Legitimacy and Accountability of International Administrations:
A Commentary on Four Papers

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Introduction

I would like to thank the organizers of the European Society of International Law 2005 Research Forum for choosing to hold a panel on international territorial administration, a subject which didn't exist as a field of study even a few years ago. One of the distinctive features of research on a new topic is that those working on it are involved in defining the parameters of the field of study itself. This is a challenging task, since such scholarship is not only contributing to the sum of critical knowledge on the key issues at stake in relation to international territorial administration; the very choice of topics to serve as the focus for such analysis plays a part in determining which issues are regarded as important, and which are not. I am therefore particularly grateful to the organizers for their decision to focus on legitimacy and accountability, which are surely two of the most important issues raised by the phenomenon of international territorial administration. An emerging strand of scholarship on this subject takes an exclusively or overwhelmingly technocratic and managerial approach to it; it is vital that such research is complemented by other work that faces up to some of the important political issues in play.[1]

All the panellists are engaged in this important work, and from their papers we see a diversity of perspectives and approaches, from Carsten Stahn's focus on domestic structures of accountability, to Erica Harper's discussion of model legal codes, Agnès Hurwitz' consideration of rule of law initiatives and Jean d'Aspremont Lynden's thesis on self-determination. I will make a few remarks on each paper in turn.

Carsten Stahn: Accountability and Legitimacy in Practice – Lawmaking by Transitional Administrations

This paper provides a valuable assessment of two key areas of domestic practice on the issue of accountability: first, the nature of domestic legal review; and second, the nature of consultation with and control by local authorities.

Legal review

On the first area of practice, legal review, the author identifies one potential reason why international administration missions have not been conceived in a manner allowing for much, if any, domestic judicial review: that international administration is seen as operating in the international, not the domestic, sphere. To this potential reason I would add two others.

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[1] See generally Ralph Wilde, 'Representing international territorial administration: a critique of some approaches,' (2004) 15(1) *European Journal of International Law* 71 – 96.

In the first place, one obvious causal factor is that international officials involved in territorial administration, like any other government officials, often resist review as something that makes their work more difficult.

The second potential causal factor concerns certain ideas of international organization rooted in a conception of the relationship between the identity of these actors, on the one hand, and that of states, on the other, in terms of opposites. Sometimes there is a presumption that international organizations are humanitarian and benign, symbolized by the appointment of two celebrated humanitarians – Bernard Kouchner and Sergio Vierra de Mello – as the first UN Administrators in the two 1999 UN plenary territorial administration projects in Kosovo and East Timor. Such a presumption might lie behind the notion that it is unnecessary to subject the 'humanitarian' UN to the same level of review as would be in order were regular state administration under examination. Related to this is the idea that international organizations perform activities that are qualitatively different from the activities conducted by states. This can be seen in the traditional paradigm of peacekeeping where an international organization monitors what a state (and its army) does, rather than taking on the role of the state. If one is approaching the construction of an administration mission on the basis of this paradigm, the need for effective accountability mechanisms is perhaps not in the foreground.

The effect of ideas concerning the normative character of the UN on the adequacy of review mechanisms in the international administration context feeds into the broader issue of the applicability of certain key areas of international law, for example human rights and humanitarian law, to the UN. For many years the Secretariat objected to this on the grounds that the UN, not being a state with its own territory, was not able to fulfil obligations in the relevant instruments in their entirety when such obligations were conceived with states in mind.[2] Whereas these constraints do operate most of the time, they clearly do not subsist when the UN is asserting plenary governmental authority.

Local consultation and participation

The author describes the second area of domestic practice relevant to accountability – the nature and extent of local consultation/participation – as the 'democratic challenge' of international territorial administration. That officials involved in administration missions are not selected or elected by the local population 'raises a legitimacy problem,' and deficiencies in the nature of local participation in governance represents an 'accountability gap.' On legal reform more narrowly, the author argues that parachuting in pre-conceived legal frameworks should be replaced by a process involving local authorities in law-making choices. This is a 'lesson from colonial practice.'

It is indeed interesting to look at the colonial analogy and consider its relevance to international administration. However, I would suggest that this might lead to a different conclusion to the one drawn by the author if one considers the compatibility of greater local participation with the nature of the enterprise being engaged in. I am led in this direction by William Bain's excellent book on the concept of trusteeship in international society.[3] Dr Bain

[2] See e.g. Legal Opinions of the Secretariat of the United Nations, Question of the possible accession of intergovernmental organizations to the Geneva Conventions for the protection of war victims, 15 June (1972) *United Nations Juridical Yearbook* 153.

[3] William Bain, *Between Anarchy and Society – Trusteeship and the Obligations of Power* (CUP, 2003).

reminds us that the underlying concept of trust – that certain individuals are deemed incapable of caring for themselves and for this reason are placed under the protection of a guardian – is evident in many, if not all, of the international administration projects.

In East Timor, for example, the plan for the UN administration was contained in the May 1999 Agreements that provided for the self-determination consultation through which the East Timorese chose to separate from Indonesia.[4] Presumably the inclusion of such a plan at that stage – before the referendum, and the breakdown in public infrastructure that followed its result, had taken place – reflected an idea that the local population were deemed incapable, in the short term, of self-administration, and should therefore be administered by the UN for a relatively short period while local capacities are built up.

This type of a 'trusteeship' mission is necessarily predicated on a perception of incapacity on the part of local actors; it surely runs counter to such an assumption to call for greater local participation as a general principle to be adopted in such situations. The reason international officials are there is precisely to displace local actors in the activity of territorial administration because such actors are perceived to be deficient in this regard.

One might not like this idea, but to take such a position is to challenge the very idea of international administration itself; challenging the particular way in which local participation and consultation has been calibrated in individual projects is, perhaps, to miss the point.

That said, even if one accepts the concept of trusteeship, and therefore the denial of local involvement in territorial administration, the 'democratic' critique set out by Carsten Stahn has purchase in requiring a greater willingness of international administrators to constantly revisit their assumptions about local incapacities, and to foster greater local involvement as soon as such capacities are deemed to have increased.

'Ultra liberal critique'?

To turn back to the more fundamental, entry-level question of whether trusteeship can ever be legitimate, I was struck by the way the author describes the argument that rejects this as an 'ultra-liberal critique.'

In general, the paper draws largely on legal principles, yet here the author chooses to describe an argument not in legal terms – despite the fact that it reflects the established legal principle of self-determination – but only in terms of political ideas. Those who articulate it are making a 'liberal critique' and not also, say, invoking a legal principle considered to be one of the most important in international law. Why characterize the argument in this manner? Moreover, why is *only* a 'liberal' critique and not also, say, a 'third world' or 'self determination'/'liberation' critique? The term 'liberal' associates the critique exclusively with abstract politics and has clear western connotations, conjuring up images of debates in the intellectual salons of the west. If one described it as a colonial or a liberation/third world critique, however, the context shifts in several ways including, crucially, into the very territories in which the administration projects are being carried out. Why cite Anne Marie Slaughter – in a piece actually discussing the International Criminal Court, not international territorial administration – as the sole authority for this argument? Where are, for example, colonial liberationalist figures like Jomo Kenyatta? Finally, why 'ultra' liberal? This suggests an extreme position, outside the mainstream, something which does not fit with the widespread international

[4] Indonesia – Portugal, Agreement on the Question of East Timor, 5 May 1999, *at* <http://www.un.org/peace/etimor99/agreement/agreeFrame_Eng01.html>, art 6.

support, even in today's world, enjoyed by a concept of self determination conceived as a right to self-administration from foreign rule.

Erica Harper – Beyond Brahimi: The Effectiveness And Sustainability Of U.N. Legal Codes In Post-Conflict Situations

This paper provides interesting insights from someone who worked for the UN in East Timor on the question of model codes for applicable law. I liked the way the East Timor experience is connected up to the general question of the role and utility of legal codes to be used in the international administration context. My comments will focus on two aspects of the author's thesis.

Legal discourse in the 'local' and 'international' spheres

The paper makes a bold attempt to represent the political character of legal discourse on the part of the East Timorese, on the one hand, and the UN and the 'internationals,' as they call themselves, on the other. For me the way this is done raises a series of questions concerning assumptions being made about the underlying issues at stake.

I was intrigued by the decision to describe the legal culture in East Timor prior to the UN administration as *East Timorese* rather than, say, *Indonesian*. Such a characterization forms the basis for a criticism of the UN for cutting across the *status quo*: because what is being altered is 'East Timorese,' this process undermines that which is rooted in local culture. However, if one chose to view the pre-UNTAET law differently, as the law of the foreign occupier, then different conclusions about UNTAET's subsequent revision might be drawn. I wondered, then, what made the author chose this particular designation and approach.

In a related move, legal discourse on the part of the UN and 'internationals' is labelled as 'western,' sometimes 'western European.' This general designation is also given to international law generally. Here, then, the author is endorsing the cultural relativist approach to international human rights law: the universalist character of human rights discourse is purely rhetorical, masking a normative system that is culturally specific. This is of course a perfectly arguable position to adopt, but in doing so its merit needs to be defended, not presented as axiomatic. It would be interesting to hear how the author came to this conclusion, and the extent to which her experience in East Timor shaped her views in this regard.

Because of the way the two different legal paradigms are presented, their interrelationship is essentially one of conflict. If the UN had left the 'East Timorese legal culture' in place, this would have been inconsistent with international law; equally, to seek to reform the local legal culture so as to create greater conformity to international law is to cut across that culture and undermine that which has local purchase.

Lessons learned

The second feature of the paper I will address concerns the lessons can be learned for UN codes generally from the East Timorese experience. The author focuses exclusively on the positive side, with remarks which all assume that lessons learned from East Timor are necessarily of purchase in understanding the issue of legal codes generally.

Although in a paper of this length it is not possible to cover everything, an evaluation of 'lessons learned' would be strengthened if some consideration was given to whether and to what

extent special factors relating to the experience in East Timor – and perhaps also Kosovo – on the one hand, and the idea of a general code to be applied in post conflict situations generally, on the other, might suggest that *different* approaches might be in order as between the two.

As far as special factors relating to the Kosovo and East Timor situations, one might highlight the fact that both missions were created and introduced in a great hurry, with little time to conduct detailed research on and train mission staff in the existing legal system. Moreover, the local law was deemed to be politically unacceptable by many local people. For many Kosovar Albanians the existing legal system was a tool of oppression; for many East Timorese Indonesia law was a symbol of the occupation.

The extent to which such special factors are in evidence in future situations might be different, and the extent to which they mediate whether existing law is reformed may therefore be quite different from in Kosovo and East Timor, something which any model code should take account of.

As far as special factors relating to the politics of a permanent code, fundamentally there is, of course, considerable resistance to the notion of a global, comprehensive code. This can be explained partly in the view that no international consensus exists on such universal standards. Moreover, because of the clear colonial echoes of international administration, one arguably sees a resistance internationally towards formalizing any general structures in relation to this activity – including a model code. This factor may have a power of its own in determining what is considered suitable for such a code, and has nothing directly to do with the experience of particular missions.

Agnès Hurwitz: Towards Enhanced Legitimacy of Rule of Law Programs in Mutidimensional Peace Operations

Agnès Hurwitz evaluates three different types of legitimacy problem in rule of law initiatives generally, including, but not limited to, such initiatives forming part of territorial administration missions. In the first place, the author discusses legitimacy problems raised by the tension between some of the objectives of the missions concerning such issues as domestic empowerment and promoting the rule of law, on the one hand, and the means through which such objectives are pursued – intervention and the taking over of administration – on the other. In the second place, the author highlights legitimacy problems at the institutional level at the stage of mission creation, for example the unrepresentative nature of the UN Security Council. In the third place, the author discusses the problem of the relative prominence given to the narrow rule of law agenda when compared to initiatives addressing broader socio-economic issues.

This is an extremely valuable and well explained contribution to the debate on these crucial issues. What I would like to do here is broaden things out to consider some of the additional factors that also mediate the overall question of legitimacy. I would suggest two such factors.

In the first place, legitimacy is mediated by ideas concerning the identity of those actors conducting territorial administration; specifically, how ideas of international organizations that presuppose legitimacy can paradoxically lead to illegitimate practice due to lack of scrutiny mechanisms and thus greater possibilities for abuse. In the second, and more fundamental, place, legitimacy is mediated by ideas of trusteeship: even with the most benign actor, even with the most multilateral form of authority, even if the projects address social and economic issues as well as more narrow rule of law issues, and even if there are adequate checks and balances are in place, there is still a further question to be asked, which goes to the heart of the question of

legitimacy, as to whether it can ever be justified for foreign actors to take over territorial administration from the local population.

Any holistic appraisal of legitimacy should strive to address as broad a set of considerations as possible, and also explore how different axes of legitimacy relate to each other. If one rejects the legitimacy of international territorial administration on self-determination grounds, for example, one might regard issues of legal authority and accountability as largely window dressing – vital on their own terms, but not saying anything about that fundamental issue. Indeed, focusing exclusively on second-order issues when discussing the question of legitimacy may paradoxically serve to legitimize the projects, in that the issue of legitimacy seems to have been disposed of – for better or worse – when in fact vital issues have not been addressed.

Jean D'aspremont Lynden : Les Administrations internationales de Territoire ou la Creation Internationale D'Etats Democratiques

Jean d'Aspremont Lynden presents an interesting and ambitious thesis that the international administration projects may not be legitimate in terms of their legal basis, but legitimacy can be found from what they are trying to achieve, viz. a democratic state in the territory concerned.

It is surely correct to observe, as the author does, that an attempt to promote 'democratic' politics is now the paradigm for complex peace operations: if an international organization ends up placed in the position of the administering authority, for whatever reason (for example in Kosovo as a holding mechanism pending the settlement of the territory's status), an idea now exists that the opportunity being in such a position creates in terms of transforming the local political culture should be taken. This idea was perhaps less prominent in earlier international territorial administration missions, for example West Irian and even Eastern Slavonia, where there was a relatively light footprint in terms of domestic reform, even though plenary administrative authority was being exercised.

The author draws an interesting conclusion from this contemporary practice: it has modified the main outcome for the realization of external self-determination – independent statehood – to independence as a 'democratic state.' Thus the East Timorese are not given the right to administer their own territory as an independent state, despite being entitled to external self-determination, until certain basic governmental structures are in place. Equally in Kosovo there is the notion of 'standards before status': that Kosovo's status is not going to be resolved until certain basic standards are considered to exist in the territory

It might be illuminating to consider this development in the conduct of peace operations alongside the parallel development in the development of the international legal criteria for statehood and recognition: the idea that particular normative tests concerning certain standards of good governance and rights guarantees must be met before an entity is entitled to recognition as an independent state. These two sets of developments can perhaps be viewed as being of a piece; looking at recognition practice *outside* the context of territories under international administration might, therefore, strengthen the argument that there is somehow a new standard of 'democracy' that must be met before an entitlement to statehood subsists.

The author asserts that this practice constitutes a new paradigm of self-determination. Such an assertion prompts us to ask whether the traditional self determination principle that overturned the notion of trust that underpinned colonialism, the Mandates and Trusteeship systems – that in the words of General Assembly Resolution 1514 of 1960, '[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for

delaying independence'[5] – has itself been dropped, so that now trusteeship is again considered somehow legitimate internationally. The author's thesis is that their promotion of what might be called 'democratic conditionally' makes the projects legitimate. But does it, given the cost in terms of the principle from Resolution 1514? I will come back to this in a moment.

To say that we are witnessing a new paradigm for external self-determination, involving some kind of democratic governance requirement, further questions need to be addressed. Is such a standard consistently applied? What of relatively contemporaneous examples of independence statehood recognized without 'democratic' guarantees, for example Eritrea? Moreover, does practice suggest that a normative standard of 'democratic conditionality' has been or will be actually determinative of the outcome; in other words, has it had or will it have juridical, or only rhetorical, significance?

For example, in the case of Kosovo it could be argued that the 'standards before status' idea is merely an alibi for staving off calls for independence, or, even if it is a genuinely held view of UN administrators on the ground, not actually relevant in terms of what will resolve Kosovo's status. Surely the main factor here will be the outcome of negotiations – based on a complex matrix of political issues – between authorities in Kosovo, Serbia and Montenegro (or, if the Union between those states ends, Serbia) and interested states, not the question of whether Kosovo is 'democratic.'

Even where the 'democratic' standard is applied, and might also be regarded as partly determinative (perhaps East Timor?) is such an example necessarily understood by states to be an individual manifestation of generally applicable standard? One might equally view Kosovo, East Timor and the like as exceptional flashbacks from an earlier paradigm, without saying that they necessarily reflect and/or constitute the establishment of a new paradigm.

The author's consideration of democracy covers only what administrators are trying to create, and not also how they are themselves conducting administration. Clearly in certain respects these are distinct issues. At the same time, however, an attempt to address the overall picture of legitimacy needs to take into account both. Moreover, surely the way the missions operate impacts on the prospects for that which they are trying to implement long term in the territory. For example, does the autocratic behaviour of international administrators set a precedent for undemocratic governance in the territory? Does this behaviour create the impression that democracy is for 'them' the locals, not 'us' the internationals, undermining the notion that democracy is universal, and fostering a sense that democratic values are somehow alien and not of local purchase?

More fundamentally, it is also necessary to unpack what is meant by democracy. The author seems to take as given that what is being imposed is 'democracy,' and that this is a good thing. But as Susan Marks reminds us so powerfully in her work on the issue, democracy is a contested concept and one has to understand that it can have different meanings.[6] Surely, then, one should ask whether the particular ideas of democracy being promoted are politically supportable. Approaching the practice of international administration in this way we see a problematic tendency to understand democracy in overwhelmingly formalist, procedural terms, being largely concerned with democratic elections.

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[5] GA Res. 1514 (XV) (Dec. 14, 1960) UN G.A.O.R. 15th Sess., Supp. 16, 66, art 3.

[6] Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (OUP, 2000)

And what of long-standing critiques by Mill and others that 'imposed democracy' is paradoxical, oxymoronic? Even if the particular model of democracy being imposed might be politically supportable – which is surely questionable – there is the quite separate question of whether seeking to *impose* this or any other model of democracy is legitimate. This question takes things back to the colonial-era manifestation of the self-determination entitlement. In order to claim that the projects are legitimate because they are seeking to promote democracy, then, it is also necessary to defend on a political level how it can be legitimate to wrest administrative control over territory from a local population on the grounds that they are not somehow sufficiently 'democratic.' This, to me, is the fundamental question of legitimacy raised by the phenomenon of international territorial administration.