

The Disempowerment of Human Rights–Based Justice in the United Nations Mission in Kosovo*

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INTRODUCTION

In 1999, the overall mandate provided to the United Nations Interim Administration Mission in Kosovo (“UNMIK”) and the Kosovo Force (“KFOR”) was unprecedented in its complexity and magnitude.¹ KFOR, led by the North Atlantic Treaty Organization (“NATO”), and numbering between 40,000 and 50,000 troops, was responsible for ensuring peace and a secure environment throughout Kosovo. UNMIK had to govern an entire province and reestablish a functioning public sector in the midst of substantial destruction, communal devastation, and the exodus of the former regime. The number of tasks necessary to achieve this mandate was overwhelming, and included the development of a civil service, the establishment of all social services, and the reconstruction and operation of public utilities and roads, airports, and public transportation. Furthermore, UNMIK had to encourage economic growth through the establishment of a banking system and the formulation of budgetary, currency, and taxation policies. Essential to the ultimate success of the mission was also the development of a public broadcasting system, the support of independent media and civil society, and the cultivation of a political system in which political parties could flourish and peacefully cooperate. Most vitally, however, the UN needed a legal basis and a criminal justice system that could foster respect for the rule of law so that all activities could be carried out and sus-

* Opinions expressed in this Article are solely those of the authors and do not represent the views of any organizations or governments with which the authors have been or are associated. Significant portions of this Article reflect the authors’ respective experiences while working in Kosovo.

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1. See generally Michael J. Matheson, *United Nations Governance of Postconflict Societies*, 95 AM. J. INT’L L. 76 (2001).

tained. As a guarantor of democracy, UNMIK had to establish a governing administration and justice system premised on respect for the rule of law and the protection of human rights.

These immense tasks notwithstanding, there have been considerable achievements. With the implementation of the Constitutional Framework in 2001, and free and fair elections in November of that year, some democratic institutions have begun to take hold.² Political parties of all colors are flourishing and a degree of peace and security now exists for the vast majority of Kosovo Albanians, and to some degree, Kosovo Serbs and other minorities. There has been substantial improvement in the province's infrastructure, including roads, hospitals, and schools. But an effective and successful democratic transition also requires a coherent approach to criminal justice reform. Moreover, ensuring that respect for human rights takes hold, both in legal institutions and the populace at large, requires a continuous and coherent engagement by the international community. In this respect, UNMIK has failed. Indeed, the failure is so profound that it puts at risk the transition as a whole.

The mission failed to clearly establish the supremacy of international human rights standards as the framework within which UNMIK and KFOR should determine the extent and quality of their actions. By virtue of the UN's having placed all executive and legislative powers in UNMIK, the structure of the mission itself involves inherent tensions with democratic governance. In fact, UNMIK's and KFOR's executive actions have clearly contravened human rights standards but remained beyond any legal challenge. In this Article, we detail violations by UNMIK and KFOR of the right to liberty and the broader fair trial rights as set out in the International Covenant on Civil and Political Rights ("ICCPR")³ and the European Convention on Human Rights and Fundamental Freedoms ("ECHR").⁴

UNMIK's legislative power has been used without the articulation of broad policy goals or any consistent, transparent, or inclusive process. In addition to the lack of judicial review of UNMIK's actions, policies regarding the establishment of the judiciary have led to concerns about its independence. In particular, the assertion of immunity for the acts of KFOR and UNMIK, even those actions taken in their official capacity, has resulted in a lack of any effective remedy for human rights violations in Kosovo.

Capitulating to political pressure to rebuild the justice sector quickly, UNMIK failed to develop any coherent strategy for the justice sector, including for war crimes cases. It opted instead for a dithering approach that proved catastrophic for defendants and victims alike, particularly Kosovo

2. UNMIK/REG/2001/9 (On a Constitutional Framework for Provisional Self-Government in Kosovo), 15 May 2001. All regulations are available at <http://www.unmikonline.org/regulations/index.htm>.

3. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

4. European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222.

Serbs. The mission failed to provide any pre-entry training on applicable law, a necessity for appointees who had not worked in the legal realm for more than ten years. This was compounded by a lack of foresight to provide the courts with the necessary tools to effectively prosecute crimes.

In announcing the creation in 1999 of a domestic war crimes court with a majority of international judges, UNMIK acknowledged the risk of judicial bias in the trials of Kosovo Serbs. But in the nine months between the announcement of its creation and its rejection, UNMIK took no steps to intervene and halt the investigation, indictment, and trials of alleged war criminals before Kosovo Albanian trial panels. The initial deployment of international judges and prosecutors was random and incoherent. These international actors, most without any criminal or humanitarian law experience, would be appointed to some, but not all, war crimes cases. Their presence in the early trials had little impact, as they were consistently outvoted by local judges. The ensuing convictions would eventually be reversed on appeal, but significant damage had been done to UNMIK's attempt to foster reconciliation and engender respect for the rule of law.

The founding documents of the mission made explicit the key role to be played by the human rights components (the international governmental organizations tasked with overseeing the mission's compliance with human rights) within the mission. These components met with considerable obstacles in fulfilling their mandates. Despite efforts to point out human rights concerns and to recommend ways to alleviate them, primary actors within UNMIK often failed to take corrective action. One of the most egregious examples of the marginalization of the human rights components was the UN's failure to engage them in the review of pending legislation for human rights compliance. As a result, critical legislation promulgated by UNMIK remains in violation of internationally recognized human rights standards.

National "ownership" is a key component for a successful transitional process. Effectively transforming society requires a real engagement with the local populace. But as the mission in Kosovo progressed, consultation on substantive issues in the areas of criminal justice and human rights was nearly nonexistent. Critical laws that introduced international judges and prosecutors and expanded domestic law were not adequately explained to local legal actors, and once promulgated, no attempt was made to engage the local population with the reasoning behind such decisions. It was almost three years into the mission before all regulations were translated into the local language. The result is a local population disillusioned and cynical about human rights rhetoric and disengaged from legal institutions. Rather than exemplifying transparency, adherence to the rule of law, and fairness, UNMIK and KFOR have demonstrated a disregard for international human rights and, as a result, have severely damaged the development of these principles in Kosovo.

I. BACKGROUND

A. *The Kosovo Crisis*

In 1989, the Yugoslav and Serbian governments revoked Kosovo's status as an autonomous province, stripping it of the entitlement to self-government under the Yugoslav Constitution and rendering it an integral part of the Republic of Serbia. This move marked the beginning of ten years of violations by Serb and Yugoslav authorities of the rights of Kosovo Albanians, who constituted the overwhelming majority of the population of Kosovo. The revocation of Kosovo's autonomy was also perceived to be the initial step toward the disintegration of the Federal Republic of Yugoslavia ("FRY") and the wars in Croatia and Bosnia and Herzegovina.⁵

With the imposition of Serbian law and authority in Kosovo, Kosovo self-government was dismantled; many Kosovo Albanians were forced from their positions of employment and from participation in most sectors of society, including public institutions, labor organizations, and governmental organs. Serbian curriculum and language were imposed at all levels of schooling, and Kosovo Albanians left the education system in large numbers as a result. Almost all Kosovo Albanians left the judiciary and law enforcement agencies and the Serbian authorities discontinued the administration of the Judicial Bar exam. Some Kosovo Albanians continued to practice in the legal system as defense lawyers representing accused Albanians in politically motivated proceedings. As a consequence of the disenfranchisement, Kosovo Albanians created parallel structures to govern and school themselves and undertook measures of passive resistance to the Serbian regime.⁶

At the end of 1995, the war in Bosnia came to an end, but the human rights issues in Kosovo were not addressed. During the 1990s, the Kosovo Liberation Army ("KLA") was created with the aim of using violence to overthrow the Serbian regime. In 1998, fighting between the Serb regime and the KLA intensified, and international engagement with Yugoslavia and Serbia resulted in the establishment in November 1999 of the Kosovo Verification Mission in Kosovo, implemented by the Organization for Security and Cooperation in Europe ("OSCE").⁷ International pressure to peacefully resolve the simmering conflict in Kosovo culminated in peace talks in France and the comprehensive plan for Kosovo, the Rambouillet Agreement,⁸ which Slobodan Milošević refused to sign in March 1999.

5. For a review of the rise to power of Slobodan Milošević in Serbia and the role of Kosovo politics, see LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1997).

6. For a comprehensive review of the history of the Kosovo Albanians, see NOEL MALCOLM, *KOSOVO: A SHORT HISTORY* (1999).

7. For perspectives on the role of the OSCE and Kosovo Verification Mission deployments to Kosovo within the larger framework of European peacekeeping, see Jan Wouters & Frederik Naert, *How Effective is the European Security Architecture? Lessons from Bosnia and Kosovo*, 50 *INT'L & COMP. L.Q.* 540, 558 (2001).

8. Interim Agreement for Peace and Self-Government in Kosovo, February 23, 1999, F.Rep.Yugoslavia-Rep.Serb.-Kosovo, available at <http://www.usofficepristina.usia.co.at/doc1.htm>. The Rambouillet Agreement

Without an explicit mandate from the United Nations, NATO began bombing Kosovo and Serbia on March 24, 1999. The Serbian regime and Yugoslav army orchestrated a widespread campaign to “ethnically cleanse” Kosovo of the Albanian community. This resulted in thousands of civilian deaths, significant numbers of rapes and other forms of torture, extensive burning and pillaging of communities, and the expulsion of approximately 800,000 persons from their homes.⁹ The bombing campaign ended in June with the signing of the Military Technical Agreement, whereby the Yugoslav and Serbian forces were to withdraw, and the promulgation of Resolution 1244/1999 by the United Nations Security Council (“UNSC”) on June 10, 1999.¹⁰

B. UNMIK and KFOR Mandate

Resolution 1244 authorized “the deployment in Kosovo, under United Nations auspices, of international civil and security presences.”¹¹ Responsibilities of the security presence included, *inter alia*, establishing a safe environment for the return of refugees and displaced persons, ensuring public safety and order until the international civilian presence could take responsibility for this task, and supporting the work of the international civilian presence. Resolution 1244 mandated that the international civilian presence provide an interim administration for Kosovo “under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions” and protecting and promoting human rights.¹²

UNMIK was established under Resolution 1244. The Secretary General (“SG”) of the United Nations declared that “all legislative and executive powers, including the administration of the judiciary would be vested in UNMIK” and exercised by the Special Representative of the Secretary General (“SRSG”).¹³ These powers included the promulgation of legislation in the form of regulations and the authority to “change, repeal, or suspend existing laws to the extent necessary.”¹⁴

laid out a framework for peaceful intervention in Kosovo to ensure the rights of Kosovars would be protected.

9. See *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. SCOR, 54th Sess. ¶ 8, U.N. Doc. S/1999/779 (1999) [hereinafter *Report of the Secretary-General*]. See also ORG. FOR SEC. & COOPERATION IN EUR., KOSOVO/KOSOVA: AS SEEN, AS TOLD: AN ANALYSIS OF THE HUMAN RIGHTS FINDINGS OF THE OSCE KOSOVO VERIFICATION MISSION OCTOBER 1998 TO JUNE 1999: PART ONE (1999), at <http://www.osce.org/kosovo/documents/reports/ht/part1>.

10. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/508 (1999) [hereinafter Resolution 1244].

11. *Id.* ¶ 5

12. *Id.* ¶ 10.

13. See *Report of the Secretary-General*, *supra* note 9, ¶¶ 35, 39.

14. *Id.* ¶ 39.

The complex structure of the mission included four components, called Pillars, each led by a Deputy Representative. A Principal Deputy (“PDSRSG”) would assist the SRSG in managing the mission and ensure a coordinated approach among the Pillars.¹⁵ Pillar I, led by the United Nations High Commissioner for Refugees (“UNHCR”), was charged with providing humanitarian aid and facilitating the return of refugees and internally displaced persons. Pillar II, led by the United Nations, was responsible for establishing the civil administration, which included the police force and the establishment of the judiciary and penal system. Pillar III, the Institution Building pillar, led by the OSCE, was to develop civil society and human rights institutions, media, and political parties. The considerable responsibility to plan and implement economic reconstruction went to the European Union in Pillar IV. In spring 2001, a new Pillar I was established called the Police and Justice Pillar.¹⁶

With the establishment of UNMIK, the SRSG created a forum for local consultation called the Kosovo Transitional Council. In 2000, the SRSG established a civilian administration with Departments, including the Administrative Department of Judicial Affairs (“DJA”), led by international and national co-heads. In November 2000, local municipal elections were held and locally administered municipalities were structured. The Departments on the national level, excluding the DJA, which was transformed into a solely international entity under Pillar I, remained in place until the creation of the Constitutional Framework, which established an Assembly, a President, and a Prime Minister with ten Kosovo government ministries. Kosovo-wide elections were held in November 2001, leading finally to the establishment of the Provisional Interim Kosovo Government in March 2002.

C. *The Emergency Judicial System (“EJS”)*

On 28 June 1999, the SRSG issued an emergency decree establishing the Joint Advisory Council on Provisional Judicial Appointment.¹⁷ The main mandate of the Joint Advisory Council consisted of recommending the pro-

15. *Id.* ¶ 45.

16. See *UNMIK at a Glance*, at <http://www.unmikonline.org/intro.htm>. This Pillar was created to ensure the integration and coordination of these two functions. It includes the local Kosovo Police Force, the local judiciary, and the local corrections service. This Pillar remained in UNMIK despite the establishment of the local provisional Kosovar administration, thereby leaving the Kosovar authorities with no competency over these governmental functions.

17. UNMIK Emergency Decree 1999/1, 28 June 1999 (providing legal basis for the establishment of the Joint Advisory Council); UNMIK Emergency Decree 1999/2, 28 June 1999 (appointing members of the Joint Advisory Council). See also ORG. FOR SEC. & COOPERATION IN EUR., OBSERVATIONS AND RECOMMENDATIONS OF THE OSCE LEGAL SYSTEMS MONITORING SECTION: REPORT TWO—THE DEVELOPMENT OF THE KOSOVO JUDICIAL SYSTEM (1999), at <http://www.osce.org/kosovo/documents/reports/justice/report2.htm> [hereinafter *OSCE LSMS: Report 2*]. The Joint Advisory Council was composed of three internationals and four local Kosovo members: one Kosovo Serb, two Kosovo Albanian, and one Kosovo Muslim (Bosniak).

visional appointment of judges and public prosecutors in the EJS for a three-month renewable period. EJS judges and prosecutors were appointed in three of the five regions of Kosovo.¹⁸ In the other two regions, and with the assistance of the OSCE, judges and prosecutors, including one Kosovo Serb, traveled by helicopter to conduct bail hearings of persons arrested by KFOR. In some regions, EJS judges began conducting investigative hearings into alleged war crimes committed by Kosovo Serbs and Roma.

Though UNMIK's official policy goal was to establish a multi-ethnic society, due to the increasing violence and paucity of security for minority communities, it became impossible to convince the few Kosovo Serb judges who had remained to participate in the EJS.¹⁹ In due course, between September 1999 and December 1999, most Kosovo Serb judges and prosecutors moved to Serbia, where many took up new judicial posts. The judicial vacuum from June 1999 to December 1999 resulted in a significant increase in serious criminal activity, including an apparent orchestrated campaign to kill the remaining Kosovo Serbs and any alleged collaborators.²⁰ UNMIK police were understaffed and domestic courts were not fully functioning.

At this time, there was a consensus within UNMIK that it might be necessary to declare a state of emergency. Although such a declaration would have resulted in the derogation of certain human rights for a limited period of time, there was broad agreement among the human rights components that, given the circumstances, it was appropriate. Periods of detention could be extended (as they eventually were), international judges and prosecutors could be brought in for limited periods to preside over issues of arrest and detention, and an intensive legal educational training program could be instituted. UNMIK demurred and opted to forge ahead with plans to start the regular judicial system within a matter of months.

On July 25, 1999, the SRSG approved UNMIK Regulation 1999/1, which provided that the law applicable in Kosovo was the law in force prior to the NATO intervention on March 24, 1999.²¹ Members of the ethnic Albanian legal community resented and resisted this determination because they considered it offensive to reinstate the laws of the repressive Milošević regime, and they willingly disregarded the applicable law in the conduct of trials.²² In response, in December 1999, the SRSG promulgated Regulation 1999/24,²³ which repealed Regulation 1999/1 and reinstated the laws applicable in 1989.

18. The five regions were Pristina, Mitrovica, Gnjilane, Pec, and Prizren.

19. See OSCE LSMS: Report 2, *supra* note 17.

20. See ORG. FOR SEC. & COOPERATION IN EUR., KOSOVO/KOSOVA: AS SEEN, AS TOLD: PART TWO (1999), at <http://www.osce.org/kosovo/documents/reports/hr/part2/>.

21. UNMIK/REG/1999/1 (On the Authority of the Interim Administration in Kosovo), 25 July 1999, amended by UNMIK/REG/2000/54, 27 Sept. 2000, and UNMIK/REG/1999/25, 12 Dec. 1999.

22. See OSCE LSMS: Report 2, *supra* note 17.

23. UNMIK/REG/1999/24 (On the Law Applicable in Kosovo), 12 Dec. 1999, amended by UNMIK/REG/2000/59, 27 Oct. 2000.

D. Establishment of the Regular Judicial System

UNMIK Regulation 1999/7 established the Advisory Judicial Commission ("AJC") to recommend candidates for judicial and prosecutorial appointment on a permanent basis.²⁴ Significant efforts, early on, to recruit minorities into the judiciary were without success.²⁵ Among the 354 judges (professional and lay) and public prosecutors sworn into district courts between January and March 2000, there was not a single Kosovo Serb.²⁶ The most recent Report of the Secretary General on UNMIK states that there are 341 local judges and prosecutors, including 319 Kosovo Albanians, four Kosovo Serbs, seven Turks, nine Bosniaks, and two Roma. As regards international judicial actors, there are twelve international judges and twelve international prosecutors.²⁷ The regular judicial system is comprised of the minor-offense court system, municipal courts, district courts, and the Kosovo Supreme Court.²⁸

Other than judicial appointments, the AJC was also empowered to investigate judicial misconduct and to make recommendations to the SRSG.²⁹ The SRSG did not renew the AJC mandate and in April 2001 promulgated Regulation 2001/8 establishing the Kosovo Judicial and Prosecutorial Council, composed of nine members, the majority of whom are internationals.³⁰

II. THE LEGAL FRAMEWORK

Despite the significant emphasis placed on international human rights standards as the basis for the mission's authority, no clear legal framework has been established in which both UNMIK and KFOR could be expected to function. The role of international human rights law in this regard has never been fully clarified. Although the Constitutional Framework clarifies the direct applicability of international human rights standards in Kosovo, it does not address human rights protection vis-à-vis UNMIK.

Within this legal vacuum, UNMIK and KFOR have violated international human rights principles, most notably by detaining individuals in

24. UNMIK/REG/1999/7 (On Appointment and Removal From Offices of Judges and Prosecutors), 7 Sept. 1999, amended by UNMIK/REG/2000/57, 6 Oct. 2000.

25. See OSCE LSMS: Report 2, *supra* note 17.

26. Interview with DJA official, in Pristina, Kosovo (Mar. 2000).

27. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, U.N. SCOR, 57th Sess., ¶ 26, U.N. Doc. S/2002/1126 (2002).

28. The minor-offense courts have jurisdiction over offenses punishable by a fine or imprisonment of no longer than sixty days. The jurisdiction of the municipal court covers offenses with sentences of up to five years imprisonment. The trial panel consists of three judges, two lay and one professional. District courts have jurisdiction over offenses that carry sentences of more than five years. The trial panel consists of five judges, three lay and two professional. There are no lay judges serving on the Kosovo Supreme Court.

29. In its first twelve months, the AJC failed to undertake any investigations, notwithstanding allegations of judicial bias against minorities.

30. UNMIK/REG/2001/8 (On the Establishment of the Kosovo Judicial and Prosecutorial Council), 6 Apr. 2001.

contravention of judicial orders of release and without any mechanisms for detainees to challenge their detentions. With regard to KFOR, the question of whether it is bound even by the applicable law has never been clearly answered and has led to KFOR's possessing seemingly unchallengeable authority.

The conflation of UNMIK's powers has provided room for executive abuse of authority, including the promulgation of legislation intended to usurp the judicial function and ensure the success of the executive agenda. There has been a failure to develop any legislative process, including ensuring meaningful consultation with local actors and transparency. The lack of a process has resulted in ineffective laws, often not implemented, and has created serious obstacles to the ability of the courts to apply the law.

Without clear guidance on human rights and concrete limitations on state power, the judiciary has been unable or unwilling to use its authority to ensure the enforcement of international human rights standards. The lack of institutional guarantees of independence, particularly in regard to international participation in the judiciary, has created concerns over the real independence of the judiciary under UNMIK. Immunity for UNMIK and KFOR actions and the failure to develop the judiciary to forcefully fulfill its role as the third branch of democratic government has negatively impacted the role of the courts in Kosovo as guarantors of the rule of law and human rights.

A. *The Role of International Human Rights Law*

In the Secretary General's Report of July 12, 1999, which detailed the authority and competencies of the mission, the SG interpreted UNMIK's obligation under Resolution 1244 to protect and promote human rights as requiring it to be guided by internationally recognized human rights standards *as the basis for the exercise of its authority*.³¹ UNMIK's authority is almost absolute because all executive and legislative power is vested in the SRSG. The SG further directed that persons holding public office or undertaking such duties shall observe internationally recognized human rights standards in exercising their functions and shall not discriminate against any persons on any grounds, and that the laws should be implemented only to the extent that they conform to international human rights standards.

1. *UNMIK Regulations*

The first UNMIK law, Regulation 1999/1³² On the Authority of the Interim Administration in Kosovo (later amended in Regulation 1999/25³³), mirrored, in part, the provisions declared by the SG. It made domestic law applicable only in so far as it was compatible with human rights standards,

31. See *Report of the Secretary-General*, *supra* note 9, ¶ 42.

32. UNMIK/REG/1999/1, *supra* note 21.

33. UNMIK/REG/1999/25, *supra* note 21.

and required all persons undertaking public duties or holding public office to observe internationally recognized human rights standards in the course of their functions. Moreover, it mandated non-discrimination in the implementation of public duties and official functions. However, the Regulation was silent as to the implications of these provisions. It did not state unequivocally that international human rights standards were to be directly applicable in Kosovo. Furthermore, it did not provide that such standards are the basis for UNMIK's authority, i.e., that they form the framework within which the mission, including the exercise of UNMIK executive and legislative authority and the judiciary, should function.

This ambiguity regarding Kosovo's governing principles is significant. Without a clear framework set out in the applicable law for the realization of rights and a mechanism for the restraint of excessive state power, the disproportionate authority concentrated in the SRSG could go unchallenged. The obligation to uphold internationally recognized standards and not to discriminate could be rendered meaningless because there would be no framework within which to enforce them. UNMIK's power could be used arbitrarily and unfairly, without accountability, transparency, or predictability—in contravention of the meaning of justice and the rule of law.

In light of this, human rights and rule-of-law advocates and experts argued that human rights norms were the framework within which the international presence and its local counterparts must function. This contention was based on the presumed intentions of the UNSC in Resolution 1244 and the SG's report. Human rights groups and institutions argued that the United Nations, when acting as a governing power, was obligated to uphold the same standards that it had itself created to ensure the rights of the people vis-à-vis their governments.³⁴ Bound by the human rights provisions of the Charter on which it was founded, the UN has a special responsibility to set the standard for human rights protection for governments when the UN itself is acting as a governing power. More formalistic positions on the issue were based on the fact that the FRY was a signatory to the ICCPR, among other human rights documents, and the United Nations, as an "occupying" force within the FRY, was obligated to ensure those rights.³⁵ Regardless of the basis for these various legal arguments, advocates urged that, in order to sustain the legitimacy of the mission itself, the SRSG only exercise his authority to the extent that it conformed to international human rights law and that he declare that such standards applied to him and his administration.

34. See LEGAL SYS. MONITORING SECTION, ORG. FOR SEC. & COOPERATION IN EUR., REVIEW OF THE CRIMINAL JUSTICE SYSTEM IN KOSOVO 19 (Feb.–July 2000), at <http://www.osce.org/kosovo/documents/reports/justice> [hereinafter *OSCE LSMS July 2000 Rev.*].

35. Despite its legal validity, the irony of the argument cannot be ignored. See AMNESTY INT'L, SETTING THE STANDARD? UNMIK AND KFOR'S RESPONSE TO THE VIOLENCE IN MITROVICA 4–5 (2000).

Advocates also took the position that international human rights standards applied to KFOR. There are multiple bases for this position. As a force established under UN auspices, KFOR is obligated to observe UN standards and to act in accordance with the UN Charter. As with UNMIK, the FRY's obligations should extend to KFOR. It was also argued that the jurisprudence of the European Court of Human Rights suggests that states that have ratified the ECHR may have the obligation to act in accordance with it even when taking action outside of their territory.³⁶ Although the arguments regarding KFOR and human rights standards are complicated, advocates contended that, at a minimum, when KFOR undertook law enforcement activities, it was required to uphold the same standards as bound the UN civilian administration.

The fairly opaque references to international human rights law and its relevance within the patchwork of the applicable law in Regulation 1999/1³⁷ and Regulation 1999/24³⁸ caused years of debate and tension within the international presence in Kosovo. Since the beginning of the mission, human rights and rule-of-law advocates have argued that, not only is the UN bound by international human rights standards, but that these regulations, despite their vagueness, made international human rights law applicable in Kosovo. As a result, all acts of the judiciary as well as those of the executive and the legislature would be held to these standards. In monitoring the establishment of the judiciary and law enforcement, the OSCE observed that the gaps in the founding Regulations created significant confusion on the part of the local judiciary concerning the role of international human rights law in the applicable law.³⁹ Moreover, it was clear that there was no mutual understanding of the status of the standards within the international components of the mission itself. As a result, the OSCE recommended in September 2000 that the SRSG clarify the status of international law by legislating its direct applicability and supremacy.⁴⁰ Such action was never taken.

Notwithstanding UNMIK's unwillingness to expressly declare that human rights standards did not apply to its authority, many inside the mission argued that adherence to such standards was not possible in light of the obstacles UNMIK faced. Although in the initial phases some human rights advocates had argued that the SRSG should declare a state of emergency and derogate from those standards,⁴¹ in March 2001, the SG pronounced that "there has been considerable progress in the implementation of UNMIK's mandate. The emergency phase is largely over."⁴² As the mission grew, the

36. See *id.* at 5; *Loizidou v. Turkey*, 20 Eur. Ct. H.R. ¶ 52 (1996).

37. UNMIK/REG/1999/1, *supra* note 21.

38. UNMIK/REG/1999/24, *supra* note 23.

39. See OSCE LSMS July 2000 Rev., *supra* note 34, at 15–20.

40. *Id.* at 22.

41. See WILLIAM G. O'NEILL, KOSOVO: AN UNFINISHED PEACE 78 (2002).

42. Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, U.N.

resistance to recognizing human rights law as a binding framework for UNMIK authority appeared to increase in the face of enhanced security and the development of the judiciary.

Just before the March 2001 SG's report, an internal UNMIK document from the PDSRSG's office argued that the mission was confronted with a choice between ensuring human rights and establishing security.⁴³ In essence, the document asserted that human rights protection was the primary obstacle to security. This document was prepared to justify the use of the SRSG's executive power in violation of human rights principles. The fact that such a position was held by those at the highest levels of UNMIK reflected a fundamental lack of understanding of the reasoning behind the principles of human rights law. In response to the paper, the OSCE noted that this stance, if accepted, would undermine the entire premise for the existence of human rights doctrine. It argued that "[s]eeking to place limitations upon applicable international human rights laws is unlikely to resolve the problems in the judicial system, nor effectively address existing security concerns. Creating a comprehensive, co-ordinated and clearly planned strategy to address the immediate and long-term needs of the justice system, whilst guaranteeing due process, continues to represent a critical challenge for UNMIK."⁴⁴

Within the mission, there was no disagreement that UNMIK would need to make difficult policy choices regarding the implementation of its mandate and that some actions would not strictly adhere to human rights standards. Indeed, human rights laws are standards that require interpretation and are consistently taking shape as jurisprudence develops. However, UNMIK never took steps to formally recognize its obligations by legislating the supremacy of human rights standards, and did not consistently work towards adherence to them by establishing and respecting mechanisms to ensure compliance. Rather, it knowingly and blatantly violated them.

2. *The Constitutional Framework*

Kosovo lacked a constitution, the conventional mechanism for guaranteeing rights and limiting state power, until the end of 2001. In transitional justice systems, the creation of a new constitutional framework or the novel interpretation of older constitutions is one of the major forces of change in a newly emerging democratic state.⁴⁵ Although the 1974 Constitution of the Socialist Federal Republic of Yugoslavia and the corresponding Kosovo pro-

SCOR, 56th Sess., ¶ 62, U.N. Doc. S/2001/218 (2001).

43. ORG. FOR SEC. & COOPERATION IN EUR., A BLUEPRINT FOR ENSURING SECURITY AND ESTABLISHING THE RULE OF LAW IN KOSOVO (on file with authors).

44. LEGAL SYS. MONITORING SECTION, ORG. FOR SEC. & COOPERATION IN EUR., REVIEW OF THE CRIMINAL JUSTICE SYSTEM IN KOSOVO 7 (Sept. 2000–Feb. 2001), at <http://www.osce.org/kosovo/documents/reports/justice> [hereinafter *OSCE LSMS Feb. 2001 Rev.*].

45. See Ruti G. Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009 (1997).

vincial constitution were arguably applicable law, in practice they could not be applied by UNMIK. Even if there had been attempts to enforce parts of the old constitution, the lack of clarity as to the role of the Kosovo Supreme Court in light of the undeniable *de facto* limitation on the jurisdiction of the FRY Supreme Court in Kosovo was problematic. The early UN mission regulations did not address the status of these constitutions. Nor did they provide any illumination on the authority of the Supreme Court as the highest court in Kosovo, let alone the enforceability of human rights norms by such a court. In short, there was no constitutional basis for persons in Kosovo to seek the realization of fundamental principles of civil or human rights or for the judiciary to place limitations on executive or legislative authority in accordance with those principles.

In May 2001, the Constitutional Framework was promulgated, and in November, Kosovo-wide elections were held for the Provisional Institutions of Self-Government.⁴⁶ Although the Framework does provide for a democratically elected government with competencies in certain areas, other functions inherent to a self-governing administration are left to international actors. UNMIK continues to solely control the areas of law enforcement and justice, both considered to be beyond the capacity of the locally elected government actors.⁴⁷ Although not expressly addressed in the Framework, it is understood within the mission that formulating legislation concerning law enforcement and criminal justice remains solely within the competencies of UNMIK. More broadly, the SRSG has retained all powers of executive and legislative authority to ensure the implementation of Resolution 1244.⁴⁸ These areas of "reserved powers," including an unfettered legislative veto, appear to be so far-reaching as to undermine the democratic legitimacy of the Framework itself. The most stark example of this so far has been the SRSG's appointment of judges and prosecutors without the approval of the Kosovo Assembly in violation of the Constitutional Framework.⁴⁹

The Framework incorporates by reference and makes directly applicable in Kosovo the rights enumerated in the primary human rights documents, with a few notable exceptions, such as the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment.⁵⁰ The

46. UNMIK/REG/2001/9, *supra* note 2.

47. *See id.* ch. 8.

48. *Id.* chs. 12, 14.

49. *See UN Appoints Legal Figures in Kosovo without Assembly's Approval*, DEUTSCHE PRESSE AGENTUR, Dec. 13, 2002. The Assembly had requested more information regarding the backgrounds of the Serb candidates, particularly during the war and the Milošević regime. Twenty-one of the forty-two candidates are Serbs.

50. UNMIK/REG/2001/9, *supra* note 2 ch.14. The regulation made the following conventions applicable in Kosovo: the Universal Declaration on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols; the International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; the European Charter for Regional or Minority Languages; and the Council of Europe's Framework Convention for the Protection of National Minorities.

framework did clarify the direct applicability of international human rights standards in Kosovo, but did little to change the situation as advocates had perceived it. The Framework provides for the creation of a Special Chamber of the Supreme Court with jurisdiction to determine "whether any law adopted by the Assembly is incompatible with this Constitutional Framework;" to resolve disputes among the Provisional Institutions; and to resolve disputes regarding acts that infringe upon the independence of certain bodies and to determine which acts are covered by immunity. The Framework clearly allows for judicial review of administrative actions taken by the Provisional Government in line with the domestic administrative laws.⁵¹

However, in the Constitutional Framework, the Supreme Court and its Chamber appear to have no jurisdiction over actions taken by UNMIK. The document thus does not provide an answer to the question of human rights protection vis-à-vis UNMIK itself. This is especially problematic because UNMIK has retained sole administrative authority over justice and law enforcement, areas which are closely entwined with human rights guarantees. As a result, despite the creation of the Kosovo-wide government and a constitutional framework, the limitation on the authority of international organizations and the rights of Kosovars to seek review of and redress for alleged violations of their rights by UNMIK and KFOR remain unclear.

B. KFOR: *The Military Presence*

Resolution 1244 is the basis for the establishment of KFOR, the NATO-led international security presence in Kosovo, under a unified command structure controlled by the Commander of KFOR ("COMKFOR"). KFOR's responsibilities do not appear as broad and far-reaching as those delegated to the civilian authorities. Two of KFOR's eight responsibilities are specifically limited by the proviso that the responsibility ends when the civilian presence can take it over. The provision that gives KFOR the most expansive authority is the mandate to establish "a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered."⁵² Although this provision may have been intended to apply to the return of the Kosovo Albanians from refuge, it forms the basis for KFOR's substantial role in providing security for the ethnic minority communities, particularly the Kosovo Serbs, in postwar Kosovo.

Resolution 1244 makes the military and civilian presences distinct and apparently co-equal partners in the endeavor to establish a democratic Kosovo. The SRSG, as leader of the civil presence, must "coordinate closely with the international security presence to ensure that both presences oper-

51. *Supra* note 2, chs. 9.4.1–9.4.11.

52. Resolution 1244, *supra* note 10, ¶ 9c.

ate towards the same goals and in a mutually supportive manner,”⁵³ and the responsibilities of the security force explicitly include “[s]upporting, as appropriate, and coordinating closely with the work of the international civil presence.”⁵⁴ However, this is the only official guidance on the intended relationship between the civil and security presences. There are no clear parameters to KFOR’s authority. Although KFOR is established “under UN auspices,” KFOR was not intended to be subject to the SRSG or the SG, and it did not have the command and control structure of other “Blue Helmet” missions. Despite the language of mutual cooperation and support between UNMIK and KFOR detailed in Resolution 1244, the practical implications of the interrelationship between the two, and the question of KFOR’s ultimate authority, pose significant challenges to the protection of human rights in Kosovo.

1. *The Applicable Law and the Law Enforcement Mandate*

The question of limitations on KFOR’s power arose early in Kosovo. It was clear that KFOR would need to take on considerable obligations in the area of law enforcement under its mandate of “[e]nsuring public safety and order until the international presence can take responsibility for this task.”⁵⁵ The substantial vacuum in Kosovo required a tough approach from KFOR, and many, including human rights advocates, argued for more substantial involvement of KFOR in ensuring the rule of law.⁵⁶ As for KFOR’s actions in law enforcement, during the initial stages of the mission it appeared that KFOR would be limited by the applicable law and international human rights standards. The Interim SRSG declared that law enforcement activities are a joint responsibility and, when conducted by KFOR and UNMIK police, they must be undertaken in line with international human rights standards.⁵⁷ This move indicated early on that the SRSG’s power to legislate could bind KFOR, presuming that KFOR would act in accordance with the applicable law, and that human rights would also limit KFOR’s authority at least in the areas of law enforcement.

As the justice system developed, the question of whether there were identifiable, predictable, and rights-based limits on KFOR’s actions was not clarified but rather obscured. COMKFOR never clearly acknowledged that it was bound by international human rights law. Moreover, the question of whether the law in Kosovo applies to KFOR has not been resolved. UNMIK

53. *Id.* ¶ 6.

54. *Id.* ¶ 9f.

55. *Id.* ¶ 9d.

56. O’NEILL, *supra* note 41, at 105.

57. Sérgio Vieira De Mello (Special Representative of the Secretary General), Statement on the Right of KFOR to Apprehend and Detain Persons who are Suspected of Having Committed Offenses Against Public Safety and Order, July 4, 1999 [hereinafter Statement of the Interim SRSG]. See also Press Release, United Nations Interim Administration in Kosovo, UN Moves to Set Up Judicial System in Kosovo (July 1, 1999), available at <http://www.unmikonline.org/archive.htm#1999>.

itself has been inconsistent in its approach to KFOR, stating at times that it has no control over KFOR's actions but at the same time legislating, when convenient, in regards to KFOR. With the promulgation of regulations that explicitly addressed KFOR, it was understood that the SRSG could regulate KFOR and that it could be bound by the law. Regulation 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo stated that KFOR shall respect applicable law and regulations *in so far as* they do not conflict with the fulfillment of their mandate under Resolution 1244.⁵⁸ There are a host of particular regulations purportedly regulating KFOR and its powers.

However, the outcome of Regulation 2000/47, because of its failure to answer the question of KFOR's mandate under Resolution 1244, is that KFOR is bound by the law when it wants to be, but not when it does not. This is exemplified by the fact that regulations concerning basic human rights principles in the area of rule of law are considered not to apply to KFOR despite the fact that it is still involved in law enforcement. The most significant law in this regard is Regulation 2001/28 On the Rights of Persons Arrested by Law Enforcement Authorities, which took more than a year to promulgate and caused significant friction between the UN administration and the human rights components within the mission.⁵⁹ The regulation provides arrestees with certain basic human rights that were not within the FRY Code of Criminal Procedure. Unlike other regulations, the definition of law enforcement agencies does not include KFOR and therefore is arguably not applicable to KFOR even when it exercises its powers to arrest and detain. This undermines legal certainty and results in potential inconsistency of treatment under the law.

2. *Extra-Judicial Detention*

It is in the area of detention that the exercise of extraordinary authority of KFOR has generated the most attention. Fairly early on in the establishment of the judicial system, COMKFOR declared its authority to detain persons without any judicial review and to continue to detain persons despite a judicial decision to release the person from custody. KFOR argued that its mandate under Resolution 1244 provided it with such authority where such detention is necessary to address a "threat to KFOR" or under its mandate to provide "a safe and secure environment [for as long as] civilian authorities are unable or unwilling to take responsibility for the matter."⁶⁰

58. UNMIK/REG/2000/47 (On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo), 18 Aug. 2000.

59. UNMIK/REG/2001/28 (On the Rights of Persons Arrested by Law Enforcement Authorities), 11 Oct. 2001.

60. Statement of the Interim SRSG, *supra* note 57. See also AM. BAR ASS'N/CENT. EUROPEAN & EURASIAN LAW INITIATIVE, JUDICIAL REFORM INDEX FOR KOSOVO (Apr. 2002) at 16, at <http://www.abanet.org/ceeli/publications/jri/home.html>.

Within UNMIK, it was argued that the local judicial system could not be trusted to respond to ethnically motivated crime and that such extraordinary action would assist in establishing an environment based on the rule of law. Yet the first so-called COMKFOR detention arose in the case of Shaban Beqiri and Xhemal Sejdiu, who were ordered released by a judge on November 16, 1999, but detained by COMKFOR until July 25, 2000, when an international judge decided that only the courts had the authority to detain.⁶¹ Despite this decision, that same month, COMKFOR detained Afrim Zeqiri, a murder suspect who had been released by an international investigating judge.⁶² Even with internationals in the system, KFOR did not abide by judicial authority.

During the conflict in Southern Serbia and the war in Macedonia, COMKFOR detained hundreds of persons, including juveniles. These actions were allegedly based on KFOR's authority to maintain a secure environment rather than on its authority to ensure public safety and order. This distinction has always been difficult to understand, and neither KFOR nor UNMIK has made an attempt to clarify it through legislation or by consistency of actions. This has led to uncertainty in Kosovo about the scope of KFOR's authority.

Although KFOR did hand over some of these detainees to the judicial system, for the most part KFOR did not purport to be detaining people for suspected violations of the criminal law. In May 2001, the SRSG passed Regulation 2001/10 On the Prohibition of Unauthorized Border/Boundary Crossings, in a move intended to allow for criminal prosecution of these groups and to afford KFOR a legal basis for the detentions.⁶³ In addition, Regulation 2001/7 On the Authorization of Possession of Weapons in Kosovo, provided KFOR with another legal basis for detention of persons caught with unauthorized weapons.⁶⁴ Despite this, KFOR, for the most part, does not utilize the law or claim to be detaining individuals for the purposes of criminal proceedings. Instead, even today KFOR continues to argue that the legal system is ill-equipped to address illegal activity and has developed a parallel system for review of its own detentions.

Human rights advocates and components of the mission argued early on that COMKFOR detentions are in violation of human rights standards and constitute arbitrary and unlawful action. There is no judicial mechanism by which persons so detained can challenge their detention. Moreover, as the practice continued in the face of a continuously developing law enforcement

61. See OSCE LSMS July 2000 Rev., *supra* note 34.

62. In this case, despite KFOR's asserted independent authority, COMKFOR sought authorization from the SRSG to detain. KFOR and UNMIK have often been inconsistent regarding their relationship. At times, they use the purported authority of the SRSG to substantiate KFOR's actions and, at other times, claim that the SRSG has no control over KFOR's actions.

63. UNMIK/REG/2001/10 (On the Prohibition of Unauthorized Border/Boundary Crossings), 24 May 2001.

64. UNMIK/REG/2001/7 (On the Authorization of Possession of Weapons in Kosovo), 21 Feb. 2001.

and judicial system with international participation, reports have highlighted that such action on the part of COMKFOR poses an unprecedented intrusion into the judicial function and undermines the rule of law. KFOR's establishment of parallel procedures falling short of standards of due process did nothing to assuage these concerns.

Despite ongoing criticism of KFOR on this issue, it has continued to hold persons in detention without any judicial process and continues to maintain that this is, in part, based on its law enforcement mandate until the civilian authority can take over. Even three years into the mission, KFOR appeared to be expanding its authority to detain persons outside of the justice system and refining its parallel system of review. KFOR's approach has arguably rendered meaningless the SG's condition on KFOR's authority in the area of public peace and order. Practically speaking, KFOR has boundless and unfettered authority in Kosovo.

Regarding the actions of KFOR that breach international law, there is no remedy or process for review. Despite the recommendations of human rights advocates, there remains no clear mechanism through which persons can seek redress of alleged human rights abuses by KFOR. There has been a failure of the human rights components of the mission, probably due to a lack of political will, to monitor the conduct of KFOR sufficiently, leaving it, in most cases, beyond public scrutiny. Most significantly in this regard, there is no oversight by the Ombudsperson Institution of KFOR. Although the Secretary General provided that the Ombudsperson Institution has jurisdiction over allegations of human rights abuses by any person or entity in Kosovo, the founding regulation, Regulation 2000/38 On the Establishment of the Ombudsperson Institution, did not provide it with the authority to investigate KFOR.⁶⁵ As a result, there is no human rights oversight of the actions of KFOR.

C. Executive Powers

The SRSG, as the head of UNMIK, was vested with all executive powers. Although the UNSC established the civilian presence for an initial twelve-month period, there were no temporal limitations on the mission other than a final political solution to the Kosovo situation. There is no clear indication of when such a solution will be found. The task of developing genuinely democratic institutions even on an interim basis may not be easily or quickly accomplished. For almost three years, UNMIK administered the province until it handed over a significant amount of authority to a newly created domestic, yet still provisional, government. In that period, UNMIK used its executive power to detain individuals in contravention of international human rights standards and without any possible mechanism for de-

65. UNMIK/REG/2000/38 (On the Establishment of the Ombudsperson Institution in Kosovo), 30 June 2000.

tainees to challenge their detention in the courts. As UNMIK had not only all executive powers but also all legislative powers, it was able to promulgate legislation to serve its agenda in individual cases or in reaction to unwanted situations and circumstances. These types of laws undercut the establishment of a society based on the rule of law and human rights.

1. *Executive Detentions*

The SRSG's assertion of an executive power to order detention has been one of the most controversial actions in the area of criminal justice and human rights taken by the mission. In the summer of 2000, the SRSG began detaining individuals despite their lawful release by the judicial authority. On August 18, 2000, the SRSG continued what had been a COMKFOR detention of a murder suspect, Afrim Zeqiri, despite the fact that his release was ordered by an international judge.⁶⁶ The action was unprecedented, and human rights advocates quickly pointed out the ways in which it contravened fundamental principles of human rights law. Human rights components of UNMIK underscored that the action not only jeopardized the authority and independence of the courts, but that the lack of a mechanism to challenge it deprived individuals so detained of any recourse.

In early 2001, the UN Office of the Legal Advisor in New York provided the SRSG with a test to follow when considering whether or not to order an executive detention. This guidance maintained that the executive order to detain could be used in a case where there was risk of judicial impropriety or misconduct. However, even where a majority-international judiciary adjudicated controversial cases, the SRSG would usurp the role of the judiciary and order detention.

On August 25, 2001, the SRSG promulgated Regulation 2001/18 On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders, which was apparently designed to provide some review of, and add legitimacy to, the SRSG's orders to detain.⁶⁷ Prior to the promulgation of the regulation, the SRSG had ordered the detention of three Kosovo Albanians suspected of bombing a bus full of Serbs despite the fact that a majority-international panel had, on grounds of insufficient evidence, ordered their release. The Regulation was quickly deconstructed by the human rights components of the mission and the Commission was found not to meet the requirements of an independent and impartial tribunal established by law.⁶⁸ It became clear that the SRSG was using his legislative authority to usurp a decision of an independent and im-

66. See *OSCE LSMS July 2000 Rev.*, *supra* note 34.

67. UNMIK/REG/2001/18 (On the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders), 25 Aug. 2001.

68. See OMBUDSPERSON INSTITUTION IN KOSOVO, SPECIAL REPORT NO. 4 (Sept. 12, 2001), available at <http://www.ombudspersonkosovo.org>.

partial court by establishing an executive body to consider the legality of an executive action.

The Commission was convened in October 2001, when it confirmed the continued detention in the case of the three Kosovo Albanians. However, the suspects were released in December 2001 as a result of lack of evidence, and the Commission has never since been convened.

More than six persons have been subject to SRSG orders to detain at different times. It is noteworthy that in May 2002, Afrim Zeqiri, the first person to be detained by the SRSG, was acquitted on the basis of insufficient evidence, after almost two years in detention.⁶⁹

2. *Lack of Clear Delineation Between Branches of Government*

The conflation of executive and legislative power has provided significant room for interference in the judicial realm. The promulgation of legislation establishing the Commission on Executive Detentions illustrates the lack of checks on executive power. Similarly, other legislation promulgated by UNMIK appears to be ad hoc, either intended to provide for a particular outcome in certain cases or to respond to isolated events. In early 2000, UNMIK passed its first law clearly in response to a particular situation. Regulation 2000/04 On the Prohibition Against Inciting to National, Racial, Religious or Ethnic Hatred, Discord or Intolerance signaled international outrage at local press coverage that alleged certain Kosovo Serbs were war criminals and provided identifying information.⁷⁰ This Regulation has never been utilized, though such press coverage has continued. There are other examples of this, such as Regulation 2001/10 On the Prohibition of Unauthorized Border/Boundary Crossing, which was created to address concerns of KFOR in regards to the movement of persons between Serbia and Kosovo during the uprising of Albanians in Southern Serbia.⁷¹ It has rarely been applied and does little to clarify the real issues of who, and under what circumstances, can enter Kosovo.

In January 2001, Regulation 2001/2, amending Regulation 2000/06 On the Appointment and Removal from Office of International Judges and International Prosecutors, was passed to ensure that the international prosecutor in the case of Afrim Zeqiri could resurrect an abandoned prosecution.⁷² It was clear that this provision was intended to apply solely to this particular case, as it could only be applied within thirty days from the date of the

69. UNMIK, *After Two Years in Prison, Afrim Zeqiri Found Innocent* (June 15, 2002), available at <http://www.unmikonline.org/press/2002/mon/june/Imm150602.htm>.

70. UNMIK/REG/2000/4 (On the Prohibition Against Inciting to National, Racial, Religious or Ethnic Hatred, Discord or Intolerance), 1 Feb. 2000.

71. UNMIK/REG/2001/10, *supra* note 63.

72. UNMIK/REG/2001/2 (On the Appointment and Removal from Office of International Judges and International Prosecutors), 12 Jan. 2001 (amending UNMIK/REG/2000/6). *See also* UNMIK, *supra* note 69.

promulgation of the regulation. Despite these legal maneuvers, Zeqiri was acquitted of all charges in spring 2002.⁷³

Beyond the dubious nature of the procedure leading to the passage of these regulations, these laws rarely produced the expected results, either due to lack of enforcement or poor construction. Without a strong framework for balancing UNMIK authority, the executive was able to act recklessly and without regard for the way it could influence the development of democratic principles and practices in Kosovo.

D. Legislative Powers

In order to create a legal basis for the implementation of the UNMIK mandate, the SRSG was vested with legislative power, including the authority to change, appeal, or suspend any existing laws. Regulation 1999/1 codified this authority, and made the applicable law the regulations of the SRSG and the laws in effect prior to March 22, 1999, insofar as they conform with international human rights standards.⁷⁴ Under Regulation 1999/24, promulgated five months later, the applicable laws were those in effect prior to the revocation of Kosovo's autonomous status on March 22, 1989, insofar as they conform with international human rights standards.⁷⁵

In 1999, the SRSG created the Joint Advisory Council on Legislative Matters ("JAC"), which was composed of local law professors and other legal actors, the Office of the Legal Advisor ("OLA"), the OSCE, the Council of Europe and American Bar Association Central European and Eurasian Law Initiative ("ABA/CEELI"). This consultative and collaborative body was intended to advise the SRSG on the applicable law and be the forum in which the legislative reform process would primarily take place. Although the UN never issued any regulations regarding its authority, it was assumed that all UNMIK regulations would be reviewed by the JAC and comments forwarded to the SRSG through the OLA. The local legal community's adverse reaction to the promulgation of Regulation 1999/1, which re-instituted the Serbian laws, exemplified the need for consultation with the local community.⁷⁶

1. The Applicable Law

The challenge of determining what constitutes applicable law is overwhelming, not only to the international lawyers in the mission, but also to the local legal community. The problems are multifaceted and involve parsing out what the applicable law is, finding the laws in relevant languages,

73. UNMIK, *supra* note 69.

74. UNMIK/REG/1999/1, *supra* note 21.

75. UNMIK/REG/1999/24, *supra* note 23.

76. UNMIK/REG/1999/1, *supra* note 21. See Wendy S. Betts et al., *Special Feature: The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371, 374 (2001).

and deciding to what extent they should be applied and whether the laws, written in the 1970s and 1980s and based on a communist system, can realistically be applied in light of the establishment of UNMIK. It has been and continues to be a daunting task.

Although these issues arose initially in the context of the criminal justice arena, the question of applying the laws in the area of government administration has proven even more difficult. As a result, it is understandable that many of UNMIK's actions have not completely conformed with the pre-1989 legal regime. The problems that have resulted from the state of the applicable law require an independent analysis and are beyond the scope of this Article. However, it is necessary to highlight the obstacles UNMIK continues to face in negotiating an effective path to meaningful legislative reform and a state based on the rule of law.

The requirement that the domestic law be applied only to the extent that it conforms with international human rights standards proved too complicated for local actors to handle early on.⁷⁷ The international human rights components of the mission set about highlighting where the domestic criminal laws were incompatible and suggesting that the judiciary not apply them. The DJA was urged to formulate interpretative guidelines to the judiciary on ensuring compliance with international human rights standards in the implementation of local law. Court circulars were produced to achieve this goal, but they appeared to have little impact. For example, there was much attention given to the publication of a circular instructing judges on interpreting the criminal procedural code to provide counsel to persons who cannot afford one where justice requires.⁷⁸ Although published in 2001, it has rarely been used. Even in cases where possible trafficking victims were facing imprisonment, and the trafficking regulation provided for the right to defense counsel, courts often failed to appoint counsel to these women. In general, efforts to find mechanisms for the interpretation of local law according to international standards appeared fruitless. Even where the law was clear and could be applied in light of those standards, the local judiciary and UNMIK police had difficulties conforming their actions to the law or consistently applying the law. The questions of what the local law was and how it should be applied, particularly its application in light of international human rights norms, considerably hampered the functioning of the justice system.

It was acknowledged that a complete review and reform process, starting with the criminal laws, would be necessary. UNMIK almost immediately initiated this process within the framework of the JAC. Substantial resources were invested in the process by UNMIK, the OSCE, ABA/CEELI, and the Council of Europe. In particular, the Council of Europe dedicated international and regional experts to the task and financed trips by working group

77. Betts et al., *supra* note 76 at 383–84.

78. See OSCE LSMS: Report 2, *supra* note 17.

members to Strasbourg to consult directly with well-known experts. Most of the local input was provided by respected university professors of criminal law. In early 2000, the United Nations International Children's Emergency Fund ("UNICEF") and the OSCE also initiated a process of redrafting the criminal laws in regard to juveniles, and presented to the JAC a separate code for juveniles that incorporated international human rights principles.

As a result of UNMIK's placing a considerable amount of emphasis on the inadequacy of Kosovo's old laws, by 2001, the need for new laws to assist the system became a mantra of the local judiciary and legal community. The criminal penal and procedure laws were finalized in the fall of 2001 and sent to the SRSG for promulgation. Although the laws were not perfect, they were the result of a consultative process among local, regional, and international actors. At this time, the draft juvenile justice law, which had undergone a process of local consultation, was reconsidered in light of the draft penal and procedural framework, and more resources were invested in finalizing the juvenile justice code.

However, as of this writing, these laws have yet to be passed. In fact, many within the mission question whether there is the political will within UNMIK to implement the draft laws. Under UNMIK's interpretation of the Constitutional Framework, the Provisional Government Institutions do not have the authority to promulgate criminal laws. UNMIK has provided no explanation to members of the international community nor, more importantly, to the local community for the failure to promulgate the draft penal and criminal procedure and juvenile justice laws. There has been no other comprehensive legal reform project undertaken by UNMIK.

2. The Legislative Process

UNMIK was not created as a democratic administration and cannot be expected to possess the qualities of a democratically elected legislative branch. The foundational concepts of democratic legislatures such as legislative transparency, public commentary and awareness, accountability to the needs and expectations of constituencies, and constitutional or other limitations could not be inherent to the way in which UNMIK created laws. That said, one would expect a degree of accountability from the agency charged with holding governments worldwide to account. Yet few steps have been taken to formulate a process which involved these concepts.

As the mission developed, the number of legislative reform initiatives grew, and UNMIK did not craft a plan to ensure the effectiveness of the legislative process. The result was catastrophic. There was no oversight of who was drafting laws or how drafts impacted or related to each other and the preexisting law. The JAC became less and less relevant and OLA began to bypass the consultative process altogether. By February 2001, there was no systematic consultation with the JAC on regulations and the OLA maintained that legislation that was "interventionist," i.e., of political character,

did not require local consultation.⁷⁹ Despite vocal protest from all members of the JAC, regulations were provided to the JAC as a token gesture. By the end of 2001, it was clear that what had begun as one of the only high-level forums for international and local consultation and cooperation on legal issues had become an empty shell. As with all other areas of development within the justice sector, UNMIK's consultation with local actors on legislative reform and on the legislative reform agenda diminished rather than expanded over time.

The result of UNMIK's legislative process, or lack thereof, was that many regulations involved the use of legal terminology unknown to the local legal community.⁸⁰ In some cases, therefore, international experts were unsure if certain regulations could really be applied. There was little, if any, guidance on the practical implementation of the regulations and there was no forethought given to the logistical and practical implications of passing new laws. The practical problems ranged from ensuring translation of the laws in local languages to dissemination to the judiciary. Until recently, a significant number of regulations had not been translated into the local languages.⁸¹ The UN has ignored a recommendation from the OSCE that no law be passed without its being translated. In addition, the public was not informed about the state of the law or of legal reform initiatives, and there were no attempts to undertake public relations campaigns to increase awareness. The acute failure to address these issues continues to hamper the timely and effective implementation of the laws.

There is no doubt that the creation of an effective legislative process in this context raises complex and weighty issues and involves tremendous time, energy, and resources. UNMIK has been dealing with all other aspects of administering a province. However, initiating a process to address some of

79. OSCE LSMS Feb. 2001 Rev., *supra* note 44.

80. See, e.g., UNMIK/REG/2000/4, *supra* note 70. This regulation demonstrates problems associated with the lack of an established legislative process. The drafting of the regulation was overseen by internationals with insufficient understanding of the local law. As a result, once promulgated, internationals (OSCE and the Kosovo Judicial Institute ("KJI")) debated whether some of the provisions could really be applied in light of the law. KJI even developed a training plan which included a discussion about the inapplicability of some of the provisions. Additionally, the regulation did little to tie into the local penal law, which had provisions overlapping with the trafficking regulation. As the regulation reflected the most modern and sophisticated definition of trafficking, it was complex and understandably difficult for the local judiciary to apply. Not until the winter of 2002 were the judges and prosecutors offered useful materials explaining the elements of the complex crime of trafficking. Although promulgated fairly quickly, the regulation was not translated into Albanian and Serbian for some time, resulting in the application of the old laws. Even after translation and almost a year after it had been passed, many judges claimed that they had never received a copy of the regulation. Many of the provisions of the regulation have yet to be effectively applied. See generally LEGAL SYS. MONITORING SECTION, ORG. FOR SEC. & COOPERATION IN EUR., KOSOVO: REVIEW OF THE CRIMINAL JUSTICE SYSTEM 47 (Oct. 2001), at http://www.osce.org/kosovo/documents/reports/justice/criminal_justice3.pdf.

81. As of April 2002, no regulation promulgated in 2002 had been translated into the local languages. Of the forty-one regulations promulgated in 2001, only nineteen had been translated into Albanian and thirty-one into Serbian. Twenty-five of the twenty-six administrative directives had not been translated. By the end of 2002, all regulations had been translated. See Official Gazette of Regulations, at <http://www.unmikonline.org/regulations/index.htm>.

these problems would have made UNMIK a better legislature and the judicial system more effective. The lack of an appropriate legislative process has led to the creation and promulgation of legislation that cannot be applied effectively or at all, undermining the development of consistency and transparency in the application of the law. It has also resulted in legislation that does not conform to international human rights standards. However, there has appeared to be no will to undertake change. The most cynical explanation for UNMIK's inertia in facing the lack of an effective process may be an unwillingness to pay the price for such a process. UNMIK would no longer be able to create results-based legislation to fix individual cases or sacrifice human rights principles for perceived effectiveness of law enforcement.

The Constitutional Framework does little to provide legal certainty and clarity as to the legislative process because certain areas of lawmaking are presumed still to fall within UNMIK authority and all legislative acts are to be vetted by OLA and approved by the SRSG. Presumably, OLA can make unilateral changes to any laws suggested by the Assembly. As to regulations that impact criminal justice, whether there is any local consultation is still a question, as the JAC was officially disbanded in late 2002. Moreover, it is not clear who is involved in formulating and approving regulations that impact criminal justice or legal issues under the authority of the provisional government.

E. The Judiciary

UNMIK was tasked with establishing a multi-ethnic, independent, and impartial judiciary to ensure the rule of law. It was clear from the first days of the mission that in order to maintain public peace and order in postwar Kosovo the creation of a functioning judiciary needed to be one of UNMIK's primary objectives. It would underpin the ability of UNMIK to implement other aspects of its mandate.

Unlike the administrative and law enforcement authorities, only Kosovars were initially appointed to the judiciary and prosecution. The reasons underlying this decision are not clear. Within the first six months of the mission, however, discussion began about the need to include international actors in these bodies. The main impetus for this was concern about the capacity of the local, mainly Kosovo Albanian, judiciary to make impartial decisions in trials of persons alleged to have committed war crimes and other violations of international humanitarian law against members of their own community. In the early part of the mission, many argued for the inclusion of international actors to ensure impartial decisions in war crimes trials. Most commentators failed to foresee the more significant challenges that the judiciary would face as the sole independent branch of the UNMIK administration.

1. *Judicial Review of Executive and Legislative Authority*

The judiciary is the only part of UNMIK that could effectively balance the power of the SRSG. Many within UNMIK expected that when the SRSG abused his authority, the courts would consider the abuse and provide a remedy. This would involve judicial review of the lawfulness of legislation promulgated by the SRSG when raised in individual cases and, where warranted, interpreting the laws to ensure that they conform in practice to international human rights standards. Despite the lack of a clear mandate to the courts in this regard from UNMIK itself, human rights components of the mission maintained that the standards themselves required the courts to engage in judicial review as well.

The primary example in this regard has been the issue of *habeas corpus*—judicial review of the basis for detention. Despite consistent advocacy within UNMIK for a review of the detention process, there was no legislative response. It was argued that the Supreme Court of Kosovo should fill gaps in the domestic law to enable it to hear challenges to all detentions, particularly those of the SRSG, find that the powers exercised by the UN were in violation of international human rights standards as part of the applicable law, and order the release and compensation of the defendant. In a challenge to the executive detention of Afrim Zeqiri on this basis before the Supreme Court, the court demurred, deciding that the SRSG's action was an administrative one, and therefore needed to be reviewed according to administrative procedure.⁸²

However, with the promulgation of Regulation 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, UNMIK, in its capacity as the legislature, gave itself and its executive actions immunity from judicial process.⁸³ The impact of this immunity is illustrated by a well-known case in which a municipal court considered an individual's challenge to a decision of the municipality and decided in favor of the individual.⁸⁴ UNMIK's response was to instruct the court, through a letter, that its delegate was immune, rendering the court's decision unenforceable. The promulgation and exercise of such expansive immunity is in violation of international human rights standards and has rendered nonexistent the right of Kosovars to seek a remedy for violations of their fundamental rights.

The courts have declined to take an active role and act as a counterbalance to the power of the SRSG. Expectations that the local judiciary would grasp and interpret human rights principles, assert its authority over the SRSG, and provide a remedy may have been unrealistic in light of the *realpolitik* of the Kosovo community. UNMIK represents the international

82. See UNMIK, *supra* note 69.

83. UNMIK/REG/2000/47, *supra* note 58.

84. See Ombudsperson Institution in Kosovo, *Elife Murseli Against the United Nations Mission in Kosovo* (Dec. 10, 2001), available at http://www.ombudspersonkosovo.org/upd_04/murseli91201.doc.

community that came to assist the Kosovars in developing their own democratic autonomy, and KFOR was to protect Kosovo from the return of the Serb regime. However, even with the inclusion of international judges and prosecutors, the judiciary has mostly refused to take on executive and legislative power or to enforce international human rights law. In individual cases where courts have initiated their role in this regard, those decisions have not been respected.⁸⁵ Needless to say, UNMIK itself, despite being made aware of the ramifications of its assertion of immunity, has taken no action to demonstrate that it, too, is bound by the rule of law.

2. *Judicial Independence and Impartiality*

The independence and impartiality of the judiciary is the basis for its legitimacy in a democratic state. The way in which the judiciary and prosecution services have been established by UNMIK has caused concern regarding the independence of the courts. The ad hoc process for the introduction of internationals into the system has not achieved the goals that many advocates had hoped for. Rather, the process has created the potential for harm to the local community's perception of justice because of a seemingly parallel international court system with ties to the executive.

The lack of any meaningful disciplinary mechanism for judges raised concerns in early 2001 regarding the institutional independence of the judiciary. These were addressed in part by the creation of a Judicial Inspection Unit ("JIU") within DJA and the Kosovo Judicial and Prosecutorial Council ("KJPC") established by Regulation 2001/8.⁸⁶ The KJPC, which provides recommendations to the SRSG on the discipline and removal of local judges, has local as well as international involvement, including minority representation, and has begun to function effectively.⁸⁷ Local inspectors, accepting a difficult job, have been integrated into the JIU, although there are still too few. Recent reports indicate that the length of appointment of the local judiciary is being addressed, and current appointments will last until the end of the international mandate.⁸⁸

The fact that the KJPC is only a consultative body and not truly independent from the executive, and that the SRSG has legislated for himself the power to remove local judges and prosecutors on his own motion, without any recommendation by the KJPC, is troubling. There is no way for a judge or prosecutor to challenge the KJPC's recommendation or the SRSG's decision. The JIU remains distant from the population because there is no clear

85. The case of Shaban Beqiri and Xhemal Sejdiu, discussed above, provides an example. See *OSCE LSMS July 2000 Rev.*, *supra* note 34.

86. UNMIK/REG/2001/8, *supra* note 30.

87. See LEGAL SYS. MONITORING SECTION, ORG. FOR SEC. & COOPERATION IN EUR., KOSOVO: REVIEW OF THE CRIMINAL JUSTICE SYSTEM (Sept. 2001–Feb. 2002) at http://www.osce.org/kosovo/documents/reports/justice/criminal_justice4_eng.pdf (as of January 2002, the KJPC had adjudicated ten cases resulting in six removals, two reprimands and warnings, and two acquittals).

88. See AM. BAR ASS'N, *supra* note 60, at 4.

way for the public to address complaints to it and it remains within the increasingly internationalized DJA of Pillar I.

Positive steps towards ensuring the institutional independence of the local judiciary have been overshadowed by the establishment of an international judiciary without any institutional guarantees of independence. International judges and prosecutors are hired as UN employees and are subject to six-month renewable terms in office. There is no disciplinary mechanism by which complaints can be brought against them. The procedures of disqualification of judges for partiality do not apply to internationals. Although the OSCE has recommended that international judicial actors be subject to the same requirements of tenure, accountability, and discipline as the locals, including investigation by the JIU and the KPJC, the SRSG has taken no such action.⁸⁹

The random allocation of cases is considered an important mechanism in ensuring the appearance as well as the reality of the courts' independence. Within the regular court system, the practice of discretionary allocation by the president of the court is being addressed to ensure random case assignment. However, there is no guarantee of the perception of independence regarding the appointment of international judges and prosecutors to cases; the international judges may select which cases they take and the executive may directly appoint them to individual cases under Regulation 2000/64 On the Assignment of International Judges/Prosecutors and/or Change of Venue.⁹⁰ There are no enforceable criteria for executive decisions about which cases have international judges and prosecutors or which individual judges and prosecutors get assigned. Ironically, the stated objective of the regulation, to ensure independence and impartiality, has garnered a perverse result. The lack of any mechanism to ensure a random assignment of judges to cases creates the perception that the executive may interfere at any time with any given case.

In addition to the institutional mechanisms that have allowed for room for executive interference into the judicial function, there have been concerns that the executive has interfered directly with the decisions of judges in specific cases. For example, in June 2000, in the case of an African international staff member of the International Organization for Migration "extradited" from Kenya and detained in Kosovo, the DJA, after meeting with the SRSG, was directly involved in attempting to guide the decision of the local investigating judge and control the nature of the information provided to the detainee's wife. Although there has been some anecdotal information published on this issue, little information has been disseminated about the extent of direct executive interference in judicial decisions in specific cases.⁹¹

89. *See id.* at 43.

90. UNMIK/REG/2000/64 (On the Assignment of International Judges/Prosecutors and/or Change of Venue), 15 Dec. 2000.

91. *See* AM. BAR ASS'N, *supra* note 60, at 30–31.

III. THE CRIMINAL JUSTICE SYSTEM

In 1999 UNMIK had to develop a justice system from scratch. UNMIK hired Kosovo Albanian judges and prosecutors who had not practiced law for ten years. UNMIK was also faced with a severely diminished law enforcement and forensic capability. However, the most pressing question was how to resolve the cases of Kosovo Serbian alleged war criminals arrested following the arrival of UNMIK. With the mission promoting the need for a multi-ethnic Kosovo, its approach to these sensitive cases could have proved pivotal in its attempts to reconcile the two communities as well as fostering respect for the rule of law.

Yet UNMIK produced no coherent strategy for the justice sector.⁹² Its approach was short term, in that it was reactive rather than thoughtful and deliberative. In addition to this posture, UNMIK failed to take into account the chronic and systemic problems inherent in a legal system without a culture of due process rights. Most Kosovo Albanian lawyers were poorly skilled and had no understanding of human rights law or professional legal ethics.⁹³ Law enforcement and forensic tools were not effectively developed to assist the courts. Legal initiatives were not explained to local legal actors or the population at large. And UNMIK's approach to the war crimes cases was clearly lacking in strategic vision. Evidence of judicial bias against Kosovo Serbs, though publicly acknowledged by UNMIK, did not bring their trials to a halt, and the introduction of international judges and prosecutors initially proved futile due to a vague mandate and limited role.⁹⁴ The miscarriages of justice that followed would later be overturned, only fuelling tension between the ethnic communities. UNMIK's approach destroyed the opportunity for the courts to dispense justice fairly and effectively. This ultimately hampered the justice system's capacity to meet its obligations under international human rights law.

A. *Legal Systems Development*

1. *Training*

In the period between 1989 and 1999, most former Kosovo Albanian judges and prosecutors were not afforded the benefit of using their legal skills or continuing their legal education. Equally troubling was the region's

92. For a similar UN approach to the war crimes cases in East Timor, see Suzannah Linton, *Prosecuting Atrocities at the District Court in Dili*, 2 MELB. J. INT'L L. 414 (2001).

93. See ORG. FOR SEC. & COOPERATION IN EUR., OBSERVATIONS AND RECOMMENDATIONS OF THE OSCE LEGAL SYSTEMS MONITORING SECTION: REPORT ONE—MATERIAL NEEDS OF THE EMERGENCY JUDICIAL SYSTEM 49–54 (1999), at <http://www.osce.org/kosovo/documents/reports/justice/report1.htm> [hereinafter *OSCE LSMS: Report 1*].

94. See *id.* at 58; LEGAL SYS. MONITORING SECTION, ORG. FOR SEC. & COOPERATION IN EUR., KOSOVO'S WAR CRIMES TRIALS: A REVIEW (2002), at http://www.osce.org/kosovo/documents/reports/human_rights/10_WarCrimesReport_eng.pdf [hereinafter *OSCE LSMS War Crimes Report*].

past disregard for international human rights law.⁹⁵ Prior to the arrival of UNMIK, the local judiciary had no exposure to these laws or to other modern European laws and procedures.

The political urgency to create some semblance of a legal system drove UNMIK to proceed with appointing judges and prosecutors without first establishing some form of legal training on the applicable law, legal ethics, and the role of human rights law and standards. The Kosovo Judicial Institute of the OSCE organized a two-day workshop for all legal professionals in November of 1999, but judges and prosecutors were not selected until December 1999. Between then and the end of January 2000, when the first court became operational, UNMIK provided no legal training.

In May 2000, judges and prosecutors received their first legal training at a joint Council of Europe/OSCE seminar on Articles 5 and 6 of the ECHR.⁹⁶ Similar training took place in September 2000, and induction training for newly appointed judges and public prosecutors took place in November 2000. In March 2001, KJI provided training on the FRY Criminal Procedure Code ("CPC") for both local and international judges and prosecutors, though most internationals did not attend.⁹⁷

The legal training failed to improve the quality of judicial proceedings.⁹⁸ First, the training programs focused on European human rights law jurisprudence, an unknown field to local lawyers. Rather than being informed on the relevant international case law, Kosovo legal professionals needed instruction on applying such standards in the courtroom. In particular, judges needed to know how human rights law can be used to fill gaps in domestic law, such as the right to *habeas corpus*, or to void incompatible provisions in the domestic law, such as the failure to afford detainees a right to counsel on arrest.

Judges, prosecutors, and defenders also required training on basic legal skills, such as the questioning of witnesses, legal reasoning, the development of evidence, and the role of professional ethics. Inadequate questioning at the investigative stage can have a debilitating effect on the chances for obtaining a legally and factually sound verdict. Indeed, poorly drafted written verdicts, which fail to adequately summarize the facts or explain the legal elements of the crime, would in due course result in numerous reversals on appeal.

Finally, there was little follow-up to the Council of Europe/OSCE training, with few visits to courts by KJI or OSCE staff to assess where improvements were needed. Assessments were made pursuant to concerns raised in reports issued twice a year by the OSCE's Legal Systems Monitor-

95. *Report of the Secretary-General*, *supra* note 9.

96. *See OSCE LSMS Feb. 2001 Rev.*, *supra* note 44, at 40.

97. *Id.*

98. For an exhaustive review of the chronic problems identified in the Kosovo criminal justice system, *see OSCE LSMS July 2000 Rev.*, *supra* note 34; *OSCE LSMS Feb. 2001 Rev.*, *supra* note 44.

ing Section ("LSMS"), an inadequate response to a critical part of the mission's goals. The OSCE, which was primarily responsible for legal training, failed to address these issues. The result was a transitional judicial regime that continued to apply laws that were incompatible with basic international human rights law.

2. *KFOR*

KFOR was mandated with responsibility for ensuring peace and security in the region, and prior to the arrival of UNMIK police, effected hundreds of arrests and detentions. Given its capacity, KFOR performed reasonably well in keeping the peace, but its peacekeeping role did not include criminal investigations, collection of evidence, or forensic analysis, and it is these functions that were needed most in the first six months. The failure to examine sites of alleged war crimes speedily and undertake general evidence gathering would come to debilitate the chances of success in the domestic war crimes and other trials.

3. *Law Enforcement*

Though KFOR deployed with rapid speed, the arrival of UNMIK police was slow and poorly organized. Its authorized strength was 4,781 within the first twelve months of the mission, but the number deployed was half that.⁹⁹ Some countries sent officers who spoke no English, and had no experience with criminal investigations or crowd control.¹⁰⁰ No deploying country provided pre-entry training on the applicable law, on international human rights standards, or on local culture. UNMIK police received copies of the OSCE compilation of applicable laws, but its distribution was as inconsistent as its application.

The domestic applicable law proved troublesome, most particularly for law enforcement from common law jurisdictions. The criminal procedure code did not provide for police warnings on arrest or during police interrogation. The code did not make reference to a right to counsel prior to being brought before an investigative judge. The domestic law states that comments made by a defendant in the course of an interrogation were not admissible in court, though, critically, other evidence that was subsequently developed through the interview often was.¹⁰¹ UNMIK police officers took full advantage of this clear gap regarding the rights international law affords detainees: UNMIK police officers from the United States, for example, began administering polygraph tests to defendants. It would be two years be-

99. Interview with senior UNMIK police official, in Pristina, Kosovo (Sept. 2000).

100. Observations by the authors, in Pristina, Kosovo (Sept. 2000).

101. 1974 CRIMINAL PROCEDURE CODE, art. 83 (Fed. Republic of Yugoslavia) [hereinafter CPC].

fore UNMIK would promulgate a regulation that afforded detainees the right to counsel on arrest.¹⁰²

The use of informers, police infiltration, or other surveillance techniques, common in both common law and civil law jurisdictions, were not utilized or developed in any coherent manner by UNMIK police. A reactive approach to law enforcement and a failure to develop a form of investigation that included a surveillance capacity further hindered the effective prosecution of criminal cases.

4. *Protection of Victims and Witnesses*

The participation, cooperation, and assurance of veracity on the part of victims and witnesses would be crucial to the functioning of the system as a whole, particularly in light of the lack of forensic evidence. Public reports dating from early 2000 raised this issue regarding war crimes trials and the perpetration of ethnically motivated crimes.¹⁰³ It was highlighted early on that victims and witnesses might fear reprisal for providing information to the police and that UNMIK police could not provide any safeguards. As the system developed, victim and witness testimony was often retracted, inconsistent, or modified during the course of the proceedings, leading to unreliable results in cases. The lack of services for victims and witnesses disproportionately affected those who were most vulnerable and disenfranchised in the community, such as female victims of sexual and domestic violence. There was a substantial need to undertake confidence-building measures to engender community trust in the system and to develop meaningful mechanisms to ensure victim services and safety. However, no steps were taken on this issue in the initial stages of developing the judiciary and law enforcement.

With the promulgation of Regulation 2001/4 On the Prohibition of Trafficking in Persons in Kosovo, some victim protections were instituted in regards to this important human rights problem.¹⁰⁴ However, no resources were put towards ensuring the enforcement of these provisions; they remain, for the most part, only aspirational at this writing. Even the practical issues of ensuring translation for victim witnesses in a language they understand has not been effectively addressed by DJA. In 2001, UNMIK police also created a witness protection program modeled on the United States approach.¹⁰⁵ This program is not integrated into the court system, fails to reflect the reality of the majority of crime in Kosovo, is totally without any local involvement, and is, therefore, likely unsustainable. Early recognition of and coherent planning for integrating access to justice and fair treatment

102. UNMIK/REG/2001/28, *supra* note 59.

103. See AMNESTY INT'L, FEDERAL REPUBLIC OF YUGOSLAVIA, KOSOVO: RECOMMENDATIONS TO UNMIK ON THE JUDICIAL SYSTEM (2000), available at <http://www.web.amnesty.org/ai.nsf/index/EUR700062000>.

104. UNMIK/REG/2001/4 (On the Prohibition of Trafficking in Persons in Kosovo), 12 Jan. 2001.

105. Interview with UNMIK police official, in Pristina, Kosovo (Summer 2001).

of victims, and corresponding protections for witnesses, could have greatly improved the effectiveness of the criminal justice system.

5. *Forensics*

Though there was much confusion over the applicable law and the role of international fair-trial standards, there was little doubt that UNMIK police were severely hampered in their investigative and forensic capabilities. In the critical period between June 1999 and December 1999, UNMIK police were without a "scenes of crimes" unit that would systematically collect forensic and other physical evidence. This remained the case for two years. Law enforcement was working with neither ballistics nor blood and fiber expertise. Forensic evidence collected, usually weapons or bullets, was sent to Bulgaria and sometimes Germany for forensic analysis. The few reports that did come back were cursory examinations of the evidence, often not more than one paragraph, and therefore lacked evidentiary weight. Defense counsel were in no position to challenge the reports' conclusions because there was no local expertise to call upon. Requesting the court to order the attendance of a foreign expert was unrealistic.¹⁰⁶

This lack of forensic support proved most devastating in the war crimes and rape cases. In such cases, the existence and quality of medical and forensic evidence is often a crucial component. Though investigators from the International Criminal Tribunal for the former Yugoslavia ("ICTY") conducted extensive forensic examinations of sites critical to their investigations, no such approach was adopted by UNMIK police for the war crimes cases that would be tried locally. Ordinarily, this role would be within the exclusive domain of an investigative judge, who would direct police and forensic experts. But given the judicial vacuum that existed in 1999 and the inexperienced judges appointed in 2000, UNMIK was under an obligation to take the lead and provide the necessary tools to ensure that investigators, UNMIK police, and the judiciary all had the capacity to conduct sophisticated evidence collection. It did not do so. Two years into the mission there was still no dedicated facility for the examination of rape victims. Though rape kits had been provided to regional UNMIK police stations, no training was given as to their use.¹⁰⁷ Medical reports, if actually produced in court, were brief and lacking in sufficient detail.¹⁰⁸

Due to logistical and financial constraints, Pristina-based doctors would not attend crime-scene investigations and would often refuse to testify in court. Without the cooperation of local doctors, and with little follow-up by UNMIK police and judicial officials or defenders, potentially critical forensic information did not reach the court. This endemic problem was high-

106. For a detailed look at cases affected by the lack of forensic capabilities, see *OSCE LSMS Feb. 2001 Rev.*, *supra* note 44, at 42.

107. Interview with UNMIK police official, in Pristina, Kosovo (Spring 2001).

108. For further details on rape cases, see *OSCE LSMS Feb. 2001 Rev.*, *supra* note 44, at 44.

lighted in the Beqiri and Sopi case. More than a year after the indictment of two men for attempted murder, it emerged that the victim, mistakenly believed to be a Kosovo Serb, had been taken to the Pristina hospital, and had in fact died the following day. The hospital failed to provide this information to the police, the court, or defense counsel, and the legal actors did not follow up on the fate of the victim.¹⁰⁹

The impact of the lack of such resources on the criminal justice system cannot be underestimated. In a period covering more than two years, the role played by forensic evidence and other investigatory techniques was nominal. Investigative judges and trial courts would come to rely on the witness testimony of the relevant parties involved, with no supporting or corroborative evidence. Given the likelihood of biased testimony in rape cases and inter-ethnic criminal trials, in particular the war crimes trials, the role of the international judges and prosecutors would be pivotal.

6. International Judicial Actors

In February 2000, Mitrovica (a city at the northern edge of Albanian-controlled areas and long a symbol of ethnic division) saw an explosion of violence that resulted in a number of deaths and injuries. Following these incidents and allegations of a judicial failure to investigate them, an international judge and prosecutor were appointed to the Mitrovica District Court. UNMIK Regulation 2000/34 extended to UNMIK the power to appoint international judges and prosecutors to all courts in Kosovo, but their introduction was ad hoc.¹¹⁰ Although the regulation provided greater discretion in the use of international judges and prosecutors, their presence in war crimes investigations and trials was almost nonexistent.

Following criticism from the Kosovo Serb community and a pending hunger strike by Kosovo Serb inmates, in April 2000, UNMIK introduced one international judge into every trial panel.¹¹¹ But the steps taken proved inadequate because they failed to alleviate the perception or reality of ethnic bias: a trial panel consists of five decision makers, all of whom have a vote. DJA stated that this approach was driven by the lack of international judges, which was puzzling given the number of European states willing to provide significant judicial assistance.¹¹² Moreover, there was no reason why these trials could not be delayed pending the recruitment of new interna-

109. *OSCE LSMS Daily Reports* (on file with authors).

110. UNMIK/REG/2000/34 (On the Appointment and Removal from Office of International Judges and International Prosecutors), 27 May 2000 (amending UNMIK/REG/2000/6).

111. *OSCE LSMS July 2000 Rev.*, *supra* note 34, at 69.

112. *See, e.g.*, News Release, UK Foreign and Commonwealth Office, Foreign Secretary Reports on Talks With Kofi Annan (Mar. 14, 2000), available at <http://www.britain.it/news/00mar/014e.htm>. UK Foreign Secretary Robin Cook stated, "I would expect shortly to see at least a dozen, perhaps more, of the British legal profession working to help bring justice to Kosovo. The first should arrive before the end of next month."

tional judges. There was no call from the Kosovo Serb community or from defendants to expedite trials before majority ethnic Albanian trial panels.

Although the limited number of internationals posed a problem for UNMIK, a more serious issue was identifying candidates with relevant expertise for these cases. Of the internationals that were appointed between 1999 and 2001, few had conducted trials involving serious criminal offenses and none had any practical experience in, or knowledge of, international humanitarian law. Indeed, one international judge's experience was exclusively in riparian rights. Furthermore, no attempts were made to provide pre-entry training on either humanitarian law or the FRY CPC. In September 2000, the ICTY held a training session in Kosovo on humanitarian law for both judges and prosecutors. The majority of international judges and prosecutors did not attend. The recruitment of adequately qualified international judges and prosecutors did not occur until 2001–2002.

The lack of adequate translators and low pay for local judges complicated the establishment of a working relationship between local and international judges. Even after pay increases, district court judges receive a yearly salary of approximately U.S. \$5,000 compared to the approximately U.S. \$100,000 paid to international judges.¹¹³ International judges and prosecutors, who received round-the-clock armed protection, could often be seen moving through the region with a phalanx of bodyguards, staff, and vehicles. No such service was afforded local judges, more likely to be victims of violence and intimidation.

7. *UNMIK Consultation with Local Judicial Officials*

Following the appointment of judges and prosecutors to the regular courts in 1999, UNMIK did take steps to consult local judicial officials on a regular basis, predominately in relation to administrative matters. Substantive legal initiatives or policy-related matters were rarely discussed with or disclosed to local officials. The most controversial of these initiatives were Regulation 1999/1¹¹⁴ and Regulation 2000/64,¹¹⁵ on the Authority of the Interim Administration in Kosovo and the Assignment of International Judges/Prosecutors, respectively.

Primarily to address the concerns of judicial bias raised in the war crimes cases, Section 1 of Regulation 2000/64 grants to prosecutors, the accused, or defense counsel the right to petition the DJA for the assignment of an international prosecutor and a three-judge trial panel that consists of a majority of international judges where this is "necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice."¹¹⁶ In the absence of a petition, DJA may act on its own motion.

113. See AM. BAR ASS'N, *supra* note 60, at 20.

114. UNMIK/REG/1999/1, *supra* note 21.

115. UNMIK/REG/2000/64, *supra* note 90.

116. *Id.*

Prior to its promulgation, UNMIK made no attempt explain to local judges, politicians, or the general public the rationale behind the regulation. This resulted in widespread resentment throughout the ethnic Albanian community. In court, local judges refused to be recruited for the Regulation 64 panels and the Kosovo Supreme Court sent a letter to the SRSG stating that the regulation was a violation of international law. In the war crimes trial of Sava Matic, which was heard by a Regulation 64 panel, the third member of the trial panel, an ethnic Albanian, called a press conference and issued a public dissent to the acquittal of Matic.¹¹⁷

Adequate consultation prior to promulgation would probably have engendered some judicial support for Regulation 64, given that the local judiciary was generally supportive of the Kosovo War and Ethnic Crimes Court ("KWECC"), for which UNMIK did much advance work with local actors. The numbers of international judges and prosecutors has increased rather than decreased as local capacity has developed. The mentoring aspects of the international presence, cited as one of the reasons for their involvement, has been almost nonexistent. The use of substantial resources in developing an enhanced international judiciary indicates a lack of trust in and attention to the local judges and prosecutors and a dismissive attitude towards the long-term development of a local justice system.

With the creation of Pillar I and the Department of Justice in 2001, the exclusion of locals in the administration of justice increased. This move indicated that there was little faith or interest in building local capacity to administer justice fairly and effectively. Despite UNMIK's mandate to develop the capacity of the locals to administer democratic institutions, including the justice system, there is no Kosovar leadership in the DJA. The Ministry of Public Services within the Provisional Government has some authority regarding the logistical administration of the justice system. However, the attitude among internationals in UNMIK seems to be that this department will have no impact on substantive judicial policymaking.

Although some international control over the justice system should continue to ensure a balance of power between ethnic and regional interest groups, there should be enhanced efforts to ensure local decision making and capacity building. The decision regarding UNMIK's continued administration of law enforcement and the judiciary was never clearly explained within the mission, to the local legal community, or to the public whom the police and courts serve. But this failure to engage local legal actors is part of the broader problem of UNMIK's failure to foster respect for legal institutions and the rule of law.

117. See *Decision to Acquit Serb for Kosovo War Crimes Absurd*, AGENCE FRANCE-PRESSE, Jan. 30, 2001. Following a successful appeal by the public prosecutor, Matic was acquitted on retrial.

B. War Crimes Trials¹¹⁸

Successor criminal trials are expected to lay the foundation of the transition by expressing disavowal of predecessor norms, yet for such trials to realize their normative potential, they must be prosecuted in the keeping with the full procedural legality associated with working democracies in ordinary times.¹¹⁹

Within six months of UNMIK's arrival, law enforcement had detained more than forty persons for war crimes-related offenses.¹²⁰ During this period there was much discussion among UN policymakers as to whether there should be an international judicial presence in these cases, but no policy was developed.¹²¹ Though no official explanation was provided, UN officials have informally stated that the reasoning behind the decision to permit local courts to investigate such cases was to instill in the Kosovars a sense of local ownership in the justice system.¹²²

There was some movement on the issue when, in December 1999, the SRSG announced publicly that UNMIK was creating a domestic court, KWECC, to try war criminals and ethnically motivated crime.¹²³ The catalyst for this decision was the growing anecdotal evidence from KFOR and OSCE human rights monitors that there was judicial bias against Kosovo Serbs and other minorities in judicial proceedings. The most striking example was the Momcilovic case.

1. The Momcilovic Case

In July 1999, one month after NATO's arrival, and at the height of ethnic tension, three members of the Momcilovic family, Kosovo Serbs, were arrested in relation to an inter-ethnic incident. Four ethnic Albanians asserted that they arrived at the Momcilovic home in order to have their car repaired, when, without reason, the Momcilovic family opened fire, killing two men and seriously injuring two others. The ethnic Albanians, who denied being in possession of weapons, were released from custody. The Momcilovics were indicted for murder, attempted murder, and weapons possession and ordered detained. One of the four ethnic Albanian males was indicted in relation to the attempted murder of a U.S. KFOR soldier during the exchange of gunfire.¹²⁴

Found at the crime scene by U.S. KFOR was a video, which had recorded the salient parts of the gunfight. Although the videotape did not show the

118. See generally OSCE LSMS War Crimes Report, *supra* note 94.

119. Teitel, *supra* note 45, at 2037.

120. See OSCE LSMS July 2000 Rev., *supra* note 34, at 74.

121. Interview with official at the Office of the SRSG, in Pristina, Kosovo.

122. Interview with senior DJA official, in Pristina, Kosovo (Apr. 2001).

123. See OSCE LSMS July 2000 Rev., *supra* note 34, at 71.

124. *Id.* at 65; Org. for Sec. & Cooperation in Eur., Justice on Trial: The Momcilovic Case (Aug. 16, 2000) (unpublished manuscript) (on file with authors) [hereinafter Momcilovic].

killing of the two men, it did undermine the prosecution's case and support the defense's case of lawful self-defense by showing the arrival of the ethnic Albanians at the Momcilovic home, armed and attempting to break into the premises, followed by an exchange of gunfire.

Although aware of the video's existence, the local investigative judge and public prosecutor refused to watch the video or enter it into evidence. The FRY CPC obligates the court to ensure that the "subject matter is fully examined, that the truth is found . . ." ¹²⁵ Given that the video undermined the prosecution's case and supported the defense case of lawful self-defense, it was arguably admissible under the above provision.

Following an aborted first trial, and prior to the second trial, more than one year after arrest and detention, U.S. KFOR produced more than 100 pages of witness statements from U.S. soldiers present at the crime scene in 1999, in which they admitted to the killings and attempted murders for which the Momcilovics were indicted.¹²⁶ This delay was never explained. The statements also indicated that U.S. KFOR had destroyed the weapons and ammunition recovered from the crime scene and had not conducted autopsies. These revelations notwithstanding, the local prosecutor persisted. The ethnic-Albanian males, now prosecution witnesses, reasserted their earlier claim of being unarmed and acting innocently. The international judge, who was president of the trial panel, did not take steps to halt proceedings but did introduce the video. Three weeks later the Momcilovics were acquitted of murder and attempted murder, convicted of weapons possession, and sentenced to twelve months' custody.¹²⁷

Partly as a result of the early evidence of bias exhibited in this case, UNMIK announced in December 1999 that the KWECC would be composed of a majority of international judges and prosecutors who would try war crimes cases. Both the local and international community, including human rights organizations, welcomed the announcement.¹²⁸ Pending the establishment of KWECC, in May 2000, the SRSG informed Kosovo Serb detainees that they would receive speedy trials before a mixed trial panel that included internationals and Serbs.¹²⁹ Such trial panels never materialized. In September 2000, and without public explanation, KWECC was abandoned. Despite acknowledging, in public statements accompanying the announcement of KWECC, the potential for judicial bias in war crimes cases, in the

125. CPC art. 292(2).

126. *GI's Testimony May Clear Serbs in an Albanian's Death*, N.Y. TIMES, July 25, 2000, at A3.

127. See Momcilovic, *supra* note 124. Following the trial, UNMIK took no steps to charge the prosecution witnesses with weapons possession, conspiracy to murder, or perjury. No steps were taken to investigate the local prosecutor for malicious prosecution or even an ethics violation, evidence of which appeared overwhelming. Moreover, the ethnic-Albanian male indicted in relation to the attempted murder of U.S. KFOR soldiers, who was released from custody in 1999, has yet to stand trial.

128. See AMNESTY INT'L, *supra* note 103. See also *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. SCOR, 45th Sess., ¶ 60, U.N. Doc. S/2000/538 (2000).

129. See Press Release, United Nations, Kosovo Detainees Agree to End Hunger Strike (May 22, 2000), available at http://www.un.org/peace/kosovo/news/99/may00_4.htm#Anchor43.

nine months that preceded the September announcement, UNMIK took no steps to halt the war crimes investigations or trials of Kosovo Serbs by ethnic Albanians.

2. *The War Crimes Investigations*

In a civil law system, fact gathering in a criminal case is done at the investigative stage by the examining judge. In Kosovo, the newly appointed judges had limited experience in conducting criminal investigations and between 1999 and 2001 took few steps to investigate the war crimes cases they were assigned. Examination of witnesses was cursory and statements implicating a defendant were not adequately explored in order to determine if evidence needed to be confirmed, developed, or discarded. The failure to gather facts adequately at the investigative stage led to problems at trial, where witnesses would often expand on earlier testimony, leaving the trial panel to determine if a witness was exaggerating. Effective questioning at the investigative stage may have alleviated these problems.

The failure to investigate adequately prior to indictment was exacerbated by chronic delays in the judicial investigations. Regulation 1999/26 mandated that in serious cases detainees must be indicted within twelve months of arrest. This was an extension of the domestic law, which required an indictment within six months.¹³⁰ As the twelve-month deadline approached, all Kosovo Serb defendants were indicted. Delays in their indictments seemed to have had less to do with problems in collating evidence and more with taking revenge on an ethnic group. In one case, three brothers were arrested on October 7, 1999 and charged with war crimes.¹³¹ Within a month of arrest, the examining judge ceased the investigation. There were no further developments in the case until October 2000, when, without explanation, the public prosecutor requested an extension of the investigation and detention, which was granted by a panel of judges that included an international judge. Because it was beyond twelve months, this extension order was in violation of Regulation 1999/26.¹³² When the error was pointed out to DJA, the defendants were released and not re-arrested.¹³³

According to the applicable law, a defendant can only be indicted if there is "sufficient evidence to warrant a reasonable suspicion" that the defendant had committed a crime.¹³⁴ The FRY CPC provides various safeguards to ensure that an insufficient investigation will not lead to an indictment, but will trigger either a request for further investigation or abandonment of the

130. UNMIK/REG/1999/26 (On the Extension of Periods of Pretrial Detention), 22 Dec. 1999, § 1.

131. *OSCE LSMS Feb. 2001 Rev.*, *supra* note 44, at 79.

132. UNMIK/REG/1999/26, *supra* note 130.

133. *OSCE LSMS Feb. 2001 Rev.*, *supra* note 44, at 79–80. DJA offered compensation to the defendants.

134. CPC art. 270.

case.¹³⁵ Prior to trial, the court also has the power to reject an indictment for insufficiency of evidence.¹³⁶ In cases concerning Kosovo Serb defendants, none of these safeguards seemed to apply. With little oversight by the international judges or prosecutors, and despite the lack of evidence, those Kosovo Serb defendants who had not escaped did in fact stand trial.¹³⁷

3. Trial Panels

In November 1999, local courts began issuing war crimes-related indictments ranging from aggravated murder to genocide.¹³⁸ The trial of Milos Jokic, indicted for genocide, was the first such trial and took place in May 2000 before a majority-local trial panel and local prosecutor.¹³⁹ Jokic was convicted of war crimes and sentenced to twenty years' imprisonment. His appeal before a majority international panel succeeded on the grounds of insufficient evidence. He was retried before a Regulation 64 panel and acquitted.¹⁴⁰ The trial of Dragan Nikolic followed, but before an exclusively local panel and prosecutor.¹⁴¹ He too was convicted and sentenced to twelve years' imprisonment. Nikolic's conviction was reversed on appeal, and he was acquitted on a retrial before an all-international trial panel.¹⁴² Indictments and trial dates continued, with no effort by DJA to bring coherence to the situation. The makeup of Kosovo Serb defendants' trial panels appeared to be determined more by fate than reason. Those fortunate enough to have been overlooked by local judges setting trial dates or indicted after late 2000 could apply to be tried by a Regulation 64 panel.

But the use of Regulation 64 panels caused much friction within the Kosovo Serb community. This was primarily due to DJA's failure to ensure that *all* war crimes-related offenses qualified for an international prosecutor and majority international trial panel. DJA also failed to issue procedural guidelines setting out the basis on which the regulation would be administered. The end result was that some alleged war criminals successfully petitioned for Regulation 64 panels, while others would be tried before a majority-international panel and local prosecutor. While the participation of a local prosecutor as co-counsel with an international should be encouraged, evidence suggested that ethnic Albanians could not conduct such a prosecu-

135. CPC art. 174.

136. CPC art. 270(4).

137. *Mass Jail Break*, BBC WORLD NEWS, Sept. 3, 2000, available at <http://news.bbc.co.uk/2/hi/world/europe/908620.stm>. By September 2000, more than twenty Kosovo Serb detainees had escaped from UNMIK detention facilities.

138. See OSCE LSMS War Crimes Report, *supra* note 94, at 9.

139. *Id.* at 17.

140. See UNMIK, *Milos Jokic, Suspect of Genocide, Released Due to Lack of Evidence* (May 2, 2002), available at <http://www.unmikonline.org/press/2002/mon/may/lmm050502.htm>.

141. See OSCE LSMS War Crimes Report, *supra* note 94, at 12-13.

142. UNMIK, *Dragan Nikolic, Accused of Murder, Released by Gjilane Court* (Apr. 19, 2002), available at <http://www.unmikonline.org/press/2002/mon/apr/lmm190402.htm>.

tion fairly. Local prosecutors issued genocide indictments in four cases.¹⁴³ None were successfully prosecuted because, as either the trial or appellate court found, there was no evidence of genocide in these cases.

A few war crimes cases straddled the period of promulgation. This should not have barred DJA from intervening and suspending such cases, pending a Regulation 64 panel review, but they demurred. DJA took no steps to suspend, or to apply the regulation to, the trial of Momcilo Trajkovic, accused of committing one of the most serious war crimes in the region.¹⁴⁴ The trial began in November 2000 and continued until March 2001.¹⁴⁵ It was alleged that Trajkovic had ordered police forces allegedly under his control to commit widespread acts of murder, kidnapping, mistreatment, and expulsion. Trajkovic was also alleged to have collated lists of persons to be killed. During his trial, the local prosecutor introduced evidence of torture allegedly committed by the defendant in the 1980s.¹⁴⁶ This allegation did not form part of the indictment and appeared to prejudice the defendant's trial. In a case prosecuted by local counsel and before a majority local panel, Trajkovic was convicted and sentenced to twenty years' imprisonment. Before the Kosovo Supreme Court, the local prosecutor filed a request that the conviction be affirmed. The international prosecutor intervened and admitted trial error.¹⁴⁷ The appellate court reversed the conviction on the grounds that there was insufficient evidence.¹⁴⁸

Because Regulation 64 was promulgated at such a late date, all those tried prior to its promulgation were convicted.¹⁴⁹ Between 2001 and 2002, the Kosovo Supreme Court, majority-international, reversed most of these convictions and ordered re-trials on the grounds that there was insufficient evidence to convict.¹⁵⁰

4. Translations

Given the presence of international judges and prosecutors, adequate translation of witness testimony is critical. Trials involving internationals are conducted in three languages: English, Albanian, and Serbian. Because DJA had earlier failed to devise a strategy for these cases, no one had considered the question of professional translation, with the result that, when DJA appointed internationals to sit on cases, translators were chosen at random, either from court staff or the pool of DJA assistants. Due to the lack of translation equipment in 2000, translators would often sit with the interna-

143. OSCE LSMS War Crimes Report, *supra* note 94, at 34.

144. *See id.* at 24.

145. The Trajkovic case, like the other war crimes cases, was staggered so that trial dates would often consist of monthly hearings.

146. *See OSCE LSMS Feb. 2001 Rev.*, *supra* note 44, at 33.

147. OSCE LSMS War Crimes Report, *supra* note 94, at 24–25.

148. *Id.*

149. *See id.* at 54.

150. *Id.* at 48–49.

tional and convey testimony *sotto voce*. As a result, it was not possible for the legal parties to know whether the information being conveyed was accurate.

In due course, this approach was changed so that translated testimony could be heard in open court. It quickly became apparent that many of the translators failed to understand local dialects, in particular Kosovo Serb testimony (there was only one native Serb-speaking translator in the region). The result was a cacophony of voices attempting to determine the meaning of witness testimony. Eventually, translation equipment to facilitate simultaneous translation was retained, but problems persisted with the poor quality of translation and inadequate equipment that was either in insufficient quantity or failed to work because of electricity blackouts. These problems caused further delays to trials.

C. Fairness and Non-discrimination Generally

Although the prosecution of war crimes and other violations of humanitarian law is the *sine qua non* of fairness in transitional justice systems, it was clear from the beginning of the mission in Kosovo that, as with all other societies in transition, ethnic discrimination would not be the only major human rights issue encountered by the justice system. Discrimination or failure to appropriately address gender and juvenile justice and the mentally ill were quickly identified by parts of the international presence to be of vital importance to ensuring a fair criminal justice system. The cases facing the criminal justice system involving these groups were not negligible or extraordinary. From September 2000 to February 2001, the OSCE found that the number of serious criminal cases involving juveniles, excluding lower level crime, constituted twenty-three percent of all cases.¹⁵¹ During that same six-month period, sexual violence cases constituted twelve percent of all completed cases.¹⁵²

Efforts to concentrate on juvenile justice, spearheaded by UNICEF, led to the creation of a functioning task force and to training of the judiciary. The OSCE, in cooperation with UNMIK police and the International Organization for Migration, took the lead in tackling the issue of trafficking in women and other gender justice issues. Within the mental health field, a working group was established involving DJA's Penal Management section, doctors, and the OSCE. As a result, training, working groups, and draft legislation were implemented on many levels.

However, the overall impact of these initiatives, with the exception of the repatriation program for trafficking victims, has been questionable. One of the primary problems is that these areas, by their nature, are complex and must involve multi-sectoral policy and planning. It quickly became clear that there could be little change without a concerted effort across multiple

151. OSCE LSMS Feb. 2001 Rev., *supra* note 44, at 28.

152. *Id.* at 60.

fields and areas of responsibility. Despite the plethora of alternatives to detention in the law, without remedial programs for delinquent youth, juvenile judges had only so many options. Without services to address the medical and psychological needs of victims of domestic and sexual violence, these women had little legal hope. Persons with mental illness require medical treatment and deserve rights-based protections, even when they are alleged perpetrators of crime or a threat to themselves or others. In essence, without a functioning social services network and effective collaboration with criminal justice actors, the needs of these important groups in the criminal justice system could not be addressed.

Despite the seriousness of the situation, there was minimal meaningful involvement by DJA or the other top levels of the mission. The Administrative Department of Health and Social Welfare would, at times, participate in the working groups and initiatives. However, the social welfare side of the Department was severely under-staffed and under-resourced, particularly in regards to these areas. These groups simply were not a priority. As a result, when systematic change was necessary, there was no comprehensive approach and little political will to ensure that the underlying issues would be tackled. With major international agencies struggling to identify solutions, there were few avenues to reach the high levels of the mission. Even UNICEF, with the mandate to advise the SRSG on child protection directly, had trouble gaining access to and a response from the SRSG. Although substantial attempts were made by many organizations, they could not garner political support from the top levels of UNMIK. Consequently, the substantial human and material resources invested in improving the responses to these groups have not created meaningful change.

IV. HUMAN RIGHTS OVERSIGHT OF UNMIK

When the SG set out the objectives of the international presence in Kosovo in two reports to the UNSC, they clustered around the theme of fostering respect for the rule of law and for human rights.¹⁵³ Indeed, the SG explicitly stated that a "culture" of human rights was to be infused into all activities of the mission.¹⁵⁴ The human rights mandate was given, primarily, to the OSCE, though other essential human rights-related components were established.¹⁵⁵

The mission began with international actors' sincere attempts to take thoughtful approaches, based on human rights and rule-of-law principles. But as the mission matured, compliance with human rights standards by UNMIK and KFOR authorities declined, and the approach to criminal jus-

153. See *Report of the Secretary-General*, *supra* note 9; *Report of the Secretary-General Pursuant to Paragraph 10 of Security Council Resolution 1244*, U.N. Doc. S/1999/672 (1999) [hereinafter *Report Pursuant to Paragraph 10*].

154. See *Report of the Secretary-General*, *supra* note 9, ¶ 42.

155. See *Report Pursuant to Paragraph 10*, *supra* note 153.

tice became increasingly erratic. Executive detentions increased in use despite the presence of an international judiciary, consultation with local actors was rendered nearly obsolete, and the OSCE became increasingly irrelevant. As a part of its mandate, the OSCE was obligated to publicly report on the mission's compliance with human rights standards. Such reporting, privately considered too critical in UN circles, led to its marginalization.

The SG mandated the creation of an independent Ombudsperson Institution to investigate and publicly report on human rights abuses by UNMIK and all public entities in Kosovo.¹⁵⁶ Highly critical of the administration, the Institution was often ignored by the authorities. Similarly, the human rights components within the UN itself were ostracized. The Senior Human Rights Advisor to the SRSB left and was not replaced, and the SRSB's Office of Human Rights and Community Affairs was stripped of its human rights advisory role. Despite the clear mandate from the SG that this office ensure that legislation conformed to human rights standards, it, as well as the other components, was not consistently engaged in the formulation of legislation. The vigorous human rights mechanisms envisioned in the SG's report failed to fulfill their mandates, did not effectively engage the local population, and set a poor precedent for the role of human rights protections in future peacekeeping missions.

A. *The Human Rights Mandate*

The SG, in a report dated July 12, 1999, assigned the lead role of institution building within UNMIK to the OSCE and stated that one of its tasks would be human rights monitoring and capacity building.¹⁵⁷ The Report instructed UNMIK to develop coordinated mechanisms in order to facilitate monitoring of the respect for human rights and to "embed a culture of human rights in all areas of activity."¹⁵⁸ Specifically:

UNMIK will have a core of human rights monitors and advisors who will have *unhindered access* to all parts of Kosovo to investigate human rights abuses and ensure that human rights protection and promotion concerns are addressed through the overall activities of the mission. Human rights monitors will . . . report their findings to the [Deputy Special Representative for Institution-Building]. The findings of human rights monitors will be made public . . . and will be shared . . . with United Nations human rights mechanisms[.] UNMIK will provide a coordinated reporting and response capacity.¹⁵⁹

156. See *Report of the Secretary-General*, *supra* note 9.

157. See *id.*

158. *Id.* ¶ 42.

159. *Id.* ¶ 87. Emphasis added.

In a Letter of Agreement between the UN and the OSCE, it was agreed that the OSCE would develop mechanisms to ensure that the courts and other judicial structures operate in accordance with international human rights standards.¹⁶⁰ Though the OSCE had the human rights mandate, there were other human rights-related components to the mission.

The SG's report required that, as a part of the SRSG's executive office, a Senior Human Rights Adviser "ensure a proactive approach on human rights in all UNMIK activities and ensure the compatibility of regulations issued by UNMIK with international human rights standards."¹⁶¹ The SRSG's Office of Human Rights and Community Affairs ("OHRCA") was charged with advising the SRSG on human rights and minority-related issues. There was a Senior Human Rights Adviser from the initial stages of the mission until around March 2000. Thereafter, OHRCA was without the leadership of an experienced human rights lawyer. Within the UN administration, the OSCE established the Administrative Department for Democratic Government and Civil Society, which has been transformed into the Prime Minister's Office of Good Governance, Human Rights, and Gender under the local government structure.¹⁶²

OLA has exclusive authority to draft legislation, and yet it does not have a dedicated post for a human rights lawyer. Since 1999, OLA has not had an experienced human rights or criminal justice lawyer on staff. UNMIK police had a position for a human rights advisor to the Police Commissioner, which was filled and active from September 2000 until November 2001. Though not a component of the mission, the UN Office of the High Commissioner for Human Rights ("OHCHR") had a presence, and under their general mandate an obligation to monitor and report on human rights compliance.

The SG's July 1999 report further recognized that "a strong system of human rights protection offers accessible and timely mechanisms for the independent review, redress and appeal of non-judicial actions," and required that an Ombudsperson Institution be established as an independent body with jurisdiction over allegations of human rights abuses by "any person or entity in Kosovo."¹⁶³ The Ombudsperson was obligated to conduct investigations and make recommendations to authorities, including those "on the compatibility of domestic laws and regulations with recognized international standards."¹⁶⁴ The Ombudsperson was required to provide regular reports to the SRSG and make its findings public.¹⁶⁵

160. Letter from UN Department of Peacekeeping Operations to Knut Vollebaek, OSCE Chairman-in-Office (July 19, 1999).

161. *Id.*

162. UNMIK/REG/2000/40 (On the Establishment of the Administrative Department for Democratic Government and Civil Society), 10 July 2000.

163. *Report of the Secretary-General, supra* note 9, ¶ 89–90.

164. *Id.* ¶ 90.

165. *Id.*

B. Legal Monitoring

Monitoring of the judicial system and correctional service fell to the OSCE's Legal Systems Monitoring Section, the largest legal systems monitoring mechanism in any OSCE mission, and one of the largest in any peacekeeping mission in the UN's history. It was mandated to report on systemic violations of international law and gross violations of fair trial standards in individual cases. In March 2000, UNMIK formally recognized this monitoring role by promulgating a regulation that recognized the OSCE's responsibility "for the independent monitoring of the judicial system and correctional service."¹⁶⁶

LSMS primarily focused on war crimes cases, ethnically motivated crime, detention, the treatment of juveniles and the mentally ill, and victims of sexual violence. From October 2000, LSMS began issuing periodic public reports highlighting systemic human rights violations and abuses in individual cases.¹⁶⁷ Such reports were issued pursuant to the mandate to support UNMIK in the development of the judiciary and correctional service.

C. *The Marginalization of the Human Rights Mandate*

In 1999, human rights policy was often coordinated among the OSCE, OHCHR, UNMIK Police representatives, and OHRCA. Local actors were also, at times, consulted. For example, the JAC, which was comprised of members of the local legal and political community, was often involved in the review of draft legislation. In December 1999, a large Human Rights Conference of international experts and local human rights activists from all sectors of Kosovo society was held.¹⁶⁸ However, as time went on, the international human rights components of the mission, particularly the OSCE, did little to engage the local human rights community effectively on a policy level. Although working group initiatives did involve some local NGOs, few real connections and genuine working relationships were established with prominent Kosovo human rights groups. As with other parts of UNMIK, the human rights components also trivialized the local community and the importance of its sense of ownership and input.

The UN–OSCE agreements notwithstanding, LSMS monitors faced much opposition from court officials and correctional staff, both local and international. The central dispute related to the degree of access that should be afforded the monitors. LSMS considered "unhindered access" to mean access to all court records and detainees, albeit on a confidential basis. The OSCE took the view that monitoring under the mandate required an exhaustive analysis of cases that could not be achieved by simply watching trials because human

166. UNMIK/REG/2000/15 (On the Establishment of the Administrative Department of Justice), 21 Mar. 2000.

167. See, e.g., OSCE LSMS July 2000 Rev., *supra* note 34.

168. O'NEILL, *supra* note 41, at 130–31.

rights abuses in the context of the criminal justice system begin on arrest. Judicial officials considered access to court hearings sufficient under the mandate. DJA failed to intervene, claiming that to do so would interfere with the independence of the courts. Two years following the creation of LSMS, an agreement was reached with DJA under which monitors would be given broad access to relevant legal materials.

However, even after an agreement on access was reached, monitors again faced obstruction in 2002. International judicial officials attempted to restrict access of human rights monitors to investigatory hearings and information in cases of internationals charged with criminal conduct. In addition, when the OSCE began to introduce more coherent monitoring of law enforcement and security personnel, similar restrictions occurred. There has been little consistent and effective monitoring of the law enforcement agencies and their actions.

Questions of access and the nature of public reporting of institutional failings resulted in much friction among DJA, UNMIK police, and the OSCE. Identifying areas in need of judicial reform in a public document appeared to irk senior UN officials. Although publicly the mission appeared to welcome such self-scrutiny, internally what were intended as constructive critical insights into a developing justice system were taken as personal slights.

Since late 2000, OLA and DJA have been developing human rights and criminal justice policy often without any discussion with the human rights components of the mission, though consultation with UNMIK police and KFOR has taken place. The exclusion of the OSCE, in particular, appeared to be in reaction to its comments on critical criminal justice issues. Rather than seek an accommodation, OLA and DJA excluded the OSCE from the relevant working groups and failed to keep them informed of substantive developments.

Since March 2000, OHRCA has been crippled by the lack of a Senior Human Rights Advisor and as a result has had little impact on the development of policy in this area. In fact, the UN eventually abolished this human rights advisory component in the summer of 2001, resulting in the lack of any human rights input at the SRSB level. Similarly, OHCHR faded from view. Despite its global human rights mandate, it was unable to alter the course of UNMIK human rights policy.

It took considerable time and resources to develop the Ombudsperson Institution, which set about fulfilling its mandate in 2000.¹⁶⁹ The Institution has published numerous reports and investigated a significant number of cases. The Second Annual Report, covering 2001–2002 and published July 10, 2002, provides insight into the apparent disregard by UNMIK of the Institution's mandate.¹⁷⁰ The bitter report gives a list of all the various ac-

169. UNMIK/REG/2000/38, *supra* note 65.

170. OMBUDSPERSON INSTITUTION IN KOSOVO, SECOND ANNUAL REPORT 2001–2002 (2002),

tions taken by the Institution, and details the response, or lack thereof, from UNMIK. The response of the PDSRSG to the report was equally acrid and defensive, denying that UNMIK has responsibilities as a surrogate state and providing rosy responses to questions concerning the reality of human rights protection in Kosovo.¹⁷¹ This litany exposes a rift between UNMIK and the Institution and provides a gloomy picture of UNMIK's respect for human rights mechanisms.

The strongest indications of the marginalization of the human rights mandate in Kosovo and of the decrease in attention to human rights are the recent Reports of the Secretary General on UNMIK to the Security Council. Unlike initial reports about the mission, reports in 2002 do not even mention the state of protection of human rights and compliance with standards in Kosovo, but rather focus on law and order and the increasing use of international judges and prosecutors.¹⁷² These lie in stark contrast to the emphasis placed on respect for rule of law and human rights protection in the founding documents of the mission.

D. Legislative Compliance with Human Rights Standards

The failure of OLA to consult the relevant human rights experts in the mission and to ensure that draft regulations are vetted for human rights compliance resulted in regulations that violate basic human rights standards. Regulation 1999/26 amends the domestic law and empowers a court to extend pre-trial custody to twelve months in serious cases (the domestic law permits six months).¹⁷³ The practice of pre-trial detention pursuant to that regulation is in violation of Article 5(3) and (4) of the ECHR and Article 9(3) and (4) of the ICCPR in that the regulation fails to make adequate provision for the periodic review of the extension of custody time limits throughout the period of detention covered by the regulation. The regulation also fails to provide the detainee the right to initiate a review of an order for detention. At no stage is the detainee entitled to challenge the reasons for detention provided by either the investigative judge or the public prosecutor. During the drafting of this regulation, the Senior Human Rights Advisor to the SRSRSG, according to his mandate, made known to the OLA that this regulation, if promulgated, would not comply with international

available at <http://www.ombudspersonkosovo.org/doc/specpreps/Final2AnnualReport200210-07-02English.htm>.

171. Response from PDSRSG, Ombudsperson's Second Annual Report 2001–2002: Responses to Errors of Judgment and Fact (on file with authors).

172. See *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. SCOR, 57th Sess., U.N. Doc. S/2002/436 (2002); *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. SCOR, 57th Sess., U.N. Doc. S/2002/779 (2002); *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. SCOR, 57th Sess., U.N. Doc. S/2002/1126 (2002). The reports include captions about tackling crime and violence, combating terrorism and organized crime and building law enforcement and judicial capacity.

173. UNMIK/REG/1999/26, *supra* note 132.

human rights standards.¹⁷⁴ However, OLA refused to follow the recommendations of the Advisor. Thereafter, human rights advocates both inside and outside the mission publicly criticized UNMIK for promulgating legislation in violation of their mandate from the SG, but the regulation was not amended or repealed.

In addition to Regulation 1999/26, other regulations, in particular Regulation 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo,¹⁷⁵ Regulation 2001/17 On the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo,¹⁷⁶ and Regulation 2001/18 On the Establishment of a Detention Review Commission for Extra-judicial Detentions Based on Executive Orders,¹⁷⁷ have been scrutinized and found to violate fundamental principles of human rights by the human rights components of the mission, in particular the Ombudsperson Institution.¹⁷⁸

In April 2001, a final draft regulation written by OLA relating to a detainee's right to counsel included a provision stating that counsel can be present during the interrogation of a detainee but "shall remain silent."¹⁷⁹ It was disclosed to DJA and an international prosecutor but no attempt was made to clear the draft with the relevant human rights experts or law enforcement officials. The result was a final draft regulation in a critical field that was in breach of basic international human rights standards.¹⁸⁰ The controversial provision was eventually deleted from the promulgated regulation, although other troubling provisions remain.¹⁸¹

In February 2001, the OSCE recommended that a human rights vetting mechanism be established to ensure the conformity of new regulations with human rights norms. Despite this, it was not until summer 2002 that the UN initiated a mechanism to ensure that draft legislation was in compliance with international human rights standards. The Human Rights Oversight Committee was established with terms of reference that include the power "to consider and agree on actions and policy to ensure respect for human rights by all UNMIK Pillars."¹⁸² The Committee, comprised of the heads of

174. See O'NEILL, *supra* note 41, at 78.

175. UNMIK/REG/2000/47, *supra* note 58.

176. UNMIK/REG/2001/17 (On the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo), 22 Aug. 2001.

177. UNMIK/REG/2001/18, *supra* note 67.

178. See generally Ombudsperson Institution in Kosovo, Special Reports, available at <http://www.ombudspersonkosovo.org>.

179. OLA, *Final Draft: On the Rights of Persons Arrested by Law Enforcement Authorities* (Apr. 2000) (draft regulation).

180. International standards and case law recognize the right to the assistance of counsel during detention, interrogation, and preliminary investigations. Silent counsel is, in effect, no counsel. See Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Role of Lawyers*, ¶¶ 1, 6, 17, U.N. Doc. A/CONF.144/28/Rev.1 (1990).

181. See UNMIK/REG/2001/28, *supra* note 59.

182. Human Rights Oversight Committee, Terms of Reference (internal document) (on file with authors).

the Pillars, is to be advised by the Inter-Pillar Working Group on Human Rights, an amalgam of components to the mission that include the OSCE, DJA, UNMIK police, KFOR, OLA, UN Office of the Political Advisor, and OHCHR. There is no local participation. As of late 2002, no attempts have been made to review current UNMIK legislation for human rights compliance. Indeed, whether this new mechanism will ensure that future laws comply with international human rights standards will depend upon the degree of human rights law expertise present and to what extent the OLA drafters respect the Committee's advice.

CONCLUSION: IMPLICATIONS FOR TRANSITIONAL JUSTICE

Establishing a *de facto* government and a new justice system is an enormous and complex task, made more difficult when the new regime is confronting serious societal wounds. Transitions from repressive regimes to democracies based on the rule of law and respect for human rights are not achieved in a matter of months. In a very short time and under difficult circumstances, UNMIK accomplished a degree of security, stability, and democracy. Despite these achievements, the international intervention in postwar Kosovo has provided some sobering lessons in the area of criminal justice and human rights from which future peace-building missions should learn.

Peace-building missions need to be premised on the recognition that developing a justice system based on the rule of law and human rights is the key to a successful democratic transition. International administrations must be structured to limit the amount of power vested in the transitional administrator and ensure a more sophisticated system of checks and balances. In peace-building missions that require some degree of autocratic decision making, meaningful efforts need to be made to ensure that actions do not undermine fundamental principles of democratic governance. Such missions should function within a clear legal framework, which if not rooted in a constitution, at a minimum has at its core international human rights standards. Regardless of the nature of the executive power, whether local or international, such a framework must be applicable to all authorities, including the security component. In this regard, it must be made explicit that security forces, particularly when undertaking civilian functions, are obligated to conform their actions to the law.

In order to guarantee the enforcement of the framework, an independent court system must fulfill its role as a check on excessive state power and the protector of fundamental rights. Crucial to cultivating a strong, independent court system is the creation of a zealous and innovative Supreme Court, which may require the cooperation of international and local judicial actors. Institutional mechanisms for ensuring the independence and impartiality of the judiciary must be implemented as soon as practicable. Peace-building authorities must respect and follow judicial decisions, notwithstanding disagreement with them. Actions that violate fundamental rights, even though

well intentioned, risk jeopardizing the mission's goals. The use of arbitrary detentions by the executive and the rejection of lawful court orders set a precedent that the UN may come to deeply regret because such moves undermine the democratic objective of developing an independent and strong judiciary.

Transitional regimes require a reformation of the law. In instances where a legal vacuum exists, a semblance of process needs to be established despite the apparent urgency of the situation on the ground. In addition, there needs to be a short- and a long-term vision brought to the creation of a legislative reform agenda. The legislative process must include transparency, consultation, and public engagement. The public must be made clearly aware of what the law is and the reasoning behind its promulgation. Initially a mechanism must be developed for a timely dissemination of the law to the relevant actors and to the public. No law should be implemented until this process has occurred. Once the process is determined, peace-building authorities must adhere to it, even in the face of significant challenges. The combination of a short- and long-term agenda and adherence to an established and transparent process that engages the local population will ultimately result in more effective and just laws.

It must be accepted that peace and order, even in a *de facto* state of emergency, can be achieved concurrently with respect for the protection of basic human rights. Peace-building missions require both external and internal human rights mechanisms. The mission in Kosovo as envisioned was exemplary in this regard. But the reality proved that such mechanisms may be disregarded and made irrelevant. The failure to ensure a meaningful presence of criminal justice and human rights experts during the creation of policy and drafting of legislation can result in irregular policy decisions and unlawful regulations. Those responsible for the development of peace-building missions must ensure that key human rights positions are filled by those with the relevant expertise and are provided the political support for tackling the difficult issues that will arise. In addition to a more engaged OHCHR, the UN Department of Peacekeeping Operations should contain a human rights component to provide field missions with support and expertise.

In situations in which the international community is engaged in rebuilding post-conflict societies that have a history of internal discord, there must be a substantial international presence of judges and prosecutors early on. In particular, in cases that most challenge the capacity of local legal actors, such as war crimes-related offences, judicial investigations must be conducted by internationals, and the composition of the trial panel must be majority-international. Having said this, it is critical that local legal actors be engaged in this process as well. For example, local prosecutors should co-chair war crimes prosecutions.

Peace-building missions must ensure that those selected as international judicial actors are competent for such high-profile posts. Pre-entry legal

training on relevant provisions of the domestic law and international human rights standards is essential. International judicial actors must be independent and impartial and subject to investigation, discipline, and removal from office. The use of international judicial actors must be well planned and must coincide with increasing local capacity. It is imperative that the inclusion of international judicial actors not result in the creation of a parallel justice system with ties to the political agenda of the peace-building mission.

Most critically, future peace-building missions must ensure that a coordinated and thoughtful approach to developing a criminal justice sector is adopted. Such a strategy must be premised on a broad and comprehensive assessment of all of the critical components and an effective justice process that is beyond merely the courts. A holistic approach would include assessing the needs of law enforcement agencies, medical and forensic expertise, and legal services. In addition, consideration has to be given to the development of victims services, witness protection, and a network of social services to meet the needs of particular groups such the victims of sexual violence, juveniles, and the mentally ill. This requires a synergy of all relevant actors in the field, one that engages law enforcement, judicial officials, defenders, legislative and policy experts, and human rights advocates.

Finally, future peace-building strategies must involve the genuine participation of the local community. Failure to consult relevant local actors in policy and legislative developments can immeasurably detract from a mission's goals. Simultaneously, effectively transforming society requires a real engagement with the local populace. Consultation on critical issues and dissemination of information to the public must be substantive and genuine. Justice sector reform requires that the international community not only take into account local experiences, wishes, and expectations but also allow such values to shape the development of the justice system.