THE LEGAL STATUS OF TERRITORIES SUBJECT TO ADMINISTRATION BY INTERNATIONAL ORGANISATIONS

The international community’s practice of administering territories in post-conflict environments has raised important legal questions. Using Namibia and Kosovo as case studies, Bernhard Knoll analyses the identity of the administrating UN organ, the ways in which the territories under consideration have acquired partial subjectivity in international law and the nature of legal obligations in the fiduciary exercise of transitional administration developed within the League of Nations’ Mandate and the UN Trusteeship systems. Knoll discusses Kosovo’s internal political and constitutional order and notes the absence of some of the characteristics normally found in liberal democracies, before proposing that the UN consolidates accountability guidelines related to the protection of human rights and the development of democratic standards should it engage in the transitional administration of territory.

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THE LEGAL STATUS OF TERRITORIES SUBJECT TO ADMINISTRATION BY INTERNATIONAL ORGANISATIONS

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FOREWORD

This book undertakes an inquiry into the set of questions about the location of political processes of ‘internationalisation’ of territory in key concepts of public international law, such as mandates, trusteeship, wardship, servitude, agency and military occupation. At the same time, Bernhard Knoll’s stimulating analysis represents a highly valuable contribution to the functional approach to the international administration of a territory under the auspices and control of the United Nations. Especially in the still evolutionary case of Kosovo, the reconciliation of the objectives of a UN territorial governance mission, mandated by the international community, as well as of the right to self-determination of people, seen by the majority of international lawyers as being a peremptory norm of \textit{ius cogens}, with the requirement of respecting the territorial integrity of an ‘old sovereign’, remains an issue with which international lawyers will continue to struggle.

From a more theoretical perspective, the study inquires how an international authority manages the legal process through which it temporarily divorces the conceptual hallmarks of \textit{dominium} and \textit{imperium} and, in a second step, how it fills the vacuum as provider of \textit{ersatz} good governance. Bernhard Knoll demonstrates that in its quality as a situated territorial agent, an international mission is constrained by the operation of a fiduciary bond between itself and the governed population. In its identity as subsidiary organ of the United Nations, a UN governance mission is conditioned in its ‘domestic’ strategic choices by both international law and by the politics of its mother organisation. Discussing the internal political and legal order of an internationalised territory, Knoll further notes that the rule of an international administration is subject to an ‘anomalous’ legitimacy cycle. The fundamental indeterminacy of law, and gaps in statutory instruments and in human rights protection further expose the frailty of transitional administrations.
The research presented in this book strikes at the heart of the current debate over the powers which the United Nations exercises both within an internationalised territory and from outside, as its supreme organ, the Security Council, is increasingly called upon to balance the weight of the sovereign’s inviolable and static borders against indigenous bids at determining the dynamic ‘self’ in a people. It thus focuses on the Security Council’s novel approach to utilise Chapter VII powers to endow a UN subsidiary organ with capacities regularly identified with those possessed by a ‘sovereign’. Second, particular emphasis is placed on the novelty of vesting a territory under UN administration with a partial personality. While the study notes that forms of international personality have displayed great variety in the past, the author presents empirical proof of the representation of non-state territorial entities in international law, focusing on the practice of UN governance missions in this field.

Yet this book is not merely a study of the legal identity of territories under transitional international administration. It is also a fascinating contribution to the study of the evolution of one of the key concepts that underlie the core of the international legal system as well as constitutional law and political theory, namely, the concept of sovereignty. Starting from apparently marginal and exceptional cases in which territories are not administrated by one single State, it reviews key notions belonging to the general theory of sovereignty, starting with the legal title on which it is grounded and continuing with the issues of legal status and régime.

Knoll does not proceed in a static way; his study accounts for the stream of history and its evolution throughout the Mandate and Trusteeship systems which heralded a significant change in normative spheres. Indeed, the author produced an exceptional account of the history of the subject of trusteeship. Thanks to the modern experiences of international transitory administration outlined in this study, the international community is deemed to possess the capacities to perform the obligations towards itself and the people under its administration. Compliance with these obligations is, as this study demonstrates in its later part, imperfect and defective. The basic dilemma of international institution-building consists in the intention to establish a framework of liberal constitutional law which does not, itself, fully submit to liberal constitutional principles. International organisations, so it seems, take exception to their commitment to human rights, equal political participation and the rule of law when they administer territory which, in
turn, raises the question whether they should be in the business of promoting normative change through techniques of norm-building.

This book is intellectually very ambitious. It deals with a subject with as much practical relevance as it has theoretical interest. Its approach to methodological issues is searching and careful. Its approach to other disciplines – its ‘interdisciplinarity’ – is thoughtful and measured. In Bernhard Knoll’s work, international law, political science and history intersect. The author, however, never becomes a ‘mere’ historian or political scientist – his legal–intellectual persona always remains in the forefront. The book is written elegantly and with remarkable passion. It is apparent that Knoll benefits from his personal knowledge of the Kosovo dilemma which permits him to expand upon subjects unfamiliar to outsiders. The reader will, in any case, not be in any doubt that the writer is anything but intimately engaged with what is a very difficult subject-matter, and he conveys the full complexity of the issues involved to the reader without pretending that there are any easy answers.

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In the course of a research journey that spans years, there are times when a student, by pure chance, stumbles over diamonds – gems cut out of the sheer brilliance of the intellect, which glow, sparkle and affect the course of one’s expedition. For each and every chapter of this book, I was lucky to find diamonds whose spark enlightened the path ahead. Three of those I shall mention. Nathaniel Berman’s remarkable article on ‘Sovereignty in Abeyance’ (published in 1988/89) was crucial in formulating the thesis of chapter 2. The writing of Antony Anghie, recently fused into a book-length account of the ‘science’ of colonial and Mandate administration and its legacies (2005), proved equally inspiring. Another key text, authored by Alfred Verdroß et al. in 1980, encouraged my attempt to apply the ‘divorce’ between sovereign title and effective control to the case of Kosovo.

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As Gred Grandin observed in the preface to his study of Mayan cultural and national identity in Guatemala, acknowledgements perform an essential Marxist task: they situate the production of individual work in a long chain of influence and encouragement.2 In this vein, I am most indebted to Elisabeth and Reinhold, my parents, and my sister Barbara, who shone from afar, and were ever so close, particularly in the challenging first year of my work in Florence.

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Within Kosovo’s closer periphery, I am indebted to Kristof Bender of the European Stability Initiative, Dr Friedhelm Frischenschlager, Elmars Svekis, Eric Manton, Ewald Orf, formerly with the OSCE Missions in Prishtina, Skopje, Tirana and Belgrade; to Michael Weiner, my former classmate and journalist partner, now with the Austrian Development Agency; and to Rainer Rosenberg of the Austrian National Radio, ORF. Without his support for realising our series of features, in the framework of ORF’s ‘Nachbar in Not’, on the desperate situation of the cities of Pakrac and Slavonski Brod in July 1992, I would not have developed the passion for South-Eastern Europe that he shares. I would also like to express my sense of profound gratitude to Elsa Gopala Krishnan, now with UNODC in Vienna, for the light shed, the conversations shared, the sacrifices made, which were many.

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Suleiman Murrah [1926], Judicial Committee of the Privy Council, 1926 Appeal Cases 321

Rex v. Bottrill, ex parte Kuechenmeister [1946], 1 All E.R. 635

R. (Al-Skeini a.o.) v. The Secretary for Defence [2005], Court of Appeal, EWCA Civ 1609, 21 December 2005

Al-Skeini a.o. v. The Secretary of Defence [2007], House of Lords [2007], UKHL 26, 13 June 2007

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Alig v. Trust Territory of the Pacific Islands [1967], High Court, Appellate Division, 61 ILR 88

Wood Industries LLC v. United Nations, UNMIK, and the Kosovo Trust Agency [2003], Supreme Court of the State of New York, Index No. 03/602741
Rasul et al. v. Bush et al. [2003], US Supreme Court, No. 03–334, 28 June 2004 (Judgment)
ABBREVIATIONS

AD Annual Digest; Administrative Directive
AdV Archiv des Völkerrechts
AdöR Archiv des öffentlichen Rechts
AFDI Annuaire français de droit international
AFP Agence France Presse
AI Administrative Instruction
AJIL American Journal of International Law
Amb. Ambassador
a.o. and Others
AöR Archiv des öffentlichen Rechts
APSR American Political Science Review
A/RES UN General Assembly Resolution
Art. Article, Articles
ASDI Annuaire suisse de droit international
ASIL American Society of International Law
BiH Bosnia and Herzegovina
BJu Boom Juridische uitgevers
BYIL British Yearbook of International Law
CARDS Community Assistance for Reconstruction, Development and Stabilisation
CC Constitutional Court of Bosnia and Herzegovina
CEFTA Central European Free Trade Agreement
cf. compare
CF Constitutional Framework
CFI (European) Court of First Instance
CFSP Common Foreign and Security Policy
CG Contact Group
Ch. Chapter
CINCSOUTH Commander in Chief Allied Forces Southern Europe
CoE Council of Europe
COMKFOR Commander Kosovo Force
CPA Coalition Provisional Authority
CPIUN Convention on the Privileges and Immunities of the United Nations
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>CPT</td>
<td>European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>CSCE</td>
<td>Conference on Security and Cooperation in Europe</td>
</tr>
<tr>
<td>DFID</td>
<td>UK Department for International Development</td>
</tr>
<tr>
<td>DG</td>
<td>Directorate General</td>
</tr>
<tr>
<td>DIR</td>
<td>Directive</td>
</tr>
<tr>
<td>DOP</td>
<td>Declaration of Principles</td>
</tr>
<tr>
<td>DPKO</td>
<td>United Nations Department of Peacekeeping Operations</td>
</tr>
<tr>
<td>D/SRSG</td>
<td>Deputy Special Representative of the Secretary-General</td>
</tr>
<tr>
<td>EAR</td>
<td>European Agency for Reconstruction</td>
</tr>
<tr>
<td>EBRD</td>
<td>European Bank for Reconstruction and Development</td>
</tr>
<tr>
<td>EC</td>
<td>European Community; European Communities</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>EComHR</td>
<td>European Commission for Human Rights</td>
</tr>
<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>ED</td>
<td>Executive Decision</td>
</tr>
<tr>
<td>EECR</td>
<td>East European Constitutional Review</td>
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<td>ed.</td>
<td>edited, editor</td>
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<tr>
<td>e.g.</td>
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<tr>
<td>EHRLR</td>
<td>European Human Rights Law Review</td>
</tr>
<tr>
<td>EIB</td>
<td>European Investment Bank</td>
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<tr>
<td>EJIL</td>
<td>European Journal of International Law</td>
</tr>
<tr>
<td>EJIR</td>
<td>European Journal of International Relations</td>
</tr>
<tr>
<td>EP</td>
<td>European Partnership</td>
</tr>
<tr>
<td>E PIL</td>
<td>Encyclopedia of Public International Law</td>
</tr>
<tr>
<td>ESDP</td>
<td>European Security and Defence Policy</td>
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<tr>
<td>ESI</td>
<td>European Stability Initiative</td>
</tr>
<tr>
<td>et al.</td>
<td>and others</td>
</tr>
<tr>
<td>et seq.</td>
<td>and the following</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EUI</td>
<td>European University Institute</td>
</tr>
<tr>
<td>EUMM</td>
<td>European Union Monitoring Mission</td>
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<tr>
<td>EUPM</td>
<td>European Union Police Mission in Bosnia and Herzegovina</td>
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</table>
**LIST OF ABBREVIATIONS**

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<th>Abbreviation</th>
<th>Full Form</th>
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<td>EUPT</td>
<td>European Union Planning Team</td>
</tr>
<tr>
<td>EUSR</td>
<td>European Union Special Representative</td>
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<tr>
<td>FAO</td>
<td>Food and Agriculture Organization</td>
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<tr>
<td>FAZ</td>
<td>Frankfurter Allgemeine Zeitung</td>
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<tr>
<td>FCO</td>
<td>Foreign and Commonwealth Office</td>
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<tr>
<td>f.k.a.</td>
<td>formerly known as</td>
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<tr>
<td>FRY</td>
<td>Federal Republic of Yugoslavia</td>
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<tr>
<td>FTAs</td>
<td>free trade agreements</td>
</tr>
<tr>
<td>fYRoM</td>
<td>former Yugoslav Republic of Macedonia</td>
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<tr>
<td>GA</td>
<td>General Assembly</td>
</tr>
<tr>
<td>GAOR</td>
<td>General Assembly Official Records</td>
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<tr>
<td>GC</td>
<td>Geneva Convention</td>
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<tr>
<td>GFAP</td>
<td>General Framework Agreement for Peace in Bosnia and Herzegovina – Dayton Peace Agreement</td>
</tr>
<tr>
<td>GYIL</td>
<td>German Yearbook of International Law</td>
</tr>
<tr>
<td>HM</td>
<td>Her Majesty</td>
</tr>
<tr>
<td>HR</td>
<td>High Representative</td>
</tr>
<tr>
<td>HRAP</td>
<td>Human Rights Advisory Panel</td>
</tr>
<tr>
<td>HRC</td>
<td>(Bosnian) Human Rights Chamber</td>
</tr>
<tr>
<td>HRLR</td>
<td>Human Rights Law Review</td>
</tr>
<tr>
<td>HROC</td>
<td>Human Rights Oversight Committee</td>
</tr>
<tr>
<td>HRR</td>
<td>Human Rights Review</td>
</tr>
<tr>
<td>HRQ</td>
<td>Human Rights Quarterly</td>
</tr>
<tr>
<td>IAC</td>
<td>Interim Administrative Council</td>
</tr>
<tr>
<td>IAEA</td>
<td>International Atomic Energy Agency</td>
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<tr>
<td>IBRD</td>
<td>International Bank for Reconstruction and Development</td>
</tr>
<tr>
<td>IC</td>
<td>international community</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICG</td>
<td>International Crisis Group</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>ICLQ</td>
<td>International and Comparative Law Quarterly</td>
</tr>
<tr>
<td>ICO</td>
<td>International Civilian Office</td>
</tr>
<tr>
<td>ICR</td>
<td>International Civilian Representative</td>
</tr>
<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
</tr>
<tr>
<td>IDA</td>
<td>International Development Association</td>
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<tr>
<td>IDI</td>
<td>Institut de droit international</td>
</tr>
<tr>
<td>IFIs</td>
<td>international financial institutions</td>
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</tbody>
</table>
LIST OF ABBREVIATIONS

IHL  international humanitarian law
IL   International Law
ILA  International Law Association
ILC  International Law Commission
ILJ  International Law Journal
ILM  International Legal Materials
ILO  International Labor Organization
ILR  International Law Review
IMF  International Monetary Fund
INTERFET  International Force for East Timor
IO   International Organization
IOLR International Organizations Law Review
IPA  Instrument for Pre-Accession Assistance
IPTF International Police Task Force
IR   International Relations
ITU  International Telecommunication Union
IUHEI Institut Universitaire des Hautes Études Internationales
J    Journal
JAC Joint Administrative Council
JCIL Journals of Comparative and International Law
JIAS Joint Interim Administration Structures
JICJ Journal of International Criminal Justice
JICL Journal of International and Comparative Law
JIL Journal of International Law
JILP Journal of International Law and Policy
JLH Journal of Law and Humanities
JPIL Journal of Public International Law
JTL Journal of Transitional Law
KFOR Kosovo Force
KLA Kosovo Liberation Army
KPC Kosovo Protection Corps
KSIP Kosovo Standards Implementation Plan
KTA Kosovo Trust Agency
KTC Kosovo Transitional Council
LJ   Law Journal
LJIL Leiden Journal of International Law
LN   League of Nations
LN Doc. League of Nations Document
xxx

LIST OF ABBREVIATIONS

LNOJ League of Nations Official Journal
LQ Law Quarterly
LR Law Review
MNBs Multinational Brigades
MONUC United Nations Organization Mission in the Democratic Republic of Congo
MoU Memorandum of Understanding
MTA Military Technical Agreement
NAC North Atlantic Council
NATO North Atlantic Treaty Organization
NGO Non-governmental organisation
NJIL Nordic Journal of International Law
No. number
NQHR Netherlands Quarterly of Human Rights
NYIL Netherlands Yearbook of International Law
NYT New York Times
NYU New York University
NYUJILP New York University Journal of International Law and Politics
NZZ Neue Zürcher Zeitung
OAU Organization of African Unity
OCHA United Nations Office for the Coordination of Humanitarian Affairs
ODIHR Office for Democratic Institutions and Human Rights
OHCHR Office of the UN High Commissioner for Human Rights
OHR Office of the High Representative
OI Ombudsperson Institution
OIOS UN Office of Internal Oversight Services
OLA Office of Legal Affairs
OMIK OSCE Mission in Kosovo
ÖRF Österreichischer Rundfunk
OSCE Organization for Security and Cooperation in Europe
O/SRSG Office of the Special Representative of the Secretary-General
ÖZöR Österreichische Zeitschrift für öffentliches Recht
<table>
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<th>Abbreviation</th>
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<td>ÖZöRV</td>
<td>Österreichische Zeitschrift für öffentliches Recht und Völkerrecht</td>
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<tr>
<td>p.</td>
<td>page</td>
</tr>
<tr>
<td>PAA (Powers)</td>
<td>Principal Allied and Associated Powers</td>
</tr>
<tr>
<td>PACE</td>
<td>Council of Europe Parliamentary Assembly</td>
</tr>
<tr>
<td>PCB</td>
<td>Peacebuilding Commission</td>
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<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<tr>
<td>PDSRS</td>
<td>Principal Deputy Special Representative of the Secretary-General</td>
</tr>
<tr>
<td>PIC</td>
<td>Peace Implementation Council</td>
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<tr>
<td>PISG</td>
<td>Provisional Institutions of Self-Government</td>
</tr>
<tr>
<td>PLO</td>
<td>Palestine Liberation Organisation</td>
</tr>
<tr>
<td>PM</td>
<td>Prime Minister</td>
</tr>
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<td>PMC</td>
<td>Permanent Mandates Commission</td>
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<td>pp.</td>
<td>pages</td>
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<tr>
<td>PSQ</td>
<td>Political Science Quarterly</td>
</tr>
<tr>
<td>R</td>
<td>Review</td>
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<tr>
<td>RCADI</td>
<td>Recueil des cours de l'Académie de droit international de la Haye</td>
</tr>
<tr>
<td>REG</td>
<td>Regulation</td>
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<tr>
<td>Res.</td>
<td>Resolution</td>
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<td>RGDIP</td>
<td>Revue générale de droit international public</td>
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<td>RIAA</td>
<td>Reports of International Arbitral Awards</td>
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<td>RIEL</td>
<td>Review of International and European Law</td>
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<td>RIS</td>
<td>Review of International Studies</td>
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<td>RSK</td>
<td>Republika Srpska Krajina</td>
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<td>RTDH</td>
<td>Revue trimestrielle du droit de l’homme</td>
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<td>s.</td>
<td>section, sections</td>
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<td>SAA</td>
<td>Stabilisation and Association Agreement</td>
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<td>SACEUR</td>
<td>Supreme Allied Commander Europe</td>
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<td>SAP</td>
<td>Stabilisation and Association Process</td>
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<td>SC</td>
<td>Security Council</td>
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<td>SCG</td>
<td>Serbia and Montenegro</td>
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<td>SEE</td>
<td>South-Eastern Europe</td>
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<td>sep. op.</td>
<td>Separate opinion</td>
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<td>SFRY</td>
<td>Socialist Federal Republic of Yugoslavia</td>
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<td>SG</td>
<td>Secretary-General</td>
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<td>SGT</td>
<td>Strategic Group on Transition</td>
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<tr>
<td>Abbreviation</td>
<td>Description</td>
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<td>SHAPE</td>
<td>Supreme Headquarters Allied Powers Europe</td>
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<td>SIL</td>
<td>Society of International Law</td>
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<td>SNC</td>
<td>Supreme National Council</td>
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<td>SOE</td>
<td>socially owned enterprise</td>
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<td>SOFA</td>
<td>Status of Forces Agreement</td>
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<td>SPS</td>
<td>Socijalistička Partija Srbije (Socialist Party of Serbia)</td>
</tr>
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<td>SRS</td>
<td>Srpska Radikalna Stranka (Serbian Radical Party)</td>
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<td>SRSG</td>
<td>Special Representative of the UN Secretary-General</td>
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<td>STM</td>
<td>Stabilisation and Association Process Tracking Mechanism</td>
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<td>SWAPO</td>
<td>South-West Africa People’s Organization</td>
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<td>TC</td>
<td>Trusteeship Council</td>
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<td>TCN</td>
<td>troop-contributing nation</td>
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<td>TFET</td>
<td>Trust Fund for East Timor</td>
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<td>TIR</td>
<td>Tijdschrift voor International Recht</td>
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<td>TRA</td>
<td>Telecommunication Regulatory Authority</td>
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<td>TS</td>
<td>Treaty Series</td>
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<td>United Nations Assistance Mission in Afghanistan</td>
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<td>UNAMET</td>
<td>United Nations Administration Mission in East Timor</td>
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<td>UNAMI</td>
<td>United Nations Assistance Mission for Iraq</td>
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<td>UNEC</td>
<td>United Nations Council for Namibia</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>UN Doc.</td>
<td>United Nations Document</td>
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<td>UNDP</td>
<td>United Nations Development Program</td>
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<td>UNEF</td>
<td>United Nations Emergency Force</td>
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<td>UNESCO</td>
<td>United Nations Educational, Scientific and Cultural Organization</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>UNHQ</td>
<td>United Nations Headquarters</td>
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<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
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<td>UNIDO</td>
<td>United Nations Industrial Development Organization</td>
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<td>UNMACC</td>
<td>United Nations Mine Action Coordination Centre</td>
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<td>UNMIBH</td>
<td>United Nations Mission in Bosnia and Herzegovina</td>
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