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Wendy S. Betts
CEELI Institute

Scott N. Carlson
CEELI Institute

Gregory Grisvold
CEELI Institute

THE POST-CONFLICT TRANSITIONAL ADMINISTRATION OF KOSOVO AND THE LESSONS-LEARNED IN EFFORTS TO ESTABLISH A JUDICIARY AND RULE OF LAW†

*Wendy S. Betts**
*Scott N. Carlson***
*Gregory Gisvold****

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† Prepared for the World Bank Conference on Judicial Reform to be held July 2001 in St. Petersburg, Russia. Wendy Betts, Scott Carlson, and Gregory Gisvold, Kosovo Unit, American Bar Association Central and East European Law Initiative, Pristina, Kosovo, and Washington, D.C. The materials contained herein represent the opinions of the authors and should not be construed to be the view of the American Bar Association, Independent International Commission on Kosovo, or the World Bank. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly should not be construed as representing the policy of the ABA. Nothing contained in this publication is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice form their own legal counsel. This publication and any forms and agreements herein are intended for educational and informational purposes only.

* B.A. 1992, University of the Pacific; M.A. 1999, International Economics and Conflict Management, Johns Hopkins School of Advanced International Studies. Country Director for ABA/CEELI's programs in Macedonia and Albania and co-director of its War Crimes Documentation Project.

** B.A. 1985, University of Alabama at Birmingham; J.D. 1989, cum laude, University of Georgia; LL.M. 1994, with distinction, Georgetown University. Central and East European Program Director for ABA/CEELI. Deputy Legal Advisor for Human Rights for the Independent International Commission on Kosovo (1999–2000) and a Fellow of the Global Law and Policy Initiative at the Chicago-Kent College of Law (1999–2000).

*** B.A. 1988, Amherst College; J.D. 1994, University of Minnesota. Country Director for ABA/CEELI's programs in Kosovo and Montenegro and co-director of its War Crimes Documentation Project.

I. INTRODUCTION

The study of post-conflict Kosovo presents an important opportunity to distill lessons that can provide guidance for future post-conflict, transitional administrations. The lessons-learned from an analysis of any post-conflict setting are many and varied. The goal of this short paper is limited to the identification of key lessons-learned in the effort to re-establish the judiciary and rule of law in post-conflict Kosovo. Even within this limited setting, this paper is not intended to provide exhaustive coverage of the issue. Rather, it is intended to provide the reader with basic information and central themes that are essential to a discussion of the challenges before the international community in Kosovo and identify potential approaches of more general application for the future.

In the early days of the transitional administration, the effort to rebuild the judicial system and establish the rule of law suffered from a number of challenges to its credibility and legitimacy. The transitional administration lacked adequate human resources and was forced in some respects to rely on local expertise in key areas where expertise and experience were lacking. At the same time, the administration failed to involve generally the local population in areas where ownership in the transition process was crucial to the administration's success. Reluctance to involve local input may be attributable to the acknowledged uncertainty as to Kosovo's final status and affiliated concerns, but regardless, the result was a number of ad hoc measures instituted by the administration in response to issues as they arose. These measures frequently met with resistance from the local population, and consequently, efforts to establish a stable, interim legal system have foundered.

A substantial number of these measures fall within several basic categories: 1) applicable law and the lawmaking process; 2) judicial infrastructure and personnel; and 3) accountability for war crimes committed during the conflict. While these themes may overlap in some respects, they nonetheless represent categories with discrete concerns of central importance to the establishment of the rule of law. The discussion of each of these issues builds to some extent on the others, and taken together, they describe core fundamental issues that are essential to an understanding of justice in a post-conflict situation.

The experience in re-establishing the legal system in Kosovo highlights a number of areas where the international community's response did not properly address the extant post-conflict conditions. A number of the problems experienced by the international community could be avoided in future situations by using a more developed, phased ap-

proach, which ultimately allows for full participation by the local population, but in the short-term relies on international standards and expertise. In the beginning, there would be the immediate, emergency term with internationals controlling the process followed by a gradual, methodical transition to an intermediate term where locals assume control of the process. The key to the success of such an approach is a mutual understanding between the affected population and the international community of their rights and responsibilities in each phase and in the general process of transition. If the international community can incorporate key lessons-learned from Kosovo into its approach to post-conflict transitional administration, the shortcomings of the Kosovo operations may be the basis for future successes.

II. GENERAL BACKGROUND

Upon the conclusion of the NATO airstrikes in June 1999, the United Nations (UN) Security Council adopted Resolution 1244, establishing a transitional civil administration in Kosovo, the United Nations Interim Administration Mission in Kosovo (UNMIK).[1] This Resolution sets up a system comprised of four substantive components. Three of these components are led by non-UN organizations, but still fall under UN overall jurisdiction, and are organized as follows: the UN heads the civil administration, the European Union (EU) addresses reconstruction, the Organization for Security and Cooperation in Europe (OSCE) is tasked with institution-building and democratization, and the UN High Commission for Refugees had been charged with humanitarian affairs, but this component has since been disbanded.[2] In early July 1999, Bernard Kouchner was appointed to head UNMIK as the Special Representative of the Secretary General (SRSG), and in February 2001, Hans Haekkerup took over as his successor.[3]

III. APPLICABLE LAW

As part of his first official legal act (UNMIK Regulation 1999/1), SRSG Kouchner identified the applicable law in Kosovo to be Federal

1. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

2. *United Nations Interim Administration in Kosovo, UNMIK at 18 Months, at* http://www.un.org/peace/kosovo/pages/unmik12.html (last visited April 12, 2001).

3. Prior to Kouchner, UNMIK was headed by Acting Special Representative, Sergio Vieira de Mello. *United Nations Interim Administration in Kosovo, Chronology, at* http://www.un.org/peace/kosovo/news/kos30day.html (last visited April 12, 2001).

Republic of Yugoslavia (FRY)/Serbian law to the extent this body of law is not inconsistent with international human rights standards.[4] Establishing the law to be applied was particularly important at this time due to the fact that security forces from different countries were neither policing nor conducting arrests according to a uniform standard. However, the manner in which the law was determined raised further issues. Regulation 1999/1 did not provide guidance on how to reconcile the FRY/Serbian law with international human rights standards. At the time, the SRSG did not have the resources to conduct such an analysis and the local legal community did not have the expertise.[5] In addition, the initial lawmaking process did not include any formal mechanism for soliciting Kosovar input from interested constituencies or the general public.[6] Thus, the selection of FRY/Serbian law was made without consulting those who would be applying the law or those who must submit to it, and questions concerning its compatibility with relevant international human rights standards were not addressed at that time.

In August 1999, the provisional Kosovar Albanian judges, appointed by UNMIK, began to protest openly against the presumed application of FRY/Serbian law. Among these judges, the SRSG's selection of applicable law was considered tantamount to re-establishment of the prior, oppressive FRY/Serbia regime.[7] The resistance to FRY/Serbian law resulted in confusion in the legal system.[8] The interim judges, the Kosovo

4. *See On the Authority of the Interim Administration in Kosovo*, sec. 3, U.N. Doc. UNMIK/REG/1999/1 (July 25, 1999); *at* http://www.un.org/peace/kosovo/pages/regulations/reg1.html.

5. This lack of resources immediately placed the SRSG in a difficult position vis à vis stated UN policy. The Secretary General's Report in July 1999: "In assuming its responsibilities, UNMIK will be guided by internationally recognized standards of human rights as the basis for the exercise of its authority in Kosovo. UNMIK will embed a culture of human rights in all areas of activity, and will adopt human rights policies in respect of its administrative functions." *Report of the Secretary General of the United Nations to the United Nations Security Council*, U.N. SCOR, 54th Sess., Doc. S/1999/779 (12 July 1999), para642.In August 1999, the SRSG formed the Joint Advisory Council on Legislative Matters (JAC/LM), a body comprising Kosovar legal professionals and in-country representatives of legal assistance providers. Although the JAC/LM was designed to solicit Kosovar input into segments of the interim rulemaking process in Kosovo, no procedures were put in place for communication between the Kosovar representatives on the JAC and the general public.

7. "This decision outraged numerous Kosovar judges, prosecutors, and lawyers, who refused to apply the discriminatory Serbian Criminal Code. . ." International Crisis Group, *Starting from Scratch in Kosovo: The Honeymoon is Over* 12 (1999), *available at* http://www.intl-crisis-group.org/projects/sbalkans/reports/Kos31rep.htm.

8. "[UNMIK Regulation 1999/1] generated widespread opposition from Kosovar leaders, including many of the judges appointed to be part of the emergency judicial system . . . [and] as a result of the confusion and dissension, few judicial proceedings got underway under the emergency judicial system, and in those proceedings that occurred, different laws were applied by different judges." UNITED STATES DEPARTMENT OF STATE, KOSOVO JUDICIAL ASSESSMENT MISSION REPORT 6 (2000).

Implementation Force (KFOR), and the UNMIK Civilian Police each applied a diverse collection of legal provisions and standards, including FRY/Serbian law, pre-1989 criminal law, and Albanian criminal law, to alleged perpetrators of crimes. Consequently, many trials were delayed and the alleged perpetrators of crimes remained in detention for extended amounts of time.[9]

On December 12, 1999, the SRSG adopted Regulations 1999/24[10] and 1999/25,[11] which identified applicable law to be the law in force in Kosovo prior to March 22, 1989, and repealed the provision of Regulation 1999/1 applying contemporary FRY/Serbian law.[12] With this decision, UNMIK identified an acceptable body of law and effectively ended the question of which law to apply. However, this decision was not made, nor was the issue resolved, until the transitional administration had been on-ground for six months. This delay expended valuable goodwill and credibility, and it did not resolve the issue of compatibility with international human rights standards.

A review of the process of selecting the applicable law highlights several difficulties that continue to plague UNMIK's attempts to restore the judicial system. First, UNMIK imposed a body of law that was not perceived as ethnically neutral. The negative repercussions of this action were compounded by the lack of Kosovar input into the legislative process more generally.[13] Both contributed to a sense of disenfranchisement

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9. The OSCE's Legal System Monitoring Section (LSMS) noted that UNMIK Regulation 1999/26 extending detention period is a "clear breach" of the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, LEGAL SYSTEMS MONITORING SECTION, KOSOVO: REVIEW OF THE CRIMINAL JUSTICE SYSTEM FEBRUARY–JULY 2000 11 (2000) [hereinafter OSCE LSMS]. For a more detailed discussion of the legal issues, see OSCE LSMS, REPORT NO. 6: EXTENSION OF TIME LIMITS AND THE RIGHTS OF DETAINEES: THE UNLAWFULNESS OF REGULATION 1999/26 (Apr. 29, 2000).

10. *On the Applicable Law in Kosovo*, U.N. Doc. UNMIK/REG/1999/24 § 1 (1999); *available at* http://www.un.org/peace/kosovo/pages/regulations/reg24.html.

11. *Amending UNMIK Regulation No. 1991/1 On the Authority of the Interim Administration in Kosovo*, U.N. Doc. UNMIK/REG/1999/25 § 1 (1999); *available at* http://www.un.org/peace/kosovo/pages/regulations/reg25.html.

12. This date is significant because it marked the date when Kosovo lost its autonomy under the Federal Republic of Yugoslavia.

13. Kosovar involvement in the legislative process has been recognized as a necessity for the success of the UNMIK administration. The *Independent International Commission on Kosovo* report stated: "Kouchner and his officials can wield this authority at their discretion, appoint and dismiss Albanian officials, determine which laws are to be applied and which are not, or override, should they feel compelled to do so, the decisions taken by the elected bodies of the future. Yet given the complexity of contemporary society, it is almost impossible to implement policy and to sustain legitimacy without cooperation with, and indeed reliance on, local experts and persons of influence." INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, AND LESSONS-LEARNED 114 (2000). The early days of the UNMIK administration were not known for their

among the Kosovar Albanians and Kosovar Serbs that remains pervasive. Second, both the conduct of trials according to varying laws[14] and the instances of extended pre-trial detentions[15] were contrary to international due process standards.[16] Third, UNMIK does not have the technical resources to engage in rapid, scholarly analysis of the compatibility of proposed laws with international standards.[17] These shortcomings called into question the international community's commitment to implementing the very human rights standards that were the genesis of its involvement.[18] During the crucial formative period, a sense of disenfranchisement, violations of fair trial standards, and a lack of technical resources had deleterious effects on the credibility and legitimacy of UNMIK and the judicial system.

IV. JUDICIAL INFRASTRUCTURE AND PERSONNEL

Compounding the problems of determining applicable law were the physical infrastructure limitations arising out of the conflict. The NATO air-strikes and violence in Kosovo inflicted significant damage on much

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inclusiveness generally. The International Crisis Group noted, "[C]ountless internationals and Kosovars have complained that UNMIK administrators still do not reach out or even get out of their offices nearly enough, that, in general, Kosovars are not routinely consulted." International Crisis Group, *supra* note 7, at 11.

14. The OSCE LSMS identified a number of fundamental examples of this problem, ranging from differing treatment of witness statements to removal of co-defendants from court. OSCE LSMS, *supra* note 9, at 20–21. In the case of Baskaya and Okçuoglu v. Turkey (Applications nos. 23536/94 and 24408/94), the Eur. Ct. H.R. (1999), The European Court of Human Rights held that uncertain legal standards were contrary to Article 7 of the ECHR. Crimes must be clearly defined in law. The court noted:

When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see the Cantoni v. France, 15.11.1996, Reports 1998-V, no. 20, pp. § 29; the S.W. and C.R. v. the United Kingdom judgments of 22 November 1995, Series A nos. 335-B and 335-C, pp. 41–42, § 35, and pp. 68–69, § 33, respectively).

Para. 36. When courts within the same jurisdiction choose different substantive bodies of law and/or standards, no charitable definition of "accessibility" or "forseeability" could be said to be met.

15. OSCE LSMS, REPORT NO. 6: EXTENSION OF TIME LIMITS AND THE RIGHTS OF DETAINEES: THE UNLAWFULNESS OF REGULATION 1999/26 (29 April 2000).

16. *See id.* and OSCE LSMS, *supra* note 9, at 20–22.

17. Lawyers Committee for Human Rights, *A Fragile Peace: Laying the Foundations for Justice in Kosovo* 3 (1999)("The UN is short of legal staff as well as skilled translators urgently needed for the legislative reform process"); *at* http://www.lchr.org/pubs/kosovofull1099.htm.

18. The International Crisis Group noted: "This emerging, inauspicious cynicism with regard to the involvement in and commitment to establishing a viable legal system for Kosovo points back to what might be called the Achilles heel of the entire international mission." International Crisis Group, *supra* note 7, at 13.

of the physical infrastructure of the region. Many of the court facilities, equipment, legal texts, and other materials necessary for an operating legal system had been destroyed. In addition, the basic utilities necessary for the society and courts to function, such as electricity, water, and telephone service, had been decimated. Many of the court buildings that remained intact at the end of the conflict were appropriated by international organizations for other uses. This lack of facilities, equipment, and materials posed a substantial obstacle to the convening of efficient and effective trials.[19]

In addition to the deficiencies in the physical infrastructure, judicial expertise in Kosovo was sorely lacking. Prior to the conflict, the vast majority of judges were Kosovar Serbs. Following the conflict, few Kosovar Serb judges remained in Kosovo, and those who did were largely unwilling to serve. The Kosovar Albanian legal professionals had little recent experience as judges or prosecutors. Since the revocation of Kosovo's autonomy in 1989, virtually no Kosovar Albanian legal professionals had been allowed to enter the legal system, and Kosovar Albanian attorneys who practiced their profession did so mainly in the private sector, primarily as defense counsel.[20]

In response to the manpower shortage, one of the first actions of UNMIK was to establish an emergency judicial system. In an emergency decree on June 28, 1999, the Acting Special Representative established the Joint Advisory Council on Provisional Judicial Appointment mandated to make recommendations for 3-month, renewable appointments of judges and prosecutors.[21] The first round of these emergency appointments was conducted on June 30, when nine judges were named to serve in a mobile court. Over the course of the next three months, additional appointments were made to staff the District Courts, the Ad Hoc Court of Final Appeal, and the Ad Hoc Office of the Public Prosecutor.[22]

Directly thereafter, UNMIK moved forward with the establishment of a permanent judiciary. In September 1999, the SRSG promulgated two regulations calling for the creation of two commissions to facilitate

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19. *See generally*, OSCE LSMS, REPORT NO. 1: MATERIAL NEEDS OF THE EMERGENCY JUDICIAL SYSTEM (Nov. 7, 1999); *at* http://www.osce.org/kosovo/publications/law/legal1.htm.

20. According to the Kosovo Chamber of Advocates, in 1990 the Serbian Ministry of Justice suspended the offering of the bar exam in Kosovo. As a result, no new lawyers have been admitted to the Chamber in 10 years because there has been no opportunity for them to complete the required legal internship or sit for the professional exam.

21. OSCE LSMS, *supra* note 9, at 11.

22. Lawyers Committee for Human Rights, *supra* note 17, at 8–9. The District Court in Gnjilane did not have judges and prosecutors appointed, but rather was served by the mobile court unit from Pristina.

this process. UNMIK Regulation 1999/7 dissolved the Joint Advisory Council and in its place established the Advisory Judicial Commission on Appointment of Judges and Prosecutors (AJC).[23] The AJC was mandated to advise the SRSG on the appointment of, and complaints against, judges and prosecutors. The second commission, the Technical Advisory Commission on Judiciary and Prosecution Service (TAC), was mandated to assess the long-term requirements of Kosovo regarding the number, level, and categories of judicial bodies.[24] The results of this assessment were presented to the SRSG in December 1999. In the period from January to August 2000, the SRSG appointed 662 judges, lay judges, and prosecutors.

Although in just over one year UNMIK had been able to fill over 600 vacant positions in the judiciary, these personnel still lacked the necessary training to conduct trials in accordance with international standards. Due to their prior international isolation, the new Kosovar judges and prosecutors were unfamiliar with the relevant human rights standards, and therefore, they were not equipped to identify provisions of the applicable law that should be superseded by applicable international human rights law.[25] The SRSG met the problem of inadequately trained local judges in two ways: the establishment of a training institute (later formalized as the Kosovo Judicial Institute), and the institution of international judges in February 2000.[26] The international judges and prosecutors were to serve a dual interim function ensuring the application of international standards in Kosovo and serving as examples to local judges of what would be expected of them in terms of efficiency, application of equal standards, and treatment of minorities.

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23. *United Nations Interim Administration in Kosovo, On Appointment and Removal From Office of Judges and Prosecutors*, U.N. Doc. UNMIK/REG/1999/7 § 1; *at* http://www.un.org/peace/kosovo/pages/regulations/reg7.html.

24. *United Nations Interim Administration in Kosovo, On Recommendations for the Structure and Administration of the Judiciary and the Prosecution Service*, U.N. Doc. UNMIK/REG/1999/6 § 5; *at* http://www.un.org/peace/kosovo/pages/regulations/reg6.html.

25. "The main reason for the courts' reluctance to use and refer to human rights law seems to be a lack of knowledge of the law, both in its substance and on how to *implement* it in practice." OSCE LSMS, *supra* note 9, at 18.

26. Continuing tensions in the Mitrovica area prompted the SRSG to sign UNMIK Regulation No. 2000/6, appointing international judges and prosecutors to the Mitrovica judicial district. According to this Regulation, the international judges have the authority and the responsibility to perform the functions of their office, including the authority to select and take responsibility for new and pending cases within the jurisdiction of the court to which he or she is appointed. The same authority is given to the international prosecutors within the functions of their office. *United Nations Interim Administration in Kosovo, On the Appointment and Removal from Office of International Judges and International Prosecutors*, U.N. Doc. UNIMIK/Reg/2000/6, *at* http://www.un.org/peace/kosovo/pages/regulations/reg06.html.

The introduction of international judges provided its own set of challenges. While the international judges were experienced with international standards, they were unfamiliar with the applicable law. Furthermore, their number and dispersal was erratic, once again detracting from the international community's attempt to enforce one set of internationally-recognized standards.[27] Finally, the presence of international judges was unfortunately reminiscent of the "parallel system" the Kosovar Albanian community had struggled so long against.

This situation fostered the same lack of confidence in UNMIK and the legal system as that which arose in relation to the applicable law question described above. Inconsistent application of the laws by a combination of both local and international judges made it difficult for defense counsel to mount a defense, particularly as they themselves were not well-versed in either the applicable international standards or the applicable law in force.

In addition, allegations quickly arose that certain judges were being improperly influenced,[28] and the necessary transparent judicial disciplinary procedures were nonexistent. While Regulations 1999/7 and 2000/6 outline the grounds for the dismissal of local and international judges, respectively, neither outlines specific, transparent complaint procedures.[29] The OSCE LSMS has identified numerous, dramatic shortcomings in trial procedures,[30] but the translation of these observations into concrete reforms has been slow at best. As a result, from its inception, the fledgling judicial system suffered a variety of challenges to its credibility, giving both internationals and locals substantial cause to question the very viability of the system itself.[31]

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27. "[T]he limited number of international judges, their sporadic distribution and the restricted scope of their powers still fail to adequately address the impartiality concerns." OSCE LSMS, *supra* note 9, at 69. The LSMS noted that this resulted in "unequal treatment of the defendants." *Id.* at 70.

28. Lawyers Committee for Human Rights, *supra* note 17, at 2–3.

29. *On Appointment and Removal From Office of Judges and Prosecutors*, *supra* note 23, at 3; *On the Appointment and Removal from Office of International Judges and International Prosecutors*, *supra* note 26, at 1; The OSCE LSMS noted, "Despite domestic law provisions and Regulation 1999/7, there is no effective system for the investigation and removal of judges and public prosecutors." OSCE LSMS, *supra* note 9, at 61.

30. OSCE LSMS, *supra* note 9, at 20–22.

31. *Report of the Secretary General of the United Nations on the United Nations Mission in Kosovo*, U.N. Doc. S/5/2000 (3 March 2000), paras. 60, 109, & 110 [hereinafter Report of the Secretary General]; *see also* INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, AND LESSONS-LEARNED 113 (2000).

V. ACCOUNTABILITY FOR WAR CRIMES

Prior to and during the international conflict, human rights abuses in Kosovo were nightly news. This phenomenon demonstrated a clearly commendable international concern that eventually brought international pressure to bear on the Serbian government. However, it also presented a puzzling array of information. While there was a general sense that abuses were prevalent, their precise dimensions were not clear. This lack of clarity caused some to question the accuracy of certain alleged atrocities.[32] Following this type of conflict, the issues of prosecution, reconciliation, and restitution may to a large extent depend upon quantifiable data, which reveal important patterns and trends in the overall human rights picture.

In the aftermath of the sort of conflict experienced by Kosovo, the justice system can play a central role in restoring order, instilling democracy, and preventing future violence. To accomplish this role, the justice system must meet the population's demand for justice for crimes perpetrated during the conflict. To do so, the data concerning the alleged atrocities must be amassed and examined in a way that instills confidence in the local community. The manner and degree to which a justice system addresses the population's sense of vulnerability and injustice fundamentally affects the pacification and reconciliation process.

Immediately after the onset of hostilities, a number of nongovernmental organizations began to collect information on human rights abuses in Kosovo. There was some formal collaboration in data collection between the NGO community and multilateral institutions in an attempt to harmonize efforts and to follow a standard format approved by the International Criminal Tribunal for the Former Yugoslavia (ICTY). These organizations proceeded to publish their findings in both qualitative and quantitative form.[33] However, collection of the information is only the first aspect of accountability. With respect to war crimes and crimes against humanity, the affected society and the international community need to have the events not only recognized, but acted on.

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32. The presence of a debate on the particulars should not be allowed to obscure the fact that large scale human rights abuses were prevalent. *See Report of the Secretary General*, *supra* note 31, at Annex I.

33. E.g., AMERICAN BAR ASSOCIATION CENTRAL AND EAST EUROPEAN LAW INITIATIVE & AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, POLITICAL KILLINGS IN KOSOVA/KOSOVO MARCH-JUNE 1999 (2000), *available at* http://hrdata.aaas.org/kosovo/pk/ [hereinafter POLITICAL KILLINGS IN KOSOVA/KOSOVO]; ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE, KOSOVO/KOSOVA AS SEEN AS TOLD (1999); INTERNATIONAL CRISIS GROUP, REALITY DEMANDS (2000).

Building on the experiences elsewhere in the former Yugoslavia, the international community recognized that the ICTY would not be the sole, or even primary, organ for investigation and prosecution of war crimes alleged to have been committed in the region.[34] Rather, much of this work would be done either entirely locally, or by international NGOs. However, continued ethnic tensions in Kosovo impeded the progress of war crimes prosecutions in the domestic courts. For instance, Kosovar Serb defendants were unwilling to allow themselves to be defended by Kosovar Albanian defense lawyers. As a result, international defense lawyers, primarily from Serbia, were brought in to defend the Kosovar Serb defendants.

UNMIK's response to the need for credible neutrality in the proceedings was the proposed creation of the Kosovo War and Ethnic Crimes Court (KWECC).[35] As an interim tribunal addressing serious ethnic and war crimes offences, the KWECC was to be a key factor in international efforts to assist the entire Kosovar population to move past ethnic division and toward reconciliation. Based in part on concepts underlying the ICTY and the Human Rights Chamber in Bosnia, the KWECC was designed to ensure international involvement and oversight in ethnic and war crimes cases. To accomplish this goal, it was to be staffed with multiethnic national and international judges, prosecutors, and staff. The KWECC was to have jurisdiction over war crimes, crimes against humanity, genocide, and serious crimes committed on the grounds of race, ethnicity, religion, nationality, association with an ethnic minority, or political opinion. However, in September 2000, the United Nations quietly discarded efforts to form the KWECC, despite having put significant effort into its establishment, relying instead upon the international judges and prosecutors in the five judicial districts in Kosovo.[36]

As the international community struggled with the question of how to best address war crimes cases on a local level, war crimes trials commenced in District Courts without adequate personnel, security, interpretation, and equipment. Consequently, a sophisticated review of the data collected to date was not a realistic goal. This limitation combined

34. Statement by Carla Del Ponte, Prosecutor of International Criminal Tribunal for the Former Yugoslavia on the Investigation and Prosecution of Crimes Committed in Kosovo, ICTY Press Release, 29 September 1999. Carla Del Ponte stated, "[P]rimary focus of the Office of the Prosecutor must be the investigation and prosecution of the five leaders of the Federal Republic of Yugoslavia and the Republic of Serbia." She went on to note the concurrent jurisdiction of the ICTY and national tribunals.

35. UNMIK ADMINISTRATIVE DEPARTMENT OF JUSTICE, THE JUSTICE SYSTEM OF KOSOVO (2000).

36. CEELI Update (Winter 2001, forthcoming).

with the modest involvement of the ICTY and the fact that key alleged perpetrators remained at large in Serbia raised serious questions about the resolve and ability of the international community to pursue accountability both locally as well as internationally. It became increasingly difficult to conceive of circumstances in which all of those guilty of war crimes would be brought to justice.

Again, the legitimacy of the international administration suffered, for the same states leading the administration were perceived to have failed to address the core abuses that lay at the root of the entire conflict. The local situation decayed further as a result of a number of well-publicized incidents in which many alleged perpetrators detained on charges of war crimes escaped from pretrial detention.[37] Because of this inability to effectively address war crimes issues in the emergency phase, the opportunity to hold the perpetrators accountable was compromised at the local level, and serious doubts emerged as to the commitment of the international community to address the issue more generally.

VI. LESSONS-LEARNED

A. *Applicable Law*

The failure of the UN to address the lawmaking process quickly and effectively created an array of problems. However, these problems were not entirely unforeseen. During an initial assessment mission in mid-July 1999, representatives from ABA/CEELI and the United States Department of Justice (USDOJ) drafted a discussion memo addressing the question of applicable law in Kosovo. The two primary issues raised were: "(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."[38] These issues enjoyed support from relevant representatives of the OSCE and the Council of Europe (CoE) in-country at the time. Though unsolicited, the memo received some circulation through appropriate channels within UNMIK, but implementing actions were limited at best.[39] In fairness to the SRSG,

37. *UN in Kosovo Dismisses Director of Detention Centre Following Escape of Prisoners* (Sept. 5, 2000), *at* http://www.un.org/peace/kosovo/news/99/sep00_1a.htm.

38. ABA/CEELI-USDOJ, Request for Clarification and Offer of Assistance to the SRSG, July 1999(On file at ABA/CEELI).

39. *See, e.g.*, Letter from SRSG Kouchner to Council of Europe, dated 20 July 1999 (Requesting the CoE evaluate the compatibility of FRY/Serbian criminal law with interna-

it was not readily apparent where he would be able to find the necessary resources to rapidly assess the compatibility of FRY/Serbian legislation with international human rights standards, but the incorporation of local participation in the lawmaking process, while difficult in some respects, did not present a significant resource challenge.

The process of defining the immediately applicable law and establishing an accepted lawmaking process should be undertaken prior to the next post-conflict administration. The next administration should deploy with these strategies in place. In the *Report of the Panel on United Nations Peace Operations (Brahimi Report)*,[40] submitted to the UN Secretary General on August 17, 2000, the UN itself conceded the need for this type of preparation, with a phased approach to implementation. The *Brahimi Report* suggested that, in the immediate emergency phase, the international community should enter with a pre-prepared, standard legal template. To enhance the perception of neutrality, all provisions included in this template should be based on international fair trial and due process standards. This template can serve as the applicable law until adequate permanent legislation can be identified and/or developed. Such a template should focus on basic criminal offences and criminal procedure. In addition, the procedures outlined should take into account the availability, or lack thereof, of qualified legal professionals.[41] The *Brahimi Report* recognizes that Kosovo posed an example of a situation where a pre-packaged, skeletal legal system could have been instituted in an interim period, during which the
region's law could be amended and brought into compliance with international standards.[42]

In this emergency phase, the international community also should commit to the establishment of an official legal publications office and distribution network, thereby dramatically increasing the public's awareness of the early steps taken by the administration. In Kosovo, such basic

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tional human rights standards). The SRSG also authorized the establishment of the Joint Advisory Council for Legislative Matters. *See supra* note 5, at para. 42.

40. *Report of the Panel on United Nations Peace Operations* (*Brahimi Report*), submitted to the UN Secretary General on August 17, 2000, U.N. Doc. A/55/305/S/2000/89 (2000); *available at* http://www.un.org/peace/reports/peace_operations/docs/summary.htm.

41. One problem encountered early on in Kosovo was the applicable criminal procedure code provision calling for trial panels of three judges. As a result, in order for trials to commence, a large number of judicial personnel were needed. *See* OSCE MISSION IN KOSOVO, DEPT. OF HUMAN RIGHTS AND RULE OF LAW, RULE OF LAW DIVISION, OBSERVATIONS AND RECOMMENDATIONS AT THE OSCE LSMS, REPORT NO. 2: THE DEVELOPMENT OF THE KOSOVO JUDICIAL SYSTEM (10 JUNE THROUGH 15 DECEMBER 1999) (Dec. 17, 1999), *at* http://www.osce.org/kosovo/publications/law/legal2.htm.

42. "[The Mission's] tasks would have been much easier if a common United Nations justice package had allowed them to apply an interim legal code . . . while the final answer to the "applicable law" question was being worked out." *Brahimi Report*, *supra* note 40, at 13.

efforts at transparency in the decisionmaking process would have gone a long way toward decreasing the appearance of the re-institution of a "parallel system." In addition, the international community should commit to a regular slate of public affairs programming discussing major legal developments. This last effort could, by necessity, be conducted in stages, as not every public information outlet may be ready to receive this information in the early days of the international community's entry into the situation. However, very early on in post-conflict Kosovo, community councils were created in most major cities and village centers in the province.[43] Public hearings or town hall meetings would have been both possible and inexpensive in Kosovo.

As soon as the interim code is in place and disseminated, the administration should embark upon a legislative drafting process, which includes a substantial public participation component with the goal of developing a body of permanent, acceptable law. This process should be sequenced to address the basic foundation legislation (i.e., criminal and criminal procedure codes, civil and civil procedure codes, etc.) in the near term and move to more specific legislation in the intermediate term. The key to the ultimate success of this endeavor is the input of the local population. This input allows for ownership by both those who will enforce the law and those who must submit to it. In the Kosovo example, a greater commitment to collaborative decisionmaking and solicitation of Kosovar input by UNMIK would have substantially decreased the resistance that met many of the administration's early decisions.

B. *Judicial Infrastructure and Personnel*

The UN's experience in Kosovo also showed that in the short-term, it is unrealistic to rely on local physical and personnel capacity when the foundation of basic legal knowledge and administration has been decimated. In such situations, it is not practical to envision establishing a comprehensive legal system by immediately appointing local judges, creating a training body, and creating a monitoring body. The existence of the interim, emergency period needs to be fully recognized. During this emergency period, the international community should be prepared to use well-trained international jurists while local personnel are identified and trained. While UNMIK did institute an emergency judicial

43. UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, STRATEGY FOR KOSOVO 2001–2003 18 (2000). In the immediate post-conflict period, the United States Agency for International Development's Office of Transition Initiatives assisted in the creation of over 200 community improvement councils.

system, it relied initially on local capacity, which was neither extensive nor fully qualified.

In terms of equipment, the OSCE and its donor governments made arrangements for the distribution of some equipment at the outset. However, these efforts did not come to fruition until late in 1999, and they did not match the increasing demand created by UNMIK's rapid efforts to fill all judicial vacancies. 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,[44] and this transitional judiciary should be accompanied by a targeted package of equipment sufficient to support the interim judiciary's functions. This package would in turn provide an equipment base for locals as they assume responsibilities within the judicial system.

Once this system is in place, the administration should shift its focus to identifying a core cadre of local legal professions for intensive training. Small groups of active judges will be more manageable for training, monitoring, and mentoring. Judicial training in post-conflict areas, especially those in post-communist countries, must be interactive and focused on issues that newly appointed judges will confront in their courtrooms. The urgency of the situation makes standard, theory-based lecture models unworkable. In the near term, as this core group of judges is trained, they should be paired with international judges as part of a mentoring program. In addition, this group should serve as trainers for their peers as additional judges are identified and appointed.

Despite this training, there can be no doubt that any judicial system assembled from the ground up will encounter difficulties. Systems must be in place to monitor and deal with such problems from the onset of the transitional administration. The international judges, as well as the new judges once phased in, should be monitored by an independent monitoring body.[45] In the instance of Kosovo, the OSCE LSMS deserves high

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44. The *Brahimi Report* also notes that there should be a standing group of legal experts prepared to deploy as a mission's justice team and that these personnel should be pre-trained in the interim legal template. This same pre-selection, vetting, and training should apply not only to the judicial advisors to the mission, but to a group of international jurists, available for immediate deployment simultaneous with the transitional administration. *See Brahimi Report*, *supra* note 40, at 13, 21.

45. UNMIK is engaged in the process of developing a supervisory body, the Kosovo Judicial Council, which would serve that function. However, a CoE analysis of the draft raised concerns about the SRSG domination of the Council and the impact of that on independence of the judicial branch. *See Comments on draft regulation No. 2001/XX on the establishment of the Judicial Council of Kosovo*, PCRED/DGI/EXP (2001) 4 Restricted. This issue has proved problematic in Bosnia for a number of years, and the international community has recently attempted to address this issue through a new body, known as the Independent Judi-

praise for its accomplishments with limited resources. Nonetheless, it was only able to aggressively monitor a fraction of the trials. Monitoring endeavors must be properly funded and lead decisively to action. The judicial system must have transparent appellate and disciplinary processes that react to identified shortcomings and abuses.

The post-conflict justice system must demonstrate to the population that, first and foremost, it will uphold human rights standards and hold accountable those who violate them. Public confidence in the justice system is of utmost importance in the wake of violent, internal conflict. Retribution and vigilantism are direct outgrowths of the society's sense of helplessness and lack of recourse, either actual or perceived. Access to, and impartiality of, the justice system is one manner by which the population gauges its ability for recourse. The re-establishment of a judicial system using specially-trained, international jurists, while local legal professionals are trained and then mentored, provides a foundation for a basic judicial system capable of immediately applying international standards and ensuring accountability. The ability of the justice system to function effectively immediately following a conflict becomes even more imperative in those instances where war crimes investigations and prosecutions will be likely.

C. *Accountability for War Crimes*

In the wake of violent ethnic conflict, war crimes and crimes against humanity cannot be treated in the same manner as standard criminal cases. There is a particular urgency and complexity that surrounds crimes committed in the course of ethnic conflict. There is also a short timeframe in which important information must be gathered before it is lost. The international community's response to these challenges has the ability to quell or exacerbate residual tensions within the local community.

The first step in the process of addressing massive violations of human rights is the collection of information that can be used to publicize the events or to hold the perpetrators accountable in some manner. The work of truth commissions, commissions of inquiry, and other similar bodies elsewhere in the world has brought to light the important role that documentation plays in reconciliation. The data collection process should begin as soon as it is possible to interview the victims of abuses; this can be during the conflict and/or in the immediate aftermath. One primary lesson learned in Kosovo regarding this documentation process

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cial Commission. This body is to be "an international oversight body for judicial reform." Press Release, Office of High Representative (14 March 2001).

is the power of cooperation among NGOs collecting and publishing data. Such collaboration leads to a larger pool of comparable information. If data is collected in varying formats, while useful for qualitative reporting, it is not conducive to amalgamation and quantitative analysis. Quantitative analysis can identify patterns of abuses that can be used as evidence by international or local judicial bodies or accountability mechanisms such as truth commissions. In the case of Kosovo, ABA/CEELI and the American Association for the Advancement of Science (AAAS) conducted an advanced quantitative analysis of data on killings in Kosovo, collected by several influential non-governmental organizations. Its provocative findings demonstrate poignantly the efficacy of pooling NGO human rights data.[46]

If the post-conflict environment calls for the information to be acted on by a judicial body, the complexity and sensitivity surrounding these crimes necessitate an unbiased, highly-trained group of judges, prosecutors, and defense counsel. In Kosovo, the necessary qualifications were not present among the existing local legal professionals and the training regimen for all legal actors in such efforts (defense lawyers, judges, and prosecutors) was insufficient to the task. UNMIK responded to this situation with the institution of international judges and prosecutors. However, this action was inadequate to meet the challenges present. First, it was belated. Second, there were insufficient numbers, and the distribution was sporadic. The case of Kosovo highlights the need for the immediate formulation of proper judicial and enforcement bodies comprising well-trained international legal experts, who are prepared to maintain proper detention facilities, conduct investigations, and hold full trials.

Moreover, the international community has yet to prove that the alleged perpetrators residing outside of Kosovo will be brought to justice. So long as the ICTY's scope remains limited and the resolve of the international community on this issue is subject to question, the issue of ultimate accountability will remain unresolved. Consequently, members of the international community seeking to administer Kosovo's transition will do so with impaired credibility and effectiveness. At the very least, leaders within the international community must express unequivocally their resolve to receive proper accounting from the current Serbian government, which houses the majority of the alleged perpetra-

46. In POLITICAL KILLINGS IN KOSOVA/KOSOVO, ABA/CEELI and AAAS estimate that approximately 10,500 Kosovar Albanians were killed during the conflict. This examination was in turn linked to an analysis of refugee flows. The results of this comparison provide credible evidence of a centrally-coordinated campaign of ethnic cleansing. *Supra* note 33, at 1–2. The Center for Peace through Justice, Human Rights Watch, and Physicians for Human Rights shared their data to make this analysis possible.

tors. Furthermore, to be credible, this expression of resolve should reference the substantial amount of data assembled and include a demand that this data be specifically reviewed and incorporated into the pursuit of accountability.

VII. CONCLUSION

Failure to establish a responsive and efficient judicial system as part of the transitional administration in Kosovo eroded local support for UNMIK and the international community at a time when it was most needed. The international community should not have expected that international human rights standards, unfamiliar to a poorly trained judiciary, would be upheld in trials, particularly when there was not an adequate disciplinary process for judges who act or adjudicate improperly. Similarly, it must be recognized that if citizens do not know the laws, do not understand how to access the legal system, and do not see that system acting fairly and impartially, it leads to disillusionment with the international community. The international community should be prepared to shoulder the responsibility for achieving these goals in the immediate emergency period.

In future post-conflict transitional administrations, the international community should initially expect to bring international resources and expertise to bear in lieu of relying on local capacity. At the same time, the international community must begin soliciting input from the local population and providing training. These resources must be targeted at all facets of governance, including the judicial system. In the emergency period, following the cessation of hostilities, the legal system will likely lack both the necessary infrastructure and personnel to address the society's need for justice. Thus, during this period, the judicial system should be staffed by a group of international legal professionals, familiar with international human rights standards and trained in a pre-existing legal template. For this to be possible in the future, steps will need to be taken in advance to assemble a pool of qualified, committed professionals.

Following the emergency period, international involvement should be phased out as local capacity increases. This process must be accompanied by an open dialogue between the transitional administration and the local population on the status of the legal system and the reform process. Mutual understanding among the international community and the local population regarding the starting conditions, the phased approach, and the ultimate goals of the legal reform process will serve to

harmonize expectations and promote the legitimacy of the transitional administration.

Finally, the international community must anticipate the need for accountability and firmly demonstrate a long-term commitment to achieving this crucial component of any reconciliation effort. Naturally, there will be debate about the precise nature and dimensions of the abuses involved. However, the victims and alleged perpetrators are entitled to a process that addresses all the relevant data involved, and this process must comport with relevant international standards. International commitment to this process must be sustained and demonstrable both within the affected locale and abroad. The failure to do so jeopardizes the entire enterprise.