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CHANGING REGIME AND STATE-BUILDING WITHIN UN-AUTHORIZED MISSIONS

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CHANGING REGIME AND STATE-BUILDING WITHIN UN-AUTHORIZED MISSIONS

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I. Introduction

During the last decades the UN gave large support in managing post-conflict scenarios, in a context of peace-keeping operations, often closer to peace enforcement. Pursuant to the Charter and its principles, such missions aim at restoring internal order, in a larger perspective of regional or international stability. Yet pursuing such a goal entails a difficult composition of different bodies of law, which apply to different aspect of a state-building process. A difficult distinction between war and peace state leads to a problematic definition of the limits set out by customary international law, regulating, for instance, the use of military force and the institutional reforms.

I will describe how peacekeeping missions changed during the last experiences in Kosovo, Bosnia and East Timor, focusing on the efforts made to implement human rights standards and create an effective and fair judiciary. I will preliminarily analyze how Humanitarian Law applies under belligerent occupation in a peace enforcement context.

II. Status quo and the law of belligerent occupation. The De-ba'athification of the Iraqi society

A state's sovereignty doesn't cease to exist under military occupation. Resolution 1483, same as other acts of the Security Council, always recalls the occupying powers on the right of the Iraqi people to determine their own political future.[1] Under occupation sovereignty is suspended, but the state continues to exist. The core question is whether an occupying power can change the former institutions and the law in force before the occupation. The Hague Regulations and the IV Geneva Convention, both customary international law, set out important rules dealing with such situations, making clear that an occupation is a temporary situation which lasts till local institutions are reestablished.

1. UN SC Res.1483/2003 ; Res.1500/2003; Res 1511/2003 and Res. 1546/2004

No country can be conquered and put under a foreigner control by annexation. On the contrary, Humanitarian Law, in particular the law of belligerent occupation[2], limits those decisions taken by an occupying power while changing local laws, and their effectiveness after the end of the occupation. The main principle is that the status quo is to be maintained. Art. 47[3] of the Fourth Geneva Convention, as same as Art. 43 of the Hague Regulations, states an obligation to respect, as long as possible, the law of the occupied state. The existing legal system should remain in force, unless it is absolutely necessary to modify it, in order to meet other obligations for the occupying power under Humanitarian Law.

Some examples of such cases can be found in Art.43 Hague Reg. - the obligation to restore and ensure public order and safety[4]- and Art. 64[5] IV GC - the obligation to enable the occupying power to fulfill its obligations and guarantee its own security - .

Other legislative reforms may be necessary to abolish those norms counter to internationally recognized human rights standards, codified in treaties after 1949[6]. Much of this body of law is now considered jus cogens, binding for all states. As such, it applies also under occupation[7]. Thus, ITA can't miss this goal.

2. See M.Sassoli *Occupation and peacebuilding*, HPCR 2003.
3. At<http://www.icrc.org/>, IV G.C. Art. 47. "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."
4. Hague Reg. 1907 Art. 43 " the authority of a legitimate power having in fact passed into the hand of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the law in force in the country".
5. IV G.C. Art. 64. "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying
Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.
Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.
The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."
6. i.e. UN Covenant on Civil and Political Rights, among others.
7. See ICJ advisory opinion on the wall in Palestine July 9, 2004.

In conclusion we can say that International Law doesn't prevent an occupying power from undertaking legislative reforms, but it allows that in a restricted range of cases.

Taking into account these general rules, some aspects of the transition strategy operated by the CPA (Coalition Provisional Authority) in Iraq and the International Territorial Administration in Kosovo, East Timor and Bosnia, that brought about a change in the law, can hardly be justified, as it deeply transform local legislation in several fields.

For instance, UNMIK and UNTAET introduced new laws on taxes, currency, property and constitutional system. Notwithstanding the provision of the Iraqi Constitution, which set a socialist system, some important sectors, such as education and health, have been privatized. These reforms go apparently beyond ensuring public order and safety. As the ICRC (International Committee of the Red Cross) Commentary affirms, occupying authorities can't change local legislation to make it accord to their own legal conceptions.

Such radical changes have been justified after an authorization given by the Security Council. Indeed Art. 103 of the UN Charter prescribes that obligations under the Charter prevail over any other international treaty or agreement. The Security Council is entrusted by the Charter to take any necessary measure to maintain or restore peace, pointing out that "in discharging these duties…the SC shall act in accordance with the Purpose and Principle of the United Nations" (Art. 24 UN Charter).

Even if it's debatable whether changing a State's regime meets the purpose and principle of the UN, SC resolutions became the final mean by which this problematic normative cadre has been recomposed, trough a case by case approach.

Important institutional reforms have been allowed in Iraq by the SC. Some CPA orders were to apply also after the end of the occupation, and were englobed in the Transitorial Administration Law. Among others, it is worth mentioning the process of de-Ba'athification of the Iraqi society. By Order n.1 and n.4, the Ba 'ath Party is disestablished, all its structures and leaderships are removed. Senior members would be evaluated for criminal conducts or threats to the security of the Coalition. Those who held a position in the top three levels of the party's hierarchy would be interviewed in order to verify any possible current affiliation with it.

The Orders also dealt with the party's property and forbade any displaying of

Saddam's image in public spaces. The Coalition went even further, establishing by Order n.5 an institution, the De-Ba'athification Council, composed by Iraqi citizens, which would operate at the discretion of the Administrator. Its main task was to reclaim the party's properties and assets and the individuation of officials and other members, involved in human rights violations. Moreover it puts on everybody an obligation to provide information about any matter the Council approves. Those testimonies won't be valued as evidence against the tests. The De-Ba'athification process has been later carried out by the Governing Council and the Interim Government. Finally the new Iraqi Constitution forbids the re-establishment of that party. [8]

Besides this aspect, the SC action in Iraq challenges other principles of the law of belligerent occupation. Res. 1546/2004 "Welcomes that, also by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty;" [9] In reality, occupation is a matter of fact, based on a factual exercise of control over a foreign territory. As long as a State's forces interfere in affairs of the occupied territory, they are bound to apply the Humanitarian Law. No SC resolution can declare when an occupation has ended, or sovereignty has been re-established.

Since June 2004, at least two legal regimes can be applied to the ambiguous and complex Iraqi situation. On the one hand the law of occupation still applies to the multinational force authorized by the SC resolution. On the other hand, the principles of state-building direct UNAMI and the missions undertaken by different organizations in Iraq.

Such a dualistic conception of law in post-conflict scenarios also raises important questions about the limits of the use of force and the application of the Humanitarian Law to UN forces. As for the UN ac-countability before Humanitarian Law, the Secretary-General's *Bulletin on the observance by UN forces of International Humanitarian Law*[10] ensures full respect for the principle and spirit (soft law) of general convections applicable to the conduct

8. Iraqi Constitution Article 7: First: "Any entity or program that adopts, incites, facilitates, glorifies, promotes, or justifies racism or terrorism or accusations of being an infidel (takfir) or ethnic cleansing, especially the Saddamist Ba'ath in Iraq and its symbols, under any name whatsoever, shall be prohibited. Such entities may not be part of political pluralism in Iraq. This shall be regulated by law."
9. UN SC Res. 1546/2004 para. 2.
10. UN Doc.ST/SGB/1999/13

military personnel, including the IV Geneva Convention, the two additional Protocols and the Hague Regulations[11]. UN forces would be responsible for combat-related damages and other breaches of Humanitarian Law, whenever under UN control and command. On the contrary, within UN-authorized operations, conducted under national or regional command, the responsibility rests with the states or those organizations conducting the operations.

The last years' experience shows a shift in territorial management strategy. Combat-oriented tasks of peace enforcement operations are mostly carried out by regional organizations (NATO in Kosovo) or coalitions of states, usually authorized by SC, under Chapter VII provisions. While peacekeeping operations are conducted by the Blue Helmets, under Chapter VI, after a peace agreement and the reestablishment of local institutions[12].

III. Peacekeeping and Territorial Administration under the UN Charter

Since the end of World War II, the United Nations has been involved in resolving humanitarian crises and other problematic aspects of post conflict societies. Interventions through its peacekeeping missions are based on the UN Charter[13], drawing a scheme that lay between Chapters VI and VII provisions. Art. 33.1 states:

"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

11. Humanitarian Law can't apply as such to UN. ONU, as an organization, is not a party in the covenants, moreover its missions don't result from a military act, but take legitimacy from SC resolutions.
12. See G.Olivier *The other side of peacekeeping:peace enforcement and who should do it?* Available on : www.internationalpeacekeeping.org
13. Its complete text is available at <www.un.org>.

In such a situation, the Security Council can also make recommendations, if the parties so request (Art. 38). In case of international armed conflict, and whenever a civil war or other internal situations could jeopardize peace and regional stability, the Security Council can act following Chapter VII provisions, which endow it with several means of intervention, even those involving a use of armed forces (Arts. 41-42). We may distinguish three different types of operations involving armed forces: armed intervention directly disposed by the Security Council (insofar such interventions have never been taken into practice); armed operations authorized by the Security Council; peacekeeping missions. After the end of the Cold War, becoming wider the consensus within its institutions, the UN has more and more enforced its authority under Chapter VII. The League of Nations had created a system by which a temporary assistance in governance was given from "mandatory powers" to certain states. The UN used this method managing with colonial territories in transition to independence. As well known, it designed in Chapters XII and XIII of the Charter a trusteeship system aimed to realize international authorized administrations of territories. The UN role was limited though. In general it amounted to a supervision. Peacekeeping missions have progressively turned into more complex operations, being the UN vested with both executives and legislative powers, exercised by a Special Representative. During the 90s, dealing with the Balkans crisis and the process of independence of East Timor, within a peacekeeping operation, the Special Representative was also empowered to administer the judiciary. As it's stated by the UN Charter (Art. 78), the trusteeship system cannot apply to Member States, "relationship among which shall be based on respect for the principle of sovereign equality". The Security Council elaborated innovative case by case solutions , giving new perspectives to the concept of suspended sovereignty based on SC authorizations and the consent of local parties, often solving a sovereignty problem beside a governmental *impasse*. It all leads to rebuilding the general constitutional system of post conflict countries, replacing Humanitarian Law, the law in force during armed conflicts or occupations, with Human Rights Law, that is to say,

14. See N. Ronzitti, *Diritto internazionale dei conflitti armati*, 3ª ed., Giappichelli Edito-re, Torino 2006, p. 53.
15. See A. Yannis, *The concept of suspended sovereignty in International Law and its implications in international politics,* EJIL 2002, p. 1037.
16. See R. Wilde, *From Danzig to East Timor and beyond: the role of International Ter-ritorial Administration*, AJIL 2001, p. 583.

providing the new governing institutions with all internationally recognized standards of democracy.

IV. The implementation of human rights standards by ITA, building new democracies

Consistent to the principle of self-determination, the International Territorial Administration always moves a first step toward a total re-establishment of local institutions, by defining and monitoring the electoral procedures and the creation of a new constitutional charter. At the same time, peacekeeping dedicates its efforts to solve those particular situations from which violence and war had broken out. UN always played a decisive role, leading those post conflict society toward reconciliation.

A Security Council act under Chapter VII provisions[17], established UNTAET in Timor East, in order to restore order after the violent campaign of Indonesia against the independent faction. In this process of decolonization, UN had never considered East Timor as a part of Indonesia, so its mission had as main task that to support the local institutions to develop in such a way to be able to lead the country.[18] Consistent to SC Res. 1338/2001, UNTAET was also responsible of all electoral procedures. By its regulation 1/2001, it stated all rules about the election of a Constituent Assembly "to prepare a constitution for and independent and democratic East Timor".[19] By the same regulation it established an Independent Electoral Commission, responsible for the organization and conduct of all electoral operations and its fairness. [20]

17. UN SC Res. 1272/1999.
18. See M.J. Matheson, *UN governance of Post conflict Societies*, EJIL, 2001, 82.
19. UNTAET Reg. 2001/1 , 1.1 "In order to implement the decision of the people East Timor in the popular consultation of 30 August 1999 and so as to protect the inalienable human rights of the people of East Timor including freedom of conscience, freedom of expression, freedom of association and freedom from all forms of discrimination".
20. *Idem* 14.8 "The IEC shall advise the Secretary-General of the United Nations Organization as to whether the criteria for a fair and free election have been met".

The IEC was headed by a Chief Electoral Officer, appointed by the Secretary-General, and vested with such powers to exercise his administrative functions. That was the first act to transfer the governing legitimacy to a democratically elected government. In 2002 UNTAET was replaced by UNMISET[21], a civil mission entrusted with the task of overseeing the democratic process and the implementation of a safe environment. In order to support the local police, still challenged by armed groups, it was created a special unit, the Rapid Deployment Service, to patrol the borders and other rural unsafe areas. Particularly important, RPD was trained by UNPOL, through "mostly theoretical sessions covering human rights, use of force, code of conduct, first aid, map reading and survival skills, among other topics"[22] .Further support for human rights implementation, has been given by UNOTIL, a UN political mission which was to appoint up to 10 human rights officers. Implementing its mandate UNOTIL shall

"emphasize proper transfer of skills and knowledge in order to build the capacity of the public institutions of Timor-Leste to deliver their services in accordance with international principles of rule of law, justice, human rights, democratic governance, transparency, accountability and professionalism".[23]

The UNMIK was placed in Kosovo in the aftermath of the NATO campaign. The UN SC resolution 1244(1999) suspended FRY sovereignty over Kosovo for an unlimited period, during which UNMIK and the Special Representative were entrusted with providing an interim administration, "facilitating a political process designed to determine Kosovo's future status".[24]

21. Established by SC Res. 1410/2002, again under Chapter VII provisions, para. 2 "the mandate of UNMISET shall consist of the following elements:
(a) To provide assistance to core administrative structures critical to the viability and political stability of East Timor;
(b) To provide interim law enforcement and public security and to assist in the development of a new law enforcement agency in East Timor, the East Timor Police Service (ETPS);
(c) To contribute to the maintenance of the external and internal security of East Timor;".
22. UNMISET Press Release 12 January 2003.
23. UN SC Res 1599/2005, para. 3.
24. UN SC Res. 1244/1999 para. 11.

UNMIK Reg. 2001/9 set forth a Constitutional Framework for provisional self-government of Kosovo. At chapter 3 it stated that all persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms. Moreover "the Provisional Institutions of Self-Government shall observe and ensure internationally recognized human rights and fundamental freedoms, including those rights and freedoms set forth in the Universal Declaration on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols". As these norms are incorporated in the provisional Constitution, they are directly applicable in Kosovo. We find the same provision in the final Constitution, which was promulgated after the unilateral declaration of independence, in 2007. As the Special-Envoy recommended, the Constitution include several provisions for minority groups, including parliamentary seat allotment[25]. Following SC Res. 1244, UN also set out a *Standards Implementation Plan*, as a memorandum on targets to be reached. Once again, UN, in the person of the Secretary-General, acted as a supporter and co-chaired monitoring institution, but within the process of the status definition of Kosovo, its participation was characterized by some peculiar aspects. Its local institutions committed themselves to fulfill those obligations, in order to demonstrate their governing skills and their capability to comply with the requirements of international life[26]. This should be a mean by which Kosovo might acquire a stronger international subjectivity, since it is still controversial. The main humanitarian problem, still unsolved, concerns refugees and displaced persons, mostly Serbs, that couldn't turn back. OSCE and UNHCR dedicated their efforts to monitor their return, and the administration of their properties, often reallocated or sold through illegal and unfair procedures. At the same time, both institutions worked to guarantee equal access to essential services, public, civil and political structures[27].

As a result of the extreme ethnic violence which characterized the war in Bosnia,

25. Each minority is guaranteed a respective minimum number of seats: the Roma community, one (1) seat; the Ashkali community, one (1) seat; the Egyptian community, one (1) seat; and one (1) additional seat will be awarded to either the Roma, the Ashkali or the Egyptian community with the highest overall votes; the Bosnian community, three (3) seats; the Turkish community, two (2) seats; and the Gorani community, one (1) seat.

26. See B. Knoll, *From benchmarking to final status? Kosovo and the problem of an In-ternational Administration's open-ended mandate,* EJIL 2005, p. 637.

27. OSCE-UNHCR *Minority Assessment Report,* available at: <http://www.unmikonline.org>.

maximum attention was given to guarantees in the field of human rights by the Constitution for BiH, included in the Dayton Peace Agreements, signed in 1995. It provides that all rights and freedoms set forth in the ECHR and its Protocols shall apply directly, hierarchically supreme to any other law. All federal and local institutions are committed to operate under their provisions. In comparison to Art. 14 ECHR, the Constitution provides for a wider non-discrimination clause, because this principle also extends to any international agreements[28].Consistent to the Dayton Peace Agreements, a Commission on Human Rights was established. The Commission, composed by a Chamber and an Ombudsman, investigate on human rights violations, giving priority to allegations or other inquiry on discrimination acts. The parties accepted to allow NGOs and a supervisory body established by the international agreements to act as a monitoring mechanism for human rights. Annex 7 reaffirms the property rights of the refugees and displaced persons, and their rights to return in BiH. The International Police Task Force, restructuring the Bosnian police force, trained local personnel in many tasks, included to ensure a safe return of refugees. Such a goal is far from being reached. Among other obstacles, no economic reforms have been undertaken to sustain that inflow. UNHCR has been often accused of "ethnic engineering", for its financial contribution to so-called *open cities*, willing to accept minority returnees. Such an intervention would "manipulate the majority-minority configuration in the area in an effort to create a majority where none existed before"[29];The SC made sure the parties respected their obligations under the Dayton Agreements[30]. The SC Res. 1022/1995 suspended temporally all sanctions established again the Serb Party, accordingly to the complete withdrawal of its forces behind the separation line. The sanction would have reapplied without a need for a new SC resolution, if they had failed to keep their obligations.

As in Kosovo (regarding the Humanitarian Intervention decided unilaterally by NATO), the SC legitimated ex post the unlawful positions of the Coalition Force, as an occupying power in a sovereign country. Since Res. 1483 the Iraqi sovereignty has been reaf-

28. See D. McGoldrick, *National identity and International Law*, Int.l J. Minority Gr. Rights 1999, p. 1.
29. See H. Stokke, *Human Rights as a mechanism for integration in Bosnia-Herzegovina,* Int.l J. Minority Gr. Rights, 2006, p. 263.
30. See J. Sloan, *The Dayton Peace Agreements: Human Rights and their Implementation*, EJIL 1996, p. 207.

firmed many times. In this resolution the SC asked for the appointment of a Special Representative in Iraq

"whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq".

Among his several tasks, he would promote human rights and the reconstruction of key infrastructures. However, the UN didn't achieve any of these goals during the first period of the occupation. The Special Representative was murdered few months after his appointment[31].By the way, in August 2003, the SC decided to "establish the United Nations Assistance Mission for Iraq to support the Secretary-General in the fulfillment of his mandate under resolution 1483"[32].UN asked the Governing Council, in cooperation to CPA, a timetable to drafting a new Constitution and to hold democratic elections under that constitution. It also underlined that UN, through UNAMI and SG Special Representative, would strengthen its vital role in Iraq "including by providing humanitarian relief, promoting the economic reconstruction of and conditions for sustainable development in Iraq, and advancing efforts to restore and establish national and local institutions for representative government". As described by the SC in its resolution, the political process led to the appointment of an interim government and, later on, an elected government, which asked UN to maintain their presence in the country. Consistent to Res. 1546/2004, UNAMI was to play a leading role to promote national dialogue and consensus-building on the drafting of a new Constitution and promote the protection of human rights, national reconciliation and judicial and legal reform in order to strengthen the rule of law in Iraq. On 15 October 2005 the Iraqi Constitution came into force. It was drafted on the precedent interim constitutional texts included in the Transitional Administrative Law. Beside the provision of civil and political rights, the country turns

31. Sergio Vieira de Mello, formerly Special Envoy in East Timor and Kosovo.

32. UN SC Res. 1500/2003 and Res. 1511/2003.

into a federal State, where all those living in Iraq, in particular the Kurds, can exercise their right to participate to all public institutions.

V. Finding a legal framework within the former law in force. The reestablishment of a judiciary

As a result of a state-building, both an occupying power and a peacekeeping mission face many difficulties in re-establishing judicial offices and structures, mostly emending the former law in force by a complex process which aims to harmonize the substantial law and the whole judicial system with the internationally recognized standards of human rights, wishing to create a stable and democratic state. Defining a legal framework for the reconstruction of a new judicial system was indeed one of the most difficult tasks for UNTAET, UNMIK and the OHR in Bosnia and Herzegovina.

The first concern of UNTAET was to avoid a legal vacuum, for this would make impossible the creation of an effective judiciary and the implementation of the other stages of complete independence and self-government. The Special Representative would be empowered to enact new laws and amend the existing ones. His first regulation (1999/1) dealt with the applicable law, which was the law in force before the SC resolution 1272, as long as it guaranteed the human rights standards and did not conflict with the SC mandate or any other regulation promulgated by the SP. An independent judicial commission was designed to appoint new judges. Its task was very difficult. Neither under Indonesian rule nor under the Portuguese, any East Timorese had been appointed to judicial or prosecutorial office, so it was quite impossible to find someone who had a suitable experience. A relevant role was played by UNTAET, creating a compulsory legal training program and a "mentoring scheme"[33] in which experienced international legal professionals would support judges and prosecutors without exercising any judicial power. In its res. 1599/2005[34], the Security Council reaffirmed

33. See H. Strohmeyer. *Collapse and Reconstruction of a judicial system* EJIL, 2001, p. 55.

"the need for credible accountability for the serious human rights violations committed in East Timor in 1999. In that regard, it underlined the need for the United Nations Secretariat, in agreement with Timor-Leste authorities, to preserve a complete copy of all records compiled by the Serious Crimes Unit and called on all parties to cooperate fully with the work of the Secretary-General's Commission of Experts".[35]

The same scenario was faced by the peacekeeping missions in the former Yugoslavia. UNMIK was broadly authorized to take all governance functions, including the administration of justice. Just like in East Timor, it needed to reestablish all fairtrial standards towards those people arrested by KFOR, charged with ensuring public security. UN personnel used the code of criminal procedure of the Federal Republic of Yugoslavia but as long as its norms respected the international human rights standards. The independent judicial commission was to appoint judges and prosecutors, taking into account the different ethnic communities of Kosovo. At the same time the Secretary-General of the UN stressed the importance of providing them with a continuous training particularly on such fields of law as human rights.[36] About human rights, UNMIK res. 2000/38 established a new figure: the Ombudsperson. This institution would collect and investigate complaints concerning human rights violations and abuse of authority. He had no power to issue binding decisions, but he could prepare reports on individual or general cases. The Ombudsperson also came to criticize some acts of the SRSG and the UNMIK.[37] In particular, he found it unacceptable that the UN personnel enjoyed such a broad immunity and that no formal judicial mechanism was disposed to review their governmental acts, which could be inconsistent with Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedom,

34. "UN SC Res. 1599/2005 para.9 "Reaffirms the need for credible accountability for the serious human rights violations committed in East Timor in 1999, and, in this regard, underlines the need for the United Nations Secretariat, in agreement with Timor-Leste authorities, to preserve a complete copy of all the records compiled by the Serious Crimes Unit, calls on all parties to cooperate fully with the work of the Secretary-General's Commission of Experts, and looks forward to the Commission's upcoming report exploring possible ways to address this issue, including ways of assisting the Truth and Friendship Commission, which Indonesia and Timor-Leste have agreed to establish;".
35. UNMISET public information, 29 April 2005.
36. Secretary-General's Kosovo Report UN Doc. S/1999/779 para. 69.
37. See R. Everly, *Reviewing Governmental Acts of the United Nations In Kosovo*, The German Law Journal 2007, p. 21.

which states: “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. By UNMIK reg.2006/12, the Human Rights Advisory Panel was given jurisdiction to examine complains from individuals or groups for violations committed by UNMIK, but, as The Human Right Committee declared[38], the Panel has no effective mean to enforce its recommendations as it lacks necessary independence and authority. At the end of 2007, all governing functions were transferred to the Government of Kosovo, which declared the independence. By the way some aspects, among which the judiciary, will be monitored by the European Union, that is going to start a mission in the region. On 15 June a new Constitution came into force. The judicial system guarantees the impartiality of its institutions from any political power[39] and the participation to the composition of the courts to the minority ethnic groups of Kosovo[40]. At least the 15% of the judges of the Supreme Court “shall be from Communities that are not in the majority in Kosovo.”[41] The same principle of respecting a multiethnic composition inspires the Office of the Public Prosecutor .[42]

Within Yugoslavia, the judiciary was inefficient, unfair and highly influenced by the communist regime. After Tito’s death, when the civil war broke out, the situation didn’t get any better. In the aftermath of the Dayton agreements, it needed a huge effort from the OHR (the Office of the High Representative in BiH) to promote an independent judiciary. Being BiH constituted of at least two Entities (the Federation of BiH and Republika Srpska)[43], it was quite difficult to implement a general system and enforce state’s institutions. *In fact all public*

38. Human Right Committee, Concluding observations of the Human Rights Committee Kosovo, UN Doc. CCPR/C/UNK/1, 16 August 2006.

39. Const. of Kosovo, art 106: “1. A judge may not perform any function in any state institution outside of the judiciary, become involved in any political activity, or be involved in any other activity prohibited by law. 2. Judges are not permitted to assume any responsibilities or take on any functions that would in any way be inconsistent with the principles of independence and impartiality of the role of a judge”.

40. Const. of Kosovo, Art. 104.3: “The composition of the courts shall reflect the ethnic composition of the territorial jurisdiction of the respective court. Before making a proposal for appointment or reappointment, the Kosovo Judicial Council consults with the respective court.”

41.The full text is available at <http://www.ks-gov.net/>.

42. Const. of Kosovo. Art. 109. 4: ”The State Prosecutor shall reflect the multiethnic composition of the Republic of Kosovo and shall respect the principles of gender equality”.

43. Not to mention the Brcko District, the Croatian cantons of the Federation and other cities or areas under the International Transition Administration.

officers – Bosnian, Croatian or Serb – operate under their own political party. A number of organizations participated to the Judicial Reform Working Group. OSCE, the UN Judicial System Assessment Program[44], the Council of Europe and the American Bar Association's Central and Eastern Europe Law Initiative, among others. The ICTY influenced the reform of the domestic courts in BiH, paying great attention to its effectiveness[45]. As a result of the Completion Strategy of the Court, stated by resolution 1503[46], some cases of war crimes would be transferred before the domestic courts. The OHR promoted a new "judicial service law" and imposed many law of national level. In doing so, he provided also for depoliticizing the appointment[47] and dismissal of judges. The role of the public prosecutor has been strengthened. He has been endowed with such powers which ensure his active role in the investigations. The Federation Prosecutor's Office, the highest prosecutorial authority in BiH, can become the main means by which a link is set between the local court system and the structures of the Federation.[48] Actually such a link has not been implemented so far, because of political influences and pressure, apart from the difficult coordination among several foreigner organizations involved in this project. In dealing with such a problem, it is interesting to mention the experience in Brčko. In 1999 the Arbitral tribunal for the Dispute over Inter-Entity Boundaries, created this autonomous district, whose governing powers are delegated from both RS and the Federation to a multiethnic democratic government. The existing laws

44. Pursuant to SC Resolution 1184/1998.
45. See Barria-Roper, *Judicial Capacity Building in Bosnia and Herzegovina*, Human Rights Review 2008, p. 317.
46. UN SC Res.1503/2003: "Noting that the strengthening of national judicial systems is crucially important.
To the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular, "1. Calls on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR and encourages the ICTY and ICTR Presidents, Prosecutors, and Registrars to develop and improve their outreach programs;
2. Calls on all States, especially Serbia and Montenegro, Croatia, and Bosnia and Herzegovina, and on the Republika Srpska within Bosnia and Herzegovina, to intensify cooperation with and render all necessary assistance to the ICTY, particularly to bring Radovan Karadzic and Ratko Mladic, as well as Ante Gotovina and all other indictees to the ICTY and calls on these and all other atlarge indictees of the ICTY to surrender to the ICTY;".
47. A Special Commission is to examine new applicants and review the professional and personal standards of sitting judges and prosecutors.
48. See Per Bergling, *Judicial Reform under International Law: Notes from Bosnia and Herzegovina*, Nordic Journal of International Law 2001, p. 502.

of the Entities would continue to apply, unless modified by the District Assembly or the Supervisor. The latter also oversaw the work of the BLRC (Brčko Law Revision Commission) while analyzing and reviewing the Entities' legislation, in order to find better solutions. Once identified those areas that needed a modification, the Supervisor drew a comprehensive strategy by a Statute[49] which set forth the basis for a democratic and multiethnic government. In this way he overcame much of those obstacles faced at the federal level of BiH, where the different opinions among the international and non-governmental organizations made them impossible to achieve their goals.

The Iraqi penal law and procedure had been widely changed by the CPA, as same as its judicial system. The CPA Public Notice of 18 June 2003[50] established the Central Criminal Court of Iraq to ensure the fundamental judicial functions after the collapse of the regime. The Court was to operate during the occupation as a temporary and emergency measure.[51] At the same time the occupying powers changed many of the former Criminal Code and Criminal Procedural Code "to accord the people of Iraq fundamental due process protections and shield them from human rights violations". In its order n.31, for instance, CPA emended some sentence provisions inconsistent with human rights, dealing with rape and kidnapping, and, on the other hand, modified the penalties for such offences which might have jeopardized the Coalition Force security, and its duty, consistent to Humanitarian Law, to restore and maintain public order and safety[52]: "Offenses Involving Damage to Public Utilities or Oil Infrastructure […] are hereby modified to provide a maximum punishment of life imprison-

49. See M. G. Karna, *Creating a legal framework of the Brčko District of Bosnia and Herzegovina: a model for the Region and other post conflict countries*, AJIL 2003, p. 110.

50. All CPA orders, regulations and memoranda are available at <http://www.cpa-iraq.org/>.

51. "This court will apply and operate under Iraqi law, as amended to ensure fundamental fairness and due process for accused persons, and will be modeled on the current Iraqi court system. The Central Criminal Court will consist of an Investigative Court, a Trial Court and an Appeal Court, with the right of further appeal to the Iraqi Court of Cassation. The judges and prosecutors will be locally selected Iraqis."
"The Court will deal with serious offenses that most directly threaten the security and civil order in Iraq. This interim measure will address the immediate need for a reliable and fair system of justice. The CPA will continue to assist in restoring the capability of the Iraqi court system, as it recovers from years of Iraqi Ba'ath Party abuse and perversion."

52. Art. 43, Hague Reg.

ment"[53]. Other Orders provided for equal access to justice to minority groups or disfavored regions[54], and established a pension to be paid by the Ministry of Justice to relatives of judges killed while serving their Office, safeguarding the independence and impartiality of the judicial system[55]. With Order n. 48, consistent with relevant U.N. Security Council resolutions, including Resolution 1483 (2003), Resolution 1500 (2003), and Resolution 1511(2003), the Coalition Force entrusted the Governing Council with establishing an Iraqi Special Tribunal, in order to try

"Iraqi nationals or residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws, by promulgating a statute, the proposed provisions of which have been discussed extensively between the Governing Council and the CPA and are set forth at Appendix A".

The Tribunal operated also during the Interim Government, under the TAL provisions. It stated:

"The judiciary is independent, and it shall in no way be administered by the executive authority, including the Ministry of Justice. The judiciary shall enjoy exclusive competence to determine the innocence or guilt of the accused pursuant to law, without interference from the legislative or executive authorities". "All judges sitting in their respective courts as of 1 July 2004 will continue in office thereafter, unless removed from office pursuant to this Law"[56]. The general system was composed by a Federal Supreme Court[57], a Higher Juridical Council, that "shall supervise the federal judiciary and shall administer its budget", and Federal, Regional and Local Courts.

53. CPA Order n.31 section 4 art 1 "The penalties for wrecking, destroying or otherwise damaging water, electricity, or oil installations or other public utilities set forth in Penal Code Paragraph 353 (1), whether or not such damage could or does lead to the closure of an installation, are hereby modified to provide a maximum punishment of life imprisonment.

54. CPA Order n.58 establishes a Court of Appeal in Maysan and Muthanna. After the entry into force of the new Constitution, both became Governatorates.

55. CPA Order n. 52.

56. TAL, Art. 43

57. Whose jurisdiction is stated by Art. 44, B "(1) Original and exclusive jurisdiction in legal proceedings between the Iraqi Transitional Government and the regional governments, governorate and municipal administrations, and local administrations. (2) Original and exclusive jurisdiction, on the basis of a complaint from a claimant or a referral from another court, to review claims that a law, regulation, or directive issued by the federal or regional governments, the governorate or municipal administrations, or local administrations is inconsistent with this Law."

This scheme has been little modified by the Iraqi Constitution, which came into force on 15 October 2005. The definitive structure of the Iraqi Judiciary is stated by art. 89[58] and many other provisions ensure the establishment of an independent, transparent and fair judicial system[59]. Among Civil and Political Rights (Section 2, Chapter 1) the Constitution declares that all Iraqi are equal before the law "without discrimination based on gender, race, ethnicity, nationality, origin, color, religion, sex, belief or opinion, or economic or social status."(Art. 14). It is also stated that: the criminal law cannot be retroactive; criminal punishment is personal; the right of defense shall be guaranteed during any phase of the investigation and trial; unlawful detentions are prohibited. The new Iraqi Constitution aims to implement such a judiciary, consistent with Human Rights standards and democracy's guarantees.

VI. Final Remarks

Considering what results have been achieved on the ground, we can easily come to the conclusion that re-establishing a state's constitutional institutions and providing them with a legal system is maybe too demanding a goal for a peacekeeping mission. The path to stability gets harder when transition strategies, which often border to assimilation, crash with a state's cultural and historical prerogatives. Such issues challenge the International Territorial Administrations while defining new rules for a fair and equal participation of all citizens in public life.

Despite the efforts directed at the implementation of human rights, still few guar-

58. The full text of the new Iraqi Constitution is available at <http://www.uniraq.org/>.

59. Iraqi Const., Article 87: "The judicial power is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law."
Article 88: "Judges are independent, and there is no authority over them except that of the law. No power shall have the right to interfere in the judiciary and the affairs of justice." Article 98: "A judge or public prosecutor is prohibited from the following:
First: Combining a judicial position with legislative and executive positions and any other employment. Second: Joining any party or political organization or performing any political activity."

antees protect the civil population under peace enforcement operations and much confusion characterize which legal framework is applicable during those complex situations which lay between peace and war state. Scholars still wonder whether it is necessary to create an *ad hoc* set of rules, rather than using the existing international law of warfare, adjusting it to particular context, through a case by case approach. The latter solution emerges from the UN last experiences and SC acts.

BIBLIOGRAPHY

Barria & Roper, *Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform Beyond the Completion Strategy of the ICTY, Human Rights Review,* 2008- 3, pp. 317-330.

Bergling, *Judicial Reform under International Law: Notes from Bosnia and Herzegovina, Nordic Journal of International Law*, 2001-4, pp. 489-512.

Burke & White, *The Domestic Influence of International Criminal Court: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina, Columbia Journal of Transnational Law Association*, 2008-2, pp. 279-350.

Everly, *Reviewing Governmental Acts of the United Nations In Kosovo, The German Law Journal* 2007-1. (at: <www.germanjournal.com>).

Johnstone, Security Council Deliberations: *The Power of the Better Argument, European Journal of International Law*, 2003-3 pp. 437-480.

Karna, *Creating the Legal Framework of the Brcko District of Bosnia and Herzegovina: a Model for the Region and Other Postconflict Countries, The American Journal of International Law*, 2003-1 pp. 111-131.

Knoll, *From Benchmarking to Final Status? Kosovo and the Problem of and International Administration's Open-Ended Mandate, European Journal of International Law,* 2005-4, pp. 637-660.

Matheson, *United Nations Governance of Postconflict Societies, The American Journal of International Law,* 2001-1, pp. 76-85.

McCarthy, *The Paradox of the International Law of Military Occupation: Sovereignty and Reformation in Iraq, Journal of Conflict & Security Law* 2005-1, pp. 43-74.

McGoldrick, *From Yugoslavia to Bosnia: accommodating national identity in national and international law, International Journal on Minority and Group Rights*, 1999-1/2, pp. 1-64.

Oliver, *The other side of peacekeeping: peace enforcement and who should do it?, The Yearbook of International Peace Operations,* 2002 Vol. 8, pp. 99-117.

Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence, European Journal of International Law,* 2005-4 pp. 695-720.

Sassoli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers, European Journal of International Law,* 2005-4 pp.661-694.

Shraga, *UN Peace Operations: applicability of International Humanitarian Law and responsibility for operation-related damage, The American Journal of International Law,* 2000-2 pp. 406-411.

Sloan, *The Dayton Peace Agreement: Human Rights and their Implementation, European Journal of International Law,* 1996-2, pp. 207-225.

Stahn, J*us ad bellum, jus in bello…jus post bellum?-Rethinking the conception of Law of Armed Force, European Journal of International Law,* 2006-5 pp. 921-944.

Stokke, *Human Rights as a Mechanism for Integration in Bosnia-Herzegovina, International Journal on Minority and Group Rights,* 2006-2 pp. 263-284.

Strohmeyer, *Collapse and Reconstruction of a Judiciary System: The United Nations Missions in Kosovo and East Timor, American Journal of International Law,* 2001-1, pp. 46-63.

Tigroudja, *Le Régime d'occupation en Iraq. In Annuare Français de Droit International,* 2004, pp. 77-101.

Wheatley, *The Security Council, Democratic Legitimacy and Regime Change in Iraq, European Journal of International Law*, 2006-3, pp. 531-552.

Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration, American Journal of International Law,* 2001-3, pp. 583-605.

Id., *Representing International Territorial Administration: A Critique of Some Approaches, European Journal of International Law*, 2004-1, pp. 71-96.

Yannis, *The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics, European Journal of International Law*, 2002-5, pp. 1037-1052.

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