ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL TERRITORIAL ADMINISTRATIONS
– A REVIEW ESSAY OF CARSTEN STAHN: THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION: VERSAILLES TO IRAQ AND BEYOND

BY KJETIL MUJEZINOVIC LARSEN*

A number of academic contributions have recently been published which provide extensive analyses of the normative framework and practice in cases of international administration of a territory. A noteworthy contribution, in addition to Carsten Stahn’s monograph, is Ralph Wilde, *International Territorial Administration* (Oxford: Oxford University Press, 2008). These monographs have received much praise, and they have even been awarded prestigious international law prizes: Wilde’s book the American Society of International Law (ASIL) Certificate of Merit for 2009, “for preeminent contribution to creative scholarship”, and Stahn’s the Ciardi Prize 2009, given to a “substantial and original study dealing with military law, law of war or any matter connected with or related to the aforementioned”. According to the jury, Stahn’s book is “an outstanding contribution to international security and co-operation which combines problem-oriented analysis of international law and practice, excellent writing, and convincing considerations of challenges for good governance on the way ahead”. It is evident that these authors – separately and collectively – provide an invaluable doctrinal analysis of international administrations, which certainly will contribute significantly to the clarification of general conceptual issues and to the development of a coherent and consistent normative framework and practice.

The present essay, which focuses exclusively on Stahn’s book, does not purport to provide a complete review of the book; the present writer chooses to let the aforementioned praise speak for itself as evidence of its general quality and significance.1 Instead, this essay addresses an issue of particular interest for the present journal, namely how to achieve accountability for human rights violations committed by international territorial administrations. This is an issue that has received much attention in discussions of the “law and practice” of contemporary international territorial administrations, in particular in light of the conduct of

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* Kjetil Mujezinović Larsen is Research Fellow / Ph.D. Candidate, the Norwegian Centre for Human Rights, the University of Oslo. E-mail address: k.m.larsen@nchr.uio.no. Full reference of the book: Carsten Stahn: The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond (Cambridge: Cambridge University Press, 2008), ISBN 978-0-521-87800-5.

1 A. Orakhelashvili reviews both monographs in 13 *Journal of International Peacekeeping* (2009) 236-238, where he concludes (at 238) that they “show great deal of expertise and intellectual input on the matters of international territorial administration, and their utility is obvious for the broad range of international lawyers employed in academia or practice”.

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UNMIK and KFOR in Kosovo. However, this particular theme was chosen for another reason as well, namely that it illustrates that even this excellent book has its limits. The book takes a wide perspective, and addresses a wide range of conceptual and practical issues in the context of a wide range of different forms of administrations. While this perspective makes the book highly valuable as a “nearly complete blueprint for the necessary structure of an interim administration”, as Christian Tomuschat puts it in his foreword (xix), the present essay focuses on an inevitable side effect of such a perspective, i.e. lack of the detail, clarification, exceptions and nuances that are necessary to provide a sufficient basis for reaching correct legal solutions in specific cases.

The question to be addressed is simply “How can an international administration be held accountable for human rights violations against individuals?” It can only be answered, however, by addressing a wide range of issues. For instance, which human rights norms apply to the administrations? Are these norms legally binding to the administrations or binding only in a non-legal sense? How should conflicts between human rights norms and other legally binding norms be solved? To which entity is the conduct of international administrations attributable? Which enforcement mechanisms exist against this entity? But these are complex questions, and clear conclusions may not exist at the present time.

Before exploring the issue further, it is useful to introduce the context. Stahn defines (44) international territorial administration as “the exercise of administering authority (executive, legislative or judicial authority) by an international entity for the benefit of a territory that is temporarily placed under international supervision or assistance for a communitarian purpose.” The definition covers such diverse arrangements as, for example, the United Nations administrations in Kosovo or East Timor, the Office of the High Representative in Bosnia and Herzegovina, and the Coalition Provisional Authority in Iraq. These arrangements vary considerably in terms of scope, functions, United Nations involvement, relationship with the host State, duration, and so on, and the applicability of human rights norms and accountability mechanisms will vary accordingly. However, all of the arrangements share, in Stahn’s words, the “common structural bond” that the authority is held by the administering entity “in the interests of the population of the territory”. The protection of human rights is thus an issue of considerable importance in the book.

Now, let us at first consider what Stahn writes about the applicability of universally recognised human rights standards. He discusses this primarily under the heading “limits of international authority” (479-510), where four legal constructions are described that may form the basis for such applicability, (i) institutional (self-)commitment; (ii) the crystallisation of human rights law as customary law; (iii) the concept of functional duality; and (iv) the
applicability of human rights treaty obligations. The book provides an analysis of them all, but clear conclusions are often hard to find.

Institutional self-commitment is rightly criticised for being imprecise and for sending the message that human rights are implemented at the discretion of the administration rather than being binding as a matter of law. Here, Stahn introduces an issue that could have deserved greater clarity, namely the distinction between human rights norms which apply as a matter of law and norms which apply as a matter of policy. It has considerable implications for the issue of accountability for violations of the norm, but the distinction is only implicitly applied when Stahn at a later stage discusses the available accountability mechanisms. Stahn also touches briefly upon another criticism that occasionally is made, namely that the inclusion of human rights functions in the mandates of international peace operations in general, and of international territorial administrations in particular, are aimed primarily at other actors in the area of deployment rather than the operation itself. In general, the relationship between the administration and other actors – including, but not limited to, the authorities of the host State – with regard to the protection of human rights could perhaps have been addressed further.

When the issue of human rights obligations as a part of customary law is addressed Stahn offers clearer conclusions, but not necessarily to the issue which his heading suggests. He does not devote much attention to whether international customary human rights law is binding for international administrations (which it is) and the challenge of determining what this customary law actually is. Both of these issues one might have expected to be addressed. But instead Stahn discusses the factual nexus that must exist between the administration and the civilian population, taking the “control entails responsibility” argument as a starting point. This leads him to address the extraterritorial effect of human rights conventions, following a quite unsubstantiated argument that the exercise of territorial authority by an international organisation is comparable to the extraterritorial exercise of jurisdiction by States. However, even if one accepts this premise, the book offers little guidance on the degree of control required in this regard. The issue of the extraterritorial effect of human rights treaties has been addressed extensively in international case law and legal doctrine in recent years, and the monograph offers only a (too?) brief introduction to the issue.

Next, the idea behind the theory of “functional duality” is that domestic courts should have jurisdiction over acts of international administrations in situations where the administration perform functions “as organs of a state” or of “a ‘surrogate’ domestic government”. Stahn appears to acknowledge the limited application of this theory *lex lata* (in particular in the later chapter on institutional accountability, 634-638), and he describes the obligations of the international administrations only vaguely. The administration “may be said” to have obligations, or “may be bound” by human rights norms. And therein lies the only objection the present writer has to the discussion, precisely that it is difficult to follow Stahn’s arguments towards a clear characterisation of this concept as a part of the *lex lata* at present. When Stahn, for example, argues (637) that the concept may be applicable “in scenarios like Kosovo”, it looks to the present writer as if he has adopted a *lex ferenda* perspective, and perhaps not a very realistic one. The theory is interesting, but the present writer would want further elaboration to be convinced about its practical applicability.

The subsequent issue of treaty obligations is addressed in more detail, but again without clear conclusions. Having established that formal accession to human rights treaties is an
impractical solution, Stahn moves on to the interesting concept of “functional succession”. This concept was developed in a context of State succession, and means that a successor regime remains bound by the obligations of the previous regime. The application of this concept to international administrations is an issue that has not yet been tested in international case law, but it is easy to agree with Stahn that the concept should be applied in such situations. However, the real problem here is to hold the administration accountable for violations of the obligations, and then the concept falls silent. As Stahn acknowledges, one must distinguish between formal treaty membership and the material obligation to comply with the substantial guarantees of treaty law, which the present writer understands to mean that the concept of functional succession cannot be extended to cover the supervisory and enforcement mechanisms of treaties. And in that case, little may in practice be gained in terms of ensuring effective human rights protection.

Thereafter, he seemingly turns – once again – to the issue of extraterritorial application of human rights treaties, but this time the discussion concerns, to a large extent, the related but separate issue of attributability. To which entity is the conduct of an international territorial administration attributable? The present writer has no strong objections to Stahn’s presentation of “State obligations within the framework of multinational administrations” (497-498), where he argues that each individual State on certain conditions remains bound by its treaty obligations. A theoretical objection is perhaps that the case of Hess v. the United Kingdom at the European Commission of Human Rights, which is Stahn’s principal source on this issue, provides a very weak basis for such a conclusion, but this does not mean that the conclusion itself is flawed. More troublesome is Stahn’s presentation of “State obligations within the framework of operations conducted by international operations”, where he addresses much too superficially (or underestimates?) the confusion and the inconsistency which was created by the landmark decision from the European Court of Human Rights in the Behrami and Sarar-mati case. The present writer agrees with Stahn when he states (499) that attributability “must be assessed on the basis of the degree of operational control in the individual circumstances”, but Stahn’s summary of the decision implies that he considers it to be compatible with this principle, and here the present writer disagrees. The opposing view is that the Court created a test for attribution of conduct which is in conflict with general principles of attribution of conduct during peace operations and also with relevant principles under general international law, and which has as its consequence that the European Convention on Human Rights in practice is rendered largely irrelevant during peace operations.

Stahn continues to discuss the scope of the applicable human rights standards, and he primarily discusses three factors that restrict this scope of application, namely (i) the relationship with international humanitarian law, (ii) derogations from human rights treaties, and (iii) the derogatory effect of a Chapter VII mandate from the UN Security Council. The general impression of this section is in line with what has been said above. Stahn has made strong

3 Admissibility decision 2 May 2007, appl. no. 71412/01 Behrami and Behrami v. France, and appl. no. 78166/01 Saramati v. France, Germany and Norway.

efforts to introduce the complexities of the issues, but again the presentation takes on the character of being an overview where many details are omitted.

Firstly, the relationship between international humanitarian law and human rights law has been extensively discussed in legal doctrine in recent years, and there remains some controversy about this issue.\textsuperscript{5} Stahn does not distinguish clearly between the introductory issue of whether human rights law remains applicable during armed conflicts (which it does), and the more contentious issue of how human rights law is to be properly applied in a situation where international humanitarian law also applies. It is quite common to describe two general theories in this regard: (a) international humanitarian law is \textit{lex specialis} (whatever that may mean in the present context, but this issue is not pursued here) to international human rights law in case of a conflict between the two regimes, and (b) the two regimes are \textit{complementary}, meaning – in the words of one commentator – the two regimes “do not contradict each other but, being based on the same principles and values, can influence and reinforce each other mutually”.\textsuperscript{6} Stahn does not enter significantly into this discussion, and skips instead quickly to a conclusion which appears to be in line with a moderate \textit{lex specialis} theory – a specific obligation of human rights law may be superseded by a more specific rule under international humanitarian law. But the reader will need to be well acquainted with the doctrinal debate to realise that this conclusion is contentious, especially in situations where the conflict is between human rights law and the law of occupation (which Stahn at 474 has described as being partly applicable by analogy to certain territorial administrations).\textsuperscript{7}

The second issue, derogations, is omitted here, since the present writer has no significant objections to Stahn’s insightful comments. The third issue, however, deserves some attention. Stahn’s discussion of the derogatory effect of Chapter VII resolutions is good in the sense that it offers clear and practical conclusions to the issue. Nevertheless, it is an inevitable problem, for this book as for any other legally scholarly publication, that relevant judgments and decisions may appear shortly after its publication and which alter the legal situation, and it is a disadvantage for the book that it was concluded before the \textit{Al-Jedda} case reached the UK House of Lords. The discussion could have benefited from a clear distinction between resolutions

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  \item \textsuperscript{6} Droege, ibid., 521.
  \item \textsuperscript{7} See, for example, D. Campanelli, “The law of military occupation put to the test of human rights law” in 90 \textit{International Review of the Red Cross} (2008) 653-668 at 659-660. See also G. T. Harris, “The Era of Multilateral Occupation” in 24 \textit{Berkeley Journal of International Law} (2006) 1-78 who argues that the law of occupation no longer retains any legal authority and is (or should be) replaced by a “new model of occupation” which focuses on the protection of human rights. This may provide an alternative view to Stahn’s discussion.
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which displace human rights obligations and resolutions which qualify such obligations, but both of these options are arguably implicitly covered by Stahn’s discussion. The present writer also misses some reference to the aforementioned Behrami/Saramati case, where the ECtHR said, inter alia, “the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court.”8 It is, however, granted that this statement strictly speaking does not concern the derogatory effect of a UN Security Council resolution, but only the jurisdiction ratione personae of the Court to examine a complaint.

But let us assume, after all this, that it is established that a human rights norm is applicable to the conduct of an international administration. How does one then achieve accountability for violations of the norm? Stahn touches subtly on this at 503 already where he explains why “the realisation of these rights and obligations often conflicts with the realities on the ground”. The main discussion of the accountability issues is made in Chapter 14, which discusses privileges and immunity, as well as institutional accountability.

As most commentators agree, human rights norms are, in one way or another, binding on international administrations, but getting from there to establishing accountability for violations of these norms is no easy matter. The first problem is one of immunity. As Stahn makes eminently clear, most international administrations enjoy immunity from legal process unless it has been waived. For example, in the aforementioned Behrami/Saramati case, the United Nations stated in its observations to the Court that UNMIK “is a subsidiary organ of the United Nations entitled to the privileges and immunities as set forth under the 1946 Convention”. Although Stahn makes a commendable effort to provide a critique of the current immunities regime, the reality is that immunity represents a considerable obstacle to establishing accountability for the conduct of international territorial administrations.

Even if this obstacle should be overcome, it is correct as Stahn writes (598), “The establishment of a right balance between the functional independence of administrators … and the principle of institutional accountability … is one of the unresolved challenges of territorial administration.” Stahn’s discussion provides an excellent overview of the many problems that arise. He takes as a starting point the general tradition of having only political accountability mechanisms, where judicial review has been – and still is – an exception rather than a rule. Building on this realisation Stahn argues that the current accountability architecture requires new thinking, and he devotes considerable attention to what he describes as a re-conceptualisation of the issue. He describes four different review mechanisms, (i) intra-institutional control, (ii) expert control and independent external scrutiny, (iii) domestic forums of accountability, and (iv) judicial review by independent international courts, all of which are, to a varying degree, relevant for the present essay, and it is evident throughout the chapter that accountability for human rights violations is a key issue. Stahn offers many insightful arguments, and this certainly is a part of the book which justifies the praise lavished on it. In the following, only two elements in the discussion will be mentioned.

Firstly, it is an unfortunate fact that the discussion of claims commissions in practice is the most relevant part of the chapter. This is a “fact” since most of the other accountability mechanisms either encounter obstacles which render them largely unavailable in many cases.

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8 Op. cit., note 3, para. 149
of human rights violations, or concern only political, and not judicial, review. And it is an “unfortunate” fact since claims commissions have serious shortcomings which are clearly described by Stahn, such as substantive exemptions from the competence of the commissions or procedural inadequacies.

Secondly, Stahn makes an interesting analysis of the possibility of judicial control by domestic courts, but one related issue could have been addressed to complete the picture. If the courts of the host State do not have jurisdiction to examine allegations of human rights violations conducted by an international territorial administration, can the host State itself be held responsible in domestic courts for not having prevented the violation? It is granted that this does not directly concern the accountability of the international administration, but it does concern accountability for acts carried out by the international administration. The issue was discussed by the Constitutional Court of Bosnia and Herzegovina in 2005, in a case which concerned the arrest and detention by SFOR troops of an individual in Republika Srpska. The Court had no jurisdiction over SFOR, but considered there to be, inter alia, “an indispensable need to ensure the highest level of protection of the constitutional rights for all persons on the territory of Bosnia and Herzegovina. The fact that human rights have been violated by persons who are not accountable to national authorities cannot remove the State’s obligation to protect such rights.”

The Court therefore continued to hold Bosnia and Herzegovina responsible for human rights violations committed by SFOR. There is room for debate about whether this conclusion is based on a correct interpretation of the relevant international law, but it does offer an interesting option that may be explored further in other situations.

To conclude, it is certainly correct that Stahn has provided an excellent and valuable doctrinal analysis of the law and practice of international territorial administrations, but one should not approach the book with unrealistic expectations. With regard to accountability for human rights violations the book offers an overview of (many of) the difficult issues that arise, but does not purport to analyse them in detail. Thus, many readers will have to search elsewhere for detailed examination and clarification of the various issues involved.

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ERRATA

In the last issue of the NJHR reference errors occurred in the article "When Parliament Comes First – The Danish Concept of Democracy Meets the European Union" by Marlene Wind. This was due to technical faults, and the editorial board apologizes strongly. New and correct versions can be found at http://www.humanrights.uio.no/forskning/publikasjoner/ntmr/ and at www.idunn.no.