Chapter 9
Re-establishing the Rule of Law under Transitional Administration

Sylvain Vité

Introduction[1]

During the 1990s, the UN Security Council began using its powers under Chapter VII of the UN Charter to establish international transitional administrations.[2] When faced with a humanitarian emergency, the Security Council may authorise the deployment of a peacekeeping or peace-enforcement operation.[3] Once the conflict is over, at least formally, the crisis may still require a continuing field presence. In such cases, the UN has established a number of transitional administrations on the territory of countries that had already been the object of an armed intervention. Among recent examples, two cases are of particular relevance: the United Nations Mission in Kosovo (UNMIK), established on 10 June 1999,[4] and the United Nations Transitional Administration in East Timor (UNTAET), established by the Security Council on 25 October 1999.[5] This chapter will mainly focus on the Kosovo case.[6]

In post-conflict peacebuilding, international actors, especially the UN, play a new and particular role. On the one hand, this may involve the use of military force, as is the case in peacekeeping and peace-enforcement operations. On the other hand, this can include broad powers for the administration of territory, to such an extent that it is no exaggeration to say that they receive 'sovereign rights' or 'prerogatives of public power'. These powers may even require the establishment of police forces under the organisation's direct control. Depending on the mission's internal structure and mandate, the exercise of such prerogatives and responsibilities may be shared with individual states.

These interventions will always raise questions concerning the rule of law and its implementation, particularly from the specific perspective of the protection of individuals. The purpose of this chapter is to consider the role of international peace operations in reestablishing and strengthening the rule of law, in particular the application of and respect for international humanitarian law (IHL) and international human rights law (HRL) by such entities, focusing in particular on the recent experience of transitional administrations. The chapter begins with a short presentation of the notion of the rule of law in this context, analyses the complexity of the applicable legal regimes and identifies the need for their harmonisation in situations where a variety of actors are involved and different degrees of instability may occur. An assessment of the practical implementation of IHL and HRL in such operations lays particular emphasis on the case of Kosovo, identifying gaps and challenges of ownership and democratic oversight. The chapter concludes with a number of concrete policy recommendations drawn from this analysis.

The Rule of Law in the Context of International Peace Operations

As defined by the UN Secretary General, the rule of law

> refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are

> publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[7]

In peacebuilding operations, international actors usually intervene in situations where legal structures have been partly destroyed or neglected. The legislative framework, for example, may be distorted by emergency laws or executive decrees, and public institutions, such as the judiciary or the police, may be unable to function properly for lack of funds or personnel. Moreover, such situations are characterised by deep political divisions, which result in the alteration of proper and impartial functions, as well as the lack of legitimacy of local authorities. As a consequence, one of the main challenges of peacebuilding operations consists in contributing to fill this 'rule of law vacuum'.[8] In these situations, two main international legal regimes may help to fill this gap and contribute to rebuilding the rule of law both in the short and long term: IHL and HRL.[9]

Within the framework of this chapter, we will use the notion of IHL in its broad meaning. IHL thus may be defined as 'a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare'.[10] In this sense, IHL is a synonym of the law of war or the law of armed conflict. Six main treaties constitute the contemporary law of armed conflict: the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.[11]

Human rights may be defined as the basic rights and freedoms which are inherent to human nature. As such they are universal and encompass civil, political, economic, social and cultural rights. They are aimed at protecting the individuals from abusive interventions by State authorities. They also oblige these authorities to act positively to ensure human integrity and dignity. International human rights are enshrined in two main conventions at the universal level: the UN International Covenant on Civil and Political Rights and the UN International Covenant on Economic, Social and Cultural Rights of 1966.[12] Contrary to IHL, HRL applies both in time of war and peace. However, under certain conditions, some human rights rules may be suspended in time of serious public emergency.[13]

IHL and HRL must be applied bearing in mind the particular objectives to ensure public security during and particularly in the aftermath of conflict, including 'the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy'.[14] The implementation of the rule of law must thus be envisaged in a comprehensive strategy aimed at reestablishing peace.

Challenges of Legal Transition in Transitional Situations

The complex nature of peace operations, including post-conflict peacebuilding, involving a range of national and international actors, is mirrored by the complexity of the applicable legal regimes. In addition to local authorities, whose status is not always clearly determined, different international, intergovernmental and non-governmental organisations, acting both under international law and their own internal rules, as well as individual states coming from diverse regions, may be involved in reconstruction missions. Moreover, such operations are characterised by their fluidity. It is often difficult to delimit the framework of an ongoing emergency situation, which passes from a conflict phase, involving armed action by a number of parties, both governmental and non-governmental, to a post-conflict peacebuilding phase, during which state

structures must be restored, and sometimes significantly transformed. In the case of long-term crises, it is difficult to precisely distinguish successive phases requiring either the exclusive application of IHL or other legal regimes, such as HRL. This complexity is increased by the fact that some human rights rules must be respected both in time of peace and war.[15] In the latter case, it is therefore necessary to determine how the two legal regimes should be articulated.

In practical terms, this uncertainty results in a lack of clarity and predictability of applicable rules, including those protecting individual rights, which may provoke a feeling among local populations that interventions are not based on equity and due process. This uncertainty may also result in a lack of clear orientation for security forces, increasing the risk of abuse. Finally, law enforcement risks being characterised by a lack of uniformity, since distinct participants may apply different rules, thus causing discrimination. Such situations raise serious problems, not only because they increase the risk of violations of the rules protecting human dignity and integrity, but also because they may threaten, in the longer term, the peacebuilding process itself. Respect for IHL and human rights is fundamental for strengthening the legitimacy of such interventions. It is of utmost importance for guaranteeing their acceptance by local populations and subsequent support of peace negotiations. Thus, respect for these legal regimes must be an essential condition for sustainable post-conflict peacebuilding.

In legal terms, the complexity of international operations entails a subjective component. The diversity of actors intervening in such operations makes it difficult to identify the legal regimes applicable to each one of them. This illustrates the need for harmonisation, bearing in mind the overarching need to ensure that local authorities will have the legal tools to guarantee security once international actors leave. The objective aspect of legal complexity in such operations is directly linked to their fluidity. The applicable law must adapt to the various stages of the intervention, namely the armed conflict, emergency and post-conflict peacebuilding phases. Although the focus of this chapter is on the post-conflict phase, it is important to recognise that in practice, it is not always easy to clearly distinguish each one of these phases and thus to identify relevant legal regimes. In other words, one of the challenges for the governing authorities in international operations consists in ensuring the transition of law in transitional situations.

The Need for Harmonisation of Applicable Legal Regimes

In order to identify a common legal framework in peace missions, it must first be determined whether IHL and HRL, which were developed primarily to regulate state behaviour, apply to other international actors participating in such operations. To answer this question, it must be established whether these actors have the legal capacity to be bound by international norms and subsequently to consider the legal sources from which specific rules can be identified. Concluding that these legal regimes are inapplicable to those actors would create a legal void, resulting in a lack of protection for the population. Respect for IHL and HRL would thus depend on the goodwill of each organisation involved, increasing the risk of abuse.

A preliminary answer may be found in the International Court of Justice's Advisory Opinion of 11 April 1949, relating to *Reparation for Injuries Suffered in the Service of the United Nations*. The Court recognised that '[the United Nations] has […] a large measure of international personality and the capacity to operate upon an international plane'.[16] Indeed, in order to fulfil its tasks under the Charter of 1945, the UN must possess a personality distinct from that of its members. This is a fundamental condition, without which the organisation is not given the capacity needed to fulfil its purposes and exercise its functions.[17] The Court thus concluded that the organisation has the capacity to be bound by international rights and obligations.[18] However, contrary to states, the UN only holds the intrinsically limited powers which are attributed to it. These powers appear in its constitutive act, and can be implicitly deduced from the act or derived from evolving practice.[19] Therefore, in order to determine the norms of international law applicable to the UN, one must refer back to its purposes and functions.[20]

This reasoning supports the argument that international actors can be bound by the norms of IHL and HRL. Given that, in accordance with its purpose to maintain international peace and security,[21] which may involve the use of military force,[22] the UN is likely to become involved in confrontations amounting to armed conflict, the necessary conclusion is that the law governing this type of situation, that is IHL, is applicable to the UN.[23] Similarly, as the UN may be empowered to exercise the prerogatives of public powers in the context of transitional administrations, it may be deduced that they may be bound by the corresponding human rights norms. However, this conclusion remains general and does not offer any orientation as how to determine the precise rules applicable to the broader range of international actors involved in post-conflict peacebuilding. Given that these organisations are not party to IHL or human rights treaties, it has been widely accepted from consistent practice that international customary law must apply to them, although the exact content of this law still need to be clearly determined.[24]

Recent UN practice shows that IHL has evolved on this point. The UN Secretary General's Bulletin, adopted on 6 August 1999, is of particular importance. This document sets out 'fundamental principles and rules of international humanitarian law' that are 'applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement'.[25] Rather than creating new obligations, it is aimed at providing a coherent, non-exhaustive presentation of those that exist already.[26] For this purpose, it draws both on customary and treaty-based law, showing that the UN seeks to apply appropriate norms to its operations in the field, independently of the legal nature of these norms. This trend was also confirmed by the Security Council, which used the Bulletin's wording in one of its recent resolutions.[27] This additional step is important, confirming principles previously set out in a purely internal administrative document, therefore strengthening its normative value.

For HRL, however, no such instrument exists. The sources of the rules applicable to international organisations are thus more uncertain in this case and would require further specification. A declaration, similar to the Secretary General's Bulletin, whereby the organisation would pledge generally to respect and implement at least some treaty-based obligations, is therefore highly desirable.

Recognising that some rules of IHL and HRL are applicable is not sufficient to ensure the harmonisation of these legal regimes in a particular operation. It may happen, as for example in Somalia in the early 1990s,[28] that individual States intervene independent of the UN in the same operation. Since States are bound by their own national law as well as by international law, different legal norms may be applicable in the same situation. Moreover, in some cases, two intergovernmental organisations, such as the UN and NATO in the transitional administration in Kosovo, may also take part in the same mission under separate legal frameworks. In these situations, where legal uncertainties can have serious practical consequences, it would be important that the UN Security Council, when establishing the mandate of a peace operation, give a clear and comprehensive definition of the applicable legal regime and state that all actors deployed on the territory concerned must abide by this framework. This was not the case, for example, in Kosovo, where the Kosovo Force (KFOR), acting under NATO's umbrella, was not covered by the UN administration (UNMIK) jurisdiction,[29] leading to some confusion.

A decision by the Security Council would give international administrations the power to adopt and interpret their own legislation. The legal framework would be detailed through the adoption of internal regulations and case law decisions. Regarding the mission in Kosovo, UNMIK Regulation 2000/59, based on Resolution 1244, specified that internationally recognised standards applicable in this context were:

1 The Universal Declaration of Human Rights;
2 The European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Protocols thereto;

3 The International Covenant on Civil and Political Rights;
4 The International Covenant on Economic, Social and Cultural Rights;
5 The Convention on the Elimination of All Forms of Racial Discrimination;
6 The Convention on the Elimination of All Forms of Discrimination against Women;
7 The Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment;
8 The International Convention on the Rights of the Child.[30]

The Importance of the Specific Context of Intervention

The need for legal transparency and predictability in international operations also requires particular attention to the specific context of the intervention. In interstate relationships, the threshold of violence, beyond which the existence of an armed conflict is recognised and which justifies the application of IHL, is very low. In the context of internal conflicts, the notion of armed conflict is subject to stricter criteria defined by two interrelated conditions: the intensity of the confrontation and the level of organisation of the non-governmental party.[31] Such criteria are usually met in peace-enforcement interventions, i.e. when states are given the power to use armed forces in a coercive way to reach the objective defined by the Security Council. Below a certain level of violence and organisation of one of the opponents, a confrontation can no longer legally be characterised as an armed conflict, and the application of IHL can no longer be justified. Such situations are referred to as cases of internal disturbances and tensions[32] and the protection of individual rights is mostly determined by human rights instruments.

The law applicable to international operations, in particular to the maintenance of peace and security in such operations, thus varies according the changes of the circumstances of each specific situation. In this regard, the combination of IHL and HRL is particularly relevant, since they provide rules adapted to various degrees of instability. If the level of an armed conflict is reached, the first body of law is the main legal reference. In situations of public emergency, the protection of the population has to be based on relevant human rights instruments. However, in such situations, and if certain requirements are met, transitional authorities have the possibility to suspend some rights for a specific period of time and in delimited parts of the territory[33] although this derogation cannot be extended to some particularly fundamental rights, such as the right to life or the prohibition of torture.[34] When the emergency phase is finished, the derogation is no longer justified and transitional authorities have to apply the complete body of human rights.

International and Local Mechanisms of Implementation

While the level of integration of substantive humanitarian and human rights rules into the legal framework of recent international operations, including the transitional administrations in East-Timor and Kosovo, have been quite satisfactory, an evaluation of corresponding implementation procedures reaches a different conclusion. Both at international and local levels, the implementation systems have been extremely weak, which raises the question of the accountability of international actors participating in these missions.

International Mechanisms of Implementation

Implementation mechanisms exist in both IHL and HRL. However, practice shows that such mechanisms are, in most cases, inefficient. With respect to procedures based on IHL, the mechanism of the International Committee of the Red Cross (ICRC)[35] is the only one that actually functions in the situations that we analyse. In 1961, for example, ICRC was given the right to make regular visits to combatants held by the forces of the UN operation in the Congo (ONUC).[36]

This was also the case in 1999 for persons held by KFOR and UNMIK,[37] and those persons detained by UNTAET in East Timor.[38] However, other IHL mechanisms, such as the system of Protecting Powers[39] or the International Fact-Finding Commission,[40] remain totally inefficient. Although the role of the ICRC is essential, it is not sufficient. ICRC's policy gives priority to gaining access to the victims of hostilities gives precedence to negotiation rather than denunciation. It does not seek to determine the responsibilities of the belligerents.[41] Its scrutiny is thus confidential, in principle, and it is extremely circumspect when asked to comment on alleged breaches of IHL. Therefore, the ICRC's activities provide only a limited solution to the need for implementation mechanisms in international operations. Other procedures, those developed under HRL, both at international and regional level, must therefore be taken into account.[42]

The particular status of international transitional administrations, however, raises some obstacles in this regard. The administration of Kosovo by the UN, for example, has created a new situation that falls to a large extent outside the traditional human rights implementation systems that exist at the international level. Whereas Kosovo is legally under the sovereignty of Serbia and Montenegro, this country has not exercised its jurisdiction on this territory since 1999. Kosovo is not an independent State either, but rather of an intermediate status which does not correspond to the framework of HRL. It is therefore necessary to develop a legal basis for human rights mechanisms to extend their jurisdiction over territories under transitional administration.

First, this should be done at the UN level. Over the years, the UN Commission on Human Rights has established a complex system of special procedures for collecting relevant information and reporting on it annually.[43] The legal basis for these mechanisms are resolutions adopted every year by the Commission. This process, which is essentially political in character, offers flexibility. Contrary to treaty-based bodies, whose jurisdictions are strictly limited to State parties and to the implementation of the instrument which they are related to, the mandates of the UN Commission special procedures have gone through significant changes. Over the last few years, their practice, which originally focused on state behaviour, has evolved to include others actors in the scope of their interventions, including transitional administrations. For instance, the Special Rapporteur on human rights in the former Yugoslavia in August and October 2000 issued a detailed analysis of UNMIK and KFOR activities.[44] Similarly, the Special Rapporteur on torture has confirmed this trend, by intervening directly with UNMIK.[45]

In addition, the practice of these UN bodies is also particularly interesting since it has been based, for several years now, not only on human rights *stricto sensu*, but on IHL norms whenever necessary.[46] These procedures may therefore function as an important model for scrutiny of the behaviour of actors involved in international operations, not only when they exercise powers involving the administration of territories, but also when they use force in the context of armed conflict. These mechanisms thus partly compensate for the failure of the IHL implementation system. Their practice, however, has so far been limited to a few cases and their competence could be used in a more systematic way. In addition, despite their numerous advantages, these procedures have only limited impact. Due to the fact that they are part of a state-composed UN body, the follow-up of their conclusions and recommendations can be politically motivated and thus often biased.

Other UN mechanisms should also be envisaged as means to improve implementation of human rights in international operations. Some international conventions concluded under the UN aegis provide for the creation of mechanisms dedicated to verifying respect of determined human rights provisions.[47]Among their functions, these treaty bodies examine reports presented to them at regular intervals by state parties. These reports cover state implementation of the rights recognised in each treaty while some have also been granted the right to examine complaints lodged by individuals claiming to have been the victim of a breach of the treaty in question.

Given that international treaties define the competence of these bodies, only state parties may be subject to supervisory processes. An extension of this function to transitional administrations is thus problematic, since such administrations are usually, partly or totally, under

the control of non-state actors. However, some observations may be formulated under the current state of international law.

The UN Human Rights Committee was recently confronted with the question of its jurisdiction vis-à-vis international operations and used this opportunity to propose a preliminary answer. The International Covenant on Civil and Political Rights, which is the basis for the Committee's jurisdiction, was ratified by Serbia and Montenegro in March 2001. The first report of this country, which was examined by the Committee in July 2004, proposed a detailed analysis of the situation of human rights in Kosovo under international administration.[48] In its concluding observations on this report, the Committee recognised that the covenant was still applicable to Kosovo and confirmed its jurisdiction over this region,[49] thereby establishing its supervisory competence over transitional administrations. However, due to the particular status of Kosovo, the Committee decided that it would wait for further information from the transitional authorities before adopting its conclusions in this specific context. For this purpose, it 'encourage[d] UNMIK, in co-operation with the Provisional Institutions of Self-Government (PISG), to provide, without prejudice to the legal status of Kosovo, a report on the situation of human rights in Kosovo since June 1999'.[50] Therefore, progress is still cautious, since the Committee only 'encouraged' UNMIK to participate in this process. From a strictly legally point of view, the UN administration is not bound to do it. So far, no follow-up decision was adopted by the Committee on this situation.

Independent of the applicability of human rights conventions to international organisations, the jurisdiction of the Committee could also be established through the treaty undertakings of the States participating in the mission. When states have direct control over the population in a region under transitional administration, it may be considered that they are bound to apply the international treaties that they have ratified. In these cases, the personnel of the mission are not employees of an international organisation, even though they may act under the umbrella of such an organisation, but remain public officers of their states of origin. Thus, these states may be subject to the Committee's supervision, under the condition that they ratified the International Covenant on Civil and Political Rights. In practice, this would mainly be applicable to the military component of international administrations. As civilian agents are usually linked to an international organisation, military personnel remain subordinate to their respective sending States. In other words, this method of applying human rights law is mostly useful for the activities of peacekeeping forces. In practice, it is problematic, since the application of treaty norms depends on the nationality of the personnel in question and whether or not their home state is a party to the relevant instruments. For civilian personnel, the question of the applicability of human rights procedures to international organisations remains relevant.

In the case of KFOR, the command structure led by NATO only plays a coordinating role, since decisions taken by its bodies cannot override the autonomous decisionmaking power of each Member State with respect to its own forces.[51] The question of the application of HRL during field operations must, therefore, be examined for each troop-providing state, rather than in the name of KFOR. International human rights norms apply to KFOR contingents through the conventional engagements of the states participating in military operations. This is a consequence of the fact that, beyond the coordinating role played by NATO, effective command and control over the deployed forces continues to be exercised by home states.

Local Mechanisms of Implementation

It is a rule of international HRL that any person whose rights or freedoms have been violated must have 'an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'.[52] In the practice of international operations, however, such remedies are restricted. This is mainly due to immunity rules protecting members of these operations and the absence of efficient tribunals where the citizens can challenge the decisions

that affect them. It is therefore particularly important that accessible domestic mechanisms be established.

In Kosovo, UNMIK regulation 2000/47[53] establishes broad immunity from any legal process for both UNMIK and KFOR personnel and property. With regard to UNMIK, this regulation states that: 'UNMIK, its property, funds and assets shall be immune from any legal process. [...] UNMIK personnel, including locally recruited personnel, shall be immune from legal process in respect of words spoken and all acts performed by them in their official capacity'.[54] The responsibility of KFOR personnel seems even more difficult to establish, since Regulation 2000/47 underlines that KFOR personnel must respect the applicable laws and regulations enacted by UNMIK 'insofar as they do not conflict with the fulfilment of the mandate given to KFOR under Security Council Resolution 1244'.[55] This immunity is extremely broad as it covers both criminal and civil matters. For UNMIK, the immunity can only be waived by the Secretary General himself, which is unlikely to happen except in the most serious criminal cases. Concerning KFOR, Section 6.2 provides that requests to waive the immunity of KFOR personnel shall be referred to the respective commander of the national element of such personnel for consideration.

The main reason for granting immunity for members of international operations is to protect them against interference by the government of the State in which they are located. In the case of transitional administrations, the government functions are controlled by the international authorities themselves. Therefore, Regulation 2000/47 in Kosovo is tantamount to a government granting immunity to itself. In other words, through the adoption of this regulation, UNMIK placed itself above the law.[56] Moreover, the lack of judicial review of UNMIK and KFOR activities undermines the independence of the judiciary and the necessary separation of powers. It also affects the right of access to the courts, an essential part of the rule of law.[57]

In addition to the immunity regime, other rules also reinforce the lack of access to efficient administrative tribunals.[58] UNMIK Regulation 2000/47 provides that "[t]hird party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not arise from 'operational necessity' of either international presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for". First it appears from this wording that a number of actions by the international administration cannot be challenged in judicial proceedings, since it is provided that no compensation is due, if these actions are justified by 'operational necessity.' Moreover, the delimitation of this last notion remains unspecified. Whereas the concept of 'military necessity' already exists under humanitarian law,[59] the notion of operational necessity seems broad enough to cover most interventions by KFOR or UNMIK, particularly the ones most likely to affect civilian populations and objects. Secondly, as stipulated under Regulation 2000/47, if wrongful activities are not justified by operational necessity, claims must be settled by commissions and following procedures established by KFOR and UNMIK. In practice, these commissions fall short of real administrative tribunals in terms of independence, accountability and transparency. In the case of KFOR, for example, the proceedings remain under its control with both the first instance and the appeal stage managed by KFOR personnel. In addition, the procedure is not binding, only resulting in recommendations of compensation.[60]

Therefore, access to effective internal remedies should be one of the key components of peace operations. As emphasised by the UN Secretary General, 'if the rule of law means anything at all, it means that no one, including peacekeepers, is above the law'.[61] This is a basic condition to ensure the legitimacy of the reconstruction process, and thus its support by the local population. Another important contribution to this objective should also be the establishment of IHL and HRL institutions entitled to report past and present abuse. The UN experience illustrates for instance that national human rights commissions have 'shown promise for helping to restore the rule of law, peaceful dispute resolution and protection of vulnerable groups where the justice system is not yet fully functioning'.[62]

Similarly, independent ombudsperson institutions have played decisive roles by sensitising local and international actors to human rights issues and denouncing violations, including those committed by peacekeepers. Their competence and capacities should therefore be guaranteed. In this regard, the influence of the ombudsperson in Kosovo has been excessively limited. It is true that his mandate is broad and potentially allows for extensive supervision power. UNMIK Regulation no. 38 provides that the ombudsperson was established 'for the purpose of enhancing the protection of human rights in Kosovo'.[63] In addition, he may 'receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution'.[64] However, his authority consists in a power of recommendation only, which limits the impact of his activities to what implicated parties are willing to accept. In addition, his competence does not cover activities by KFOR.[65]

Transition of Security Ownership

One of the greatest challenges for international transitional administrations is to achieve sustainable peace. If massive armed intervention by international forces may in the short-term end hostilities and prevent the perpetration of widespread abuse, the ultimate goal of these operations consists in transmitting security and governance responsibilities to local institutions. Peacebuilding missions may only be considered successful when the international institutions can leave, without the country being subjected again to violence. In order to reach this objective, the transition of security ownership from international to domestic authorities must be prepared from the beginning of the operation. Both public and private local actors must actively take part in the peacebuilding process and be trained for this purpose. As confirmed by the UN Secretary General, 'no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable'.[66]

Post-conflict peacebuilding involves a variety of activities, which must be guided by IHL and human rights principles both in the short- and long-term. Peace negotiations, repatriation of refugees, reintegration of former combatants, reconstruction of administrative and judicial structures, economic development, the maintenance of security and order, all these components raise questions which cannot be answered without a clear reference to the relevant legal regimes at each stage of the peacebuilding process. Therefore, IHL and HRL have to be taken into account not only within the limited framework of the international mission – i.e. as long as international structures function in the country – but also in terms of supporting and reinforcing the transfer of power to local institutions.

This is particularly important in post-conflict contexts where local law officers usually remain influenced by the conflict and may be tempted to discriminate against former opposing groups. In particular, police reform is intensely political.[67] It is a long-term process, which involves reorganising power distribution and changes of mentalities. It is usually aimed at shifting from 'a model based on repression and social control to prevention and investigation'.[68]

In Kosovo, the impartiality and commitment to human rights of local police officers has been challenged on various occasions. Their performance in crime prevention has been judged unsatisfactory and some cases of serious violations of human rights, including cases of torture and extra-judiciary executions, have been documented.[69] It is important therefore, that the transmission of responsibilities in the maintenance of peace and security be accompanied by training sessions on human rights for local police forces. In addition, strict oversight procedures must be implemented and disciplinary sanctions applied in case of illegal behaviour. Institutions responsible for these procedures must be 'independent, objective, transparent and effective'.[70] Long-term peace and security is not sustainable if the local police are perceived as acting with impunity.

Similar concerns have been raised regarding the judiciary in Kosovo. Establishing an effective justice system represents one of the most important challenges of post-conflict reconstruction. In Kosovo, most members of the judiciary had left to Serbia with their files by the time the international administration was in place. UNMIK suffered thus from a serious shortage of qualified judicial personnel. In addition, most available lawyers were of Albanian origin, making it difficult to create a balanced multi-ethnic judiciary, able to avoid political bias and resist intimidation.

The international authorities in Kosovo, at least during the first months of the mission, were confronted with a constant dilemma. On the one hand, they had to enforce peace and order in a region under explosive circumstances. In the framework of this mandate, they carried out numerous arrests and detentions. On the other hand, they were bound to respect the right to challenge the lawfulness of the detention before a judge as well as the right to be tried within a reasonable time or to be released.[71] Due to the lack of judicial structures, these authorities often had to choose between liberating the detainees and keeping them without judicial oversight, thus violating the basic right to protection against arbitrary detention. In practice, both UNMIK and KFOR, arguing that public safety had to be preserved, frequently used administrative detention outside judicial control under conditions which were not compatible with international standards.[72] This practice continued even when the emergency phase was finished.

In the short-term, a temporary solution to this dilemma may be sought in the employment of international judges and prosecutors. Such a measure may offer a relatively easy answer to the lack of local trained lawyers and to the need for an immediate effective judiciary. In addition, international experts are less likely to be influenced by political bias or local pressure, especially in sensitive cases. However, this measure also raises problems in practice. It is very difficult for international judges and prosecutors to get knowledge of a foreign legal system in a very short period of time. In Kosovo, even the accessibility to domestic legislation was problematic. Translation into English of the applicable law was rarely available. Moreover, this solution is not sustainable in the long-term and may slow down the transition process. As emphasised by the Human Rights Commissioner of the Council of Europe, 'this sort of permanent umbrella does not favour capacity building of the local judiciary, as they are not given the opportunity to take on sensitive and difficult cases to build their competence, prove their impartiality and, ultimately, gain respect'.[73]

Therefore, the only sustainable solution in the long-term must be based on the training and increasing participation of the local judiciary. Moreover, the reconstruction of the justice system must be comprehensive, engaging all institutions of the justice sector, including police services, judicial development, legislative improvement, legal education and monitoring procedures.[74]

Conclusion and Policy Recommendations

Respect for IHL and HRL are key components of post-conflict peacebuilding operations. Rather than limiting the security forces' capacities to guarantee the protection of civilian populations in armed conflict and emergency situations, the obligation to abide by these legal regimes is, on the contrary, a key contribution to long-term reconstruction and development. No confidence in the transitional authorities and the future government can be established if the use of force has been indiscriminate, if minorities are not protected, or if individuals are detained without judicial review or if police forces enjoy immunity. Therefore, respect for IHL and HRL is not a separate objective that international operations must seek to achieve but is the common denominator in which both peace-enforcement and post-conflict reconstruction must be rooted.

The combination of these two legal regimes is particularly important in peace operations. They express a balance between the principles of humanity and the effective provision of security, including the necessity to prevent serious and widespread abuse. Furthermore, as this

chapter has argued, they are particularly adapted to the need for legal transition. Through their articulation, they offer a global set of rules on the protection of human dignity and integrity, applicable to each phase of the continuum from war to peace. This is the reason why it is important that all actors involved in such operations be formally and uniformly bound by clear legal norms. In this regard, the UN Security Council, when establishing a mission, must play a key role. Its resolution establishing a particular mission should provide that all actors involved, including international organisations, such as the UN or NATO, as well as individual States, are bound by the same set of IHL and HRL rules. Reference to specific relevant treaties should also be made.

Transition in international operations must reflect the imperatives of local ownership and distinguish between different contexts. While the first step of the intervention, that is the peace-enforcement mission characterised by the use of armed force, is usually under international leadership, post-conflict peacebuilding must focus on reestablishing local capacities as soon as is realistic. If the participation of international experts may contribute to this process in the short-term, such measures may have negative impact in the long-term, reducing incentives to transmit government responsibilities to local institutions. Therefore, in order to remain temporary, the internationalisation of administrative structures must be accompanied by the participation of a variety of local actors. These actors need to be informed, consulted and integrated into the decisionmaking process. They also must be prepared to exercise their future responsibilities, and be adequately trained and supervised for this purpose, in particular with respect to rule of law principles. This is the only way to guarantee the legitimacy and sustainability of the peacebuilding process.

Finally, one of the greatest challenges for international operations is the implementation of law. Both at the institutional and individual level, accountability in case of abuse must be ensured. On an international level, this means that the competence of IHL and human rights mechanisms over these entities must be reaffirmed. The UN procedures, in particular, must extend their jurisdiction to cover other international actors. They also must systematically refer to HRL, in addition to IHL, as indeed they have done in some cases in the past several years. In addition, domestic supervision mechanisms must also be strengthened. The principle of accountability for IHL and human rights violations is one of the fundamental components of the rule of law. This requires the establishment of procedures allowing a real access to impartial and independent tribunals. The mandate of international operations should also stipulate that the competence of those tribunals must extend to all actors participating in peace operations, including international military and police officers. In this regard, immunity rules should strictly be limited to the preservation of the effective functioning of the transitional administration. On a national level, human rights commissions and/or ombudsperson offices should be established to address past and present IHL and human rights violations. It is particularly important to ensure the functioning of such mechanisms from the early stages of the mission, i.e. when the formal justice system still has to be rebuilt.

Notes

1 This contribution is based on an extensive research conducted by Robert Kolb, Gabriele Porretto and the author himself. This research was recently published in French: *L'application du droit international humanitaire et des droits de l'homme aux organisations internationales: Forces de paix et administrations civiles transitoires* (Bruylant: Bruxelles, 2005), 506 pp. The author wishes to thank Alexandre Faite, Legal Adviser at ICRC, for his scientific support in this study.

2 For general analyses of this phenomenon, see Kelly, M. J., *Restoring and Maintaining Order in Complex Peace Operations*, (Kluwer: The Hague, 1999); Daudet, Y., 'L'action des Nations Unies en matière d'administration territoriale', *Cursos Euromediterráneos Bancaja de Derecho Internacional* volumen VI (2002), pp. 459-543; Korhonen, O., 'International Governance in Post-Conflict Situations', *Leiden Journal of International Law* vol. 14

(2001), pp. 425-529; Wilde, R., 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration', *AJIL* vol. 95 (2001), pp. 583-606.

3 For an overview of these operations, see Bothe, M., Doerschel, T., *United Nations Peacekeeping – A Documentary Introduction* (The Hague, 1999).

4 See UN Security Council Resolution 1244 (10 June 1999).

5 See UN Security Council Resolution 1272 (25 October 1999). See also the United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium (UNTAES), established by UN Security Council Resolution 1037 (15 January 1996), para 1.

6 For detailed analyses of these transitional administrations, see Brand, M. G., 'Institution-Building and Human Rights Protection in Kosovo in the Light of UNMIK Legislation', *Nordic Journal of International Law* vol. 70 (2001), pp. 461-488; Guillaume, M., Marhic G., Etienne G., 'Le cadre juridique de l'action de la KFOR au Kosovo', *AFDI* vol. 45 (1999), pp. 308-334; Irmscher, T. H., 'The legal Framework for the Activities of the UN Interim Administration Mission in Kosovo: The Charter, Human Rights, and the Law of Occupation', *German Yearbook of International Law* vol. 44 (2001), p. 353-395; Kondoch, B., 'The United Nations Administration of East Timor', *Journal of Conflict and Security Law* vol. 6 (2001), pp. 245-265; Lagrange, E., 'La mission intérimaire des Nations Unies au Kosovo, nouvel essai d'administration directe d'un territoire', *AFDI* vol. 45 (1999), pp. 335-370; Morrow, J., White, R., 'The United Nations in Transitional East Timor : International Standards and the Reality of Governance', *The Australian Yearbook of International Law* vol. 22 (2002), pp. 1-45; Ruffert, M., 'The Administration of Kosovo and East-Timor by the International Community', *ICLQ* vol. 3 (2001), pp. 613-631; Stahn, C., 'The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis', *Max Planck Yearbook of United Nations Law* vol. 5 (2001), pp. 105-183; Strohmeyer, H., 'Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor', *American Journal of International Law* vol. 95 (2001), pp. 46-63; Zimmermann, A., Stahn, C., 'Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo', *Nordic Journal of International Law* vol. 70 (2001), pp. 423-460.

7 United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, report of the Secretary General, UN doc. S/2004/616 (23 August 2004), para 6.

8 S/2004/616, *op. cit.*, para 27.

9 Other legal regimes are also relevant in this context, although not analysed in the framework of this chapter. The UN Secretary General thus refers to 'the four pillars of the modern international legal system', namely HRL, IHL, international criminal law and international refugee law. See UN doc. S/2004/616, *op. cit.*, para 9. On this issue, see Expert Meeting on Multinational Peace Operations, *Applicability of IHL and International Human Rights to UN Mandated Forces* (ICRC: Geneva, 11-12 December 2003), p. 93.

10 ICRC, 'What is International Humanitarian Law ?' (July 2004), URL <www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNXM/$FILE/What_is_IHL.pdf?OpenElement>.

11 For a complete list of IHL international instruments, see URL <www.icrc.org/ihl>.

12 See URL <www.ohchr.org/english/law/index.htm>. Other instruments on specific rights, such the Convention against torture, or determined categories of persons, such as the Convention on the Rights of the Child, have also been developed. Moreover, regional conventions have also been adopted.

13 See Art. 4 of the *UN International Covenant on Civil and Political Rights.* See Doswald-Beck, L, Vité, S., 'International Humanitarian Law and Human Rights Law', *international Review of the Red Cross* no. 293 (March-April 2003), pp. 94-119.

14 UN doc. S/2004/616, *op. cit.*, para 25.

15 Even though some international human rights instruments provide that States Parties may take measures derogating from their obligations in time of public emergency, some fundamental rights must be respected under any circumstances. See for example art. 4 of the *International Covenant on Civil and Political Rights.*

16 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, Reports 1949 (11 April 1949), p. 179.

17 *Ibidem.*

18 *Ibidem.*

19 *Ibidem.*

20 This case-law was later confirmed by the Court. See ICJ, *Legality of the use of nuclear weapons*, Advisory Opinion, Reports 1996 (8 July 1996), para 25.

21 Art. 1, para 1 of the *United Nations Charter*. See Lachs, M., 'Art. 1, para. 1', Cot, J-P., Pellet, A. (eds.), *The United Nations Charter*, 2nd edition (1991), pp. 31ff; Wolfrum R., 'Art. 1', Simma, B. (ed.), *op. cit.*, p. 49ff.

22 Art. 42 of the *United Nations Charter*. See Fischer, G., 'Art. 42', Cot, J-P., Pellet, A. (eds.), *The United Nations Charter*, 2nd edition (1991), pp. 705ff; Frowein, J.A., 'Art. 422', Simma, B. (ed.), *The Charter of the United Nations- A Commentary* (1995), p. 628ff. UN practice, based on Chapter VI of the Charter (pacific settlement of disputes), also allowed the deployment of peacekeeping forces with the agreement of the host State.

23 Meyrowitz, H., *Le principe de l'égalité des belligérants devant le droit de la guerre* (Pedone: Paris, 1970), p. 190; David, E., *Principes de droit des conflits armés* (Bruylant: Bruxelles, 2002), p. 199ff; Emanuelli, C., *Les actions*

militaires de l'ONU et le droit international humanitaire (Wilson et Lafleur Itéé: Montréal, 1997), pp. 41ff; Greenwood, C., 'International Humanitarian Law and UN Military Operations', *Yearbook of International Humanitarian Law* vol. 1 (1998), p. 16; Kolb, R., *Droit humanitaire et opérations de paix internationales* (Helbing & Lichtenhahn: Bâle/Bruxelles, 2002), pp. 27ff.

24 See in particular Schindler, D., 'United Nations Forces and International Humanitarian Law', Swinarski, C. (ed.), *Mélanges Pictet* (CICR/Nijhoff: Genève/La Haye, 1984), p. 527; Benvenuti, P., 'The Implementation of International Humanitarian Law in the Framework of UN Peacekeeping', *Law in Humanitarian Crises: How Can International Humanitarian Law Be Made Effective in Armed Conflicts ?* (CE: Luxembourg, 1995), p. 113.

25 United Nations, *Observance by United Nations forces of international humanitarian law*, Secretary General's Bulletin, UN doc. ST/SGB/1999/13 (6 August 1999), para 1.1.

26 Benvenuti, P., 'Le respect du droit international humanitaire par les forces des Nations Unies: La Circulaire du Secrétaire général', *Revue Générale de Droit International Public* vol. 105 (2001), pp. 357s; On the Bulletin, see also Condorelli, L., 'Les progrès du droit international humanitaire et la circulaire du Secrétaire général des Nations Unies du 6 août 1999', *Mélanges Abi-Saab*, (Nijhoff: The Hague), pp. 495-505; Ryniker, A., 'Respect du droit international humanitaire par les forces des Nations Unies', *International Review of the Red Cross* vol. 81, no. 836, pp. 795-805; Zwanenburg, M., 'The Secretary General's Bulletin on Observance by United Nations Forces of International Humanitarian Law: A Pyrrhic Victory', *Revue de droit militaire et de droit de la guerre* vol. 39 (2000), pp. 15-35.

27 UN Security Council Resolution 1327 (13 November 2000), chapter I, para 3.

28 United Nations, *The United Nations and Somalia : 1992-1996*, The United Nations blue books series, vol. 8 (UN Department of Public Information: New York, 1996), 516 pp.

29 UN Security Council Resolution 1244 (10 June 1999).

30 Article 1.3 of the Regulation, URL <www.unmikonline.org/regulations/2000/reg59-00.htm>.

31 Common Art. 3 of the Geneva Conventions of 12 August 1949. ICTY Appeals Chamber, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, case no. IT-94-1-AR72 (2 October 1995), para. 70. See also the conclusions of the ICRC Commission of Experts of 1962, *International Review of the red Cross* vol. 45 (1963), p. 76 ff.; Schindler, D., 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', p. 147; David, E., *op. cit.*, pp. 114ff.

32 Art. 1 para 2 of the *Protocol Additional II to the Geneva Conventions of 12 August 1949*, and art. 8 para 2 (f) of the *Statute of the International Criminal Court*. Concerning the concept of troubles and internal tensions, see *inter alia* Pictet, J. (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, *op. cit.*, pp. 52 ff; Eide, A., 'Troubles et tensions intérieurs', UNESCO (ed.), *Les dimensions internationales du droit humanitaire*, (UNESCO: Paris, 1986), pp. 279ff; Momtaz, D., 'Les règles humanitaires minimales applicables en période de troubles et de tensions internes', *International Review of the Red Cross* vol. 80 (1998), pp. 487ff.

33 See for example, art. 4 of the *International Covenant on Civil and Political Rights.*

34 *Ibidem.*

35 ICRC's activities in the field may be based on various treaty provisions. In practice, ICRC mainly acts under its right of initiative, that is the right freely and at all times to propose its services to any State or armed group involved in an armed conflict. Under the law of international armed conflict, see: Art. 9/9/9/10 common to the *1949 Geneva Conventions*, art. 81 para 1 of the *Additional Protocol I of 1977*. Under the law of non international armed conflict, see : Common art. 3, para 2. of the *1949 Geneva Conventions*. The right of initiative is also set out in art. 5 para 2(d) and 3 of the *Statutes of the International Red Cross and Red Crescent Movement*.

36 ICRC, *Activity Report 1961*, pp. 10-11.

37 ICRC, *Yugoslavia / Kosovo: Summary of ICRC work last year to help detainees in Yugoslavia*, News 02/02 (18 January 2002), URL <www.cicr.org/Web/Eng/siteeng0.nsf/iwpList74/05D87BCEC6FB7592C1256B660060E81E>.

38 Syméon, A., Deputy Manager for ICRC operations in South-East Asia and Pacific, Interview (17 January 2003).

39 Common Art. 8/8/8/9 of the *1949 Geneva Conventions*,.

40 Art. 90 of the *Protocol Additional I to the 1949 Geneva Conventions*. Generally on the IFFC, see URL <www.ihffc.org/fr/aboutus.html>.

41 Pfanner, T., 'Le rôle du Comité international de la Croix-Rouge dans la mise en œuvre du droit international humanitaire', *Le droit face aux crises humanitaires* vol. 1, (CE: Luxembourg, 1995), p. 218.

42 Roberts, A., 'The Laws of War: Problems of Implementation in Contemporary Conflicts', *Duke Journal of Comparative & International Law* vol. 6 (1995), p. 72.

43 See URL <www.ohchr.org/english/bodies/chr/index.htm>. Alston, Ph., 'The Commission on Human Rights', Alston, Ph., (ed.), *The United Nations and Human Rights* (Clarendon: Oxford, 1992), pp. 126-210.

44 United Nations, *Situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia - Report of the Special Rapporteur*, UN doc. A/55/282-S/2000/788 (9 August 2000), para. 101ff; United Nations, *Note by the Special Rapporteur*, UN doc. A/55/282 (20 October 2000), para. 106ff.

45 See Sir Nigel Rodley, *Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: torture and other cruel, inhuman or degrading treatment or punishment, Report of the*

Special Rapporteur, submitted pursuant to Commission on Human Rights resolution 2001/62, Addendum, UN doc. E/CN.4/2002/76/Add.1 (14 March 2001), paras 1819s; van Boven, T., *Report of the Special Rapporteur on the question of torture*, submitted pursuant to Commission resolution 2002/38, Addendum, UN doc. E/CN.4/2003/68/Add.1 (27 February 2003), paras 2014-16.

46 For details of this practice, see Vité, S., *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire* (Bruylant: Bruxelles, 1999), pp. 66ff.

47 The Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination, the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women. See URL <www.ohchr.org/english/bodies/treaty/index.htm>.

48 *Consideration of reports submitted by States Parties under Article 40 of the Covenant, Initial Report, Serbia and Montenegro,* UN doc. CCPR/C/SEMO/2003/1 (24 July 2003). See especially: *Annex: Consideration of the Criminal Legal System and the Situation of Human Rights in Kosovo and Metohija Since the Arrival of the United Nations International Forces (1999-2002)* starting p. 198.

49 *Concluding Observations of the Human Rights Committee : Serbia and Montenegro*, Doc. CCPR/CO/81/SEMO, (12 August 2004), para 3.

50 *Ibidem.*

51 Kolb, R., Porretts, G., Vité, S., *op cit.*, pp. 165-173.

52 Art. 2 of the *International Covenant on Civil and Political Rights.*

53 URL <www.unmikonline.org/regulations/2000/re2000_47.htm>.

54 Section 3.1.

55 United Nations, UN doc. UNMIK/REG/2000/47 (18 August 2000), section 2.2.

56 *Compatibility with Recognized International Standards of UNMIK Regulation No.2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo*, Ombudsperson's Special Report no.1 (18 August 2000), paras 21-27; Alvaro, G.-R., *Kosovo: The Human Rights Situation and the Fate of Persons Displaced From Their Homes*, CommDH (Strasbourg, 16 October 2002), para 37-43.

57 Ombudsperson's Special Report No. 1, *op. cit.*, para 24; Alvaro, G.-R., *op. cit.*, para 43.

58 Similar concerns were also expressed regarding judicial remedies on detention in Kosovo. See Ombusperson Institution in Kosovo, *Special Report No. 3 on The Conformity of Deprivations of Liberty under 'Executive Orders' with Recognised International Standards* (29 July 2001).

59 See for example art. 54 of *Additional Protocol I to the 1949 the Geneva Conventions*.

60 Standard Operating Procedure 3023 for Claims in Kosovo (22 March 2003). For further details see Kolb, R., Porretto, G., Vité, S., *op. cit.*, pp. 433ff.

61 UN doc. S/2004/616, *op. cit.*, para 33.

62 UN doc. S/2004/616, *op. cit.*, para 31. See also, *Ibid*., para 36.

63 *UNMIK Regulation on the Establishment of the Ombudsperson Institution in Kosovo*, UN Doc. UNMIK/REG/2000/38, 30 June 2000, Preamble.

64 *Ibidem*, section 3.1.

65 *Ibidem*, section 3.4.

66 UN doc. S/2004/616, *op. cit.*, para 17.

67 O'Neill, W.G., *Police Reform in Post-Conflict Societies: What We Know and What We Still Need to Know*, International Peace Academy policy paper (April 2005), p. 2.

68 Neild, R., *Police Training: Themes and Debates in Public Security Reform: A Manual for Civil Society*, (Washington Office on Latin America: Washington, DC, 1998), p. 12.

69 Alvaro, G.-R., *op. cit.*, paras 44-54.

70 O'Neill, W.G., *op. cit.*, p. 7.

71 See for example, art. 9 of the *International Covenant on Civil and Political Rights.*

72 For further details, see Ombudsperson Institution in Kosovo, *op. cit.*

73 Alvaro, G.-R., *op. cit.*, para 66.

74 United Nations Security Council, UN doc. S/2004/616, *op. cit.*, chapter IX.