1. Introduction

The UN has actively engaged in the last decade in projects of territorial administration such as in Bosnia, East Timor and Kosovo. This type of UN intervention has been described as addressing inter-related but distinctive problems of ‘sovereignty’ and ‘governance’.¹ The involvement of international organisations in administering territories has a long-standing history dating back to the start of the League of Nations. Furthermore, the UN has exercised in the past and still exercises today territorial competencies not only by providing the means and resources for direct territorial administration, but also deciding upon issues of formal territorial status, and endorsing territorial situations on the ground.

The underlying idea is that global governance in the name of global interests can represent the solution to irreconcilable clashes of local interests in local governance. The perceived role of the world organisation as the vehicle for fundamental interests of the international community as a whole, be it in the promotion of the right of self-determination of non-self governing territories, or in the maintenance of peace and security in a certain disputed area, make questions of legality as secondary to the concept of effectiveness of the world organisation. The question is not so much how to make the UN decision-making process in conformity with the positive norms of the instituting treaty, but to render the organisation as effective as possible in view of the political challenges of the Post Cold-War era. In an age where conflicts and unilateralism seem to represent the main threat to a system of global governance, to assess the action of the UN in terms of legality sounds pretentious to a pragmatic mind. The willingness of the UN founding states not to create a system of judicial review of the internal organs’ acts and the consequential presumption of legality of those acts developed by the ICJ since the Certain Expenses case makes the realist argument even stronger. However, even the pragmatist and realist must bear in mind the fact that the activity of an international organisation neither exists in a legal vacuum, nor represents a water-tight compartment of international law. As stated by Judge Percy Spender his separate opinion in the Certain Expenses advisory opinion, the

¹ Wilde, ‘From Danzig to East Timor and Beyond: the Role of International Territorial Administration’ 95 AJIL (2001), 583.
ICJ may be called to decide on the competence of a certain organ of the UN to act in a certain way, and, in that case, it will be only legal considerations that must be taken into account. In other words, the UN does not act as an absolute world sovereign situated above the rule of law. Abidance by international law makes UN organs more legitimate, thus more effective thanks to what Franck calls the ‘pull towards compliance’. But this is not the only role played by legitimacy. Legitimacy may also play a fundamental role in shaping the very broad powers of international legality, as embodied in the theory of implied and inherent powers of international organisations. Furthermore, the legitimacy derived by the promotion of the UN broad ends and aims provided by Article 1 of the UN Charter may be able to accommodate the tension between original Charter violations and de facto territorial situations produced on the ground.

This chapter expands the analysis of unlawful territorial situations articulated in the previous chapters to consider UN territorial powers and competencies. Such powers have been with different aims and purposes exercised in the past by the GA and are nowadays mostly exercised by the SC. It assesses the limits in terms of legality and legitimacy to the action of the SC in this respect. The chapter reviews how a situation of territorial unlawfulness can be reinforced by ultra vires actions by the SC. As an example of a partly unlawful territorial situation under the authority of the UN the case of Kosovo is considered. On the other hand, the role of legitimacy provided by UN endorsement of post-conflict unlawful territorial situations and by different forms of recognition by the affected state shows how effectiveness and legality can be also reconciled in the long run. Finally, the legitimacy factor can also represent a restraining factor in the way the SC acts and justifies its choices, enhancing its accountability towards the international community and the direct addressees of its actions. The question of sovereignty and final status of Kosovo and the way these two issues have been so far addressed by the UN administration shows the important role that legitimacy plays in this respect.

2. UN competence and powers in territorial situations

The exercise by the UN of territorial competencies and powers is multifaceted, and, albeit conceptually not entirely new, it represents one of the most innovative and interesting developments in international governance of the last ten years. Bosnia and Herzegovina, Kosovo and East Timor represent three

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