NO EXIT WITHOUT JUDICIARY: LEARNING A LESSON FROM UNMIK'S TRANSITIONAL ADMINISTRATION IN KOSOVO

ADAM DAY*

I. INTRODUCTION

Transitional administrations represent the most complicated operations undertaken by the United Nations (UN). Most recently, UN interventions in Kosovo and East Timor prompted what many saw as a new era of complexity in such administrations.[1] In both regions, the destruction to both the infrastructure and the physical landscape left in the wake of the conflict invited comparisons to post-war Germany or even ancient Carthage.[2] In Kosovo, with a population of 1.7 million people, for example, almost half had fled the country, and another 500,000 had been internally displaced.[3] Likewise, the scorched earth campaign of the Indonesians retreating from East Timor left behind a society bereft of the basic capacities of law and order.[4]

Faced with a vacuum of resources, United Nations Interim Administration Mission in Kosovo (UNMIK) in Kosovo and the United Nations Transitional Administration in East Timor (UNTAET) in East Timor took on greater "state building" roles, ones which involved security, policing, administration, humanitarian aid, judicial support, and many other vital state functions.[5] Correspondingly, the Special Representatives (SRSG) of the missions were granted greater powers in order to fulfill this expanded role. UNMIK's mandate, for example, included "all legislative and executive authority with respect to Kosovo."[6] In

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* JD/MALD Candidate, Boalt Hall School of Law/The Fletcher School of Law and Diplomacy (degrees expected May 2006).

[1] SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING i (2003).

[2] Hansjörg Strohmeyer, *Making Multilateral Interventions Work: The UN and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25 FLETCHER F. WORLD AFF. 107, 108 (2001).

[3] *Id*.

[4] A Review of Peace Operations: A Case for Change (East Timor Report), International Policy Institute: Kings College London, para. 6 (28 February 2003).

[5] Strohmeyer, *supra* note 2, at 109.

[6] *On the Authority of the Interim Administration in Kosovo*, UNMIK/Reg/1999/1, para 1.1 (1999), *available at* http://www.unmikonline.org/regulations/1999/re1999_01.htm.

terms of the transitional judiciary in Kosovo, this authority allowed the SRSG to appoint judges, to detain citizens, and to decide upon the applicable law in Kosovo.[7]

Especially regarding Kosovo, this grant of supreme authority to the SRSG to control the judiciary has been heavily criticized. Many of these criticisms can be broken into three basic categories: (1) UNMIK's increasing involvement in the judiciary has had the effect of weakening local involvement over the long term;[8] (2) UNMIK's regulations themselves contravened international human rights law, thereby undermining its credibility and the stability of rule of law;[9] and (3) the failure of any accountability for actions taken by UNMIK in the whole process has alienated the locals and deprived them of any ownership over the transition into a new judiciary.[10]

Part II of this Article will examine the above three criticisms of UNMIK in terms of the goal to bring lasting peace to the region. It will focus in particular on how the problems reinforced each other. The impact of increasing international involvement was exacerbated by the fact that UNMIK and the Kosovo Force (KFOR) violated international human rights principles. Likewise, the lack of accountability for UNMIK actions functioned to further disillusion a local community already alienated from the justice process. Part III will address what appears to be the central problem in these critiques of UNMIK: few holistic solutions are offered to the shortcomings. Authors are quick to locate and criticize failures in transitional administrations, but the solutions offered frequently fail to recognize the impact of one aspect of the judiciary on other areas. In discussing the solutions to the problems of accountability and human rights, this Article will conclude that a synthesized approach to each of the identified problem areas would have an overall beneficial approach on future transitional administrations.

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[7] *Id.; see On the Appointment and Removal from Office of Lay Judges*, UNMIK/REG/1999/18 (1999), *available at* http://www.unmikonline.org/regulations/1999/re99_18.pdf.

[8] Michael E. Hartmann, *International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping*, UNITED STATES INSTITUTE OF PEACE SPECIAL REPORT 112, at 1, 3 (Oct. 2003), *available at* http://www.usip.org/pubs/specialreports/sr112.html.

[9] David Marshall & Shelley Inglis, *The Disempowerment of Human Rights–Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 96 (2003).

[10] *Id*. at 97.

II. Identifying the Problems

There are three problems central to UNMIK's transitional judiciary: (1) the introduction of international judges and prosecutors into the transitional judiciary; (2) the possible violations of human rights norms under the mandate of the SRSG, especially in terms of detention of prisoners; and (3) the lack of accountability of UNMIK personnel. Identifying them separately in this Part will provide the framework for Part II, which will discuss more holistic, integrated solutions.

A. The Gradual Hegemony of International Judges and Prosecutors

United Nations Security Council Resolution 1244 of 10 June 1999 envisioned the complete withdrawal from Kosovo of all Yugoslav military and police, together with the deployment of an international civil and security presence under UNMIK and NATO-led KFOR.[11] Since most of the police, prosecutors, and judges in the region were Serbian, due in great part to the purges of Albanians in 1989, this withdrawal left a significant vacuum in the realm of security and rule of law.[12] Therefore, the principal task of UNMIK was "to establish an international civil presence . . . in order to provide an interim administration in Kosovo."[13] To accomplish this task, Regulation 1244 gave "all legislative and executive authority with respect to Kosovo, including the administration of the judiciary," to the Special Representative to the Secretary General (SRSG).[14] This initial regulation also proclaimed the applicable law in the region to be that of March 1999 in Kosovo and provided for local judges to execute this law.[15]

The law in force in 1999, however, was widely regarded in the Albanian community as a remnant of the Milosovic regime and, given the exodus of Serbs from the region following the

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[11] Alexander Yannis, *The UN as Government in Kosovo*, 10 Global Governance 67, 67 (2004).

[12] Hartmann, *supra* note 8, at 3.

[13] *On the Authority of the Interim Administration in Kosovo*, UNMIK/REG/1999/1, para 1.1 (1999), *available at* http://www.unmikonline.org/regulations/1999/re1999_01.htm.

[14] *Id.*

[15] Hartmann, *supra* note 8, at 4–5. It is by failing to provide for international judges that 1244 implicitly requires a local judiciary.

NATO-led attack, it was a virtually homogenously Albanian judiciary that would apply this law. By September 1999, for example, the SRSG had appointed 42 Kosovo Albanians and only seven Kosovo Serbs, all seven of which eventually resigned.[16] Albanian judges who had served in the 1990's were widely thought of as collaborators with the Serb regime and were frequently threatened to the point of resignation.[17] Therefore, of the almost entirely Albanian judiciary, most were relatively new to the judiciary and had little experience with serious criminal trials.[18]

The UNMIK administration had not foreseen the consequences of this combination of inexperience and overwhelming dislike for the applicable law. It became immediately apparent that the local judiciary would not apply the law promulgated under Regulation 1999/1.[19] Instead, the judges and prosecutors based their decisions upon earlier 1989 law, which came before Milosevic eliminated Kosovo's autonomy within Serbia and was considered among Albanians to be the last "legitimate" Kosovo law.[20] Not only did the judges and prosecutors disregard the applicable law mandated by UNMIK, but they applied their own law in a discriminatory fashion against the Serb population. For example, prosecutors would frequently propose the release of Albanian resistance fighters, while detaining Serbs for the same crimes.[21]

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[16] Organisation for Security and Co-operation in Europe, The Criminal Justice System in Kosovo 1 February 2000 – 31 July 2000, at 11 [hereinafter First LSMS Report], *available at* http://www.osce.org/documents/mik/2000/08/970_en.pdf.

[17] Hartmann, *supra* note 8, at 5.

[18] *Id. See also* WILLIAM O'NEILL, KOSOVO: AN UNFINISHED PEACE 77 (2002) ("some good judges have been appointed, but they are people coming out of a totalitarian system, which is like a diver coming from the deep sea to the surface too quickly, he gulps oxygen but his brain doesn't function normally.")

[19] First LSMS Report, *supra* note 16, at 12.

[20] Hartmann, *supra* note 8, at 4.

[21] O'NEILL, *supra* note 18, at 84.

> Instances of bias against Serbs and other minorities among the Albanian judiciary surfaced early during the Emergency Judicial System and have continued ever since . . . .
> Albanians arrested on serious charges, often caught red-handed by KFOR or UNMIK police, frequently were released immediately or were not indicted and subsequently released. Meanwhile, Serbs, Roma, and other minorities arrested on even minor charges with flimsy evidence were almost always detained, and some stayed in detention even though they were not indicted.
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> *Id.*

By January 2000, the UN and the Organisation for Security and Cooperation in Europe (OSCE) agreed that the Kosovo judiciary's inexperience and judicial bias could no longer be ignored. They identified three sources of the problem: first, there was actual bias arising from at least ten years of discrimination by the Serb regime in Kosovo; second, there was social pressure on the Albanians by their communities to act in their own self-interest; and third, there were several threats of bodily harm to judges if they did not decide in favor of Albanian defendants.[22] Furthermore, the homogenous nature of the judiciary created perceived bias, even if the judges did in fact make a fair decision.[23] On February 4, 2000, the issue received immediate action after a group of Albanians hijacked an ambulance from an Italian NGO in Mitrovica in southern Kosovo. Despite eyewitness proof, the local judiciary released the suspects almost immediately, enraging the KFOR commander and bringing the issue of bias to the forefront.[24]

UNMIK Regulation 2000/6 addressed this problem by permitting the SRSG to appoint International Judges and Prosecutors (IJP) in the region of Mitrovica.[25] IJPs occupied the same status as local judges with three key differences: (1) they were limited to the Mitrovica District (one of five districts in Kosovo); (2) they were limited to criminal cases; and (3) they had the authority to "select and take responsibility for new and pending" criminal investigations and cases.[26]

An initial problem with this regulation was its restriction to Mitrovica,[27] where only a small portion of the ethnically motivated crimes were taking place. Even within Mitrovica, IJPs only participated in a small number of cases, leaving many Serbs in long detentions without the necessary procedural safeguards.[28] In April 2000, several Kosovar Serbs and other minority detainees began a hunger strike to protest the release of an Albanian accused of throwing a grenade in a crowd, along with the slow

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[22] Hartmann, *supra* note 8, at 7.

[23] *Id*. at 7.

[24] O'NEILL, *supra* note 18, at 90.

[25] *On the Appointment and Removal from Office of International Judges and International Prosecutors,* UNMIK/REG/2000/6 (2000).

[26] *Id*. at para. 1.2; Hartmann, *supra* note 8, at 8.

[27] *On the Appointment and Removal from Office of International Judges and International Prosecutors,* UNMIK/REG/2000/6, para. 1.1 (2000).

[28] Hartmann, *supra* note 8, at 9.

pace of their own cases, and the overall bias still present in the courts.[29] This strike brought the situation much more into the public eye and forced action on UNMIK's part. On May 27, 2000, UNMIK enacted Regulation 2000/34, expanding the scope of the IJP program to all five judicial districts in Kosovo.[30]

However, a second limitation on the IJPs undermined their effectiveness even after Regulation 2000/34. IJPs were only ever a minority on the panels created in the second phase of the transitional judiciary. With only one IJP appointed to the Supreme Court, for example, Kosovar judges continued to control the decision-making process on every case.[31] IJPs were not only consistently outvoted by the locals, but they were outvoted on the most significant inter-ethnic cases, which then permitted the Albanian judges to "overcharge" the convicted Serbs in the sentencing phase.[32] As the OSCE Report concluded, "the equal distribution of voting power to all judges severely reduces any real impact that the international judge may have upon a potential verdict motivated by ethnic bias."[33] Therefore, as David Marshall and Shelley Inglis wrote, "[e]vidence 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."[34]

Responding to these continuing difficulties, UNMIK passed two significant regulations and initiated what later became known as the third phase of the transitional judiciary. The first was Regulation 2000/64, giving the SRSG the authority to create judicial panels in which international judges would constitute the majority.[35] The preamble to Regulation 64 acknowledged the

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[29] O'NEILL, *supra* note 18, at 91.

[30] *Amending UNMIK Regulation No. 2000/6 on the Appointment and Removal from Office of International Judges and International Prosecutors,* UNMIK/REG/2000/34 (2000).

[31] Hartmann, *supra* note 8, at 9.

[32] *Id*. at 10; *see also* First LSMS Report, *supra* note 16, at 61 (discussing the disparate treatment of Serbs and Albanians by the judiciary).

[33] Organisation for Security and Co-operation in Europe, Kosovo: A Review of the Criminal Justice System 1 September 2000–28 February 2001, at 76 [hereinafter Second LSMS Report], *available at* http:// http://www.osce.org/documents/mik/2001/07/969_en.pdf.

[34] Marshall & Inglis, *supra* note 9, at 123.

[35] *On Assignment of International Judges/Prosecutors and/or Change of Venue,* UNMIK/REG/2000/64 (2000).

bias present in the local judiciary, "[r]ecognizing that the presence of security threats may undermine the independence and impartiality of the judiciary and impede the ability of the judiciary to properly prosecute crimes which gravely undermine the peace process and the full establishment of rule of law in Kosovo."[36] Such ad hoc panels, which were convened after a request had been made by either defense counsel or the prosecutor to the SRSG, became known as "64 Panels."

Initially, however, 64 Panels were easily circumvented by bringing a case quickly in front of a local set of judges. According to the regulation, a 64 Panel had to be in place before the trial started.[37] Therefore, failure to provide notice to the parties, or abandonment of the case before an International Judge (IJ) or International Prosecutor (IP) was selected, would make it impossible to resurrect the possibility of a 64 Panel.[38] In the high profile trial of Afrim Zeqiri—an Albanian accused of serious ethnically motivated crimes—the Kosovo Supreme Court took advantage of this loophole by overturning a previous 64 Panel decision, ordering Zeqiri's release, and then refusing to reopen the case.[39]

Regulation 2001/2 was passed to remedy this deficiency. It required any prosecutor abandoning a case to notify an IP within fourteen days, in order to allow the IP to file a resumption of the prosecution.[40] While this still did not address the problem of cases that had been dropped more than 14 days before the regulation, it was an important step in ensuring UNMIK's control over the judiciary.

UNMIK's increasing control over the transitional judiciary is most severely criticized by the international community, especially in terms of its effect on long-term local ownership of Kosovo. For example, David Marshall and Shelley Inglis write:

> 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

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[36] *Id.*

[37] *Id*.

[38] Hartmann, *supra* note 8, at 11.

[39] *Id*. at 11–12.

[40] *Amending UNMIK Regulation No. 2000/6, as Amended, on the Appointment and Removal from Office of International Judges and International Prosecutors,* UNMIK/REG/2001/2 (2001).

> reasoning behind such decisions. . . . The result is a local population disillusioned and cynical about human rights rhetoric and disengaged from legal institutions.[41]

Likewise, Wendy Betts writes, "the presence of international judges was unfortunately reminiscent of the 'parallel system' the Kosovar Albanian community had struggled so long against . . . [and] fostered the same lack of confidence in UNMIK and the legal system as that which arose in relation to the applicable law question . . . ."[42]

Such control by UNMIK had been opposed strenuously by the local judges as illegal, improper and creating a parallel justice system in Kosovo.[43] In fact, there were increasing instances of Kosovar judges refusing to attend 64 Panels, especially in high profile cases of war crimes and terrorism.[44] Whether the reluctance to participate was due more to external pressures or a personal dislike for the way UNMIK commanded the judiciary is unclear. What is clear, however, is that Regulations 2000/64 and 2001/2 had the effect of disenfranchising local judges and prosecutors from the most important criminal cases and replacing them with IJPs.

Furthermore, UNMIK gave the IJPs an almost unchecked power to decide which cases to remove from the hands of the locals. As Marshall and Inglis point out, "[t]he 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."[45] And because Regulation 64 was promulgated at such a late point in the UNMIK's transitional governance of Kosovo, all those tried and convicted prior to its enactment were forced to live with the result. Rather than establish a sense of stability in the judiciary, therefore, Regulation 64 caused friction within the Kosovar Serb community, due to its failure to ensure that all war

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[41] Marshall & Inglis, *supra* note 9, at 97.

[42] Wendy S. Betts et al., *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, 379 (2001).

[43] Hartmann, *supra* note 8, at 12.

[44] *Id*.

[45] Marshall & Inglis, *supra* note 9, at 134.

crimes-related offenses qualified for an IJP and the clear injustice to those who had been tried under a different set of rules.[46]

B. Detentions Under UNMIK's Regulations as a Violation of Human Rights

Related to the structural problems of the transitional judiciary was the substantive legal question of executive detentions. Article 9 of the International Covenant on Civil and Political Rights (ICCPR) states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."[47] In Kosovo, this article not only was directly contravened by UNMIK and KFOR arrests and detentions, but the UNMIK regulations passed in 2000 in fact gave prisoners accused of the same crimes different rights and different periods of detention. This raised two issues in particular: the need to have a domestic mechanism for prisoners to challenge their detention,[48] and the need to establish a viable law on detention at the outset of the transition.

UNMIK's detentions violated generally accepted human rights law in various ways. In the case of *Moses Omweno*, for example, UNMIK held a defendant incommunicado for four days in Kenya, in violation of Kenyan domestic law, then brought him to Kosovo and detained him again without ever informing him of his rights under any body of law.[49] In the case of *Shaban Beqiri* and *Xhemal Sejdiu*, UNMIK overrode a Kosovo judge's order to release the suspects and detained them for a further nine months, in direct contravention of UNMIK's own regulation giving the local judges the sole power to order detention and release.[50] Likewise, COMKFOR detained Afram Zeqiri—a high profile murder suspect—after an international judge had released him.[51] Many of these detentions took place without the

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[46] *Id*.

[47] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

[48] *See* First LSMS Report, *supra* note 16, at 24.

[49] *Id*.

[50] *Id*. at 25; *see also* On the Law Applicable in Kosovo, UNMIK/REG/1999/24 (1999).

[51] Marshall & Inglis, *supra* note 9, at 111.

presence of lawyers, and without the suspects ever being informed of their rights.[52]

In August 2001, the SRSG put forth Regulation 2001/18 On the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders, which was designed to create a more legitimate and transparent system for evaluating the decision to detain individuals.[53] This Commission, however, was largely a public relations maneuver, as it only met once to confirm the detention of three Kosovar Albanians and was never convened again.[54]

The length of detention was also problematic for UNMIK, given that the courts were overburdened and unable to try all the cases within a short time period. UNMIK Regulation 1999/26 effectively extended the Kosovo six-month detention period to one year, provided supporting reasons were given to the presiding judge or prosecutor.[55] Notably absent from this regulation, however, was any mechanism for dealing with prisoners detained before and after the regulation was passed, or those who had already been detained for periods greater than one year and then released. In some cases, prisoners were detained for more than ten months without reference to this regulation and some were detained without any stated legal basis whatsoever.[56]

This confusion led to dramatic problems, both for the UN administrators and the locals. KFOR, for example, essentially abandoned the detention review system put in place by UNMIK and developed a parallel system of review.[57] Likewise, there was significant opposition from the local judiciary and prosecutors, who saw their ability to control the trial process increasingly taken away from them. Finally, the prisoners—many of whom had been held for months without contact with a lawyer or being arraigned—complained of unequal treatment. In April 2000, for example, many Kosovar Serbs and other minority detainees began a hunger strike to protest the release of an Albanian accused

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[52] *See* First LSMS Report, *supra* note 16, at 26.

[53] UNMIK/REG/2001/18 (2001).

[54] *See* Marshall & Inglis, *supra* note 9, at 113–14.

[55] UNMIK/REG/1999/26, para. 1.1-1.3 (1999).

[56] First LSMS Report, *supra* note 16, at 34–35.

[57] Marshall & Inglis, *supra* note 9, at 111.

of throwing a grenade in a crowd, the slowness of their own cases, and the overall bias still present in the courts.[58]

KFOR's detention policies not only "led to uncertainty in Kosovo about the scope of KFOR's authority,"[59] they undermined the overall legitimacy of the mission. As the OSCE Monitoring Report noted, "*UN Resolution 1244* does not provide KFOR with the power to violate international human rights standards."[60] However, especially in 2000 and 2001, when the detention of suspected criminals most notably outstripped the judiciary's ability to investigate and try the detainees, such international human rights standards were consistently violated.

C. Lack of Accountability of the SRSG and UNMIK

The previously discussed problems were significantly exacerbated by the lack of any meaningful accountability on the part of the SRSG, and UNMIK generally. This manifested itself in two particularly significant ways: the immunity granted to all UN workers in Kosovo from criminal prosecution and the absolute, unchecked executive and legislative authority granted to the SRSG. These policies separated the transitional administration from any meaningful contact with the locals and compromised the long-term effectiveness of the peace process.

Several legal documents specifically eliminated any liability by UNMIK workers. UNMIK Regulation 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo rendered such personnel "immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo."[61] This blanket immunity from domestic trial was expanded to all potential trials, domestic or otherwise, where the UN Secretary-General was given "the right and the duty to waive immunity [from prosecution] of any UNMIK personnel in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of UNMIK."[62] While this broad immunity is typical of

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[58] O'Neill, *supra* note 18, at 91.

[59] Marshall & Inglis, *supra* note 9, at 111.

[60] Second LSMS Report, *supra* note 33, at 18.

[61] UNMIK/REG/2000/47, para. 2.4(a) (2000).

[62] *Id*. para 6.1.

UN peacekeeping missions, it was combined with an almost complete absence of local or international mechanisms by which the Kosovo population could voice a grievance. Keeping in mind the bias in the judiciary and extended periods of detention, the immunity granted to UNMIK and KFOR drastically disenfranchised the local population, many of whom had to watch as their own family members languished in prison for acts that had yet to be verifed by any court.

This problem became codified in the Kosovo Constitutional Framework in May 2001, which replaced the 1974 Constitution of the Social Federal Republic of Yugoslavia. While it was unclear whether the 1974 Constution could be applied against members of UNMIK, the 2001 Constitution explicitly divested the Supreme Court of any jurisdiction over actions taken by UNMIK.[63] This was especially problematic, as David Marshall and Shelley Inglis point out, "because UNMIK has retained sole administrative authority over justice and law enforcement, areas which are closely entwined with human rights guarantees."[64] UNMIK therefore controlled both the law enforcement that was meant to guarantee human rights norms and the mechanisms that should have monitored and checked such enforcement, granting UNMIK and KFOR "seemingly unchallengeable authority."[65]

This problem of increasingly centralized authority was concisely identified by William O'Neill, who wrote:

> The problem is that in the case of Kosovo, as in East Timor, the UN is directly responsible for administering justice. Neither the OSCE nor the UN can just sit back and criticize "the authorities" for bias or failure to comply with international standards; the UN is the state and must guarantee fair trials, access to counsel, laws that comply with international human rights, and utter fairness.[66]

As the state, however, the UN lacked checks and balances characteristic of traditional democracies. Evidenced by the initial grant of all "executive and legislative power" to the SRSG in Resolution 1244, the mission was plagued from the beginning with the problem of accountability.

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[63] Marshall & Inglis, *supra* note 9, at 108.

[64] *Id.*

[65] *Id.* at 103.

[66] O'NEILL, *supra* note 18, at 95 (emphasis added).

The crucial problem, however, was that "[a]s 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."[67] One monitoring team noted, "[a]s it was never the intention to be 'running someone else's country,' success would be measured on how well roles could be passed on to local staff."[68] The privileged treatment and increasing centralization of power with UNMIK significantly compromised this kind of success. Part II will offer possible solutions to these problems, focusing on how to create a viable exit strategy for UN interventions in areas of conflict.

III. Three Interrelated Solutions to the Problems Encountered in Kosovo's Transitional Judiciary

The previous Part identified three central problems in UNMIK's transitional administration: (1) the increasing dominance of international judges and prosecutors in the judiciary; (2) detention practice by UNMIK and KFOR that violated human rights norms; and (3) a general lack of political and legal accountability for the members of UNMIK and the SRSG. These issues, however, cannot be thought of as independent legal problems to be dealt with in a vacuum. They are rather symptoms of an underlying approach by the UN that fails to address some of the basic requirements of a transitional administration. In particular, they demonstrate an approach that does not achieve its exit strategy of local ownership of administrative and judicial processes.

This Part will lay out three approaches to improve transitional administrations in the future, based on the shortcomings of UNMIK discussed above. These approaches are: (1) a phase-out approach that starts with complete UN ownership over the judiciary; (2) clarity of applicable law; and (3) accountability for UN peacekeepers to an outside source. Central to these recommendations is the notion of taking a holistic approach to post-conflict justice. A phase-out approach will only work if there is clarity of applicable local law. Likewise, complete UN control of the judiciary at the outset can only truly function if there is some system

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[67] Marshall & Inglis, *supra* note 9, at 118.

[68] A Case for Change, *supra* note 4, para. 163.

of accountability in place. This Part will conclude that implementation of these three recommendations together would have a significantly positive impact on situations like Kosovo.

A. A Phase-Out Approach to the Judiciary

As discussed above, the most significant deficiency of the transitional judiciary from a structural point of view was that each phase marked an increase in international involvement and a corresponding decrease in local participation. It was unrealistic of UNMIK to expect that the local judiciary could act independently during such an intense period of conflict, after the foundation of basic legal knowledge and administration had been decimated by violence. In the future, the following recommendation by Wendy Betts should be a starting point for the transition:

> When deploying a transitional administration, the international community should be prepared to send a group of international judges, prosecutors, and defense counsel pre-trained in the emergency law template, and this transitional judiciary should be accompanied by a targeted package of equipment sufficient to support the interim judiciary's functions.[69]

It is vital during the incipient phase of a transition to have the capability to reestablish law and order, even at the expense of local participation. With such a capacity, it would then be possible to follow Hartmann's recommendation that "international participation in the judicial arena should have been immediate and bold, rather than incremental and crisis driven."[70] Early prosecution of criminals, he notes, "would have inhibited the growth of the criminal power structures . . . . [and] [t]hese destabilizing influences would have had less time to entrench themselves into their communities."[71]

Not only would a strong, internationally driven judiciary have prevented organized crime more effectively, but also the problem of judicial bias would have been addressed from the outset. One of the principal failings of the Kosovo judiciary was that individuals accused of the same crime were treated differently, based on their ethnicity, and as a result of when they were detained. For example, a prisoner detained in the first phase of

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[69] Betts et al., *supra* note 41, at 385.

[70] Hartmann, *supra* note 8, at 13.

[71] *Id.*

the transitional judiciary would have been exposed to a blatantly partial, untrained local judiciary, whereas a prisoner during the third phase would have had the benefit of an international panel. A strong international judiciary at the outset is an important step in assuring the locals that their treatment under the law is not going to be governed by such arbitrary conditions.

Perhaps the most important aspect of this strong initial presence would be the ability to train the locals before they are given judicial power. As Hartmann proposes, a "phase-out" approach would permit the international judges to give authority gradually back to the locals as they prove themselves to be capable of trying cases involving inter-ethnic crimes and other serious acts.[72] As such, it would give the local judiciary prospects for the future: whereas the local judiciary under UNMIK could only predict less responsibility for itself in the future, a phase-out approach would give them incentives for improvement, while more adequately protecting the rights of the detainees.

It is important to note that the local judiciary would not be completely sidelined at the outset. The phase-out approach relies on their constant involvement in the process, in order that they receive adequate training. Not only could locals assist in the translations and other processes of the court, but they could be instrumental in interpreting local laws and customs. I would in fact recommend a mentoring system based loosely on American judicial clerkships: local judges would initially be assigned to an international judge for the purposes of learning applicable law and procedural mechanisms that conform with international human rights standards. However, like American clerks, they would also be responsible for interpreting the law, drafting legal opinions, and participating in the daily actions of the court. The duties of such a position would have to be tailored to the expertise of the judges. In a situation like Kosovo, where the Albanian judges had very little experience in international crimes, the American clerkship model could be very effective. In other situations, where perhaps the judges are more experienced, the internationals could initially work more in tandem with the locals.

This scheme takes as its central purpose the creation of a sense that the internationals are merely temporary and that the ultimate responsibility will eventually rest with the local judiciary. This sense could be reinforced in a second phase, roughly

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[72] *Id*. at 14.

corresponding to the second phase of UNMIK's transitional judiciary, where the local judges take a majority control over decisions but the internationals are nonetheless present. Rather than reiterate UNMIK's failings, however, the local judges will have already experienced being in the minority, and will act with full knowledge that their incompetence likely will cause a reversion to the first phase of international control. Likewise, the international judges will have already gained important experience in the first phase and will be ready to intervene if the need arises. This "linear reverse" of UNMIK's approach is an important lesson learned from Kosovo.[73] However, it is important to consider the following two recommendations in conjunction with this one. Having a strong international presence at the outset of a judiciary will do little to remedy the problem if there is not also a clear applicable law and accountability for UN personnel.

B. Clarity of Applicable Law

An important shortcoming of Resolution 1244 was the absence of a clear legal framework. While Regulation 1999/1 called for the application of 1999 Kosovo law, there were several holes that needed to be filled with the fairly vague notion of international human rights law, and it did not take into account that the local judiciary would refuse to apply the 1999 law as written. As William Schabas and Neil Kritz note, the type of approach taken by UNMIK "has proven to be unworkable given the enormity of the task of reconciling local law and international norms."[74] In fact, these shortcomings had been foreseen by the U.S. Department of Justice in mid-July 1999 when it posed the following questions: "(1) how can the applicable law be defined, established and disseminated in an expedient manner to the legal professionals who will be responsible for its enforcement; and (2) given the importance of the Kosovar community's inclusion in the legal reform process, how can their participation and support be encouraged?"[75] However, in July 1999, there simply was not time to answer these questions for the particular situation in Kosovo, at least not in a way that took into account the local sentiment toward Kosovo and Serb law. Defining, establishing, and

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[73] *See id.*

[74] William Schabas & Neil Kritz, The Model Codes for Post-Conflict Transition 2 (4/15/05) (unpublished manuscript, on file with author).

[75] ABA/CEELI-USDOJ, Request for Clarification and Offer of Assistance to the SRSG, July 1999 (ABA/CEELI Publications).

disseminating the applicable law, as well as including the local Kosovar community, is a time-consuming process that continues to this day.

The Report of the Panel on United Nations Peace Operations (Brahimi Report) suggested a "template" approach to deal with the fact that peacekeepers will not have time to draft a law specific to each situation.[76] It noted, "[t]hese missions' tasks would have been much easier if a common United Nations justice package had allowed them to apply an interim legal code to which mission personnel could have been pre-trained while the final answer to the 'applicable law' question was being worked out."[77] Such a code, it is contemplated, would provide the basic framework of criminal law and procedure in conformity with international human rights standards and would offer the transitional judiciary the stability and neutrality necessary to the initial phases of the transition.[78] Furthermore, these codes could be part of the training to be an international judge or prosecutor: rather than have a very steep learning curve for each situation, depending on which local law to apply, international judges could enter a situation fully appraised of the applicable law.

The benefits of a skeletal criminal framework should not be underestimated; however, it is important briefly to discuss the potential drawbacks. First, the principle of *nullum crimen sine lege* (roughly translated as "no crime without law") could be a difficult hurdle for the imposition of these codes in countries that do not have a fully developed set of criminal laws, or where such laws are not in conformity with international human rights standards. Individuals cannot be tried unless they have broken a law that applied to them at the time of the act. Interim model codes necessarily arrive after many of the atrocities have taken place.

In times of conflict, however, it must be recognized that many of the lesser crimes will go unpunished. The model codes should therefore focus primarily on significant crimes that likely are part of nearly every criminal system. As Schabas and Kritz argue, "the needs of the system would have two main focal points: prosecuting major crimes that threaten life and property;

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[76] Report of the Panel on United Nations Peacekeeping Operation, U.N. SCOR, U.N. Doc. A/55/305 S/2000/809, at 14 (2001).

[77] *Id*.

[78] Schabas & Kritz, *supra* note 74, at 7.

and combating impunity for the most egregious human rights violations of the past regime."[79] Furthermore, the internationally recognized standards of international crimes (or the smaller set of *jus cogens* acts) are such that domestic law need not necessarily have defined such acts: genocide, crimes against humanity, and war crimes are punishable acts even without an applicable domestic law. While accepting a certain degree of impunity for some less egregious crimes, the model codes would act to prevent the early organization of crime and to establish a mechanism for addressing the most serious crimes in the region.

Secondly, however, it is vital that the model codes not become a substitute for the local law, that they do not become a permanent addition to the country after the UN has left. As Schabas and Kritz note, "transitional Codes would need to be adaptable enough to give way to truly national institutions and legal norms."[80] In keeping with the overarching goal of transitioning back into a phase where the locals can take over the system, a model code would need to be overtly temporary and easily dismantled, while still able to "leave some legacy" in the realm of international human rights.[81] The importance of creating a "bare-bones" code, rather than attempting an exhaustive list of crimes, will certainly help this dismantlement procedure in the future.

It is not the place of this Article to suggest the specific design of such codes, but it is worth noting that the United States Institute of Peace has already drafted a model code for transitional administrations. Therefore, this is a viable recommendation for future interventions that was not available to UNMIK at the time. Again, this recommendation must be thought of in terms of the previous notion of a phase-out judiciary: just as the international judges and prosecutors will be gradually removed in favor of local actors, so too must there be a mechanism for phasing out the interim code. This must occur alongside increasing local capacity and, as the next section points out, in an atmosphere that gives them confidence that the administration will continue to uphold human rights norms in the meantime.

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[79] *Id*. at 8.

[80] *Id*.

[81] *Id*.

C. Accountability of UN Workers in Transitional Administrations

David Marshall and Shelley Inglis write that "[i]nternational 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."[82] This Article has demonstrated the latter half of Marshall's and Inglis's statement to be somewhat true, but no such conclusion can be drawn concerning the limitation of the administrator's power. In fact, as the section concerning the phasing out of the local judiciary reveals, the centralization of power in the administrator is in fact a vital component of the early phases of the transition. Limiting such power could have a deleterious effect on the stability of the transition and create confusion among the separate branches of the team. This Article has in fact argued in favor of the kind of grant of all legislative and executive power that was given under Regulation 1999/1. However, what then becomes even more important is the system accountability for the entire intervention team, as suggested by Marshall and Inglis. It is the argument of this section that such a system cannot—at least in the incipient phases of the transition—be governed by the local laws of the region.

The first reason for creating a non-locally run system of accountability is that no UN intervention will occur if the UN peacekeepers are subject to the local jurisdiction of the courts. As evidenced by the clear bias in the local judiciary in Kosovo, and by Regulation 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, UN interventions must be premised on the fact that local courts will not try UN forces.[83] Not only would it be politically unfeasible to permit local courts to exercise jurisdiction over UN troops, but also it would compromise the effectiveness of the mission: UN troops cannot realistically be briefed on all of the intricacies of local laws before they enter a region of conflict.

However, as the above discussion of detentions in Kosovo highlights, there is a need for some system of accountability for the actions taken by the UN in contravention of international

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[82] Marshall & Inglis, *supra* note 9, at 144.

[83] This conclusion is supported by the fact that all of the most recent interventions, including Somalia, East Timor, and Sierra Leone, have had similar Status of Forces Agreements (SOFA) or other arrangements.

human rights standards. Furthermore, recent actions taken by UN civilian personnel in the Democratic Republic of Congo have brought to light even more insidious and direct violations of human rights that can take place in areas of conflict.[84] Clearly, accountability is required.

One solution would have the UN submit to the jurisdiction of the International Criminal Court (ICC). Because the ICC only has jurisdiction over the most serious international crimes, including war crimes, crimes against humanity, and genocide, UN personnel would not be subject to capricious local judges or unknown domestic laws. Despite U.S. resistance to the ICC, the Rome Statute is gaining recognition in the international community as a valid source of law and a competent tribunal for trying serious crimes.

However, fairly serious structural and legal impediments still exist to any plan involving UN personnel under the ICC's jurisdiction. Firstly, the ICC only operates over states that have ratified the Rome Statute. The UN is not a state,[85] and it would therefore require an amendment to the Rome Statute in order for it to become a signatory. Secondly, it is not clear that the ICC would be capable of trying the kinds of acts that occurred in Kosovo. As discussed above, the principal problem of detentions by KFOR likely would not be considered war crimes or crimes against humanity and therefore would not fall within the ICC's jurisdiction.[86] While the ICC could be an effective tool in creating accountability for serious infractions of human rights by UN personnel, it would not address some of the central problems present in areas like Kosovo.

A more realistic system of accountability could in fact rely upon the panels of international judges and model criminal codes discussed above. Model criminal codes lay out the bare bones of

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[84] UN News Centre, *Annan Vows to End Sex Abuse Committed by UN Mission Staff in DR of Congo* (Nov. 19, 2004), *at* http://www.un.org/apps/news/story.asp?NewsID=12590&Cr=democratic&Cr1=Congo ("Secretary-General Kofi Annan today acknowledged that United Nations peacekeeping personnel in the Democratic Republic of the Congo (DRC) - both civilian and military - committed sexual exploitation and abuse, and vowed to put an end to such practices and hold the perpetrators responsible.").

[85] An argument could be raised that the UN does have a legal personality, according to its own Charter. However, this legal personality does not give it the official status of a state.

[86] Note, however, that the United States Restatement on Foreign Relations does codify "prolonged arbitrary detention" as an international crime. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(h) (1987).

criminal law and procedure and are drawn from the most common and well-known sources of law. Holding UN personnel accountable to these laws would be a much more feasible task than holding them accountable under strictly local law. In the initial stage of the conflict, however, a state of emergency could still be declared that would temporarily suspend even these model codes, to facilitate the quick restoration of order to the region. As Schabas and Kritz note, "Transitional Codes would find their true vocation during this [second] stage in the process" (i.e. the phase after order has been somewhat restored).[87]

Furthermore, trying UN personnel under the model codes would only be practicable if such trials were conducted by the international judges and prosecutors. Again, it is clear that local judges would be incapable of such trials, and the UN personnel would never submit to such a procedure. If, however, it was understood that the international judges would try UN personnel only for the fairly serious crimes listed in the model codes, a viable and publicly recognized source of accountability would have been established.

In terms of the detentions discussed above, having a system whereby prisoners could voice a legal claim for violations of their human rights would obviate the great rift that grew between locals and UN forces in Kosovo. The hunger strikes by the Serbs were directly in retaliation to the disparate treatment being given to the various ethnic groups in the court system, and to their prolonged detentions without procedural safeguards. Applying the system of international judges and prosecutors to both the locals and the UN personnel would address both problems: trials would be fairer, and detainees would have the possibility of contesting their detentions in a court of law. Again, this recommendation must be thought of in terms of the previous two. The establishment of a strong international presence under a clear applicable law would provide a legitimate tribunal, so legitimate in fact that even UN personnel could be tried under it.

IV. Conclusion

In conclusion, there is no utopian answer to the problem of post-conflict justice. There will always be criticisms that guilty people escaped, that some innocent people were detained, and that human rights were not perfectly upheld. These criticisms are

[87] Schabas & Kritz, *supra* note 74, at 8.

an important tool to enable transitional justice organizations evolve into more effective, flexible institutions. However, criticism should be combined with recommendations. Many authors merely strike down UNMIK as a failed transitional administration and offer no insight into how future interventions can be improved. This Article has offered three interrelated recommendations that respond to three clear failures on the part of UNMIK in Kosovo. Rather than look at the discrete shortcomings of the transitional judiciary, it has attempted to offer a holistic remedy that hopefully will lead to more complete exit strategies in the future.