



# SPECIAL REPORT

1200 17th Street NW • Washington, DC 20036 • 202.457.1700 • fax 202.429.6063

## ABOUT THE REPORT

This report examines the role of the international community—and particularly of international judges and prosecutors—in creating a climate in Kosovo to challenge impunity and contribute to the establishment of the rule of law.

Michael Hartmann served as the first international prosecutor of Kosovo for the United Nations Interim Administration Mission in Kosovo (UNMIK) and as the first international public prosecutor of Kosovo before the Supreme Court from February 2000 until early 2003. From 1998 to 2000, he was a judicial systems officer for the United Nations Mission in Bosnia and Herzegovina (UNMIBH). Hartmann is currently a senior fellow in the Jennings Randolph Program for International Peace at the U.S. Institute of Peace. An earlier version of this report was presented in May 2003 at the Institute and has been revised and updated following the author's visit in June and July to Bosnia, Serbia, Kosovo, and The Hague.

*Note on terminology:* The term "Kosovan" is preferred by UNMIK to refer to judges and prosecutors of Kosovo, other than the internationals; that usage is not meant to comment in any way on Kosovo's current or final status. "Jurists" is used to refer to judges and prosecutors collectively.

The views expressed in this report do not necessarily reflect views of the United States Institute of Peace, which does not advocate specific policies.

*Michael E. Hartmann*

## International Judges and Prosecutors in Kosovo

### A New Model for Post-Conflict Peacekeeping

#### Summary

- In an effort to establish the rule of law and mechanisms of accountability following the war in Kosovo and rising civil disorder, the United Nations Mission in Kosovo (UNMIK) established a program of international judges and prosecutors (IJP) that was the first of its kind in the world.
- In June 1999, international police were introduced into the region, but Kosovan judges and prosecutors retained exclusive jurisdiction for the administration of justice. Some of these jurists—virtually all of whom were ethnic Albanians—failed to apply the law evenly for ethnic Serbian and Albanian Kosovans.
- Given the discriminatory exercise of the law, compounded by a lack of sufficiently qualified and trained judges and prosecutors, an international consensus soon gelled around the need to introduce internationals into Kosovo's legal structure. In early 2000, UNMIK broke with international precedent and appointed one international judge and one international prosecutor to the Mitrovica district court, one of the five district courts in Kosovo.
- With only two internationals, however, ethnic Albanians continued to control the justice system. A series of hunger strikes by ethnic Serb defendants in Kosovo in protest of continued ethnic-Albanian control of the judicial system prompted UNMIK to authorize the appointment of IJP to all five districts of Kosovo and to appoint an international judge to serve on Kosovo's Supreme Court.
- Even so, the IJP faced problems. Staffing was inadequate to fill all the international positions; Kosovan judges continued to hold a voting majority on the five-member trial panels, where they could outvote the international judges, particularly in the controversial war crimes and inter-ethnic violence cases; and the independence and impartiality of the judiciary continued to be undermined by improper decisions by some ethnic Albanian jurists against some Serbs and in favor of their own ethnic group.

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- In response, UNMIK instituted special “64” panels, named after the regulation that created them (2000/64), to ensure that international judges would constitute the majority in designated cases. Furthermore, it instituted rigorous case-monitoring practices and passed an additional regulation (2001/2) that ensured that international prosecutors could resurrect cases that had been abandoned by their Kosovan counterparts.
- Further refinements are still needed concerning a number of outstanding issues—for example, the selection, recruitment, and hiring practices for IJP; terms of IJP mandate, tenure, and dismissal; grievance procedures against IJP; IJP training practices and policies; and the development of more uniform case-selection and charging criteria.
- What has been learned from the international experience in Kosovo, however, is that successful international intervention in the judicial arena should be immediate and bold, rather than incremental and crisis-driven. Early prosecution by internationals can ensure fair and impartial trials and a public perception that even the powerful are not immune to the rule of law, can inhibit the growth and entrenchment of criminal power structures and alliances among extremist ethnic groups, and can end impunity for war criminals and terrorists alike.

## Introduction

At the beginning of 2000, the world's only international humanitarian law or criminal law judges and prosecutors were part of international tribunals at The Hague and Arusha, which stood separate from national judicial systems. Peacekeeping missions had often involved international rule of law assistance and expertise being provided by the United Nations, Organization for Security and Cooperation in Europe (OSCE), Council of Europe, American Bar Association/Central European and Eurasian Law Initiative (ABA/CEELI), and many other international organizations. Peacekeeping missions with “heavy footprints” sometimes involved monitoring and even supervision by international authorities, such as the UN Mission in Bosnia and Herzegovina (UNMIBH)—for police—and the Office of the High Representative and UNMIBH's Judicial System Assessment Program—for judiciary. But international judges and prosecutors in missions were limited to assistance, monitoring, or oversight: they did not participate or act within the domestic judicial system.

Then, in February 2000, for the first time, the United Nations inserted international judges and prosecutors (IJP) into a criminal justice system to work alongside existing jurists. Internationals in the UN Mission in Kosovo (UNMIK) were granted the same competencies as the Kosovans, except that the IJP were limited to criminal cases. A year later, the Kosovo IJP program had evolved into a system of special international-majority trial and appellate panels, which were assigned by UNMIK to all war crimes cases, as well as all significant cases of organized crime and “power vacuum” and “payback” crimes, including terrorism, inter-ethnic violence, political assassinations, and corruption.

Soon thereafter, IJP were also appointed in East Timor, and later to the Special Court of Sierra Leone and the Special Panel of the State Court of Bosnia and Herzegovina. Cambodia's Extraordinary Chambers, which include IJP, were recently approved by the United Nations and are awaiting ratification by the Cambodian National Assembly. The Kosovo IJP were unlike these internationalized courts that followed, however, because Kosovo IJP had the broadest jurisdiction—its IJP could take on *any* case of *any* crime, including new cases and cases already assigned to Kosovan jurists, while IJP subject matter jurisdiction in other countries was usually limited by law to certain categories—to war crimes, or to crimes committed with war crimes during a specific time in the past during a conflict.

The ability of Kosovo's IJP to take on any crime by selecting any case and any type of crime proved to be a double-edged sword. On the one hand, the unlimited flexibility of Kosovo's IJP to select any case is an advantage because an impartial international panel can provide justice in any politically explosive case for which the Kosovan jurists do not

yet have the capacity to withstand pressure or threats, or to uphold the appearance of impartiality—for example, a domestic-violence case of an organized crime kingpin, or a political assassination by feuding party factions. On the other hand, this selection flexibility is arguably vulnerable to political abuse; it has been criticized by some as a violation of judicial independence because instead of providing and complying with transparent criteria defining international jurisdiction, the UNMIK administration can take any case from the Kosovan judiciary and require an international panel without explanation. As well, the potential negative effect upon Kosovan judicial capacity and professionalism cannot be ignored, for without an effective transitional phase-out of IJP, the Kosovan judges will lack experience in trying such politically sensitive cases.

This report will discuss the three phases of international involvement in justice in Kosovo. First, the period from June 1999 through February 2000, during which there were international police but only Kosovan judges and prosecutors. Second, the period from the February 2000 appointment of the first two IJP to the growth by mid-December 2000 to thirteen IJP. Third, the current ongoing phase, starting in mid-December 2000, when the criminal procedure law for Kosovo was further changed by UNMIK to ensure that sensitive trials chosen by the special representative of the UN secretary general (SRSG) would be assigned a special trial panel with a majority of international judges. This third phase has now entered a second stage, in which the new director of UNMIK's Department of Justice will exercise supervisory control over the substantive and procedural decisions of the international prosecutors, who have been reorganized into a new Criminal Division.

## Phase One: International Police but Kosovan Judges and Prosecutors

By the summer of 1998, the internal armed conflict in Kosovo between the ethnic Albanian Kosovo Liberation Army (KLA; in Albanian, UCK) and the Serb authorities had escalated from isolated incidents of violence to a full-fledged armed conflict. The NATO bombing of Serbia starting on March 24, 1999, initiated a concurrent armed conflict between Serbia and NATO.

With the advent of peace, the NATO-Serbian Military Technical Agreement signed on June 9, 1999 called for the withdrawal of the Serbian military and police from Kosovo within 11 days. Since most of the police, prosecutors, and judges in Kosovo were Serbian, due to the purges and resignations of the ethnic Albanians in 1989 and the early 1990s, this move left a power vacuum. The United Nations believed that it could rapidly mobilize international civilian police (CivPol) to take over the Serb policing function, which would be undertaken by NATO and other international military forces until sufficient CivPol officers arrived in Kosovo.

### *The Applicable UN Mandate and Law*

On June 10, UN Security Council Resolution 1244 replaced Serbian control over Kosovo with an "international security presence" (a joint international military force in Kosovo, KFOR) and an "international civil presence" (the UN Mission in Kosovo Interim Administration, UNMIK). The special representative of the secretary general, as the head of UNMIK, was "to provide an interim administration . . . under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia." The SRSG's mandate included "maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo, protecting and promoting human rights." Thus, the CivPol were provided an explicit mandate while IJP were not mentioned. However, the broad language left open the possibility of introducing IJP later.

A brief description of the powers of and law governing UNMIK illuminates the evolving role of the IJP. The SRSG established his control over UNMIK, including the power to make

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and amend law, by issuing regulations. On July 25, 1999, the SRSG issued his first regulation. Regulation 1999/1 defined the SRSG as the sole executive and legislative authority, and granted him the power to administer and make appointments to the judiciary.

The UNMIK administration had to choose which laws it would use to govern Kosovo. The June 1999 laws in effect when UNMIK entered Kosovo included many Serb wartime emergency powers that violated peacetime human rights standards. Since, under resolution 1244, Kosovo was still “within the Federal Republic of Yugoslavia,” albeit with “substantial autonomy,” the SRSG in his first regulation used his legislative authority to establish that the Yugoslav and Serbian law that had been in effect prior to March 24, 1999, when the NATO bombing started, would be applicable in Kosovo, as long as the provisions were consistent with “internationally recognized human rights standards.”

The UNMIK administration, however, had not anticipated the intense Albanian Kosovan opposition to its choice of laws. This episode foreshadowed later evolutionary steps in the criminal justice system, due to Kosovan politicization of essentially legal and judicial issues, and UNMIK’s willingness to re-examine the effects of its decisions and take corrective actions. In many cases, the new Kosovan judiciary refused to apply the March 1999 “Serb” criminal laws, and instead based their decisions upon the earlier March 1989 criminal laws, including the 1989 Kosovo Criminal Code enacted by the then-existing Kosovo Assembly. While none of the March 1999 laws discriminated on their face against ethnic Albanian Kosovans, they had been applied under Slobodan Milosevic in a discriminatory fashion against Albanians, especially after Albanians were excluded from the criminal justice administration.

The Milosevic regime’s 1989 decision to eliminate Kosovo’s autonomy within Serbia; dissolve the Kosovo legislature, Supreme Court, Provincial Prosecutor’s Office and other Kosovan institutions; and then remove many Albanian Kosovans from government positions had triggered Albanian resignations from government institutions, especially the judiciary, which was being used by the Serbian authorities to oppress the majority Albanian Kosovan population. Thus Kosovan Albanians viewed the 1989 law as the last “legitimate” Kosovan law, while the 1999 law was characterized as a symbol of Serb discrimination. The strength of Kosovan Albanian opposition caused UNMIK to reconsider its choice, and less than five months later UNMIK replaced the 1999 law with the 1989 law.

The 1989 law was composed of three government levels: Kosovan, through the 1989 Kosovo law; Serbian, through incorporation of some crimes not included in the Kosovo Criminal Code (KCC); and federal, through the law on criminal procedure (LCP) and the criminal code from the Federal Republic of Yugoslavia (FRY). Violations of international humanitarian law were proscribed in the FRY Criminal Code. The LCP provided for use of investigative judges before the indictment was filed, and three- or five-judge trial panels.

### *The 1999 Kosovo Judiciary*

Resolution 1244 specified the use of international police, but not international judiciary, because at that time, there was no international consensus on whether to use internationals as judges and prosecutors. Prior to the conclusion of the bombing campaign, the OSCE had sent personnel from its Kosovo Verification Mission to refugee camps to try to identify Kosovan Albanian judges and prosecutors, and had planned that international judges and prosecutors would be working with the Kosovan jurists. But when the United Nations was given the responsibility of administration and decision-making with less than two weeks’ notice, it was not yet ready to also insert international judiciary. Instead, the early UNMIK administration rejected that OSCE proposal, fearing that gaining additional power through the appointment of international jurists who were UN staff would leave it open to charges of neo-colonialism, especially since the United Nations already held executive and legislative power through the SRSG.

Thus, UNMIK decided to rely solely upon Kosovan prosecutors and judges to staff the Kosovo judiciary; these jurists had to be identified, vetted, funded, and appointed.

Furthermore, the newly appointed judiciary would need to have its capacity for ethical and impartial judging and prosecuting built through training, assistance, encouragement, and oversight, including a functioning disciplinary system.

The few Kosovan jurists who had worked in the judiciary in the 1990s were widely regarded by ethnic Albanian Kosovans as being collaborators with an oppressive Serb regime. The majority of the appointed Kosovan Albanians, therefore, had no experience in the judiciary or prosecutor's office; of those with experience, most had not worked as judges or prosecutors at least since 1989. While this meant they had avoided serving during the oppressive Milosevic regime, it also meant that they lacked experience in an impartial judicial system, since Kosovo was still part of Yugoslavia in the 1980s, when "telephone justice" was a favored mechanism by which the reigning political party controlled judicial and prosecutorial actions. The Yugoslav judicial system had never been truly independent and impartial under Marshall Tito or his party, and the internationals were aware that developing Kosovan judicial capacity would take time, resources, and substantial effort.

To assist with judicial appointments, on June 28, 1999, the SRSG established the Joint Advisory Council (JAC), composed of Kosovan and international representatives. Drawing from an earlier list of ethnic Albanian Kosovan judges and prosecutors who were refugees drawn up by OSCE, as well as making use of information from attorneys in Kosovo, the SRSG appointed a total of 55 judges and prosecutors to the Emergency Judicial System. Most of those appointed continued to serve as judges and prosecutors in the regular courts as these courts became reconstituted and replaced the Emergency Judicial System, which was dissolved in October 1999.

These Kosovan jurists were not an ethnically diverse group, however, since the Serbian judges were intimidated (either directly or indirectly) by threats and violence into fleeing, or refused the appointment as part of a broader Serbian determination not to participate in or serve the new UNMIK administration. As a result, this group of judges and prosecutors, almost wholly ethnic Albanian, were functioning as circuit-riders or "mobile courts," primarily conducting detention hearings for KFOR.

During the summer and fall of 1999, there were hundreds of inter-ethnic attacks, including murders, against Serbs, Roma, and other minorities in Kosovo. Whether due to revenge or to calculated ethnic Albanian extremist plans to "cleanse" Kosovo of Serbs and increase the chances of Kosovan independence, Serbs and other minorities of all ages and genders were being assaulted, shot at, and bombed. Since judicial investigations were needed to take testimony of witnesses, the limited number of judges resulted in few indictments. The slow pace of the judicial investigations resulted in many accused being held for months in pre-trial detention.

By December 1999, a crisis resulted because the applicable criminal procedure only allowed a six-month maximum for pre-trial detention, if no indictment was filed. Especially in those cases charging genocide and war crimes, the judicial investigations were not near completion, and without the investigations being completed, the prosecutors could not file indictments. Faced with this Gordian Knot of a dilemma, the SRSG simply used his legislative power to amend the law and allow a pre-indictment detention period of up to one year.

Concurrently, KFOR and UNMIK administrators had realized that there was a significant disparity in the way the Albanian Kosovan prosecutors and judges were ordering detention. When former KLA members were arrested by KFOR or CivPol for attacks on Serbs, they would often be proposed for release by the prosecutor, and then released by the investigative judge, while Serbs would often be detained in custody for the same crimes. KFOR, which had the mandate to ensure a "safe and secure environment," reacted to the Kosovan judicial release orders by adopting a detention practice separate from judicially ordered detention, called a "COMKFOR hold." Arrestees might be locked up in KFOR detention facilities for a time to be determined by KFOR, without consideration of any judicial orders, if KFOR felt they posed a danger to safety and security.

Human rights activists and OSCE's Legal Systems Monitoring Section (LSMS) regarded COMKFOR holds as a violation of judicial independence and the rights of those detained.

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At the first “judicial roundtable,” held September 22-24, 1999, to discuss such problems, the Kosovan judges made these complaints known to KFOR and the UNMIK Department of Judicial Affairs (later Department of Justice). In response, the KFOR legal representative, UK Army colonel Richard Batty, acknowledged use of such COMKFOR holds and assured the judges that, regretfully, KFOR would continue to use them despite judicial orders to release them, unless such release orders were based upon a reasonable view of the circumstances. He defended his position, citing examples, such as that of a Kosovan Albanian judge who ordered the release of a KFOR-arrested Kosovan Albanian suspect, despite eyewitness accounts by KFOR soldiers who had seen the arrestee throwing a hand-grenade into an occupied Serbian store (injuring three Serbs) the day before.

Earlier that month, in September 1999, the SRSG had issued regulations re-establishing an ad hoc Supreme Court and Provincial Prosecutor’s Office (both abolished in 1989 when the province of Kosovo was dissolved), and establishing an Advisory Judicial Commission (AJC) and the procedures for the vetting and appointment of judges. In December 1999, the AJC started making recommendations of judges and prosecutors, which had to be approved, and usually were, by the SRSG. While it succeeded in staffing the courts, the AJC failed to discipline Kosovan judges and prosecutors, although the latter was part of its mandate. While no disciplinary action for ethical misconduct or legal violation was ever initiated by the Kosovan-majority AJC, it did remove one Kosovo Albanian District Court president who had (quite legally and properly) instructed judges to conduct proceedings in both Albanian and Serbian when Serbs were involved.

By the end of January 2000, however, there was a consensus among the United Nations, OSCE, and international NGOs that the justice system in Kosovo had significant problems. Some problems were due to a lack of sufficiently qualified, experienced, and trained judges and prosecutors. More important, the mono-ethnic Albanian Kosovan judiciary and prosecutors’ offices gave the appearance of partiality and in some cases discriminated against Serbs, while favoring fellow Albanians, especially where the suspects had ties to organized crime or were former KLA members.

In *Kosovo: An Unfinished Peace*, William O’Neill, UNMIK’s senior adviser on human rights from August 1999 to February 2000, described the international consensus in early 2000 on the consequences of bias of as well as pressures on the Albanian Kosovan jurists: “Instances of bias against Serbs and other minorities among the Albanian judiciary surfaced early during the Emergency Judicial System and have continued ever since. . . . Albanians arrested on serious charges, often caught red-handed by KFOR or UNMIK police, frequently were released immediately or were not indicted and subsequently released. Meanwhile, Serbs, Roma, and other minorities arrested on even minor charges with flimsy evidence were almost always detained, and some stayed in detention even though they were not indicted” (Lynne Rienner Publishers, 2001).

While some have tried to argue that the Albanian jurists’ discriminatory results were due only to lack of knowledge of war crimes law and human rights standards, this is not the view of experienced observers. The reasons for the actions of the Albanian Kosovan jurists included actual bias, community pressure and fear of ostracism, and threats or fear of harm against self or family.

First, some Kosovan Albanian jurists actually showed bias against Serbs, which is not surprising after the Milosevic regime and its agents subjected ethnic Albanians, including legal professionals and their families, to over 10 years of discrimination, baseless arrests, physical abuse, false convictions, murders, oppression on multiple levels, and then war crimes and crimes against humanity. Certainly, the family and friends of some of the Kosovan court personnel have suffered greatly, and this personal experience undoubtedly contributed to creating a bias against Serbs in some Kosovo jurists, even though collective guilt is rejected by the many fair-minded Albanians and Serbs alike. Yet no bias or partiality can be allowed in an impartial judicial system to influence judicial and prosecutorial decision-making.

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Second, social pressure from neighbors and fellow ethnic Albanians sometimes influenced the jurists, many of whom feared social ostracism and the end of employment advancement if their decisions went against the results desired by their Albanian Kosovan community. This applied to what some extremists characterized as “going easy” on Serbs (regardless of the strength of the evidence), or conversely, of prosecuting or convicting former KLA fighters who were characterized as “war heroes.”

Third, threats against Kosovan judges and prosecutors spanned the spectrum from gentle phone hints by those in power, to threats of bodily harm against the judge or his or her family. Moreover, because the existence of some of these threats was known among the judicial community, there was no need to threaten jurists in every case. Merely the fear of being threatened could also control judges and prosecutors with high-profile or notorious defendants.

Once made aware of such pressures, UNMIK could not reasonably expect a fledgling Kosovan judiciary to withstand them. UNMIK had initially chosen to depend solely upon a Kosovan judiciary composed primarily of former Albanian Kosovan attorneys. Most of the new judges and prosecutors had not practiced law other than as defense attorneys, if that, for over a decade, and many had never been in their new positions. The pay for these jurists was very low, and the capacity-building role assigned to OSCE and NGOs such as ABA/CEELI had just started. The Kosovo Judicial Institute was not yet operating in 1999, and one could not reasonably expect the Kosovan jurists to overcome these life and professional experiences immediately, and become independent and impartial jurists, even if they sincerely desired to be such. There was by the end of 1999 a need to increase the Kosovan jurists' level of competence and professionalism through supportive professional associations, disciplinary codes, ethics and skills training, appropriate pay and tenure protection, and experience within an independent judiciary.

Last, regardless of the actual results of the Kosovan judicial decisions, there was the problem of the *appearance of partiality* when mono-ethnic Albanian Kosovan judges decided cases of Serbs accused of war crimes against Albanians so soon after the conflict. By the beginning of 2000, UNMIK was aware of this issue, as well as of the discriminatory results of some of the judges' and prosecutors' actions.

The final impetus for UNMIK's decision to introduce international judges and prosecutors occurred in the first week of February 2000, when there were massive riots, inter-ethnic mob violence, and murders involving both ethnicities in the divided city of Mitrovica, which had a Serbian majority north of the Ibar River and Albanians to the south. The fuel for the riots was a February 2 anti-tank rocket attack on a UN High Commissioner for Refugees (UNHCR) bus transporting 49 Serbs into Mitrovica, which killed two and gravely injured five people. The next day, grenades were thrown into a Serb Mitrovica cafe, seriously injuring those inside. This triggered Serb rioting, with Serb attacks upon Albanians, which caused at least five deaths of Albanians and Turks in northern Mitrovica. The Serb mob also broke into and vandalized Albanian homes and burned UNMIK police and UNHCR cars.

The Serb rioting inflamed the ethnic Albanians, who attacked Serb houses in the north of Mitrovica. Civil disorder spread to include the south as well, where armed members of the Kosovo Protection Corps (KPC; in Albanian TMK) fired weapons at French KFOR troops in protest against the failure of KFOR to protect Albanians in the north. The KPC was composed almost entirely of former KLA fighters, and when the UNMIK police arrested those KPC members firing and brandishing weapons, including AK-47s, the Kosovan Albanian judge released them the next day.

## Phase Two: The Insertion of International Judges and Prosecutors

The slow evolution of international involvement in the Kosovan judicial system started with one small step—the SRSG appointments of one international judge (IJ) and one international prosecutor (IP) to one District Court, in Mitrovica. After KFOR and the UNMIK

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police re-established a semblance of order in Mitrovica, the SRSG acted with unprecedented speed to place internationals into the Kosovo judicial system, through Regulation 2000/6, issued on February 15, 2000, allowing the appointment of internationals to the Kosovan judiciary.

While it was only a small step for UNMIK, it was a giant leap for international justice, because UNMIK set the precedent for hybrid courts. No international judges or prosecutors had ever been appointed to serve within a judicial system, alongside their existing counterparts, and operating under existing law and procedure. Rather, previous international judges and prosecutors had their own courts (including the International Criminal Tribunal for Yugoslavia or ICTY, the International Criminal Tribunal for Rwanda or ICTR, the International Military Tribunal or IMT in Nuremberg after World War II, and the IMT Far East in Tokyo). Plus, their procedures excluded judges and prosecutors from the countries of the accused, and were restricted to adjudicating war crimes, crimes against humanity, and other violations of international humanitarian law.

In contrast, UNMIK took a minimalist approach in the creation of an international judges and prosecutors program. The Kosovo IJP were inserted into an existing system, rather than creating a separate international court and procedure; and rather than providing a new humanitarian law jurisdiction for the IJP, they had the same criminal jurisdiction as any other Kosovan district judge or district prosecutor.

The IJP were appointed to the District of Mitrovica Court and Prosecutor's Office, and had the same competencies, powers, and functions as their Kosovan colleagues. There were only three differences: (1) the IJP were limited to serving in the Mitrovica District, one of five Kosovan judicial districts; (2) the IJP were limited to criminal cases; and (3) the IJP each had the authority to "select and take responsibility for new and pending" criminal investigations and cases.

The latter authority meant that the IJP could take a pending investigation or case away from a Kosovan judge or prosecutor. This was the only extraordinary power the IJP had and it had the effect of reducing the power of the president of the District Court and the district public prosecutor, who had previously held the exclusive power to assign judges and deputy prosecutors, respectively, to investigations and cases.

The appointment of IJP required different methods than those used to appoint Kosovan jurists. The international judges and prosecutors were and continue to be selected through an UNMIK recruiting process, sometimes through recommendations by nations or international organizations such as the Council of Europe. They are appointed by the SRSG for six-month renewable terms, which is the standard term for all mission personnel with the UN Department of Peacekeeping Operations. Although some NGOs, and the ombudsperson (which is also an UNMIK appointment under regulation 2000/38), have raised the issue of whether such short terms restrict judicial and prosecutorial independence and allow implicit executive control, as the threat of non-renewal could cause jurists to favor the SRSG's position on cases, for now members of the newly established judiciary have the same six-month terms as any other mission personnel.

Regulation 2000/6 also established criteria for dismissal of IJP: the SRSG must show cause, such as physical or mental incapacity, serious misconduct, or failure in the due execution of office. Given the existing alternative to dismissal—non-renewal of the contract—it is not surprising that dismissal has not been used. However, at least one judge has not had his contract renewed and several IJP received only three-month renewals. Most IJP have either left Kosovo willingly, or have had their contract renewed upon request.

The February 2000 regulation had only limited effect, however. It did not allow appointment of IJP to Pristina—the capital district, where approximately 35 percent of the crimes in Kosovo occur—or to Prizern, Gjilan/Gnjilane, or Pec/Peje, or to the Supreme Court. It could thus be characterized now (but was not then) as a "pilot project."

The catalyst for the UNMIK decision in May 2000 to expand the use of IJP throughout Kosovo was a Serb prisoners' strike, which was put forth by Serbs within Kosovo and in Serbia as proof of an unfair, ethnic Albanian-controlled justice system. The ethnic Serb

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Kosovans accused of war crimes and genocide started hunger strikes in May to publicize their being held in custody without trial for up to 10 months “and counting.” Most had not even been indicted, since an UNMIK regulation had increased the limit of detention without an indictment from six months to one year. The Serbs accused wanted their trials to start immediately and, having seen that IJP in Mitrovica would not discriminate against them, demanded that IJP be assigned to each of their upcoming cases.

Soon thereafter, UNMIK enacted Regulation 2000/34 on May 27, 2000 and expanded the scope of the international judges and prosecutors program to all five judicial districts in Kosovo. UNMIK would appoint IJP to all district courts and prosecutor’s offices, and would appoint IJ to the Supreme Court of Kosovo, which hears the second-instance appeals and provides the highest review of detention decisions. IJP subject matter jurisdiction remained restricted to criminal cases and investigations.

The wisdom of the expansion was demonstrated within the week. On May 28, a terrorist used an automatic weapon to shoot Serbs socializing outside a popular gathering place—the Serbian Grocery Store in Cernica, a village in the Gjilan/Gnjilane judicial district—and murdered three people, including a four-year-old child, and injured two. One of the two wounded survivors made an eyewitness identification of Afrim Zeqiri, a former KLA fighter living in the village who had been arrested three times by KFOR, twice for threatening Serbs. Each of Zeqiri’s previous arrests by KFOR resulted in his release by Kosovan judges after the abandonment of charges by the Kosovan prosecutor. When Zeqiri was arrested this time, however, the SRSG quickly appointed an IJ to the Gjilan/Gnjilane judicial district, who then selected the case as investigating judge.

This case also demonstrated the need to have an IP, in addition to an IJ, in such sensitive inter-ethnic murder and terrorist cases, when the Kosovan prosecutor failed to show up and submit questions to the alibi witnesses proposed by the defense, and then abandoned the case as not grounded in fact. Under the applicable law, the public prosecutor has the right to abandon a case, and once declared, the investigating judge has no choice but to release the accused and dismiss the case. This fourth abandonment of charges against Zeqiri was done despite the testimony of a wounded Serb victim who had seen Zeqiri shooting, and the statements to the police of two other Serbs who had seen Zeqiri in Cernica just before the shooting, thus contradicting Zeqiri’s alibi that he had been in Gjilan/Gnjilane for hours before the shooting. In addition, a KFOR soldier from the U.S. Army also contradicted the testimony of Zeqiri and one of his alibi witnesses. The SRSG then appointed the Mitrovica IP to the Gjilan/Gnjilane district to allow him to attempt to re-open the case under the Kosovan procedure, given that the Kosovan prosecutor had abandoned the case without proposing that the investigative judge hear any of the witnesses disputing the alibi. The SRSG also used the controversial and unprecedented doctrine of “executive detention” to keep Zeqiri in detention pending the success of proceedings to re-open the prosecution. (Note that the author was the IP assigned to the Zeqiri case, which was tried in 2002 by a “64” panel with one Kosovan judge. The panel acquitted Zeqiri, after stating that it found the defense’s alibi witnesses not credible but also found the testimony of the one eyewitness victim to be insufficient to justify conviction.)

By the end of 2000, IJ had been appointed to each of the five district courts, and one IJ had been appointed to the Supreme Court, bringing the total number of IJ to ten. As for IP, by the end of 2000, two more had been appointed; they were assigned to Pristina and Prizern, bringing the total number of IP to three. The IJP program reached its highest staffing level in 2003, with 13 IJ and 14 IP. By IJP choice and consensus, the IJP dealt primarily with war crime cases and inter-ethnic violence, along with a few high-level organized crime cases, and were hard-pressed to cover even those cases, given the high demands for their time.

The appeals level was thus short of needed IJP in 2000 during this second phase. With only one IJ appointed to the Supreme Court, Kosovan judges continued to hold the majority voting control on the three-member appeals panels. Even worse, throughout 2000 and

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the first half of 2001, there were not enough international prosecutors in Kosovo to assign one to the Provincial Public Prosecutor's Office (later renamed Office of the Public Prosecutor of Kosovo), which handled cases before the Supreme Court dealing with appeals and other extraordinary remedies.

The UNMIK administration found three critical problems inherent in its minimalist Phase Two approach, especially when the cases involved war crimes, inter-ethnic crime, or organized crime:

1. The international judges were being outvoted by the lay and professional Kosovan judges, resulting in unsubstantiated verdicts of guilt against some Serbian defendants and questionable verdicts of acquittal against some Albanian Kosovan defendants.
2. The Kosovan prosecutors "over-charged" Serbs; they would initiate criminal investigations and propose detentions based on insufficient evidence, while abandoning cases and refusing to investigate against ethnic Albanians.
3. Unlimited IJP subject matter jurisdiction (due to unlimited case selection under regulation 34) resulted in increased case volume beyond the capacity of the IJP, which negatively affected their ability to spend appropriate time for case and verdict preparation, research, and drafting. Under the applicable Kosovan law, the substantive decisions of both the judges and prosecutors were independent of the executive and the Ministry of Justice (now UNMIK Department of Justice). If international prosecutors continued to select cases, start criminal investigations, and file indictments without any overall coordination and prioritization, this risked overburdening the IJP program.

***International judges could never make up the voting majority, even if both professional judge places were occupied by internationals.***

The first problem was the most urgent, and the main impetus for expanding the role of the IJP. The international judges were being outvoted by the Kosovan judges, especially in the war crimes cases. This was possible because the risk-averse, incremental approach of the IJP regulations did not alter the traditional composition of court panels. In Kosovo, in a trial for genocide or war crimes under Articles 141 or 142, respectively, of the Criminal Code of the Federal Republic of Yugoslavia, as well as in a trial for murder (Kosovo Criminal Code, Article 30), *five* judges sit on the trial panel, of which only *two* are professional (attorney-trained). The remaining *three* judges are lay judges, people from the community without legal training, appointed for the duration of a case, in a system similar to the German trial system. This meant that international judges could never make up the voting majority, even if both professional judge places were occupied by internationals.

Furthermore, it was unlikely that both professional judges would be IJs because there were a maximum of two IJs appointed per district, and an IJ's previous role as an investigating judge, or judge making a decision on a motion to challenge the indictment, would then disqualify her or him from participating in the subsequent hearing. Thus a typical internationalized panel in 2000 would be one IJ and four Kosovan Albanian judges—the Kosovans consisting of one professional judge and three lay judges. No ethnic Serbs were selected by the majority ethnic Albanian court presidents or sat as a professional or lay judges on any war crimes trial panels in 2000 or 2001. And the regulations only allowed appointment of IJ professional judges, not lay judges.

***The Kosovan judiciary could make decisions that the IJ opposed, and to add insult to injury, then use the IJ's presence for "window dressing" to justify an unjust decision.***

As a result, the Kosovan judiciary could make decisions that the IJ opposed, and to add insult to injury, then use the IJ's presence for "window dressing" to justify an unjust decision. Even if the IJ had vehemently dissented in chambers, the Kosovan criminal procedural law, like many other continental European judicial traditions, does not allow any judge to reveal to the public or parties the results of judicial voting, including whether a decision is unanimous or not.

It became clear to observers both within UNMIK and outside that the international judges, using accepted legal standards of proof, were often overruled. This situation meant that some persons, usually Serbs, were being convicted without sufficient evidence, and with procedural and substantive violations of their rights.

In the year 2000, the limited number of IJP resulted in every war crimes trial having only one IJ sitting on its five-judge panel. More than half of those trials had a Kosovan

rather than international prosecutor. This resulted in some Serbs being unjustly charged. Indeed, those initial genocide and war crimes case convictions have almost all been reversed by later Supreme Court panels where international judges held majority voting control.

### Phase Three: International Judges and Prosecutors in “64” Panels

IJP powers evolved further as a direct result of the above problems of international judges being outvoted and Kosovan prosecutors sometimes overcharging Serbs and undercharging Albanians. In response, UNMIK enacted two significant regulations. The first was regulation 2000/64, “Assignment of International Judges and Prosecutors and Change of Venue,” enacted on December 15, 2000, which gave UNMIK and the SRSG a method to ensure majority international control of voting. This regulation gave the SRSG the authority to approve a “64 petition” for a particular case, which meant that the case would be heard by a panel composed of three professional judges, with a minimum of two international judges, instead of a five judge panel with two professional and three lay judges.

This “64” panel differs from the special panels that followed conflicts in East Timor and Sierra Leone and have just started in Bosnia, and that will be formed in Cambodia (if it ratifies the Cambodia–United Nations treaty setting up that special court). The latter are permanent courts or chambers applying laws specifically designed for them, with IJP assigned to them. In contrast, the Kosovo “64” panels are formed ad hoc and apply the same laws as the Kosovan courts. Whenever the SRSG designates a specific case under regulation 64, the IJ and IP for that specific three-judge panel are then chosen by the UNMIK Department of Judicial Affairs (later Department of Justice) from among all IJP in Kosovo, based on the schedules and commitments of the IJP at the time.

In enacting regulation 64, UNMIK acknowledged in its preamble the limitations on the capacity of the Kosovan judiciary to adjudicate certain cases, and the need for international control of the voting, by “recognizing that the presence of security threats may undermine the independence and impartiality of the judiciary and impede the ability of the judiciary to properly prosecute crimes which gravely undermine the peace process and the full establishment of the rule of law in Kosovo. . . .”

The inherent limitation of regulation 64 was that quick Kosovan action could pre-empt its use—the “64” panel had to be assigned before the trial started, and thus could be circumvented by a lack of notice after a Kosovan prosecutor filed an indictment, combined with quick Kosovan action to form a trial panel and start the trial after the filing of an indictment. Similarly, the Afrim Zeqiri case demonstrated that if a Kosovan prosecutor abandoned the case before an IP selected it or was assigned to it, it would be difficult, if not impossible, to resurrect it.

UNMIK reacted by making it a priority to improve the case-monitoring capabilities of the Department of Judicial Affairs (DJA) so that it could exercise its “64” powers in a timely fashion. This monitoring was not focused upon detecting legal and human rights violations, as OSCE’s LSMS was doing. Rather, the DJA legal officers collected, collated, and synthesized case investigation, motion, and indictment filings, and monitored IJP schedules, to determine upcoming detention hearings, trials, and other proceedings that might require “64” designations.

The next evolutionary step was to provide IP with powers of resurrection that were not provided to the Kosovan judges and could undo acts of case or investigation abandonment by Kosovan judges.

The second regulation, 2001/2, was enacted on January 12, 2001 and allowed international prosecutors to resume cases abandoned by Kosovan prosecutors without having to do so through the arcane and burdensome procedures required by Kosovo law. Not coincidentally, UNMIK promulgated regulation 2001/2 within a month of the Afrim Zeqiri Supreme Court decision by an all-Kosovan judge panel that ordered Zeqiri’s release—a

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*This new paradigm, therefore, starting phase three, called for international voting control, and international control of Kosovan prosecutorial abandonment of cases and charging.*

*A key issue, given the growing case load, will be whether there will be a limit . . . that restricts the ability of IJP to select or be assigned any case, or a review process by which cases are selected by or assigned to international judicial personnel.*

*Although the presence of IJP will result in some capacity-building through example, there should be more rigorous and systematic efforts undertaken, so that when the IJP leave, the Kosovan judiciary can successfully cope with the remaining criminal power structures.*

decision that overturned a District Court ruling by one of the first IJP "64" panels, which had granted an IP's motion to re-open the prosecution of Zeqiri after the Kosovan prosecutor had abandoned it. Regulation 2001/2 effectively nullified the Supreme Court's decision to prevent re-opening the prosecution, and also required any Kosovan prosecutor abandoning a case to notify the IP in that judicial district within 14 days, to allow the IP time to file a resumption of the prosecution.

These procedural changes had been opposed in 2000, and after enactment in 2001, by many of the Kosovan judiciary as illegal, improper, and creating a parallel system of justice, and the changes did in fact create a separate trial procedure, with the Department of Judicial Affairs scheduling international judges and international prosecutors for the "64" panels, with international judges presiding. The department attempted to assign a Kosovan judge to each "64" panel, but in some controversial and high-profile cases of war crimes, organized crime, or terrorism, the Kosovan judges either refused or found excuses of sickness or scheduling to avoid sitting. The majority of "64" panels, however, had two international judges and one Kosovan judge, who was ethnic Albanian. This new paradigm, therefore, starting phase three, called for international voting control, and international control of Kosovan prosecutorial abandonment of cases and charging.

By December 15, 2000, there were already ten international judges, with one in the Supreme Court, and three international prosecutors in Kosovo. In August 2001, the first international prosecutor was appointed to the Office of the Public Prosecutor of Kosovo before the Supreme Court, bringing the total of international prosecutors to six. During 2001, the number of international judicial personnel varied due to recruitment and departures, with 17 IJ and 11 IP being the high-water mark. As of the end of 2001, there were approximately 80 ongoing court cases assigned to or selected by IJP; as of October 2002, IJP were participating in over 90 ongoing court cases. Those numbers do not include a significant number of cases being investigated by the police and being supervised by the IP. The need for careful IP scrutiny of police investigation and evidence before initiating a request for a judicial investigation is especially important given the complexity of the legal elements and factual determinations in war crimes cases. Many of these and other high-priority cases are interrelated, as the criminal power structures, including organized crime, are also involved in terrorism and inter-ethnic violence.

A key issue, given the growing case load and criticism of the vast discretion in deciding which cases will receive "64" panels, will be whether there should be a limit—imposed by a future regulation or law—that restricts the ability of IJP to select or be assigned any case, or at least a review process by which cases are selected by or assigned to international judicial personnel. In 2002, the UNMIK Department of Justice's Legal Policy Unit submitted to the SRSG and UNMIK Office of Legal Advisor a draft regulation that would give the department the power to coordinate international prosecutor actions so as to allow it to prevent overburdening of the IJP program. The director of the UNMIK Department of Justice works under the deputy SRSG, who is in charge of the UN police, justice, and penal authorities.

To resolve the problem of prioritizing and limiting case selection, as well as ensuring efficiency, effectiveness, and uniformity of selection and charging, UNMIK initiated a second stage of the third phase in March 2003. At that time, the UNMIK Department of Justice (DoJ) began implementing a plan to exercise operational and legal control over the decisions and actions of the international prosecutors. The DoJ reorganization transferred all IP into a new Criminal Division, so that the DoJ director could supervise the case selection, initiation of investigation, drafting and filing of indictments, and other actions of the international prosecutors. The international judges remained under the administrative coordination of DoJ's International Judicial Support Division. A pending UNMIK regulation to complete this plan awaited final UN approval at the time of this writing.

No discussion of IJP is complete without reference to the essential need for capacity-building of the Kosovo criminal justice system, including police, defense attorneys, prosecutors, and judges. Although the presence of IJP will result in some capacity-building

through example, there should be more rigorous and systematic efforts undertaken, so that when the IJP leave, the Kosovan judiciary can successfully cope with the remaining criminal power structures. In addition, the IJP may provide a model for what kind of police protection the Kosovan jurists should be provided, and proper judicial/prosecutor working relationships with the police, including close supervision of investigations and prevention of human rights abuses, both of which will be required to end an atmosphere of impunity. UNMIK is planning to continue its work in these areas, but will need donor support during the phased withdrawal of international personnel. This will require coordinated and adequately resourced international assistance in three areas: (1) assistance with physical assets, equipment, and professional associations, and training on human rights, forensics, medical-legal expertise, victim/witness interaction, and courtroom skills; (2) monitoring (including vetting) and investigation of complaints and disciplinary action through the existing Legal System Monitoring Section of OSCE, the DoJ Judicial Investigation Unit, and the Kosovo Judicial and Prosecutorial Council; and (3) expert assistance on drafting legislation and standard operating procedures, to provide modern and effective legal tools against organized crime, terrorism, trafficking in humans and narcotics, inter-ethnic hate crimes, and weapons use.

## Lessons Learned

The main lesson learned from the experience of IJP in Kosovo's criminal justice system is that international participation in the judicial arena should have been immediate and bold, rather than incremental and crisis-driven. The Security Council Resolution 1244 mandate would have allowed UNMIK to appoint IJP from the start. But instead of immediately establishing the IJP program (parallel to the formation of the international CivPol force), thus making use of the "honeymoon period" to shape the unformed Kosovan expectations as to the nature of the interim judiciary, UNMIK chose to rely solely upon Kosovan judges and prosecutors. In doing so, UNMIK encouraged Kosovan jurists to think they would enjoy exclusive judicial authority. Judicial decision-making and authority, once it was ceded exclusively to the Kosovan authorities, was much more difficult to take back, even partially. If the IJP program in its present form had existed from the start, it is likely that Kosovan opposition and allegations of neo-imperialism would have been minimized.

More important, earlier prosecution by IP and trial before majority IJ panels would have inhibited the growth of the criminal power structures, including alliances among extremist ethnic groups, war criminals, terrorists, and organized crime. These destabilizing influences would have had less time to entrench themselves into their communities.

Each of Kosovo's three judicial phases was preceded by an international hesitancy to assume authority; in the first phase, internationals were hesitant even to assume partial authority shared with Kosovan jurists. The initial deployment relied upon international policing yet depended upon Kosovan judges and prosecutors. The Mitrovica riots resulted in the creation of an IJP program that started small, with the appointment of only one IJ and one IP, expressly limited to Mitrovica. The May 2000 hunger strike by Serbs accused of war crimes resulted in an expansion of the IJP program throughout Kosovo, but allowed Kosovan judges to retain voting control. It was not until the crisis caused by examples of unjust release and acquittal of accused Kosovan Albanians, and unsubstantiated convictions of Serbs for war crimes, that the IJP were given voting majorities and the power to provide a semblance of justice. It took another year and a half until the legal tools were provided in 2001 and 2002 to collect the evidence that allowed successful prosecution of organized crime, terrorism, and war crimes. These tools included the enactment of regulations that allowed the use of anonymous witnesses and witness protection, granted immunity for witnesses, and authorized the use of covert measures.

Funding for witness protection is a continuous problem. Only recently Kosovo received its first set of courtroom equipment designed to protect anonymity, just in time to try a

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high-profile war crimes case where Albanian Kosovan suspects were also believed to have been involved in organized crime. There is a continuing need for more funding for safe houses and equipment, and for agreements with other countries to accept and relocate protected Kosovan witnesses.

The Kosovo example provides proof that future international missions should condition their initial deployment in the judiciary upon a worst-case scenario. Local or national jurists should not be expected to be impartial and impervious to coercion and threats, in light of the expected power vacuum struggle, and the influence that the former regime had upon those jurists. These future missions should establish the most robust international intervention possible, given the existing political and budget realities. While the views of the local or national jurists should be taken into account, their understandable desire to have exclusive authority should not in itself decide the issue of whether there should be IJP participation in the domestic judicial system.

Kosovo illustrates that the effective investigation and prosecution of organized crime, terrorism, and inter-ethnic crime may not be within the initial capacity of existing jurists, and that impartial prosecution and adjudication of war crimes may require internationals. The criminal power structure and the fight over a power vacuum may well require IJP as well as international police (and intelligence) to perform the initial investigations under international prosecution control. If a more optimistic view of Kosovan judicial and prosecutorial capacity were to become warranted, the phase-out to exclusive Kosovan judicial control could simply occur much faster than planned. Another way to speed the phase-out might be to have an international and a Kosovan serve as co-prosecutors on some investigations and trials.

Other issues that can have a critical effect upon the success of IJP interventions are the selection, peer performance monitoring, supervision, pre-mission preparatory education, and in-mission training of IJP. While not within the limited scope of this paper, the causes and solutions to these needs are related to human and budgetary resources, as well as taking into account lessons learned in Kosovo.

***There must be a phase-out of international involvement that makes use of the lessons learned from phases one and two.***

Finally, there must be a phase-out of international involvement that makes use of the lessons learned from phases one and two. In the case of Kosovo, one option being considered by UNMIK is a "linear reverse" phase-out that would revert to the phase two model of having one IJ on trial panels and one IP per district (in other words, stop using the international-majority "64" panels stipulated in regulation 2000/64 and rely primarily on regulations 2000/6 and 34). It seems unrealistic, however, to expect structural societal change to occur within the three-year period. Rather, UNMIK should consider using its scarce resources primarily at the Supreme Court level, keeping international voting majority "64" panels. This would ensure international appellate control over any alleged unfairness or partiality at the trial level. However, since the trial panels would be mostly all-Kosovan, there should be an IP on each high-priority case that may test Kosovan capacity, such as those involving organized crime, war crimes, terrorism, or inter-ethnic crime. An IP at the initial trial level is necessary because if the Kosovan prosecutor fails to act, or acts unjustly due to improper pressure, and does not propose to the court either exculpatory evidence (for example, in war crimes cases against ethnic Serbs) or inculpatory evidence (for example, in organized crime and terrorism cases), there would be insufficient evidence in the record to achieve a just result on appeal. If the IP proposes such evidence—even if the Kosovan judges do not admit it into evidence or consider it at trial—it would be in the record for the IJ to consider upon appeal.

The determination and implementation of Kosovo's final status do not prevent the continuation of a limited-scope program of international judges and prosecutors; for example, both Bosnia and East Timor have IJP. The possibility of such a continuation should perhaps be discussed during talks on final status.

Eventually, all parties must accept that the establishment of democratic governance—including an efficient, impartial, and independent judiciary—will probably take at least a decade. The phasing-out of international involvement should therefore focus on strength-

ening civil society, including a free media and government and NGO support of an independent, transparent, and professional judiciary. Direct intervention in the administration of justice should have a clearly defined ambit and should rely on statutorily defined competencies and procedures, rather than depending on executive actions.

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