

International Administration of Territories and the Dilemma of Accountability

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Abstract

Two decades post the Cold-War; the World has witnessed a systematic revival of a practice long thought to be extinct-territory administration via an international body to act as a government for running the state/territory. The most prominent examples were the United Mission in Kosovo (UNMIK) and the United Nations Transitional Administration in East Timor (UNTAET).

Various criticisms were directed to the International Administrations of Territories; the most prominent was mandating this Administration Authority complete power in running the Legislative, Executive and Judiciary authorities where its decisions are not being subject to monitoring or accountability. Yet, such decisions were mostly in violation of the International law which undermined the core principles of democratic governments, the rule of law and human rights as being the corner stones of International peace and security.

This study aims at analyzing the legitimacy of forming international administrations as well as scrutinizing the legal restrictions and commitments thereof. The ramifications of any violations of such restrictions and commitments (The International Human Right Law and The International Humanitarian Law) should be holding these administrations and its members accountable internationally.

Keywords: International administration; Territories

Introduction

During the past two decades, an international phenomenon stated to spread called "the International Administration of Territories". The United Nations was the body to run these territories as a local government where Administration members control the three authorities per se: Legislative, Executive, and Judiciary. The Administration, however, is not subject to any clear legal accountability leading to the violation of enshrined principles in the International Law - the Rule of Law, the Right to Self-determination, Human Rights...etc. - which are considered the core factors in protecting International Peace and Security.

This paper tries to highlight the deficiency in the attempt to hold the UN Administration accountable.

The Legality of the International Territorial Administrations

The UN Charter includes several provisions that are considered the legal basis of establishing Territorial International Administration as follows:

General assembly

Under Article 11 of the Charter, the General Assembly can establish an international administration upon the approval of the concerned State. The General Assembly has the right to discuss any question

relating to the maintenance of international peace and security brought to it by any member of the United Nations or the Security Council, as well as to make its recommendations on these matters to the members or the Security Council or to both. However, the General Assembly is not qualified to decide on military actions as per Article (11) paragraph (2) of the Charter, which states: "Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion". The term "action" refers to actions related to the threat and breach of peace or act of aggression as detailed in Chapter VII [1].

Security council

Article 6 of the Charter authorizes the Council to recommend procedures and methods for the peaceful settlement of international disputes with the consent of the State concerned. It should be noted that the Security Council is prohibited from taking action that interferes with the internal jurisdiction of the State, except with the explicit consent of the State or when the Security Council acts under Chapter VII in accordance with Article 2, paragraph 7, of the Charter.

On the other hand, Chapter VII of the Charter authorizes the Security Council to enforce arrangements to settle international disputes without the consent of the State concerned and by coercive means, both military and non-military, whenever the situation constitutes any threat to the peace, breach of the peace, or act of aggression. Here, the Council can establish international administration based on three legal rules [2].

Article 39 grants broad powers to the Security Council to take appropriate measures for the maintenance of international peace and

security. The International Criminal Tribunal for the Former Yugoslavia (ICTY) notes that the Security Council enjoys a very wide margin of discretion in choosing the appropriate course of action for the exercise of its primary function of maintaining International peace and security.

The International Court of Justice's decision on compensation for injury claims affirmed that the United Nations should be given powers other than those explicitly provided for in the Charter when it is deemed necessary for the performance of its duties. The establishment of international administration should be seen as an implicit consequence of the task of maintaining international peace and security.

The consent of the UN member states regarding Kosovo and East Timor administrations is a sign of the emergence of a customary law with the international community accepting the legitimacy of Security Council actions in establishing international administrations, and this can be seen from the fact that General Assembly resolutions have endorsed all such actions [3].

Legal Restrictions on International Territorial Administration

There are a number of legal limitations to be observed by the international administration. The identification of these restrictions contributes to determining the legal framework for the accountability of international administration and the administering authority. This is discussed through the following:

Obligations of the Instrument Establishing International Administration

The instrument establishing the international administration determines the nature of its powers and jurisdiction. If established under a peace treaty, parties shall determine the powers and responsibility of the administration. If the administration is established by a Security Council resolution under Chapter VII, its purpose is to deal with a crisis involving a situation in which international peace and security are threatened in a territory or a State that lacks order [4]. It is therefore the establishment document and its circumstances determine the nature of the authority of international administration, whether it is limited to specific areas or to exercise its authority in a particular manner.

It is noted that the establishment documents of international administrations are vague and often difficult to interpret, which has been demonstrated in practice in international administration missions in East Timor and Kosovo [5]. This has led to divergent interpretations of administrative functions that should be observed by the administration.

Human Rights Obligations

The United Nations and its subsidiary bodies are obliged to respect the international law, as stated by the International Court of Justice [1,6], as long as they enjoy an independent international legal personality. Therefore they are obliged to respect the internationally recognized human rights standards, such as the Universal Declaration of Human Rights. Moreover, many provisions of human rights law are considered peremptory norms per se, and it is recognized that

peremptory norms in international law are binding to all International Organizations.

This means that the United Nations and the International Administrations are obliged to respect human rights, especially if entrusted with the legislative, executive and judicial authorities. In practice, the International Administrations in Kosovo and East Timor has adopted regulations providing that human rights treaties are part of the law in force, particularly when they assume functions for which human rights can be applied such as detention facilities or police activities [7].

International Humanitarian Law Obligations

International Humanitarian Law expresses a fundamental principle relating to the obligation on the occupier to maintain the status quo, while giving the occupier the right to take all possible measures to restore and ensure public order and security as far as possible. In other words, the powers stipulated in the Law of Occupation are aimed at limiting the actual powers of the occupying power, regulating the conflict between the military interests of the occupier and the humanitarian needs of the population, and prohibiting actions that would decide the final status of the region at the end of the conflict [4].

The international administration is obliged to respect the International Humanitarian Law when it comes to law enforcement. The Secretary-General of the United Nations affirmed that "The present provisions do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel, and do not prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation" [5].

In accordance with United Nations human rights obligations, forces operating in a foreign territory must respect the laws of armed conflict [8]. The scope of application of human rights instruments is not limited only to those subject to the jurisdiction of State parties to these instruments, but include actions committed on the territory of another State [9]. Noting that the Commission on Human Rights had affirmed that the jurisdiction of States could extend beyond the territorial limits of the State party to the International Covenant on Civil and Political Rights.

Furthermore, the 1994 Convention on the Safety of United Nations and Associated Personnel criminalizes attacks upon United Nations personnel while performing their duties established by the Security Council and is approved by the United Nations [10]. The only exception relates to the duties of the United Nations missions approved by the Security Council under Chapter VII, as the participating United Nations force personnel are considered combatants against regular armed forces and this entails applying the international law of armed conflict [11].

Accountability of the International Territorial Administration

The responsibility of international organizations is an important starting point for examining the accountability of International Territorial Administration. The United Nations General Assembly resolution regarding the responsibility of international organizations for internationally wrongful acts stated that; "There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) Is attributable to that

organization under international law; and (b) Constitutes a breach of an international obligation of that organization [12].

Accountability is a broader concept of international responsibility, as it refers to standards and practices designed to hold public officials accountable for their actions and outcomes. The International Law Association (ILA) linked international authority to accountability when the international administration conflicts with the limits of authority granted or contravenes instructions, and linked administration and accountability in terms of reviewing the way in which the administration performs its duties; or in terms of liability that involves harming others and acts or omissions that are in breach of any rule of international law [13]. This is discussed through the following.

Responsibility of the International Administration

The United Nations bears the consequences of the actions of its bodies. This principle has been included in the articles on the responsibility of international organizations discussed by the International Law Commission. According to article 6, "The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization". While Article 8 stated that, "The conduct of an organ or agent of an international organization shall be considered an act of that organization under international law if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions [12].

As for the military forces placed at the disposal of the United Nations, the consequences of their conduct lie with the participating State if the conduct is attributable to that State. Article 7 of the International Liability Determination establishes that the conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

Usually, the agreement of military forces participation defines the attribution of responsibility for conduct which applies to the parties to the agreement [1].

The European Court of Human Rights concluded that the actions of the multinational peacekeeping force in Kosovo were attributable to the United Nations; the Court also noted that Security Council resolutions were the primary reference for analyzing the human rights obligations of the international administration [14].

International Territorial Administration Immunity

The United Nations and its personnel enjoy judicial immunity under Article 105 of the Charter. The 1946 Convention on the Privileges and Immunities of the United Nations contains provisions concerning the immunity of United Nations and associated personnel [15].

Immunities are often negotiated with the United Nations or with troop-contributing States and are incorporated into the Status of Forces Agreement or the Status of the Mission. For example, before the establishment of the United Nations Transitional Authority in East

Timor (UNTAET), Australia signed a Status of Forces Agreement with Indonesia to regulate the participation of Australian troops in the mission of INTERFET and provided for the immunity of military and civilian personnel, including those provided for in the Charter of the United Nations [1].

The immunity of the international administration and its personnel is critical to the success of the mission, but this should not mean immunity to accountability for acts that are breaching the law, including human rights violations.

Mechanisms for Accountability of International Territorial Administrations

The International Administration of Kosovo and East Timor introduced the Ombudsman's Office to enable those affected to lawsuit the administration or its staff. The Ombudsman's Office was to investigate complaints of human rights violations and actions that constitute abuse of power and brought against any individual or other official institution [16].

Another mechanism used to ensure accountability was the judicial review of laws issued by the administration before national courts and tribunals. However, the continued application of United Nations immunity and immunities guaranteed by the legal status agreements of military forces precludes the effectiveness of this mechanism [1].

Judicial review of international administration's laws presupposes the existence of an effective judicial system and a competent judicial authority, but both of them cannot often be met due to the collapse or absence of the judicial system or the courts lacks the necessary powers to review legislation, at the time of establishing most international management missions, as in the cases of Kosovo and East Timor. Yet judicial review remains an important alternative to provide an effective legal procedure for cases involving violations of human rights standards.

In some cases, the International Mission itself developed a specific review mechanism. For example, UNTAET has issued two regulations allowing individuals to submit a written request to the Vice-President of the Authority to review decisions taken by a unit of the Authority [17]. However, this mechanism is not neutral and not a judicial institution, which prevents the establishment of effective accountability mechanisms, especially in light of the situations in which these administrations operate and the post-conflict environment.

Conclusions

Since the concept of accountability is broader than the concept of responsibility under international law, as it aims to hold the international body and those responsible for their actions and consequences for the damage resulting from the breach of international obligation and the acts that caused damage to individuals, the exercise of international authority and those responsible by the authority should be subject to accountability. This accountability is an international legal obligation, and it enhances the legitimacy of the administration and its success in achieving its goal.

The study concluded that there are legal obligations and restrictions on the international administration and its staff under the terms of the establishment document and the provisions of international human rights law and international humanitarian law.

On the other side, the study showed that the international legal framework is inadequate to oversee accountability of the international administrations and its associates under its immunity, as well as the weakness of accountability mechanisms created by the international administrations, which requires bridging these gaps by strengthening the accountability system for the international administrations to achieve its goal successfully.

It may be appropriate to apply international mechanisms that can make the administration more accountable, such as accepting complaints from individuals and communications of the administered states, in particular human rights violations. In this regard, the administration application of the first Optional Protocol to the International Covenant on Civil and Political Rights helps to bridge the accountability gap. Judicial review of international administration decisions remains the most important means of activating the system of international accountability and protection of human rights in such circumstances. When individuals in an internationally administered region lack access to judicial institutions, this violates the right to access justice.

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