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978-1-107-40464-9 - The Legal Status of Territories Subject to Administration by International Organisations

Bernhard Knoll

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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 administering 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.

BERNHARD KNOLL is Special Adviser to the Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR).

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CAMBRIDGE
UNIVERSITY PRESS

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CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9781107404649

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First published 2008
First paperback edition 2011

A catalogue record for this publication is available from the British Library

ISBN 978-0-521-88583-6 Hardback
ISBN 978-1-107-40464-9 Paperback

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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 *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 *dominium* and *imperium* and, in a second step, how it fills the vacuum as provider of *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.

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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

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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.

Pierre-Marie Dupuy
Chair of Public International Law,
European University Institute and Université de
Paris II (Panthéon-Assas)

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ACKNOWLEDGEMENTS

*On s'aperçoit qu'on est devenu un spécialiste
quand les choses dont on parle avec plaisir
ennuient les autres.*¹

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.

Just as pieces of academic research, one also discovers people; conversations can be as inspiring as gazing into the heart of a jewel. I have incurred many debts in writing this book and, most of all, I am grateful to the supervisor of my doctoral thesis at the European University Institute in Florence, Professor Pierre-Marie Dupuy, for providing direction and perspective. I hold him accountable for eventually convincing me to expand what was planned to be a Master's thesis into a dissertation. He has done so with an astonishing sense of humour that managed to keep my enthusiasm in check. I would like to extend special thanks to the Institute for Legal Studies of Madison Law School, and in particular Professor Heinz Klug, for support during the extremely productive winter semester 2004/2005 as visiting scholar at the University of

¹ Gilbert Cesbron, *Ce siècle appelle au secours* (Paris: Robert Laffont, 1998), at 95.

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Wisconsin. Third, I am grateful to my defence board for reviewing this work and providing critical comments: Professors Neil Walker, Hanspeter Neuhold and Christian Tomuschat.

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.

In Kosovo, I thank many colleagues and friends both within and outside the international mission for their encouragement, inspiration and the valuable documentary material. Among them were Franklin de Vrieze, still with the OSCE Mission in Kosovo, Carsten Weber, now with MONUC, Verena Ringler and Severin Strohal of the ICO/EUSR Preparation Team in Prishtina, Izabella and Tim Cooper at UNMIK and UNDP Kosovo, respectively, Dardan Gashi at the Kosovo Ministry of Local Governance, and Judith Safar, formerly with the UNMIK Pillar IV's Legal Department. Without the rigorous guidance of OSCE Ambassadors Daan Everts and Pascal Fiesci and their respective Chefs de Cabinet, Andrew Joscelyne and Mark Etherington, I would not have received the professional insights that enabled me to probe deeper into the tensions underlying an international institution-building mandate.

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.

² Introduction to *The Blood of Guatemala. A History of Race and Nation* (Duke University Press, 2000).

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ACKNOWLEDGEMENTS

The year spent within the Austrian Ministry for Foreign Affairs following the defence of my dissertation proved invaluable to develop and test a number of arguments. In this respect, I would like to gratefully acknowledge the provoking exchanges with, and inspiring company of, Ambassador Hanns Porias, Jan Kickert, Thomas Schnöll and Alexander Bayerl who all share an enthusiasm for, and knowledge of, everything Balkan. I am also grateful to the referees of Cambridge University Press and its skilled editors for their extensive and helpful observations and corrections.

I would like to extend my sense of appreciation to Professors Christoph Schreuer and Alina Lengauer and Dr Stephan Wittich, of the University of Vienna, Kathrin Maria Scherr, Srdjan Cvijić, Monica Arino Gutierrez, Stefan Imhof at HM Treasury, Wenke Crudopf at the Auswärtiges Amt, Morag Goodwin and Richard Giesen of the Universities of Maastricht and Giessen, respectively, Rebecca Everly at Cambridge University, Felix Martin at the World Bank, Michael Karnitschnig of the European Commission, Robert-Jan Uhl and Max Hennig at the OSCE/ODIHR, Margarethe Matic, Peggy Herrmann, Alessandro Ciappi, Chiara Manetti, Joy Dragland, Stephanie Le Bihan and Catherine Clarke, for reading, thoughtfully commenting, and improving on earlier drafts of the manuscript, or just bearing with me when I did not know how to proceed.

I thank Ioana Tudor for the love, enthusiasm and unfaltering support, not only during the mad five months prior to the completion of our doctorates in Florence, but ever since we moved to Vienna and Warsaw. This work would also have taken a different path had it not been for the precious advice and enduring friendship of Marcus Brand, Wolfgang Sporrer, Andres Clerici, David del Vecchio, Harald Meier, Viola Gangl and Nikolaus Marschik.

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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

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LIST OF ABBREVIATIONS

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CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CSCE	Conference on Security and Cooperation in Europe
DFID	UK Department for International Development
DG	Directorate General
DIR	Directive
DOP	Declaration of Principles
DPKO	United Nations Department of Peacekeeping Operations
D/SRSG	Deputy Special Representative of the Secretary-General
EAR	European Agency for Reconstruction
EBRD	European Bank for Reconstruction and Development
EC	European Community; European Communities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
EComHR	European Commission for Human Rights
ECtHR	European Court of Human Rights
ED	Executive Decision
EECR	East European Constitutional Review
ed.	edited, editor
e.g.	for example
EHRLR	European Human Rights Law Review
EIB	European Investment Bank
EJIL	European Journal of International Law
EJIR	European Journal of International Relations
EP	European Partnership
EPIL	Encyclopedia of Public International Law
ESDP	European Security and Defence Policy
ESI	European Stability Initiative
<i>et al.</i>	and others
<i>et seq.</i>	and the following
EU	European Union
EUI	European University Institute
EUMM	European Union Monitoring Mission
EUPM	European Union Police Mission in Bosnia and Herzegovina

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

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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	Journal 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

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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