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# THE UN AS A HUMAN RIGHTS VIOLATOR?

## SOME REFLECTIONS ON THE UNITED NATIONS CHANGING HUMAN RIGHTS RESPONSIBILITIES

Frédéric Mégret

Florian Hoffmann

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**Abstract:** This article attempts to explore how changes in the UN's mission may force it to rethink its responsibilities in terms of human rights. Until recently, the UN had never thought of itself as actually capable of violating human rights. But a number of evolutions have made this a possibility. Starting with peace operations and culminating with the international administration of entire territories, the UN is increasingly taking on sovereign-like functions. This evolution may be seen as a larger metaphor for what the UN is becoming, from a traditional inter-governmental organization to one increasingly entrusted with tasks of global governance. With these new powers, it would seem, come new responsibilities.

## I. INTRODUCTION

The United Nations has a long, and by some accounts successful, history of human rights involvement. Through its specialized or non-specialized [End Page 314] organs its actions in favor of human rights are sprawling and multifarious. The creation of the High Commissioner for Human Rights following the landmark Vienna Conference, and its subsequent reinforcement, gave human rights more prominence than previously achieved in the UN system.

There is, of course, an old criticism that the United Nations does not pursue human rights causes with enough resolve in the face of competing commitments, most notably international peace and security. This criticism may be at its weakest today, however, now that the United Nations, under the Secretary General, is pursuing a vigorous course of administrative reform focused on mainstreaming human rights. 1

Despite this trend, the United Nations conception of its human rights role has at times appeared exceedingly limited. For as long as it has existed, the United Nations consistently—and many would say with reason—saw itself as a benevolent promoter of human rights, at a safe distance from where the real responsibilities for human rights protecting and guaranteeing lied, namely with the state. Above all, although the UN human rights policy may have many shortcomings, the United Nations never seems to have thought itself capable of human rights violations. 2

By and large, it is not difficult to see why. The UN self-identity became so mixed-up in human rights talk that it simply seems to beg belief that the organization which is specifically asked to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" 3 should simultaneously be held susceptible to violating them. Although most would willingly concede that the United Nations might not be doing enough for human rights, there is a long way between such an assessment and finding the United Nations guilty of human rights abuses.

But what if the UN could commit human rights violations in the fullest sense of the expression? Would not such a reality force one to reconsider the way one thinks of the UN responsibilities?

This article seeks to explore how the transformation of the United Nations from a traditional intergovernmental organization into a more supra-governmental one involved in occasional direct tasks of governance is potentially reshaping its human rights mission. The article begins by analyzing from a theoretical perspective specifically what traditionally [End Page 315] made the United Nations an unlikely target for the kind of ultimate human rights responsibility generally associated with states (I). It goes on to chart some of the radical changes in the UN mandate and how these have modified the legal regime applicable to the organization's peace-operations. Taking the international administrations in Kosovo and East Timor as its central case study, it finds that the assumption of

quasi-sovereign powers by the United Nations in those territories is the crucial element in triggering a reconceptualization of the United Nations as a potential human rights violator (II). This evolution is put into a system-wide perspective and shown to be symptomatic of a larger trend that sees the United Nations taking on more and more sovereign functions (III). The article concludes by arguing that changes in the UN functions are slowly—but in a way that is potentially revolutionary—changing the way one should conceptualize the UN human rights role.

## II. THE UN AS AN UNLIKELY HUMAN RIGHTS VIOLATOR

### A. POSSIBLE FOUNDATIONS FOR THE APPLICABILITY OF HUMAN RIGHTS STANDARDS TO THE UN

The applicability of UN human rights standards to itself is, in truth, an old debate, although one that remained of very marginal significance for most of the UN history. 4 Technically, the problem is that from a strictly legal standpoint, the United Nations is not party to any human rights instrument, not even the Universal Declaration proclaimed thanks to its efforts. Of course, the United Nations can enter into international agreements, but because it is not a state 5 and because the Universal Declaration or the Covenants (the only general human rights text which the UN might adhere to, because they are the only ones that are universal) are open only to states, it appears barred from being formally bound. 6 Indeed, one might even have some reservations about the United Nations being bound by the most extensive human rights obligations, be it only because the United Nations [End Page 316] will probably never behave in all respects like a state. Furthermore, the United Nations itself has, at times, given the impression of carefully drawing the line. 7

If these were the only obstacles, however, they do not seem especially hard to overcome. One can think of three main ways that the United Nations can possibly be bound by international human rights standards.

#### 1. THE "EXTERNAL" CONCEPTION

The "external" conception focuses on the United Nations as a subject of international law, and assesses the extent to which it is bound by relevant international human rights standards. 8 According to this argument, the United Nations is bound "customarily" as a result and to the extent that international human rights standards have reached customary international law status. 9 Indeed, it has been contended that, in the case of "treaties that have been drafted by representatives of nearly all States with the intention of creating universal law," international organizations, whose "constitutional roots are in international law" cannot invoke their non-party status. This is because "the legal foundation (of the obligation to apply such treaties) lies not in its character as an international treaty but rather in its character as a general principle of law codified by treaty." 10

#### 2. THE "INTERNAL" CONCEPTION

The "internal" conception focuses on the United Nations as an international organization and its internal juridical order. This argument is that the United Nations is bound by international human rights standards as a result of being tasked to promote them by its own internal and constitutional legal order, without any added juridical

finesse. 11 As one author pointed out "[i]t is self-evident that the Organization is obliged to pursue and try to realize its own purpose." 12 Surely, therefore, if "[n]othing can be more contradictory [End Page 317] than a United Nations force transgressing humanitarian law standards," 13 then that is true a fortiori of human rights law which is so characteristically embedded into the UN general mission. 14

### 3. THE "HYBRID" CONCEPTION

The "hybrid" conception argues that the United Nations is bound "transitively" by international human rights standards as a result and to the extent that its members are bound. 15 In other words, the United Nations is bound by a type of "functional treaty succession by international organizations to the position of their member states," be it only because "states should not be allowed to escape their human rights obligations by forming an international organization to do the 'dirty work'." 16 This conception mixes elements of both the "internal" conception (since the binding character flows from membership of the organization) and the "external" one (since states "bring in" binding international human rights norms "from the outside").

These conceptions are not mutually exclusive and can be combined. The logical conclusion, at any rate, is that the United Nations, even if it wanted to (which by all accounts it does not), could not have it both ways, namely to be a leading human rights actor while being immune to criticism for human rights failures.

## B. POSSIBLE MEANINGS OF "APPLICABILITY" OF HUMAN RIGHTS STANDARDS TO THE UN

There is a long way, however, between declaring human rights norms broadly applicable to the United Nations, and the idea that the United Nations is directly responsible for human rights violations. The traditional textbook treatment of applicability of human rights standards to the United Nations conveniently skirts the issue of the consequences attributed to a [End Page 318] failure of the United Nations abiding by its human rights obligations. 17 In fact, the real difficulty in determining whether the UN might commit human rights "violations," is that it is not clear what it means exactly to say that human rights are "applicable" to the UN.

It may therefore be useful to look closer at the issue by distinguishing between different versions of what it means to say that human rights are applicable to the United Nations. Although this might appear to be an obvious question, it is even more neglected than the foundations of applicability, and possible understandings must be garnered very inferentially from the literature.

The most simple interpretation—and the one that probably comes most naturally to specialized lawyers—takes its cue from the fact that the United Nations is bound by its Charter to "promot[e] and encourag[e] respect for human rights." 18 "Promotion" and "encouragement" refer to efforts at raising public awareness as to the right and procedures for asserting and protecting human rights. Failure to promote or encourage, however, does not lend itself easily to a human rights violations framework. It is quite clear, moreover, that within that conception the United Nations is not the addressee of the obligation to respect human rights, and is merely asked to "assist in the[ir] realization." 19 In fact, failures to sufficiently pursue one's own mandate are above all, technically speaking, violations of the UN internal order. They may also be human rights violation, but that line of thinking provides only poor guidance as to why and how they are so.

Another way of looking at UN human rights obligations, therefore, is to start not from the UN constitutional order, but from the international human rights instruments themselves. International human rights instruments typically

stipulate that state parties (or, to the extent that a particular norm has achieved customary status, other states as well) should "respect and ensure" human rights. 20 "Respect" for human rights refers to abstention from interference with the enjoyment of human rights. 21 "Ensuring" (or fulfilling) refers to measures taken toward the full realization of human rights. 22 [End Page 319]

Breaches of the obligation to "respect," and to a lesser extent of the obligation to "ensure," human rights are probably what is generally understood in ordinary language as "human rights violations." To the extent that the United Nations is not a state, however, it may otherwise be bound to generally abide by the standards contained in international human rights instruments, but it cannot properly be said to violate rights (as opposed, say, to being in breach of a convention or customary rule). This school shows how an entity might violate human rights, but it offers poor guidance on why and how this might relate to the United Nations.

There is a gap, therefore, between theories of how international human rights law binds the United Nations, and explanations of how the United Nations might violate human rights. To transcend that dichotomy, a cogent middle-ground is needed where UN responsibility for violating human rights can be located. That the United Nations is bound to respect human rights constitutionally means that it is more bound than if it were not so mandated. However, the fact that the United Nations is not contemplated as an active subject by human rights treaties means that it is less clearly prone to commit human rights violations than if it were.

### C. THE LIMITS OF APPLICABILITY OF HUMAN RIGHTS TO THE UNITED NATIONS AS A NON STATE ACTOR

Some of the unease with developing a human rights framework for the United Nations to not only encourage, but also to abide by, is linked to difficulties in thinking of human rights as owed by anything but sovereign states. Historically, the concept of rights and the concept of the state were intertwined so that rights have expressed the relationship between the sovereign state and its citizens.

Intergovernmental organizations do not have a constituency whose rights they might violate, however, so it seemed superfluous at best to think of them as violating human rights. It is this reasoning, in turn, that profoundly structured the division of labor between the United Nations and states. As highlighted by one early commentator:

[I]n the Charter, a clear distinction is drawn between the promotion and encouragement of respect for human rights, and the actual protection of these rights. The one is entrusted to the United Nations. The other remains the prerogative of each Member state. 23 [End Page 320]

The United Nations has contributed to this division by consistently emphasizing that, although "the promotion and protection of all human rights is a legitimate concern of the international community," the responsibility for implementing them is "primarily" left to states. 24 Even in the midst of the mainstreaming debate, the Committee on economic, social, and cultural rights still sees international organizations—contra governments' "principal responsibility for ensuring respect for human rights"—as having merely "a strong and continuous responsibility to take whatever measures they can to assist governments to act in ways which are compatible with their human rights obligations." 25 A stronger wording, no doubt, than ventured by most, but nonetheless one that seems to stop on the edge of some invisible conceptual cliff.

At this junction, several options are available. The first and most popular is to note that notwithstanding the fact that they are not states, international organizations can at times have a significant negative impact on the

enjoyment of human rights. In that sense, the difficulties in assigning direct human rights responsibilities to the United Nations is seen as part of the larger problem of how to assign human rights responsibilities to non-state actors. "Impact-based" reasoning, such as this, has been employed most successfully vis-à-vis the likes of multinational corporations and guerrilla groups. 26

Typically the argument begins by noting the relative loss of importance of the state in a globalized world, and the resulting rise in the importance of non-state actors. It then goes on to point out the importance of reverting to an old idea of rights, for example as "titles, rooted in the dignity (intrinsic value) of every human being" 27 existing before and independently of the state. Hence in detaching the concept of sovereignty from the state, the old monolithic, and essentially domestic, conception of rights can gradually give way to a more fluid, relational, and global one. In this conception responsibility is based on the degree to which actors can impact an individual's or group's human rights. 28 [End Page 321]

An example of the application of this logic to the United Nations is seen in the debate over the UN responsibility in maintaining the embargo over Iraq, which has had devastating humanitarian consequences for the civilian population there. 29 Here, it is the "devastating impact" of sanctions on human rights that is highlighted as a reason why the United Nations should "shoulder[] a large measure of responsibility" for human rights. 30 Similarly, some of the pioneering efforts to attach human rights obligations to the Bretton Woods institutions (essentially the World Bank and the IMF) emphasize the extent to which these are "powerful development actors deciding the fate of millions." 31

Undoubtedly this approach has many strengths. Namely, it manages to find a way to invigorate the debate over non-state actors' human rights responsibilities. In the case of the United Nations, it distinguishes those cases where the organization is merely a benign bystander, from those where it is arguably part of a direct chain of causation leading to human rights violations.

There is, however, a fundamental ambiguity involved. It is evident that the United Nations can affect human rights and should shoulder some responsibility for that fact, but can it properly be said to go as far as to violate them? Surely it is not the case that every causal factor hindering the enjoyment of human rights is a violation thereof. Indeed, the problem with a purely rights based approach is that it under-specifies who the duty holders are and it does not clarify whether, even if all were to owe duties to all, that there would be any difference in the duties owed by different kinds of actors.

Clearly, something more than impact is required. As Nigel Rodley put it in a landmark contribution, "it would not occur to many to suggest that torture inflicted in the home or by a common criminal, or a gang of common criminals, is a human rights violation." 32 The criminal system is expected to deal with such individuals, and it does not seem particularly relevant to the opprobrium associated with their conduct that it be described as a violation of the right to physical integrity. In ordinary social life, every person or group has an influence on all the others' rights. However, when attributing specific human rights responsibility, one still [End Page 322] looks for actors that, because of their particular position, assumed a recognizable set of duties regarding human rights. Ultimate human rights responsibility, in turn, depends on the unique capacity to impact human rights that results from some form of exclusive control over individuals—a short hand for something that looks surprisingly like sovereignty. 33 It is that capacity for control that simultaneously creates a potential for, and a duty to avoid, human rights abuse.

The issue is not simply one of terminology. One might want to accuse intergovernmental organizations of "violating human rights" each time one of their policies affects such rights, because of the perceived moral charge associated with the word. It is not obvious, however, that the cause of human rights would come out unqualifiedly

reinforced. After all, a responsibility shared by all is a responsibility that risks being felt by none. Putting intergovernmental institutions rigorously on a par with states for human rights responsibilities might even be perceived as a self-defeating strategy that would only relieve states of some of their obligations.

Indeed, the paradox is that on closer analysis, if non-state actors attracted the eye of international lawyers as committing human rights violations in the fullest sense, it is only as a result and to the extent that they behaved in quasi-sovereign fashion. Even enthusiastic proponents of human rights responsibilities for non-state actors agree that these human rights responsibilities are strongest with those actors who, because of their nature and responsibilities, most prototypically emulate the state. An example of this is when a guerilla group controls a piece of territory or a multinational corporation can virtually be equated with the lord of the land. 34 To illustrate from the perspective of international organizations, an element aggravating the human rights responsibility of international financial institutions is, for example, when IMF structural adjustment programs require a surrender of (at least economic) sovereignty such that at a minimum, responsibilities for economic and social rights should be shared. In a sense the reasoning [End Page 323] comes full circle: one only does away with the formal concept of sovereignty, to be left with exclusive control as an analytical one.

From thereon it is always possible, and no doubt necessary, to denounce non-state actors' complicity with some states in violating human rights. 35 Equally, one may want to stress that more attention should be paid to non-state actors' impact on the enjoyment of human rights, holding them accountable for failures to stand up in their particular, limited role. 36 As regards international financial institutions, for example, one focus is the extent that these can reinforce regimes routinely involved in human rights violations. 37

There seemed to be a distinction worth keeping, however, between a responsibility to promote and a responsibility to guarantee. The risk of merely negatively affecting prospects of human rights enjoyment is characteristic of the former, while the propensity to violate human rights is characteristic only of the latter. This reasoning did rule out, for the most part, a strict understanding of the United Nations as a human rights violator. For example, the arguments over Iraq typically end up emphasizing that distinction or that the UN behavior is "contradicting the Universal Declaration of Human Rights," 38 has "adverse consequences on the enjoyment of human rights," 39 or "implicate[s] a number of fundamental human rights." 40 This is strongly reminiscent of the idea expressed in the context of the IMF that its policies merely risk having "adverse side effects" 41 on human rights. All, however, characteristically fall short of pronouncing the "v" word, because of the assumption that only the Iraqi state could in fine be held liable for human rights violations, in the strong sense of the term. 42 [End Page 324]

This might not be particularly deplorable, at least in a world where states more or less fulfilled their functions. There appeared to be a missing link, however, between the emerging recognition that the United Nations could do more than fail to promote human rights sufficiently, and the conclusion that the United Nations had violated human rights. Indeed, the question of direct UN responsibility for human rights violations might have remained moot, and the path of the United Nations might never have crossed that of a human rights victim on account of its own wrongdoing, if not for the dramatic changes in some of the UN functions (II).

### III. NEW TASKS, NEW RESPONSIBILITIES, NEW RISKS



The UN was created as an institution that worked for, with and through states. Although the United Nations or its operational agencies might contingently find themselves in direct contact with populations, they were never intended to function like quasi-governments, and even less to provide the whole gamut of services associated with state power. Even traditional peace-keeping operations, arguably the most significant deployment of UN field personnel, often involved relatively limited interaction with the population. As for most other UN activities, it could be safely assumed that they occurred in the limited context of interstate cooperation, and the capacity of UN agencies to provide certain political, financial and technical services to governments. 43 Most importantly, the United Nations was never in any one place and at any one time the sole actor responsible for people whose lives it was affecting. Thus, even when it might otherwise strongly affect human rights, the United Nations could lay the blame on some intermediary state echelon. 44

A number of complex and interrelated phenomena linked to the evolution of the international order, the changing nature of statehood, and developments within the United Nations itself, however, contributed to a gradual change of the background against which these assumptions rest. First, the end of the Cold War and the collapse of a number of satellite [End Page 325] regimes have precipitated cascading state dismemberments. Second, globalization has dramatically weakened (sometimes already weak) state structures in various parts of the globe. Third, the United Nations itself has witnessed a renewed willingness to take up new tasks, partly as a result of the reinvention of the Security Council since the fall of the Berlin Wall. 45 With both a need for UN intervention and a willingness to endorse new responsibilities, the pattern of UN involvement was bound to change.

Although this change is felt in many areas of UN activities, and more will be examined further in this Article, it is most paradigmatically obvious in the transformation of "peace operations" into fully-fledged international administrations.

## A. FOREWARNING OF DANGERS TO COME?

Early signals of the dangers involved in the expansion of UN responsibilities were provided by a number of peace operations in the 1990s. Much was made of the fact that, in so-called "distructured conflicts," the United Nations was eventually called to move beyond the "thin blue line" in its attempts to deliver humanitarian assistance, and occasionally in an effort to "enforce" the peace it was supposed to keep. 46 This raised concerns of the possibility of international humanitarian law violations in the context of "Chapter six-and-a-half," "quasi-enforcement," "peacemaking" operations. 47

If anything, however, there are few instances of the UN using excessive force "in combat," or indeed, with the possible exceptions of Somalia and Bosnia, of it using much force at all (in fact, the United Nations is often criticized precisely for its unwillingness to bring decisive force to bear). As it turned out, it was not so much the United Nations' use of force as some collateral problem of its deployment that first gave an unpleasant indication of how things might occasionally go badly wrong. Of particularly sinister memory was the alleged torture and acts of barbarity performed by Canadian, Belgian and Italian peacekeepers in Somalia. 48

The legal significance of these episodes, however, was difficult to evaluate because it was not immediately obvious under what juridical framework they should fall. As it happens, the abuses were mostly treated as [End Page 326] violations of military discipline and/or of the national penal laws of the contributing states, in accordance with the standard Status of Force Agreements. This effectively gave the United Nations the benefit of the doubt and obviated the need for much soul searching. However, a lingering feeling remained that the United Nations was being let-off a little too easily and that surely the choice between "nothing" and the law of the contributing state

was not the end of the story. It was awkward, in retrospect, that if abuses did not make it to the level of violations of criminal law, they would be unlikely to receive much follow-up. The inability to "give a legal name" to such occurrences was, arguably, a major hindrance in apprehending the phenomenon. 49

## B. THE NEW PROTECTORATES

Be that as it may, recent evolutions in the nature and mandate of peace-keeping operations may simultaneously aggravate and clarify the problem of UN human rights responsibility. While first and second generation peacekeeping operations involved no meager tasks, they pale in comparison to the duties the United Nations has increasingly been asked to undertake. Already under the "multi-dimensional operations" label, a turning point in the evolution of peace-building was reached with the United Nations effectively driven to provide humanitarian assistance, supervise disarmament and organize elections in places like Somalia, Namibia, Mozambique, Angola, Salvador, Rwanda, and Haiti. 50 Cambodia's United Nations Transitional Authority in Cambodia (UNTAC) is often hailed as the archetypal case involving an unprecedented effort at civil reconstruction. 51

Just as this concept was beginning to stabilize as the high-watermark of UN intervention in the 1990s, another qualitative ceiling was broken in a seemingly endless process of expansion of UN responsibilities. At least in "peace-support" contexts, the United Nations effectively had something to "support." As has been highlighted:

Even in most of the more ambitious operations that have been launched in the post-Cold War era, the normal "mode" has been that the international presence [End Page 327] is in place to keep the war away and, on that basis, to support a transition process for which the local authorities are ultimately responsible themselves. 52

Above all, in every instance "where there were extensive roles for the United Nations in a variety of civil matters," it was safely assumed that "none of them involved the complete administrative responsibility for a country, however small." 53

This, however, is precisely what has been changing. The radicalization of the concept of "failed" or "collapsed" states 54 (or at least their identification as such by the international community), combined with a newfound unwillingness to abandon such places to their own fate, prompted the United Nations to step in in situations of a complete vacuum of power. 55 Here, the United Nations is no longer seen as trying to rein in various factions involved in a dispute over the monopoly of the legitimate use of force. Instead it is seen as overtaking and centralizing that monopoly in its own hands, in a move strongly reminiscent of processes of state creation. 56 Where all traces of corps intermédiaires have been erased, the "international community" is coming face to face with local populations in ways that can hardly be ignored as when Timorese crowds massed to ask for jobs and protested before the office of the Secretary General's Special Representative. 57 That this is introducing a qualitative rather than simply quantitative change in governance functions can be seen in the changing nature of the use of force: not so much, despite the occasional military uniform, peacekeeping or even peacemaking in any conventional military sense, as the kind of policing and order-maintenance work that is usually taken care of by the state.

As many observers have noted, in such a configuration the United Nations is effectively acting as a sovereign power 58 (or, as one author put it, as "both state and state builder"). 59 In the case of Timor, which was [End Page 328] scheduled for independence, this was hardly a *vue de l'esprit*, since the United Nations Transitional Administration in East Timor (UNTAET) was granted "the overall responsibility for the administration of East Timor" and the powers "to exercise all legislative and executive authority, including the administration of justice" 60 —a

rather convoluted way of saying that it was sovereign. The issue is at least partly more complex in Kosovo due to current indecisiveness about that province's future status. Whereas old-style mandates and trusteeships under the League of Nations were administered by states with the League merely exercising supervisory power, the United Nations is henceforth engaged in an unprecedented experience of massive direct rule "with broader competence over a territory than ever before bestowed upon an international body." 61

That this "international civil presence," to use the prevalent euphemism, is meant to be temporary, does not change the fact that it is effective, often exclusive and, in most cases, likely to last a number of years. 62 Concretely, this means that, in a context of renewed commitment to "nation building," the United Nations is asked to build state structures from scratch in a process that has variously been described as post-conflict "reconstruction," "management" or, perhaps even more adequately, "international social engineering." 63 After a quick humanitarian transition, both the United Nations Interim Administration in Kosovo (UNMIK) and UNTAET blossomed into fully fledged governance structures containing all the ministry-like departments associated with governmental administration, complete with an official gazette and various other attributes of officialdom.

As a result, there is virtually no sector of public administration that the United Nations has not had its hands on. From security provision *latu sensu* and the organization of elections, to such unlikely tasks for the United Nations as creating an army, the collection of taxes, national budgeting, the maintenance of civil and commercial registers, border and customs control, accreditation of foreign legations and representations, issuing of ID cards, travel documents, registration plates and stamps, prisons, currency, radio frequencies management, down to the question of what flags get to appear on public buildings or the regulation of road traffic, the United Nations is [End Page 329] involved in nearly every aspect of public administration. 64 Nor has the international administrations' role been limited to that of a care-taking government issuing only the minimum regulatory framework. On the contrary, both UNMIK and UNTAET were involved in efforts to trigger reconciliation processes; attempts to organize both national and local democracy; economic, justice, law, education, pension, health, and land reform; the launching of a policy of environment protection; legislation over matters of public mores; the drafting of a constitutional framework; or the negotiation of complex treaties over natural resources that will affect the long term prospects of the territories. 65

## IV. BRINGING HUMAN RIGHTS TO THE FOREFRONT

Looking back, it is evident that this new "sovereignty" of the United Nations in internationally-administered territories contributed to a fundamental reformulation of the discussion of the legal regime applicable to some of its operational activities.

### A. THE GROWING INADEQUACY OF INTERNATIONAL HUMANITARIAN LAW

As stated, the main debate in the early 1990s was over the applicability of international humanitarian law. This was a legitimate and useful debate within the limited context of the UN enforcement and quasi-enforcement missions, and eventually gave rise to the issuance of a bulletin by the Secretary General 66 that probably settled most immediate worries. 67 However, even if there were more cases of excessive use of force, the changing nature of the UN responsibilities has increasingly called into question the adequacy of international humanitarian law as the privileged framework to compute UN performance, at least in protectorate type territories and beyond. [End Page 330]

To begin, even if force is used as part of a peacekeeping force's mandate, international humanitarian law—as a law whose "thrust is at regulating the warrior, not the peacekeeper" 68 —was always a slightly odd way of dealing with peace operations. In particular, although it may be a valid legal policy shortcut to say that the United Nations is bound by the laws of war notwithstanding the fact that it is not a belligerent in the conflicts, international humanitarian law fails to capture the fact that the United Nations is not like any "party" to such conflicts. 69 The kind of confusion this caused is seen in one early Amnesty International report, which seemed to permanently waver between arguing for the applicability of human rights and that of international humanitarian law when dealing with the arrests of Somalis by UN peacekeeping forces. 70

Perhaps more importantly, there was often simply no conflict to trigger the applicability of international humanitarian law in the first place. 71 The whole point of, for example, peace-building missions is that they operate on a continuum somewhere between the absence of war and the attainment of peace. Indeed, when it comes to full-blown international administration, it is not obvious that these are adequately described as peace-something operations rather than, for example, the somewhat distant progeny of trusteeship mechanisms. 72

Recently, Michael Kelly cogently made the case for the application of the IVth Geneva Convention which governs occupation situations. 73 Although the IVth Convention regime is normally applicable to situations of occupation by states, it has been suggested that it could provide an adequate, ready-made approximation of the United Nations' own responsibilities in certain peace operations. This is no doubt an important clarification, [End Page 331] where UN troops were once described as "as much at risk from legal ambiguity [than] from militia bullets." 74 It suggests a kind of *via media* that may yet provide an adequate framework in some chaotic situations by at least "remov[ing] contentious and evasory legal argument." 75

When it comes to situations of nation-building, however, such a solution has a makeshift quality because the concept of occupation, which is often "perceived as carrying negative connotations either of colonial domination (...) or oppression," 76 is an awkward way to describe a situation of full-UN governance. To begin, despite the proposed use of the expression "international law regulating civilian-military relations" as a substitute, 77 the United Nations is unlikely to want to portray itself as an occupying (albeit non-belligerent) power, be it only for (essentially good) public relations reasons. Next, although it may be a valid expedient to apply the IVth Geneva Convention *de facto* even when it does not apply *de jure*, the concept of occupation, as Michael Kelly recognizes it, appears unsuitable for anything beyond the short term when a force transforms itself into a quasi-government. 78 Finally, after an operation does transform, the international law of occupation, as a regime essentially geared toward the military, lacks the legal comprehensiveness necessary to provide a fully integrated framework for normalized international administrations. 79

In different ways, these points help underscore the simple reality that international humanitarian law, as an essentially derogatory regime to the normal applicability of human rights, is fundamentally a better-than-nothing solution that is resorted to only where the case for full respect of human rights cannot be made. There may be little reason to settle for second-best when a case is readily available that human rights law applies even more clearly to the United Nations than international humanitarian law probably ever did. 80 Hence, subtly but surely, it emerges that perhaps "more is [End Page 332] required of international personnel than strict adherence to Geneva's prohibitions on abusive acts." 81 To the extent international humanitarian law delays a recognition of the full applicability of human rights standards, it may sometimes be more part of the problem than the solution. 82

## B. THE RISE OF HUMAN RIGHTS AS THE FRAMEWORK OF CHOICE

This is precisely where the changing UN role instilled a new breath of legal imagination. Prohibitions on the taking of hostages or on forcing inhabitants to divulge information, although undeniably necessary as a core minimum, were bound to appear gradually out of touch with a reality where this was the very least expected from UN personnel. Similarly, the focus on maintenance of order and the fairly permissive mandate granted to occupation powers, completely lacked the programmatic impulse required of international administrations if they were—as they seemed mandated to—to make more than a pretense at kick-starting the countries under their responsibility.

By contrast, the United Nations assumption of powers akin to those of sovereign states allows the conceptual leap toward a vision of the United Nations as not merely a benign promoter, but as a potential guarantor of human rights in places like Kosovo or East Timor. The UN potential for abuse here has the potential to simultaneously rejuvenate the human rights critique and give substance to the otherwise curiously eerie debate on the applicability of human rights standards to the United Nations. Whereas peacekeepers in Somalia conceivably got away with the argument that they were operating in a gray zone, the legal regime of which was unclear, such a loophole is ever-tightening under the weight of the United Nations new responsibilities.

This change was unlikely to go unheeded by the United Nations and, indeed, the Security Council specified in Kosovo and Timor that the international administrations' responsibilities would include "protecting and promoting human rights." 83 Both UNTAET and UNMIK in turn emphatically proclaimed the "applicability" of human rights standards by stipulating that "[i]n exercising their functions, all persons undertaking public duties or [End Page 333] holding public office [in the respective territories] shall observe internationally recognized human rights standards." 84

That international human rights instruments should be applicable, however, does not resolve the earlier identified ambiguity inherent in the very concept of "applicability." It is striking, in this context, that one of the early controversies that plagued both administrations' work was the precise status of international human rights standards vis-à-vis domestic law, particularly before courts. 85

Notwithstanding, the Kosovo ombudsman made it clear beyond a doubt (in a reasoning that seems applicable mutatis mutandis to Timor) that, to the extent resolution 1244 86 has created UNMIK "as a surrogate state," this imposed upon the international administration "all ensuing obligations, including affirmative obligations to secure human rights to everyone within UNMIK jurisdiction." 87 Such a characterization seems to open the way for holding the international administrations accountable to the strictest types of obligations in terms of human rights; obligations, in fact, whose breach might adequately be described as human rights violations.

### C. HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ADMINISTRATIONS?

Evidently, a complete overview of the UN human rights performance in Kosovo and Timor raises complex questions relating to the existence of a state of emergency in those territories, 88 or the extent that proto-sovereign [End Page 334] actors, such as the UCK or the CNRT, should share the burden of human rights protection/violation. It is, therefore, beyond the scope of this Article, and will have to await a more systematic study in a future piece.

It is fairly common knowledge, however, that despite their considerable achievements, the record of international administrations has been far from perfect. It suffices here, in order to make the general point that the United Nations is not immune from committing human rights violations, to show that even a small number of such violations are possible and have been highlighted consistently by various official and officious bodies.

There have been, for example, several documented instances of UN police brutality, including some culminating with the death of "suspects." 89 UN police and KFOR, more generally, have been accused of "using excessive force and improper behavior in executing weapons searches in private homes, including breaking down doors and destroying personal property." 90 Excessive lengths of pre-trial detention were a worrying feature in both Kosovo and Timor. 91 The right to be tried within a reasonable time is also routinely flouted, 92 and not all accused have benefitted from legal assistance, 93 amidst numerous and repeatedly identified procedural flaws in the administration of justice. 94

Aside from the odd electoral mishap, 95 there are concerns that the international administrations failure to involve local populations in decision-making constitutes a flagrant violation of their political rights. 96 Both [End Page 335] UNTAET and UNMIK, moreover, seem to have strikingly omitted any framework strategy for the advancement of economic and social rights, in a context where serious questions arise about the dire poverty of populations and the economic models proposed for development. 97 Last but not least, international administrations are the target of accusations of rampant discrimination. UNTAET has been criticized for differentiating between international and local staff in its employment policies, 98 and UNMIK for its unequal judicial treatment of different ethnic minorities 99 as well as its more general failure to guarantee the protection of minorities. 100

All in all, although the US State Department described UNMIK as having "generally adhered to international human rights standards in its administration of the province," 101 and UNTAET as having "generally respected the human rights of East Timorese," 102 human rights violations by international administrations are an inevitable reality. Note that it is of little significance that the majority of these violations were not particularly grave, or that they have not offset the considerable benefits that international administration brought to these regions. If the United Nations routinely calls on states to adhere to the strictest international human rights standards, it can hardly exempt itself from that call.

## V. INTERNATIONAL ADMINISTRATIONS AND BEYOND

One might think that the sheer possibility of human rights violations by the United Nations in internationally administered territories would be reason enough to prompt a more radical integration of human rights in UNMIK and UNTAET's activities. Something quite different happened, however. The original ambiguity over the status of human rights in the internationally administered territories was, in fact, fed by some of UNMIK and UNTAET's own regulations. 103 The international administrations at times seemed to [End Page 336] engage in patterns of behavior specifically designed to side step human rights. For example, the behavior of both UNMIK and UNTAET is monitored by appropriate institutional bodies, 104 but the Ombudsperson's office in Kosovo suffers from chronic underfunding, and the Timor office was only designated two years into the mission's activities. The Kosovo ombudsman, in turn, criticized attempts by the United Nations to seek a broad immunity for itself and its personnel in Kosovo. 105 Some UN regulations have been held incompatible with international human rights standards ab initio, suggesting an occasionally cavalier attitude by the administrations. 106 None of the reports by Security Council missions in Kosovo 107 and Timor 108 or by the Secretary General 109 evidence a strong reflexive thrust when dealing with human rights.

Overall, although the United Nations is clearly and actively engaged in promoting human rights in the territories under its governance, it does not appear to have made the mental leap to seeing its occasional shortcomings as

more than merely "not doing enough to promote and protect." The idea, in particular, that these shortcomings might amount to "failures to guarantee" or, in other words, to human rights violations, has hardly made its way into the official discourse.

Still, if the debate was limited to the "special case" of international administrations, one might wonder what the implications are for the United Nations more generally and mainstreaming in particular. This grander type of human rights talk could be safely left to what was, in the end, a relatively [End Page 337] marginal epiphenomenon. Indeed, there is a tendency in the literature to deal with international administrations separately, as very much a *sui generis* experience. 110

Apart from the fact that international administrations seem set to become a more or less permanent fixture of "peace-cum-something" operations, there also seems to be a case that international administrations are merely the most emblematic instances of a larger trend. Part of the fascination generated by UNMIK and UNTAET in recent scholarship is the extent to which they have so fully mimicked traditional forms of government power—to the point that the United Nations sometimes ends up emulating some of the very behavior that it criticizes in states. 111 This is a point well-taken, and clearly what makes international administrations so striking is the all-encompassing, particularly glaring character of their sovereign powers. There are a number of cases, however, where the United Nations appears to have assumed something very much like sovereign powers.

## A. MICRO-SOVEREIGNTY: HUMAN RIGHTS AND REFUGEE CAMPS

In one recent ground-breaking study, Ralph Wilde, disputing the "radical novelty" of international administrations, argued that UNTAET and UNMIK are properly seen as only the latest instances of a recurrent practice by the international community of "International Territorial Administration" (ITA). 112 One example suggested by Wilde as having the potential to raise similar issues is refugee camps. 113 For the most part, refugee camps are considered governed by a combination of international refugee law and the law of the host state. 114 This is amply justified to an extent. Clearly, for example, refugee law is the most important tool for insuring that only the right persons are allowed into the camps. It also makes obvious sense that the host state's law should apply. The United Nations is keen to stress as a leitmotiv that the "primary responsibility of states hosting refugees is to ensure the security and civilian and humanitarian character of refugee camps." 115 [End Page 338]

Notwithstanding, Wilde argues for a more explicit "human rights law governance" 116 mandate for the United Nations High Commission for Refugees (UNHCR) on account of the "de facto control" that it may sometimes exercise. In so called "medium-term development camps," where refugees often stay for long periods the United Nations cannot simply invoke the host state's failures in fulfilling the refugees' rights if it is acting, be it in microscopic fashion, as a "de facto sovereign." 117

The case for such human rights governance seems boosted in light of the recurrent debate over the security of camps, both internal and external, and the suggestion that, where there is a partial or total collapse of state structures, the United Nations should take over law enforcement directly by deploying various types of "UN guards." 118 Indeed, it has been stressed that a refugee is never merely a refugee, but also something of a human rights holder in transit. 119 Here again, with the United Nations ending up very much as the prime security provider, it is arguably bound by international human rights norms not only as a protector and promoter, but also as a potential guarantor. Recent events made it amply clear that international agencies are not immune from

committing abuses. This, in turn, suggests that maximum clarity of legal framework is a matter of some urgency.  
120

## B. FUNCTIONAL SOVEREIGNTY: HUMAN RIGHTS AND THE ADMINISTRATION OF INTERNATIONAL CRIMINAL JUSTICE

It seems necessary, however, to go beyond the concept of ITA to include situations where, although the United Nations is not territorially sovereign, it exercises the equivalent of sovereign control over certain persons through [End Page 339] the exercise of select functions of sovereignty. One example is the United Nations effort to promote international criminal justice, notably through ad hoc tribunals. Although formally neither the International Criminal Tribunal for Yugoslavia (ICTY) nor the International Criminal Tribunal for Rwanda (ICTR) are sovereign, analytically speaking their existence fits neatly in the trend toward the assumption of quasi-regalian functions. For those in UN prisons, in fact, the United Nations may well be the closest thing they have to a sovereign, at least during their detention.

Here, the protection of human rights seems of particular importance since due process guarantees are ontologically intertwined with dominant liberal conceptions of what criminal justice means. Notwithstanding, the UN tribunals have, at times, attracted substantial criticism for their human rights record, in terms surprisingly identical to those used in criticizing the judicial component of various international administrations. The ICTR, for example, was criticized from the outset for its excessive delays in bringing the accused to trial, delays that would have warranted the release of the accused under the European human rights system.<sup>121</sup> In another case, Amnesty International scolded the Tribunal for refusing to indemnify one person who was mistaken for one of the accused and wrongly detained as a result, in flagrant disregard of human rights best practices.<sup>122</sup> In these cases, the Tribunal is not merely in breach of its own Statute: it is in breach of international human rights standards arguably to the point of committing human rights violations, and in a way that is insufficiently accounted for by traditional conceptions of the UN human rights role.

## VI. CONCLUSION: TOWARD A GLOBAL HUMAN RIGHTS GOVERNANCE?

This Article tried to argue that dramatic changes in the United Nations functions are gradually forcing us to reconceptualize the UN human rights role. On the one hand, for a long time the idea that the United Nations might violate human rights would have seemed odd, if not extravagant. On the other hand, sovereignty, perhaps because of its longtime association with the state, was perhaps a little too readily discarded as a positive contribution to human rights discourse. As an analytical device for allocating [End Page 340] responsibility for human rights rather than for shunning it, however, it seems to have the potential to throw light on many dimensions of UN activities. By reinstating "control" as the wedging criterion for ultimate human rights responsibility, the conceptual gap between the United Nations as an actor constitutionally bound to "promote and encourage respect" for human rights, and that of an actor bound to respect human rights tout court can be bridged.

Coming on top of a long series of incremental developments, the exemplary case of international administrations makes it possible to think of the United Nations as submitted to the higher kind of human rights obligations traditionally associated with states. Although the United Nations does not seem to have fully acknowledged the consequences of such a turnabout change, international administrations may in fact be the most striking instances



of UN exercise of "control" over given populations. To the "extreme" case of international administrations should be added, at least to a degree, the management of certain refugee camps and the administration of justice through international criminal tribunals. Beyond the examples suggested in this Article, it is possible to envisage a number of activities undertaken by the United Nations in the development, health or even cultural fields where the weight of its responsibilities would increasingly bring human rights to bear as the framework of reference.

Indeed, there may even be a case that the UN authority in internationally administered territories can be used as a more general metaphor for its changing mission in a globalized world. Formal instances of sovereign exercise have rightly attracted the most attention as spectacular examples of the degree of change experienced by the United Nations. There are few attempts in the relevant literature, conversely, to bridge the gap between the theme of "global governance" and the occasional assumption of governmental functions by the United Nations. The interesting thing about international administrations, however, may simply be that they make a larger point more striking. It seems likely that the UN sovereign powers in Timor and Kosovo are only the emerged part of an iceberg: one which may be immersed in the sea-change of globalization, but which has at its core the gradual taking-on of ever-growing responsibilities by the international community in a context of increased disintermediation<sup>123</sup> between the United Nations and human rights holders. Although that assumption of responsibilities occasionally crystallizes into full-blown government, more often it will tend toward various forms of informal interstitial management of [End Page 341] state shortfalls. Hence, international administrations, whether territorial or not, may provide a key to conceptualize the United Nations evolving missions in the twenty first Century by helping to "electrify" the debate over the UN's human rights responsibilities.

Clearly, not all the UN's activities will or should fall within a "human rights violations" framework, if only to avoid further demobilizing the state. There is a case for distinguishing between the full assumption of sovereign duties, as exemplified by international administrations, and various forms of partial administration of sovereign functions. One might envisage, for example, a three-tier system allocating human rights responsibility on the basis of the degree of control exercised. At the apex of that system are international administrations and perhaps a few other cases of intense, "all-round" exercise of sovereignty. In those cases, guaranteeing human rights is a matter of the greatest urgency, deriving its force not only from constitutional injunction, but also from the very essence of human rights jurisprudence and positive international human rights law. One might conceive of a middle category where the United Nations activity, although it has a strong impact on local populations, nonetheless falls short of ultimate control. In those cases, attention to human rights would be seen as a very strong constitutional and policy imperative. Finally, one would have a residual category of promotional activities fitting in the traditional intergovernmental framework, where the United Nations would "only" be submitted to the constitutional obligation to "promote and encourage respect" for human rights.

One can anticipate, however, that the higher categories could exercise a significant "pull" factor on the others. Ultimately, the contribution of a "human rights violation" framework might be its capacity to act as guarantee against any nonchalance. This effect would be felt not only in situations where the United Nations is exercising direct governance, but throughout its human rights activities.

In becoming aware and integrating these changes, the United Nations may simultaneously accompany and amplify a paradigm shift away from traditional concepts of government—which are inextricably linked to states—and toward a concept of (global) governance hinging on the effective, as opposed to theoretical, exercise of control over people and territory. This is the logical consequence of a world in the throes of globalization in which classical citizenship, in terms of exclusive "belonging" to a state, no longer affords individuals the protections for which it

was envisioned. Indeed, the United Nations occasional assumption of the role of a sovereign authority and the resulting human rights responsibilities, could be seen as a first step into the direction of an, as yet utopian, world citizenship.