CONTENTS

Illustrations page xi
Foreword: Pierre-Marie Dupuy xiii
Acknowledgements xvi
Table of Cases and Judicial Decisions xix
1 Permanent Court of International Justice xix
2 Permanent Court of Arbitration xix
3 International Court of Justice xix
4 International Criminal Tribunal for the former Yugoslavia xxi
5 European Commission/Court of Human Rights xxi
6 European Court of First Instance xxii
7 Domestic courts xxii
  7.1 Austria xxii
  7.2 Bosnia and Herzegovina xxii
  7.3 Canada xxiii
  7.4 East Timor xxiii
  7.5 Germany xxiii
  7.6 Kosovo xxiv
  7.7 Palestine xxiv
  7.8 South Africa xxiv
  7.9 United Kingdom xxiv
  7.10 United States xxiv
List of Abbreviations xxvi

Introduction 1
  1.1 International administrations and the discourse of empire 2
  1.2 Methodological frames and structure 9
1 Creation of internationalised territories 18
  1.1 Horizontal transfer of effective control and the bare title to
   territory 19
    1.1.1 Doctrine and jurisprudence 20
CONTENTS

1.1.2 Dynamics of state practice 25
   (i) Panama Canal and Guantánamo Bay (both 1903) 26
   (ii) Bosnia-Herzegovina (1878) and the Saar Territory (1920) 28
   (iii) Contrasting the nudum ius with state servitudes 30

1.1.3 Mixed methodology: Chapter VII and the incorporation of a horizontal agreement 32
   (i) Eastern Slavonia (1995) 33

1.2 UN territorial administration and the vertical imposition of imperium 36

1.2.1 Searching for a legal basis: from Art. 24 to Chapter VII of the Charter 37
   (i) Jerusalem and Trieste (both 1947) 37
   (ii) Western Irian (1962) and Namibia (1967) 40

1.2.2 Imposing the divorce: Chapter VII and the appropriation of effective control by the UN 42
   (i) Kosovo and East Timor (both 1999) 44
   (ii) Disjunction between sovereign title and effective control in state practice: selected examples since 1878 50

Résumé: towards an in rem characterisation of internationalised territories 51

2 Fiduciary administration: mandates, trust and the transitory sovereignty vacuum 53

2.1 Mandates and the displacement of the sovereign 56
   2.1.1 Translating political context into legal response 59
      (i) Trust and the transposition of municipal legal instruments 59

2.1.2 The Mandate system as a network of interlocking obligations 63
      (i) Formal categorisation of legal instruments utilised 63
      (ii) Suprema potestas within the Mandate system? 66
      (iii) Application of a ‘matrix of modernism’ 69

2.2 ‘Le roi est mort, vive le roi!’: the Trusteeship system and the return of the sovereign 72
   2.2.1 Self-determination and the reversion to the sovereignty narrative 74
      (i) ‘Silent alchemy’: Namibia and the triumph of the teleologists 75

2.2.2 Ever-closer supervision and obligations under the Trusteeship system 80
<table>
<thead>
<tr>
<th>CONTENTS</th>
<th>vii</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Normative framework of the Trusteeship mechanism</td>
<td>81</td>
</tr>
<tr>
<td>(ii) Institutional framework</td>
<td>84</td>
</tr>
<tr>
<td>(iii) Mandates and Trusteeship territories</td>
<td>91</td>
</tr>
</tbody>
</table>

2.2.3 South-West Africa revisited 92

(i) Background 92
(ii) Legal basis for terminating the Mandate 96
(iii) Virtual governance: the United Nations Council for Namibia 102

Résumé: heightened international authority and the ‘peoples’ as a new actor 108

3 Self-determination and the personality of internationalised territories 111

Introduction: international law’s agnosticism 112

3.1 Subjectivity as entitlement 116

3.1.1 The dynamic principle of self-determination 117
(i) Norms of self-determination as a latent international entitlement 122

3.1.2 Other sources of entitlement: the inductive approach to personality 124
(i) The Free City of Danzig, the Westbank/Gaza and Kosovo 126

3.2 Agency and the construction of international legal personality 131
(i) Two points of clarification regarding agency ex lege 133

3.2.1 Representation-in-trust 135
3.2.2 Agency and ‘performativity’ 139

Résumé: functional approaches to legal personality 143

4 ‘The King’s two bodies’: the dual functions of international administrations 149

Introduction: the elusive ‘international community interest’ 151

4.1 Of international agents and organs 158
4.1.1 A custodian’s parallel set of duties 162

4.2 Cases of dual functionality 164
4.2.1 The ‘dual mandate’ 164
4.2.2 The Allied Control Authority and its bona fide representation function 166
4.2.3 The United Nations Council for Namibia 171
(i) Normative content of the Council’s Decree No. 1 . . . within the UN legal order 173
(ii) . . . within the domestic legal order of states 176
(iii) . . . within the Namibian legal order 177

Postscript: temporary identity of domestic and foreign policy 179
5 Extent of UN authority in Kosovo and the problem of an open-ended institution-building mandate 184

Introduction: the UN imperium over the territory 184

5.1 Kosovo’s status and Serbia’s bare title to the territory 186

5.1.1 ‘Paramount law of the land’: Resolution 1244 and its first implementing Regulations 187

(i) UNMIK’s deployment strategy and ‘pillar’ structure 190

(ii) Sovereignty v. imperium: applying the in rem framework 196

(iii) A case study 199

5.1.2 From benchmarking to status? 203

(i) Governance challenge wrapped in a sovereignty enigma 204

(ii) Of roadmaps and roadblocks: the ‘earned sovereignty’ approach 207

5.2 UNMIK as territorial agent and UN organ 213

5.2.1 Territorial agency 213

(i) UNTAET and the Timor Gap Treaty 214

(ii) UNMIK’s performance of agency 217

(iii) Towards a limited legal personality? A memo to the Kosovo Premier 228

5.2.2 UNMIK as administrator of an international trust 237

(i) Privatisation, or: to be or not to be immune? 238

Postscript: view from international humanitarian law 243

6 The status process: Kosovo’s endgame 248

Introduction: UNMIK as facilitator? 250

6.1 Statehood or stasis? UNOSEK and the Contact Group 252

6.1.1 Miscalculations and flawed premises 258

(i) Spoiling the party 262

(ii) The Troika 264

6.1.2 UNOSEK’s settlement proposal 266

(i) The question of international powers 268

(ii) Building legitimacy: a new constitution 270

6.2 Wider implications for public international law 272

6.2.1 The option of ‘status imposition’ 273

6.2.2 The future of self-determination claims 276

6.2.3 Challenges to Serbia’s position 280

Résumé: status resolution as contrapunctus 282

7 An anomalous legitimacy cycle 288

Introduction: premises and challenges 290

7.1 A transitional administration in transition 292

7.1.1 Two dimensions of the legitimacy discourse 294
CONTENTS ix

7.2 Pursuit of domestic legitimacy: two promises 298

7.2.1 Foundational promise 299

(i) The Border Agreement between FRY and Macedonia 300

(ii) Vouching for the ward: the Haradinaj case 302

7.2.2 Devolution of power and the democratic moment 303

7.3 Legitimacy through defiance 305

7.3.1 SRSG v. the Kosovo Assembly 306

7.3.2 ‘You’re fired’: OHR v. The Bosnian Constitutional Court 309

7.3.3 Two fronts of the struggle over domestic legitimacy 318

Résumé: negative externalities 320

8 Properties of a transitory legal order 326

Introduction: the transitionality frame 328

8.1 Unmediated import of international law 329

8.1.1 Policing the border between past and future government authority 332

8.1.2 Collapse of dualism and the promise of a liberal future 335

8.2 Absence of hierarchy of local norms 339

8.2.1 Uniform promulgation 339

8.2.2 The problem of review 344

(i) Palestine: competence to review an Ordinance 349

(ii) Bosnia: incidental norm control 350

8.2.3 ‘Sed quis custodiet?’: norm control and legality 356

8.3 A human rights vacuum? 360

8.3.1 Rights without remedies 360

(i) Extraterritorial applicability of human rights instruments 362

(ii) The Shell Game: the Court’s failure to close the gap in Behrami and Saramati 367

8.3.2 Too little, too late: Kosovo’s Human Rights Advisory Panel 381

(i) Options 383

(ii) The long march of UNMIK Regulation 2006/12 384

8.3.3 Will the International Civilian Representative in Kosovo do better? 394

(i) A new Mandate 395

Résumé: the ‘stickiness’ of an interim legal order 399

Concluding appraisal 404

(i) As to the legal status of the administering organ 408

(ii) As to the nature of powers assumed by an international administration 408

(iii) As to their extent 409
(iv) As to their limitation by international human rights law 409
(v) As to the fiduciary bond established between the international community and the population under its tutelage 410
(vi) As to the title to territory 411
(vii) As to the legal status of the territory 411
(viii) Five themes for Accountability Guidelines for plenary UN Administration Missions 428

Bibliography 434

1 Primary sources 434
   A Treaties, conventions and constitutions (of international organisations) 434
   B UN sources 436
       United Nations General Assembly 436
       United Nations Security Council 438
       International Law Commission 439
   C Documents and reports of international organisations 440
       League of Nations 440
       UN: peacekeeping/peace-building, governance and accountability 440
       South-West Africa/Namibia 442
       Eastern Slavonia 442
       Bosnia and Herzegovina 442
       Kosovo and Serbia 443
       East Timor 449
   D UNMIK and UNTAET legal sources (mediate UN law) 449
   E Agreements between international/local institutions and third parties 451
       UNTAET 451
       UNMIK 451
   F Pronouncements of local Kosovo institutions 453
   G Contact Group statements and unpublished documents (letters, Code Cables, etc.) 454

2 Secondary sources 457
   A Books 457
   B Book chapters 468
   C Articles 475
   D Speeches, theses, working papers and think tank/NGO studies 495

Index 502
ILLUSTRATIONS

4.1 Position of an international territorial administration  page 181
5.1 UNMIK’s consultative structure within the IAC, 2000  192
6.1 The Contact Group in the status process, January 2006–December 2007  254
7.1 Dual-key governance framework  293