Non-Elected Legislators: International Administrations and the Rule of Law

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The 1990s have seen the emergence of international peace missions and civilian administrations as a means of coping with conflicts and post-conflict situations worldwide. Last year alone, two international missions with broad mandates were established in East Timor and Kosovo.

Such missions pose a major challenge to the international community and, in particular, to the relevant international organizations. They need to respond rapidly and to activate a high number of personnel They face the challenge of ensuring peace and building structures for self-administration in the future. More often than not this takes place in an environment where parts of the population are traumatized, where infrastructure is destroyed or non-existent and where the roots of the conflict are still present.

International organizations, such as the United Nations, the European Union and the Organization for Security and Cooperation in Europe (OSCE) are trying to improve their capacities for mission deployment.[1] This raises questions about the needs and approaches of an international civilian administration when deployed in a post-conflict area. It is generally agreed that besides basic humanitarian and security needs, a cornerstone of its functions is the swift establishment of the rule of law in the given territory. Much emphasis is usually placed on developing the court system and, in particular, the administration of criminal justice. It seems that less attention is given to aspects of administrative justice and good governance. This is understandable, given the high pressure and complex challenges with which international missions are faced. However, this article will stress the fact that the key principles of the rule of law should be applied to the work of international administrations themselves.

Legitimacy of international administrations and the rule of law

The notion of the rule of law is often synonymous with effective law enforcement (notably in relation to combating organized crime), but this is no more than one aspect of the rule of law. Viewed more broadly, the concept of the rule of law requires that all state actors are bound by the law and nobody is above the law[2]. The notion of the rule of law describes a holistic concept of a public order, which goes beyond a formalistic or positivistic approach and entails protection of human rights and a democratic foundation.[3]

Degradation of the rule of law is normally a contributing factor to the outbreak of conflict. In Kosovo, for example, the civil war was preceded by the exclusion of ethic Albanians from the administration and from access to effective remedies. When

international administrations establish themselves in a post-conflict situation, they often have to function in a situation of complete absence of the rule of law. For some time they may be the only source of legitimate exercise of public authority. However, their legitimacy is not of a democratic character. Their legitimacy is *external*, based on international law (such as UN Security Council Resolutions) and often *de facto*, as the force that is restoring peace. Since this legitimacy does not last indefinitely, there is pressure for quick elections in order to identify legitimate local partners and lay the foundation for a transition of power to domestic institutions. In reality, the completion of such a process may take years or decades during which time the international administration rules supreme.

In the first few months following deployment, an international administration often has substantial credibility with large sections of the population but it is likely to become increasingly difficult to maintain this legitimacy over time. One strategy to support legitimacy is adherence to principles of the rule of law as they improve acceptance of the public authority.

Such principles of the rule of law are based on the assumption that public authority, independent of who is exercising it, is fallible and requires checks. This rationale also applies to international administrations, even if administrating a post-conflict area is an extremely hard and often unrewarding task. The international administration has the opportunity to introduce and create a new legal culture within a territory and set the standard for the domestic institutions that will follow it one day.

International administrations as guardians of rule of law

An intrusive international administration establishing itself in a post-conflict situation must pay particular attention to certain key principles of the rule of law with regard to its own functioning.

Transparency

The international administration needs to be transparent in this work, consult regarding its decisions[4] and explain and publish them.

Remedies and independent review

Accountability of public power is a key aspect of the rule of law. Obviously, an international administration does not function as a normal state. Under the domestic law in a given territory, accountability is problematic because international personnel enjoy immunities and the allocation of responsibility is difficult between the individual, the hierarchy of the international organizations involved and the sending state. For traditional remedies under international law, an individual claim has to be espoused by the state as attracting the possible protection of international law. However, there is normally no state authority capable or likely to respond to such claims in a post-conflict situation.

In this respect, it is a positive step when an international administration submits itself to some form of quasi-judicial control, such as that exercised by an ombudsperson. In Kosovo, an ombudsperson institution has started working recently. Although it is regrettable that the institution was established one year after the deployment of the international administration, it is still a welcome step. The ombudsperson has the mandate to accept complaints against the civil administration and, as is normal for such institutions, it can recommend that the administration adopts decisions to remedy a given situation. It is interesting to note that the ombudsperson regulation also foresees the possibility of the ombudsperson negotiating an agreement with the international security presence in the area.[5] Such an agreement would be a positive step and could be useful for KFOR in providing 'mediation' where conflicts with the population arise.

Independence is very important for any review body and this is also acknowledged in international standards dealing with ombudsperson-like institutions.[6] In this respect, two procedural aspects of the Kosovo ombudsperson regulation are problematic: first, a very short term of two years and, secondly, an unclear provision for removal.[7]

Clarity of the normative system

Post-conflict situations are often marked by a lack of clarity as far as sources of law are concerned. There is domestic legislation that might be discriminatory or flawed in other ways, there are international standards and there is an evolving body of law produced by an international administration. In Kosovo, there are, in principle, four sources of law: United Nations Mission in Kosovo (UNMIK) regulations, international human rights standards, domestic legislation before 1989 and domestic legislation after 1989.[8] The hierarchy between UNMIK regulations and international human rights standards is not made clear, in particular, as regards the application of laws by courts. International administrations need to create clarity on legal sources and hierarchy from the outset.

International human rights standards

An international administration, like any government, will be quickly forced to make decisions, which relate to human rights. These can relate to the administration of justice and principles of fair trial, to media and freedom of expression or to questions of data protection when preparing for elections. As mentioned above, an international administration has an opportunity to introduce a legal culture based on meaningful human rights protection. It needs conspicuously to avoid violating international standards in its legislation.

Since international administrations are often faced with a vacuum of professional and training standards in the countries where they are operating, they can directly apply the rich body of international soft law standards, such as the UN Code of Conduct of Law Enforcement Officials, UN Standard Minimum Rules for the Treatment of Prisoners, UN Basic Principles on the Role of Lawyers, etc. These form a 'reserve stock' of elaborated standards, which can be directly written into rules of engagement and serve as a basis for training.

'Atmospheric' aspects

Finally, one needs to speak about the non-legal, 'atmospheric' aspects of an international response to a crisis: the, often massive, presence of international personnel has a deep impact on the situation and social dynamics in a country, for example:

Payment of local staff is always a problem: it is a strange social order, in which drivers of international organizations earn many times more than local university professors. The notion of economic justice in a society, one aspect of the rule of law, is likely to be corrupted by such inequalities.

In conflict situations, the main role models for young people, especially boys, tend to be military leaders. Although in some instances a strong international military presence has a reassuring effect on the population, international agencies need to contribute in the mid-term to a change of role models putting more emphasis on civilian roles.

Conclusion

It can be assumed that intrusive international responses to crises, military and civilian, will remain a standard feature of international politics. Principles of the rule of law need to be respected by international administrations. Politically this is important to ensure the legitimacy of such administrations in the mid-and long-term and to set the standards for domestic institutions that are to follow. Some fields of the rule of law are of particular relevance for international administrations, notably accountability, transparency of decision-making, clarity of the legal framework and human rights protection. There are many lessons to be learned from experience to date in this field. International organizations need to understand fully and to exploit the potential of their administrating role as 'governments in reserve' and prepare themselves for developing those aspects of the rule of law that will lay a solid foundation for present and future governments.

Notes:

[*] The Office for Democratic Institutions and Human Rights is the principal human rights body of the Organization for Security and Cooperation in Europe. This article expresses a private opinion.

[1] Currently, the organizations try in particular to organize the registration of potential international civilian personnel more efficiently, in order to accelerate staffing of international missions.

[2] The concept is well captured in the OSCE commitments as 'the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law' and 'the activity of government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law. Respect for that system must be ensured' (paragraphs 5.3 and 5.5 of the document of the Copenhagen

meeting of the Conference on the Human Dimension of the Commission on Security and Cooperation in Europe (CSCE), 29 June 1990).

[3] The OSE commitments describe this brad notion of the rule of law: '[the participating states] are determined to support and advance those principles of justice which form the basis of the rule of law. They consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing framework for its fullest expression. They reaffirm that democracy is an inherent element of the rule of law. They recognize the importance of pluralism with regard to political organizations' (paragraphs 2 and 3 of the document of the Copenhagen meeting of the Conference on the Human Dimension of the CSCE, 29 June 1990).

[4] In the OSCE framework, this is clearly expressed in the document of the CSCE Moscow meeting on the human dimension, 3 October 1991, para 18,1: 'Legislation will be formulated and adopted as the result of an open process reflecting the will of the people, either directly or through their related representatives'.

[5] See United Nations Mission in Kosovo (UNMIK) Regulation 2000/38, para 3.4: 'In order to deal with cases involving the international security presence, the Ombudsperson may enter into an agreement with the Commander of the Kosovo Forces (COMKFOR)'.

[6] See UN GA Resolution A/RES/48/134 on national institutions for the promotion and protection and protection of human rights ('Paris Principles').

[7] See UNMIK Regulation 2000/38, para 8.2: 'The Special Representative of the Secretary-General remove the Ombudsperson and/or his Deputy Ombudsperson(s) form office where the Special Representative of the Secretary-General considers that one or more of the following grounds have been established in respect of the Ombudsperson and/or the Deputy Ombudsperson(s): ... (c) failure in the execution of his or her functions….'.

[8] UNMIK Regulation 2000/24, Section 1.