ACCOUNTABILITY AND INTERNATIONAL ACTORS IN BOSNIA AND HERZEGOVINA, KOSOVO AND EAST TIMOR

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Current international involvement in Bosnia and Herzegovina, Kosovo and East Timor has two elements. The first is an "accountability" element, consisting of various judicial and non-judicial processes. This element includes the International Criminal Tribunal for the former Yugoslavia (ICTY), the proposed mixed international/local courts for "special crimes" in Kosovo, and the mixed international/local process for prosecuting militia members for serious crimes committed after the East Timorese referendum in 1999. The second is a territorial administration element. Here, international actors assert the right to exercise either plenary powers of administration—as with the United Nations Mission in Kosovo (UNMIK) and the United Nations Transitional Authority in East Timor (UNTAET)—or certain governmental prerogatives (*e.g.* the right to impose laws), as with the Office of the High Representative (OHR) in Bosnia and Herzegovina.

In this paper, I suggest that the two elements of international involvement —accountability and administration—have been conceived by international law as mutually exclusive. That is to say, the accountability agenda has been set up to address a particular area of activity, excluding the conduct of territorial administration by international actors. I argue that such an exclusion has a potentially negative impact within the territories affected. I set out the powers asserted by and accountability regime directly applicable to international actors in the sphere of territorial administration, and suggest the reasons for and the effects of a lack of accountability in this sphere. In this regard, I look at international law's regulatory structures insofar as these structures are directly applicable tot he international actors involved. I am not concerned, therefore, with how such structures might engage with the activity of territorial administration because this activity engages the legal personality of the host territorial entity.[1]

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1. I discuss this issue in *The complex role of the legal advisor when international organizations administer territory* (forthcoming, 2001, PROC. AM. SOC. I.L.). As far as Bosnia and Herzegovina is concerned, see Consitutional Court of Bosnia and Herzegovina, Decision in Case U 9/100 (regarding the Law on the State Border Service), Nov. 3, 2000, *available at* http://www.ustavnisud.ba/home/en/index.html, (last visited May 15, 2001) [hereinafter Case U 9/100] at para 5.

In each of the administration projects, international actors assert extensive administrative powers. These powers are broad in terms of their subject-matter, covering the whole spectrum of territorial administration. For example, under Resolution 1272, the United Nations Transitional Administration in East Timor is "endowed with overall responsibility for the administration of East Timor and . . . empowered to exercise all legislative and executive authority, including the administration of justice."[2] These powers are also wide in scope, being explicitly conceived with minimal standards delineating how they are to be exercised. Much of general international law—such as human rights and environmental law—is clearly relevant to the conduct of territorial administration. However, traditionally this law is conceived in terms of state or (in the case of gross human rights abuses) individual responsibility.

In Bosnia, Herzegovina, and Kosovo, international actors have been granted the usual privileges and immunities, undermining the capacity of national law to regulate them directly for their conduct of administration.[3] In East Timor, UNTAET considers itself immune from local jurisdiction, although at the time of this writing, no legal instrument relating to such immunity has been passed in local law. An Ombudsperson has been introduced belatedly in Kosovo, and a similar institution is, at the time of this writing, at the proposal stage in East Timor.[4] The Kosovo Ombudsperson has the power to hear complaints "concerning human rights violations and actions constituting an abuse of authority" by UNMIK, but only has the power to make recommendations as a result of these complaints.[5]

This attenuated local system of accountability is more than matched at the international level, since none of the international judicial scrutiny mechanisms can hear complaints brought against the international actors involved arising out of their conduct of territorial administration. Looking at the International Court of Justice (ICJ), scrutiny would only seem possible in the (somewhat unlikely) event of the United Nations referring a case relating to its own activities for a non-binding advisory opinion.[6] Beyond judicial mechanisms, there is, of

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2. U.N. Scor, 4057th mtg., at 2, U.N. Doc. S/RES/1272 (1999).

3. For Bosnia and Herzegovina, see Bosnia and Hercegovina Croatia Federal Republic of Yugoslavia: General Framework Agreement for Peace in Bosnia and Hercegovina with Annexes, Dec. 14, 1995, 35 ILM 75, *available at http://www.ohr.int/gfa/gfa-home.htm*, (last visited Dec. 3, 1999) [hereinafter Dayton Peace Agreement] done at Paris, *e.g.* Annex 1A, article VI.9.a and Annex 10, art. III. For Kosovo, *see* UNMIK Regulation 2000/47, UNMIK Doc. UNMIK/REG/2000/47 (2000).

4. For the Kosovo Ombudsperson, see UNMIK Regulation 2000/38, UNMIK Doc. UNMIK/REG/2000/38 (2000). UNMIK/REG/2000/38, *available at http://www.ohr.int/gfa/gfa-home.htm*, *supra* note 3 [hereinafter UNMIK Regulation 2000/38]. Source of information on the East Timor Ombudsperson proposal: e-mail from a member of the UNTAET Legal Office, December 2000.

5. UNMIK, Regulation 2000/38, *supra* note 4, at 1-2.

6. *See* Statute of the International Court of Justice, Art. 34.1, Art. 65.

course, also the United Nations Security Council. However, in addition to the usual problems that are raised by the idea of the Security Council as an effective regulatory mechanism (its unrepresentative nature, the veto etc.), an additional independence question is raised by the fact that this body played a formal role in creating each of the administration projects to begin with.

A striking example of the combined inadequacy of domestic and international scrutiny mechanisms directly applicable to international actors when they carry out territorial administration would be the mandates of OHR and the military Stabilization Force (SFOR) in Bosnia and Herzegovina. Dayton grants both organizations "final authority" power "in theatre" (viz. Bosnia and Herzegovina) to interpret their respective mandates.[7] Since the mandates exist as a matter of international law, the "in theatre" caveat suggests that the final authority power does not render all interpretations made by OHR and SFOR automatically lawful, but rather makes the legality of such interpretations unchallengeable in Bosnia and Herzegovina. Taking this domestic exclusion alongside the lack of international jurisdiction, it would seem that, lawful or unlawful, all interpretations of these mandates by the relevant international actors go unchallenged as far as the institutions of national and international judicial scrutiny are concerned.[8]

Considering the above factors together, international actors engage in administrative activity that is similar to (and, indeed, necessarily based on) the activity performed by states in their own territory, yet no comparable regulatory regime applies directly to them when they engage in such activity. Some of the reasons for this lie in two broad areas: first, assumptions concerning the behavior of states and international organizations, and second, the manner in which territorial administration by international actors has emerged.

The way international law applies to international organizations and states assumes that these two actors perform different activities. With territorial administration, the assumption is that states perform this activity and international organizations do not. This assumption explains who is involved in regulating territorial administration, and in what role. States are regulated; international organizations are not, and, moreover, act in a regulatory role (for example, through monitoring human rights). The international regulatory process reflects, and thereby reinforces, these distinct roles and the assumption that lies behind them. Moreover, the assumption that states administer territory and international actors do not is reflected in the way international law influences the application of national law to these two actors. Whereas the law

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7. *See* Dayton Peace Agreement, *supra* note 3, Annex 1A, art. XII (SFOR); Annex 10, art. V (OHR).

8. They may however, be challengeable not as the acts of international actors, but as the acts of the state. See *supra* note 1.

is silent with respect to local governments (in their own state), as I have already said it grants international actors immunity from national law. This immunity reflects an idea that international organizations do not perform "local" activities (such as administration), but rather, perform activities that are distinct and somehow "above" the "local" (such as scrutinizing territorial administration by states).

A further potential cause of the accountability deficit is the way the current administration projects merged and were conceived. The projects developed in an *ad hoc* manner, with different organizations involved (OHR in Bosnia and Herzegovina, the United Nations in Kosovo and East Timor). Each project is conceived as "temporary" and "interim," with the full conduct of territorial administration by local actors the eventual goal. These two factors can undercut arguments calling for accountability mechanisms applicable directly to international actors when they engage in territorial administration—there is no need to bother too much about accountability for something that will not last and may not recur.

What effect does this accountability problem have on the activity itself and those affected by it? One of the objectives in the current projects is to foster conditions for a liberal-democratic order in the territory, rooted in human rights, a vibrant civil society, the rule of law and an elected, representative government. Whereas territorial administration by international actors seeks to promote these conditions, paradoxically it operates in an autocratic manner itself—"benevolent despotism," as Sergio Vierra de Mello, the head of the United Nations administration in East Timor, puts it.[9] An aspect of this 'despotism' is, of course, the lack of accountability. One danger is that territorial administration by international actors may be undermining its own objectives, by establishing a precedent for governance that is unaccountable, centralized and autocratic.

Moreover, the accountability deficit with respect to international actors when they carry out administration creates further problems when considered alongside other areas where accountability is promoted. This brings me back to the accountability agenda I sketched at the start. One of the arguments made for the International Criminal Court (ICC) was that justice is compromised when it is selective. The presence of *ad hoc* tribunals with limited temporal and territorial scope, in the absence of an ICC, effectively privileges accountability with respect to a narrow geographical area and time period. Looking at the issue of selectivity from a different angle, the existence of criminal tribunals with certain subject-matter jurisdiction over individuals, in the absence of accountability mechanisms applicable directly to international actors conducting administration, may operate on a symbolic level to foster an idea that

9. SERGIO VIERRA DE MELLO, HOW NOT TO RUN A COUNTRY: LESSONS FROM KOSOVO AND EAST TIMOR (2000).

accountability operates exclusively on the individual level, and only in respect of the most serious acts. I shall discuss these two symbolic elements in turn.

First, the symbolism of focusing exclusively on individual accountability. Of course, because of the role played by group identity in the 1991-95 conflict in the former Yugoslavia, many found the focus on individual rather than collective local accountability appealing. However, this consideration, whatever its merits, is on its own terms inapplicable to collective responsibility as far as international actors are concerned. Moreover, the above objective allied to the conduct of administration by international actors—promoting a liberal democratic order—is necessarily rooted in the idea of a collective polis. In administration, therefore, the nettle of collective identity has been grasped already, albeit in a confused fashion in the case of Kosovo, given the continuing uncertainty as to that territory's eventual status. An exclusive focus on the individual in the accountability sphere risks undermining the project of forging a particular kind of collective identity in the political sphere.

Turning to the symbolism of focusing exclusively on serious crimes. Again, the commission of these crimes is considered more important than other forms of accountability, because of their serious nature. Such a consideration, however, concerns relative importance: it does not itself suggest why other forms of accountability should be almost totally absent. Moreover, in the long term, an absence of other forms of accountability may operate on a representational level to occlude the changes that happen in the society affected. The prosecution of serious crimes symbolizes a deeply traumatized society. Equally, the operation of other, less important accountability structures also symbolizes a society where accountability issues are no longer as grave. As far as Bosnia and Herzegovina is concerned, the vast majority, if not all prosecutions at the ICTY concern acts that took place at least five years ago. Whereas these prosecutions continue to symbolize the trauma of the Bosnian people, certain other accountability mechanisms symbolizing how Bosnian society has changed since 1995—such as mechanisms directly applicable to international actors—are absent. Yet all can agree that, regardless of whether anything else has changed significantly since Dayton, the kinds of acts that come under ICTY jurisdiction no longer take place to anywhere near the same degree.

Another representational problem with the current accountability bias is that it risks creating a perception that accountability is for "us" the local people, not "them" the international officials. Whereas some of the reasons for territorial administration by international actors—for example, filling the administrative vacuum after conflict—are understood, the reasons for unaccountability on the part of international actors are not. This apparent inconsistency creates the impression of arbitrariness, potentially making more persuasive the idea that territorial administration by international actors is a

paternalistic, imperialist endeavor. In turn, this idea threatens the project of fostering conditions where a liberal-democratic political system can flourish, by reinforcing perceptions that the project is about imposing an alien system rather than supporting local political initiatives.

In conclusion, the international regulatory regime directly applicable to international actors when they carry out administration needs to be transformed. This requires changes in the law and legal enforcement modalities. Territorial administration by international actors is a significant institution of international policy that profoundly affects the lives of people in Bosnia and Herzegovina, Kosovo and East Timor, and may be utilized in other situations in the future. The *ad hoc* criminal tribunals were followed by the joined-up thinking on international criminal justice effected through the institution of the ICC. What is also needed, in the light of the *ad hoc* administrative projects, is joined-up analysis on the way international actors can be made more directly accountable for their conduct of territorial administration.