Gap negotiations between Australia and UNTAET, see Don Greenlees and Nigel Wilson, 'Touch and Go on Way to Timor Deal', *The Weekend Australian* (Sydney, Australia), 7 July 2001, 6.

37 [1992] ICJ Rep 240.

38 Crawford, *Democracy in International Law*, above n 4, 23.

39 Bardo Fassbender, 'The *United Nations Charter* as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529, 609; *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, opened for signature 21 March 1969, 25 ILM 543, art 30(6) (not yet in force).

all observe *UNCLOS* in practice and aim to fulfil their requirements under it.[40] Finally, *UNCLOS* states that the '*Convention* shall be open for signature by … international organizations, in accordance with Annex IX'.[41] Annex IX elaborates upon this right, declaring that a signatory international organisation

> shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this *Convention*, on matters relating to which competence has been transferred to it by those member States.[42]

Thus, given that member states of *UNCLOS* have transferred their competence for the maintenance of international peace and security to the UN, it is arguable that the UNSC — as an organisation whose actions and involvement are integral to implementation of *UNCLOS* — can temporarily inherit and exercise rights and responsibilities under the *UNCLOS* territorial sea regime through an authorised transitional administration. As noted previously, the UN has in fact exercised different forms of temporary authority over both land and sea territory. This has been evident in the Northern Iraq no-fly zone and Kurdish humanitarian operation, the safe areas in the Balkans and the five kilometre UN-NATO monitored 'ground safety zone' set up inside Serbian territory along the border with Kosovo.[43] From a maritime perspective, this practice is most recently illustrated in the declaration of an UNTAET Area of Operations which included the waters around East Timor extending out to 12 nautical miles from East Timor's prospective baselines.[44] UNTAET effectively treated the 12 nautical mile sea zone around East Timor as the territorial sea-designate of the East Timorese state-in-waiting.[45] Further, an effective (if not officially promulgated) regime of maritime zones around East Timor underpinned UNTAET's capacity to negotiate with states on issues such as the oil and gas resources of the Timor Gap, which presumed an Exclusive Economic Zone-designate and Continental Shelf-designate.[46]

In the context of East Timor, the third major argument supporting this approach is that it conforms with what is required under the international law of

---

40 See, eg, David Anderson, 'Legal Implications of the Entry into Force of the *UN Convention on the Law of the Sea*' (1995) 44 *International and Comparative Law Quarterly* 313, 316–7. As Kelly notes, it 'is established that the UN has the capacity to enter into and be bound by international conventions, particularly in view of the *Vienna Convention on the Law of Treaties Between States and International Organisations or between International Organisations*'. Further, Kelly continues, it 'seems clear from the *Expenses* case that the UN has capacity to engage in treaties that are in accordance with or authorised by the *Charter* of the Organisation': Michael Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges* (1997) [443]; *Certain Expenses of the United Nations Case (Advisory Opinion)* [1962] ICJ Rep 151.

41 *UNCLOS*, above n 20, art 305(1)(f).

42 Ibid annex IX art 4(3).

43 'Europe: The Tension Rises Again' *The Economist* (London, UK), 2 December 2000, 64. UN action has been known, on such occasions, to 'lead to the establishment of a degree of internal autonomy within a State polity' to ensure minority rights and humanitarian assistance: Kelly, above n 40, [127].

44 Interview with Commander David Letts, Chief Legal Officer, Peacekeeping Force, UNTAET (Dili, East Timor, 17 February 2002).

45 Ibid. Although, as Letts notes, the formal act of declaration of a territorial sea — an act of significant sovereign symbolism — was consciously left for the new government of East Timor to promulgate at some time after independence on 20 May 2002.

46 See *UNCLOS*, above n 20, pts V, VI.

self-determination. Firstly, as noted previously, an entity's legitimate right to self-determination imposes a duty upon other actors (states and the UN) to assist that entity to achieve this self-determination. In turn, this imposed upon UNTAET the duty to protect and promote the territorial integrity, resources and future sustainable development of the state-in-waiting.[47] With respect to the territorial sea-designate, this duty can involve negotiating advantageous seabed resource treaties, patrolling and protecting the future state's fisheries, and guaranteeing its seaward security. However, this duty to assist could also extend to require the UN to undertake (or subcontract out) territorial sea obligations, such as maritime search and rescue, surveying and pollution response on behalf of the state-in-waiting during the transitional period.[48] Secondly, *UNCLOS* itself is coloured by its context, in this case as reflected in Resolution III,[49] which declared, inter alia, that:

> In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under this *Convention shall be implemented for* the benefit of the people of the territory with a view to promoting their well-being and development.[50]

Clearly, in the case of a UN transitional administration, it is the UN itself which is best placed both to fulfil this duty with respect to the territorial sea-designate, and to hold in trust any rights and benefits that will accrue to the entity on achieving full independence.

The fourth argument in favour of this scheme is that it is far easier to implement and maintain than schemes of residual sovereignty vested in the former colonial power, or interim quasi-sovereignty vested in the state-in-waiting. Initially, the point at which UN control and authority over the territorial sea-designate coalesces, and the former colonial power's sovereignty ends, is easily identifiable: it is the moment at which a UNSC resolution implementing a transitional administration comes into force.[51] In addition, having the UN exercise sole authority over the territorial sea-designate during the transitional period allows a UN naval force to operate clearly, effectively and without external hindrance as the sole enforcer of laws, protector of rights and implementer of responsibilities within the territorial sea. This frees the UN naval

---

47 UNTAET, *Regulation No 2000/19 on Protected Places*, UN Doc UNTAET/REG/2000/19 (30 June 2000).

48 See, eg, Robert Staley, *The Wave of the Future: The United Nations and Naval Peacekeeping* (1992) 51–3. Under UNTAET, for example, search and rescue responsibilities were vested in the International Civilian Police and the Peacekeeping Force components of the Transitional Administration.

49 *Final Act of the Third United Nations Conference on the Law of the Sea*, adopted 10 December 1982, Resolution III ('*Resolution III*').

50 Ibid (emphasis added). *Resolution III* '[r]elating to territories whose people have not obtained either full independence or some other self-governing status recognized by the UN or territories under colonial domination' was one of four resolutions adopted at the Eleventh Session (1982). These four resolutions, with *UNCLOS* itself, form the 'integral whole' which was adopted at the Third United Nations Conference on the Law of the Sea on 30 April 1982, and then opened for signature 10 December 1982: see Myron Nordquist, United Nations Convention on the Law of the Sea *1982: A Commentary* (1995) vol 1, 420–1, 433.

51 Or, in the case of Somalia, it is the moment of implementation of other measures requiring or implying UN authority and control over the territory or territorial seas.

force to act without the complications and potential for 'incidents' inherent in a regime of split sovereignty, or divided rights and responsibilities, over the same territorial sea.

Thus the most logical, practical and beneficial approach to authority over the territorial sea-designate of a state-in-waiting under UN transitional administration is a scheme of UN 'control' or 'administration'. Effective until the entity achieves full independence, this control differs from sovereignty in four important respects: time, purpose, end-state and legal character. The nature of this control is overtly and determinedly temporary and is such that it cannot be used for the UN's own enrichment. This is because it is exercised on behalf of, and exists for the benefit of the entity and its people, rather than for the benefit of the controller. It is effectively a beneficiary–trustee relationship. Also, the UN transitional administration is informed by a required end-state in that it is exercised, as was the case in East Timor, with a view to transitioning the entity to self-governance, thus allowing the East Timorese people to exercise their own sovereignty. Finally, the UN is not a state, and thus is not accorded access to many of the international and domestic rights and freedoms inherent in the concept of sovereignty — such as exploitation of territory and resources for its own gain.[52]

However, while the *purpose* of UN control is not sovereign in character, within its particular milieu, the *scope* of UN control is equally as powerful as that conferred by sovereignty over a territorial sea. Under the *UN Charter*, *UNCLOS*, and a mandate for full or partial transitional administration, the UN possesses the authority to police, control and manage the affairs of the entity. This includes referential access to the full suite of rights and responsibilities that attach to the territorial sea under both *UNCLOS* and the interim domestic legal scheme. As Kingsbury notes, 'sovereignty provides the means by which people can express … consent to the application of international legal norms and to international institutional competencies'.[53] Thus while UN transitional control of a territorial sea-designate can be neither exploitative and sovereign in purpose, nor indeed sovereign in name, it is nevertheless quasi-sovereign in scope. In terms of both intent to bind the UN transitional administration and the peoples of the entity to the international legal norms and processes that apply in territorial seas, UN control over a territorial sea is essentially sovereign in effect. This claim is further supported by the scope of issues over which its authority can be exercised.

For some, the 'non-sovereign' nature of a UN transitional administration's control over a territorial sea (or over land territory) may be too legally ambiguous and uncertain to be satisfactory. With respect to physical territory, some might argue, if authority is not ultimately sourced from sovereignty, it cannot be controlling in nature. This argument is premised upon the rather

---

[52] David Letts, for example, describes the legal character of UNTAET administration as quasi-sovereign in effect, but with three significant caveats: it is administration *on behalf of* the people of East Timor, it is administration *with a view* to enabling East Timorese self-governance, and it is not properly and legally definable as 'sovereignty' because the UN *is not a state*: Letts, above n 45.

[53] Benedict Kingsbury, 'Sovereignty and Inequality' (1998) 9 *European Journal of International Law* 599, 601.

dogmatic assertion that when it comes to physical territory, sovereignty can reside in only one state.[54] However, this view ignores the longstanding 'grey area' that exits between these two extremes. First, the High Seas, Antarctica, the common heritage of humanity and space — all definable in some form as 'territory' — can be utilised appropriately by all states, despite being owned by none.[55] Second, the UN trusteeship concept, enshrined in Chapter XII of the *UN Charter*, is premised upon the notion that there is in fact a middle ground of effective control over territory; one that is neither UN sovereignty, nor an imposition upon the legitimate sovereignty of another state. Third, when dealing with ocean space, 'authority' is generally the sum of 'power' and 'legitimacy'. Sovereignty does not necessarily play the predominant role in defining legitimacy at sea. Finally, the nature of control exercised by a UN transitional administration can be distinguished from occupation or colonisation[56] on three grounds: means, aims and actors. Firstly, UN transitional administration is a facilitative process of capacity-building towards self-government, whereas occupation and colonisation perpetrate an imposition of rule in order to access resources and to achieve the subjugation of the populace. Secondly, UN transitional administration is fundamentally conceived of as a temporary measure, its timeline terminating with the formal creation of a sustainable and self-administering entity; whereas occupation and colonisation are generally of undetermined duration, and aim to achieve some material or strategic benefit for the occupier. Thirdly, UN transitional administration is undertaken by the UN in its persona as the international community's representative of altruistic internationalism; whereas occupation or colonisation, whether by a single power

---

54 As Kelly notes of this 'changing face of sovereignty': 'There is no question that the concept of sovereignty is a constantly evolving one and that we are at present witnessing one of the more dynamic periods in this evolution': Kelly, above n 40, [110], discussing J N Rosenau, 'Sovereignty in a Turbulent World' in Gene Lyons and Michael Mastanduno (eds), *Beyond Westphalia?: State Sovereignty and International Intervention* (1995) 191–2. Similarly, Michael Matheson asks,

> does the exercise of [UN transitional] governance represent an impermissible interference with state sovereignty? I believe it does not. The exercise by the Security Council of functions under Chapter VII does not derogate from the sovereignty of any UN member affected by its decisions.

Matheson, above n 1, 84.

55 See, eg, *UNCLOS*, above n 20, arts 136 and 137 on the seabed as the common heritage of humanity; *Agreement Governing the Activities of States on the Moon and other Celestial Bodies*, opened for signature 18 December 1979, 1363 UNTS 3, art 11 (entered into force 11 July 1984) on the moon as the common heritage of humanity; *Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71, art 4(2) (entered into force 23 June 1961) which effectively 'suspends' territorial claims over Antarctica; *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205, art 2 (entered into force 10 October 1967). See generally, R W G de Muralt, 'The Military Aspects of the *United Nations Law of the Sea Convention*' (1985) 32 *Netherlands International Law Review* 95; Nikos St Skourtos, 'Legal Effects for Parties and Nonparties: The Impact of the *Law of the Sea Convention*' in Myron Nordquist and John Moore (eds), *Entry Into Force of the* Law of the Sea Convention (1995) 187, 201; *UNCLOS*, above n 20, art 88–99.

56 UN interventions such as those in Somalia and Cambodia may effectively be tantamount to a new type of colonialism: see Charles Krauthammer, 'The Immaculate Intervention', *Time* (New York, US), 26 July 1993, 66; Ramesh Thakur, 'From Peacekeeping to Peace Enforcement: The UN Operation in Somalia' (1994) 32 *Journal of Modern African Studies* 387, 404.

or a condominium of powers, is generally undertaken in their own national interests.

As Politakis succinctly observes, 'to identify a pattern of UN action which does not enjoy a clear legal basis in the *Charter* is not uncommon or unique'.[57] Indeed, UN peace operations best demonstrate this truism. Therefore, just as UN transitional administration is simply the current high water mark in the evolution of the UNSC's roles and powers with respect to maintaining international peace and security, the fact of temporary UN control over a territorial sea is also an aspect of these roles and powers. UN control over a territorial sea-designate, with a state-in-waiting as the beneficiary, should not be seen as problematic simply because that control is not definitively sovereign. It is not, after all, unusual that international law appears constructively ambiguous on such politically sensitive issues.

IV UN CONTROL OF TERRITORIAL SEAS IN NON-SELF-DETERMINATION CONTEXTS

It is arguable that describing UN temporary authority over a territorial sea as a form of fiduciary control, but attributing to it the full scope of powers, rights and responsibilities available to a coastal state, could equally operate in non-self-determination situations. This article will briefly refer to two such cases in which the UN exercised authority over a territorial sea in such situations: Somalia and Cambodia.

A *Somalia: A Failed State*

Somalia in 1992 was a state 'whose government [had] effectively collapsed with no replacement to provide basic governmental services'.[58] As in Liberia and Sierra Leone, it was a territory in which 'state structures had unravelled and violence had become an end in itself, profiting warlords and their factions.'[59] This anarchy, along with the humanitarian catastrophe of famine and refugee flows, threatened to spill across Somalia's already porous borders, and destabilise the region. This, and constant media coverage of the famine, finally prompted the UNSC to declare that the situation constituted a threat to international peace and security.[60] This was, in effect, the case in point that justified the initially curious wording of the UN General Assembly's June 1992

---

57 George Politakis, 'UN-Mandated Naval Operations and the Notion of Pacific Blockade: Comments on Some Recent Developments' (1994) 6 *African Journal of International and Comparative Law* 173, 193.

58 Paul Diehl, 'With the Best of Intentions: Lessons from UNOSOM I and II' (1996) 19 *Studies in Conflict and Terrorism* 154.

59 Shawcross, above n 12, 343. See also Diehl, above n 58, 153–8; Richard Jackson, 'The State and Internal Conflict' (2001) 55(1) *Australian Journal of International Affairs* 65, 68–74. See generally Kelly, above n 40, [165]–[166], chs 7–10.

60 Ruffert, above n 7, 617; Richard Lillich, 'Humanitarian Intervention through the United Nations: Towards the Development of Criteria' (1993) 53 *Heidelberg Journal of International Law* 557, 566. The UNSC initially authorised intervention to facilitate the delivery of humanitarian aid within Somalia, but later expanded this mandate to include creating a stable and relatively safe environment for the distribution of aid, some basic governmental functions, and the apprehension of violators of the mandate: see generally *Resolution 837*, SC Res 837, UN SCOR, 48th sess, 3229th mtg, UN Doc S/RES/837 (1993).

resolution on humanitarian involvement: that humanitarian assistance '*should* [not 'shall'] be provided with the consent of the affected *country* [not 'state' or 'government'] and in principle on the basis of an appeal by the affected *country*'.[61] In Somalia, there was no government to give consent, but the needs of the people clearly called for UNSC action. As Kingsbury notes, when the international community dispenses with a state's sovereignty, it can de-legitimise that state.[62] But in Somalia, there was no 'state', nor even a representative of the state, to de-legitimise. Thus UN action in Somalia was not an *imposition upon* Somalia's sovereignty, nor was it aimed at *creating* the possibility of such sovereignty, as in East Timor. Rather, UN action was an attempt to *restore* Somalia's sovereignty. As Helman and Ratner argue, sovereignty 'is consistent with the idea of conservatorships [such as that of the UN in Somalia] because the purpose of conservatorship is to enable the state to *resume responsibility for itself*'.[63] However, despite considered arguments voiced at the time that rebuilding Somalia into a self-governing nation would take five to ten years,[64] the UN withdrew in 1995 and the grafted political order it had attempted to establish simply collapsed.[65]

In the Somali context, the UN did not usurp state sovereignty; rather, it attempted to restore it in a territory deemed incapable of expressing this sovereignty. Somalia, as a single entity, was incapable of being held accountable for actions taking place within its borders, and indeed for those actions, perpetrated by its 'nationals', which had significant effects outside its borders. The limited UN administrative activity in Somalia took on some of the aspects of modern, mature UN transitional administration,[66] and also included use of the Somali territorial sea for UN naval operations, such as logistics support and surveillance. In many ways, this situation was similar to that surrounding East Timor, because the possibility of the entity eventually (re)expressing its own sovereignty was perceived to rest upon international assistance in (re)creating the environment and capacity for that expression. Again, the UN effectively

---

61 Quoted and discussed in Helman and Ratner, above n 19, 11; *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*, GA Res 46/182, UN GAOR, 46th sess, 78th plen mtg, annex, [3], UN Doc A/RES/46/182 (1991) (emphasis added).

62 Kingsbury, above n 53, 620–1.

63 Helman and Ratner, above n 19, 17 (emphasis added). Sovereignty, as Helman and Ratner imply, is not only about what a state can do internally, but also about who is held responsible internationally.

64 For example, the then New Zealand Foreign Minister, Don McKinnon: see Robert Patman, 'The UN Operation in Somalia' in Ramesh Thakur and Carlyle Thayer (eds), *A Crisis of Expectations: UN Peacekeeping in the 1990s* (1995) 103.

65 Thakur, above n 56, 403; see also Diehl, above n 58, 153.

66 Such as, controversially, a declaration by the UN Secretary-General's Representative of the criminal law to be enforced within Somalia. Lorenz observes of the UNOSOM II mandate that

> [t]he new mission included providing humanitarian assistance; rehabilitating political institutions and the economy; promoting national reconciliation; completing the disarmament process; establishing a national police force; and reconstituting the courts and legal system[:]

F M Lorenz, 'Forging Rules of Engagement: Lessons Learned in Operation United Shield' (1995) 75(6) Military Review 17.

exercised functional authority and control over the Somali territorial sea — possibly much more comprehensively than it ever did over parts of the land territory of Somalia. Thus in the case of a collapsed or failed state (when that state has become incapable of expressing and being held accountable for its sovereignty), UN authority over a territorial sea as a fiduciary trustee should be characterised as legitimate even in the absence of any formal request for, or consent to, assistance.

B *Cambodia: A Failing State*

The 'need to safeguard international peace and security' can prompt UN action 'aimed, at least partly, at rescuing failing states through direct involvement in their internal affairs.'[67] The focus of the United Nations Transitional Authority in Cambodia mission was to restore peace, temporarily take over and reform civil administration, and supervise elections in a state that was failing, but had not yet entirely collapsed.[68] In doing so, the UN also aimed to 'eliminate a great source of regional tension in Southeast Asia'.[69] Cambodia possessed a corrupt and barely functioning government, but was so racked by civil war and internal strife, and so territorially segmented, as to be on the verge of total disintegration.[70] The *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict* essentially entailed a temporary voluntary relinquishment of the state of Cambodia's control over its own internal and external affairs,[71] in the hope that UN administration could rescue the state and save it (and the region) from what would become Somalia's fate. In a corporate analogy, Cambodia placed itself into voluntary administration because it feared it was insolvent, losing control and effectiveness, and because it wanted (with a little encouragement from the international community) to save itself. The UN was called in as the administrator and, as with a corporate administrator, had full powers to manage the state, deal with its assets and restructure its operations.

The sovereignty of the state of Cambodia in comparison still existed, and was vested in the Supreme National Council of Cambodia ('SNC') — a body created under the *Paris Peace Agreement* — that comprised representatives from the four main warring factions.[72] Thus the institutional source or holder of Cambodia's sovereignty could be readily identified. Therefore, the context of the relationship between UN authority and state sovereignty in Cambodia differs from that in Somalia and East Timor. In Somalia, sovereignty had existed, but no current institutional holder could be identified, while in East Timor, sovereignty had yet to be fully created and adopted by an indigenous institutional holder. In Cambodia, the international community's 'acceptance of limitations on [the] absolute sovereignty' of another fellow state allowed the UN to respond effectively and authoritatively and to rescue a failing state by assuming its

---

67 Helman and Ratner, above n 19, 8.

68 See generally Shawcross, above n 12, ch 3.

69 Helman and Ratner, above n 19, 8; see generally ibid.

70 See, eg, Shawcross, above n 12, 22.

71 Opened for signature 23 October 1991, 1663 UNTS 27, annex 1, s A (entered into force 23 October 1991) ('*Paris Peace Agreement*'); Helman and Ratner, above n 19, 16.

72 See also Shawcross, above n 12, 53–65.

governmental functions in order to implement a peace agreement.[73] Further, though sovereignty remained vested in the SNC, this body could not veto UN action and policy. The UN, whilst following unanimous directions from the SNC, was entitled to disregard the SNC's views if, *in the UN's opinion*, they were inconsistent with the peace agreement or its implementation.[74]

In this context, UN authority and control over the Cambodian territorial sea was, again, effectively absolute, consistent with its delegated authority and responsibilities. Nevertheless, in this situation, the nominal sovereignty of the territorial sea was easily located because it remained with the SNC. Functionally, however, the UN's authority and control was theoretically as wide and unhindered as that of UNTAET. Thus UN authority over a territorial sea does not rely on sovereignty for its force and scope. Further, even where sovereignty does exist, regardless of whether it can be 'located' or not, UN authority can still overlay this sovereignty, acting as a referential incorporation of the UNSC's international peace and security mandate into the *UNCLOS* territorial sea regime. Therefore, given the international community's emerging views regarding the legal irrelevance of a belligerent's consent to an action under Chapter VII of the *Charter* to halt that belligerent's illegal conduct, it is also clearly arguable that if Kosovo did have a coastline, the UN Transitional Administration's authority and control over the Kosovar territorial sea would be as wide and total — and to the exclusion of Yugoslav naval forces — as that which applied in East Timor, regardless of the sovereignty which Serbia and Montenegro still nominally holds over the territory of Kosovo.

V CONCLUSION

From its origins in plans for the international administration of Trieste, Libya and Jerusalem, through to the current mature transitional administrations of Kosovo and East Timor, the territorial and effectively domestic authority exercised by the UN transitional authority has expanded the traditional notion of international peace and security. Thus, it seems only consistent that the theory and practice of UN transitional administration should also have similar implications for the *Charter–UNCLOS* relationship, and for UN authority at sea — especially in the territorial sea-designate of a state-in-waiting, such as East Timor prior to 20 May 2002, and indeed even in disintegrated or disintegrating states which are placed temporarily under UN administration. In such situations, UN naval peace operations forces can and have operated as the only authority in what are effectively, albeit temporarily, UN waters. Therefore, as a high water mark, UN transitional administration holds significant, almost quasi-sovereign, implications for UN naval operations. Furthermore, because it so clearly and overtly accommodates practices not even contemplated in the *UNCLOS* territorial sea regime, the UN transitional administration also offers compelling evidence for, and an assertion of, the relevance of an integrative approach to *Charter–UNCLOS* interaction.

---

[73] Helman and Ratner, above n 19, 11.

[74] Ibid 15. See also Matheson, above n 1, 77; *Paris Peace Agreement*, above n 71, annex 1, s A.