Strengthening the Rule of Law in Kosovo and Bosnia and Herzegovina

The Contribution of International Judges and Prosecutors

Almut Schröder
Foreword

It is only recently that Rule of Law has become a key task of international peacekeeping and peacebuilding operations. The mandates of the UN-Missions in Kosovo and East Timor as well as of the Office of the High Representative (OHR) in Bosnia and Herzegovina have been decisive steps. As part of so-called “executive” mandates the international community decided in all three cases to take over full or partial governmental authority for an interim phase, including the responsibility for public order, security and administration based on the principles of Rule of Law. More recently, the UN-Missions in Haiti as well as in Liberia were also given broad Rule of Law mandates, albeit without executive authority.

In the field, the implementation of these demanding mandates quickly ran into serious difficulties. The reasons are manifold and vary from case to case. They include weak or non-existing Rule of Law traditions in the respective countries and a lack of appropriate institutions and trained personnel, as well as the lack of experience on the international side in the implementation of Rule of Law in the context of multi-dimensional peace operations. There is, therefore, a considerable demand for empirical research and Lessons Learned on how to improve the implementation of Rule of Law.

The study presented here by the German Center For International Peace Operations (ZIF) on “The contribution on international judges and prosecutors strengthening the Rule of Law in Kosovo and Bosnia and Herzegovina”, was undertaken in 2003 and 2004 in view of this demand, like an earlier report on “Organized Crime as an obstacle to successful peace building – Lessons Learned from the Balkans, Afghanistan and West Africa”. The study on Kosovo and Bosnia and Herzegovina analyzes the role of international judges and prosecutors in Kosovan and Bosnian judiciaries. The evaluation of the advantages and shortcomings of international participation in the administration of justice is followed by recommendations on how to address the shortcomings.

Both studies take a very field-oriented approach in accordance with ZIF’s mandate to train and provide German civilian experts for peace operations and peace building, among them an increasing number of Rule of Law experts. ZIF would also like to express its gratitude to the German Federal Foreign Office for funding these studies.

Dr. Winrich Kühne
Director, ZIF

Berlin, April 2005

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1 7th International Berlin Workshop, December 11-13, 2003
The Zentrum für Internationale Friedenseinsätze (ZIF) was established by the German Federal Government in June 2002 with the aim of enhancing Germany's civilian crisis prevention capacities. ZIF’s core mandate is the training, recruitment, and support of German civilian personnel for peace operations and monitoring missions conducted in particular by the OSCE, the EU, and the UN. ZIF is organized in three units:

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**Recruitment Unit** – maintains a pool of pre-trained and pre-selected German civilian professionals. In close cooperation with the German Foreign Office, ZIF selects candidates from this pool and deploys them to peace and election observation missions. Currently, over 200 German professionals are serving in UN, EU, and OSCE field missions. Since its founding, ZIF has also deployed more than 800 German election observers all over the world.

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Introduction

Stability in the former Yugoslavia is unthinkable without a strong judiciary in compliance with international rule of law standards. Both impartial prosecution of war crimes and effective human rights protection are essential for reconciliation and for rebuilding a stable post-conflict society. New trust in a functioning judicial system can only grow if the courts are seen to treat everyone equally regardless of their ethnic affiliations. In order to reach these goals, not only fair rules but also independent judges who implement these rules are necessary.

Several years after the end of the violent conflicts, judicial impartiality can by no means be taken for granted in the societies of Bosnia and Herzegovina (BiH) and in Kosovo. Both regions are still largely divided by ethnic conflict lines. In order to pave the way for an independent jurisdiction, international judges and prosecutors have been appointed to Bosnian and Kosovan courts. They decide - mostly together with local jurists - politically sensitive cases such as war crimes, other ethnically motivated crimes and cases of organized crime and corruption. In Bosnia and Herzegovina, international judges also participate in decisions on violations of constitutional rights and human rights.

This international participation in the courts of BiH and Kosovo has led to considerable improvement with regard to the impartial handling of politically sensitive crimes and human rights violations. However, the way international jurists have been introduced has also caused additional difficulties for the former Yugoslav legal system which is already undergoing significant changes. For instance, English as an additional court language requires considerable extra efforts in the courts and hampers direct professional communication between the panel judges. Furthermore, upon arrival, international jurists are usually not familiar with the local law that they are expected to apply. The fact that they often originate from different law systems causes disagreement and confusion, too.

This study analyzes the role of international judges and prosecutors in Kosovan and Bosnian judiciaries. The evaluation of the advantages and shortcomings of international participation in the administration of justice is followed by recommendations on how to address the shortcomings. The study is based on an extensive analysis of relevant literature, reports of the Organization for Security and Co-operation in Europe (OSCE) and approximately 45 interviews the author conducted with international and local jurists in Bosnia and Herzegovina and Kosovo in 2003 and 2004.
Executive Summary and Recommendations

For a transitional period, international judges and prosecutors are needed to ensure fair and independent court decisions in former Yugoslav post-conflict societies. In politically sensitive cases local jurists are often suspected of being biased against members of the other ethnic group. International participation, therefore, strengthens the actual impartiality and the appearance of impartiality in such cases. In addition, international jurists provide urgently needed rule of law expertise to the former socialist judicial systems. This includes the application of international human rights standards, modern interpretation techniques and the effective use of witness protection programs.

In BiH, international jurists participate in decisions of the Constitutional Court and, until its closure in late 2003, they decided cases at the Human Rights Chamber. They are also members of the Special Section for organized crime, economic crime and corruption at the State Court and they will be part of the soon to be opened Special War Crimes Chamber at the same court. International judges and prosecutors in BiH decide exclusively in cooperation with local colleagues, either in mixed panels of judges or as co-prosecutors at the State Court’s Prosecutor’s Office.

In Kosovo, international jurists are exclusively involved in criminal cases related to war crimes, organized crime, economic crime and corruption working in mixed panels alongside local judges, but often also in purely international panels. At the public prosecutor’s office, cases are either dealt with by international prosecutors or their local colleagues. Cooperation between international and local prosecutors does practically not take place.

General problems of the international judicial participation in Kosovo and BiH are caused by the diverse legal backgrounds of the international jurists and by a lack of professional court interpreters. In addition, the high turnover of international jurists hampers the efficiency of the evaluated judicial missions, causing loss of institutional memory and in some cases significant delay in court procedures. While in BiH the cooperation of international and local jurists has shown positive effects on local capacity-building, the Kosovan model does not seem to be sustainable in the same manner. In Kosovo, cooperation between international and local jurists is the exception rather than the rule. A comprehensive strategy for building local capacities does not exist. Additional problems arise from the interference of the United Nations Interim Administration Mission (UNMIK) in the independence of the judiciary, a clear violation of the separation of powers. And even if both regions are still in post-conflict situations where certain restrictions in the application of rule of law standards are unavoidable in order to re-establish public order, these restrictions have to be revised on a regular basis and rescinded gradually.

In order to address the shortcomings of the international judicial participation in Kosovo and BiH the following recommendations are made:

• The difficulties caused by the use of English as an additional court language cannot be avoided totally. But they can be reduced by well-educated and specialized court interpreters. If such professionals cannot be found, on-the-job training programs must be established as quickly as possible in order to guarantee sufficient quality of the court interpretation services.
• Better recruitment procedures and preparatory training should ensure that international jurists are sufficiently qualified and experienced. Judges and prosecutors should be deployed to post-conflict missions only on condition that they have substantial experience in rule of law based judiciaries, that they are able to adapt to a different legal system and that they have sufficient command of the English language in general and of legal terminology in particular. In any case, international jurists should be prepared prior to their deployment through job-specific and country-specific training programs.

• Given the confusion and uncertainties caused by the origins of the international jurists from diverse legal backgrounds, it should be considered to deploy only international jurists from legal systems that correspond to the ones in which they are meant to serve. In the former Yugoslavia, this would be the continental or civil legal system.

• A main objective of the deployment of international jurists should be capacity building so that rule of law reforms can be made sustainable. Mixed panels of international and local judges should be the rule. In the field of public prosecution, international and local judges could carry out sensitive investigations together. This requires a comprehensive strategy for building local judicial capacities which must be combined with a reasonable exit strategy. Such developments are needed in Kosovo in particular.

In order to address shortcomings related to the independence of the judiciary from UNMIK administration and to the high turnover of international jurists, the following additional recommendations should be followed particularly in Kosovo:

• International judges and prosecutors should be employed for a minimum period of one year. In the initial stages of an international judicial mission, a realistic assessment of the minimum deployment duration is essential. Even in regions with a legal tradition influenced by the continental legal system, as is the case in BiH and Kosovo, the rule of law cannot be established within a short period of time. Patience and serious commitments in terms of financial resources and personnel are needed.

• Vacant posts should be filled quickly and, if possible, jurists who have worked in other international missions should be brought in in order to reap the benefits of their experience. More attention must also be paid to the number and professional experience of clerical support staff.

• In order to guarantee judicial independence from the UNMIK administration, decisions on extending international jurists’ contracts should be taken outside the authority of UNMIK.

• Precise criteria should be officially adopted to define the international judges' and prosecutors' responsibilities for particular cases. Under no circumstances should these decisions lie within the UNMIK administration.

• To fully respect the separation of powers as a central pillar of the rule of law, UNMIK must refrain from any other interference in purely judicial matters.
Establishing a judiciary under the rule of law in post-conflict societies is not only time consuming but also requires considerable financial resources. While some of the recommended changes do not generate costs, other measures like deploying additional international jurists or implementing training programs for court interpreters will be expensive. Therefore, something very hard to achieve in day-to-day politics is needed: staying power. A half-hearted engagement and a premature phase-out of international jurists would cause a relapse into old structures and endanger the hard-won achievements on the road to the rule of law, reconciliation and stability.
A. Areas of Employment of International Judges and Prosecutors

I. Kosovo

The International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Hague very early made it clear that, while still overburdened with a huge caseload from Bosnia and Herzegovina, it was not in a position to try more than a few war crimes cases from Kosovo.\(^2\) Therefore, in 1999 UNMIK decided to open a special court for dealing with war and ethnically motivated crimes. However, for financial reasons this plan could not be carried out.\(^3\) Instead, UNMIK chose another way of involving international jurists in sensitive trials: it created so called “hybrid courts”. These are local Kosovan courts at which international judges, as well as local jurists, try sensitive cases according to local law. In order to ensure international expertise during the investigation phase, UNMIK also appointed international prosecutors. Thus, for the first time ever, international jurists were involved in local criminal judiciaries.\(^4\)

In the spring of 2004, 16 international judges and 10 international prosecutors were working at Kosovan courts. The judges were assigned either to one of the five district courts or to Kosovo’s Supreme Court. The latter is mainly competent for appeals and reviews of remand in custody. The vast majority of cases reviewed by international jurists deal with war crimes, ethnically motivated crimes and organized crime. This model of “hybrid courts” is not only cheaper than establishing a special international court, it also offers the chance for sustainable local capacity-building through practical cooperation of international and local jurists.

Unfortunately, UNMIK introduced the new model in a very slow and hesitant manner.\(^5\) In February 2000, based on UNMIK Regulation 2000/6,\(^6\) only one international judge and one international prosecutor were appointed to the particularly conflict-ridden town of Mitrovica. Very soon, however, it became obvious that this solution was not sufficient to ensure impartial trials for all ethnically motivated crimes in Kosovo. Therefore, a new regulation enabled international jurists to be involved throughout the country.\(^7\)

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\(^3\) ICG, note 1, p.20.
\(^4\) ICG, note 1, p. 1.
\(^7\) UNMIK Regulation 2000/34 amending UNMIK regulation 2000/06 of 27.5.2000.
At the beginning the country-wide participation of international jurists did not show significant results. On the traditional five-member panels Kosovan judges continued to hold a majority so that they could outvote the international judges in controversial cases.\(^8\) In response, UNMIK instituted special “64 panels” (based on UNMIK Regulation 2000/64) to ensure that international judges would constitute the majority in designated cases.\(^9\) The newly created panels consisted of three professional judges at least two of which were internationals.

Therefore, as of December 2000, international participation at Kosovan courts was possible in two different ways: international judges continued to participate in the decision-making of the traditional five-member panels and, in addition, acted as investigating judges. The other option enabling international majority decisions was the establishment of the three-member “64 panels” which were either purely international or consisted of two international and one Kosovan judge.

Due to the slow and hesitant introduction of international jurists to the Kosovan judiciary, precious time was lost. Detainees were not brought to trial within the statutory period, witnesses were not examined properly, and in many cases important evidence was not secured. Beginning in late 2000, however, the new “64 panels” and the extended authority for the international prosecutors lead to more efficient procedures although the caseload was still immense and the number of international jurists could never meet the needs.

At first sight the formal authority of international judges and prosecutors appears similar to that of their local colleagues. In the courtroom the votes of the international judges count the same as those of the local judges. However, there are significant differences in the roles of international and local jurists: international jurists operate only in the field of criminal law and have much broader authority than Kosovan jurists. For instance, at their own discretion they can take over both new and pending cases,\(^10\) even if a Kosovan judge or prosecutor is already dealing with the case. Furthermore, international prosecutors can revive cases abandoned by their local colleagues without following the respective local procedures for re-opening an investigation.\(^11\)

Significant differences also exist in terms of status as well as court management. Although working at Kosovan courts, international jurists do not form part of the Kosovan judiciary. They are UN staff, employed by the UNMIK Department of Justice (DOJ). As far as court management

\(^8\) Hartmann, note 5, p. 1, 10; ICG, note 1, p. 5.

\(^9\) Concerning the legal basis of UNMIK Regulations: Hartmann, note 5, p. 3, 29; UNMIK Regulation 2000/64: Regulation on Assignment of International Judges/Prosecutors and/or Change of Venue of 15.12.2000 (see Annex); Hartmann, note 5, p. 11.

\(^10\) "select and take responsibility for new and pending criminal investigations" and "criminal cases", UNMIK Regulation 2001/2 amending UNMIK Regulation 2000/6, Articles 1.2. and 1.3.; UNMIK Regulation 2000/64, Article 3.2. (see Annex)

\(^11\) UNMIK Regulation 2001/2 Article 1.4.; Hartmann, note 5, p. 12.
is concerned, the local presidents of the courts are only competent for scheduling hearings of the local judges. Procedures with international participation are scheduled by the international judges themselves. Unless international judges and court presidents co-operate on a voluntary basis, this division of schedules creates severe problems particularly when international and Kosovan judges are to decide in mixed panels.

Moreover, the offices of international jurists are often located outside the court buildings, separate from those of their local colleagues.¹² There are further differences relating to salaries and personal security – the latter of which is provided for international jurists in particular cases but not for their local colleagues. In practice, international jurists form a separate jurisdiction within the Kosovan court structure. Real integration has not yet been achieved.

II. Bosnia and Herzegovina

In BiH international jurists are better integrated into the court structure than in Kosovo. All international judges, at the Constitutional Court, the Human Rights Chamber and the State Court of BiH, work in mixed panels with local judges and both groups are covered by a single court management system. International prosecutors serve as co-prosecutors with their local colleagues. At the newly created State Court the same applies to the special panels for organized crime, economic crime and corruption. As in Kosovo, international and local judges have equal voting rights in the courtroom. At the Constitutional Court, Bosnian judges form the majority, whereas decisions at the Human Rights Chamber and the special panels of the State Court are made by a majority of international judges. Moreover, the Constitutional Court and the Human Rights Chamber employ international legal advisors who draft the decisions. In some cases they cooperate with Bosnian legal advisors.

1) The Constitutional Court

The Constitutional Court of Bosnia and Herzegovina is a national court with a minority participation of international judges. It was established in May 1997 and consists of nine judges – six local and three international judges. Decisions are made by a simple majority, i.e. international judges can be outvoted by their Bosnian colleagues.

The jurisdiction of the court covers classic constitutional proceedings such as reviews of the constitutionality of laws, litigations between public bodies, and constitutional complaints. Due to the fact that constitutional complaints can be based both on the Bosnian constitution and on the European Convention of Human Rights, the jurisdiction of the Constitutional Court and the Human Rights Chamber which is also responsible for violations of the Convention

¹² See ICG, note 1, p. 9.
overlapped in the past. But with the closing of the Human Rights Chamber at the end of 2003 and the take-over of the Human Rights Chamber's remaining caseload by a commission within the Constitutional Court, this problem ceased to exist.

The international judges are appointed by the President of the European Court of Human Rights in consultation with the Bosnian presidency.\textsuperscript{13} The Bosnian judges are appointed by the parliaments of the two Bosnian entities: two by the Serb Republika Srpska and four by the Bosniak-Croat Federation. Although the ethnicity of the local judges is not mentioned in the regulations for appointment, de facto the posts of local judges are filled with regard to an ethnic balance because of the persisting self-image of each of the entities as a nation-state of “its” ethnic group. As a result, two of the judges at the Bosnian Constitutional Court are Bosniaks, two are Croats, and two are Serbs.\textsuperscript{14}

Normally, the international judges visit Sarajevo only during the 2 or 3 days per month when the court is in session. International and local legal advisors prepare the decisions for all cases scheduled and submit them to the judges prior to the session.

2) The Human Rights Chamber

The creation of the Human Rights Chamber of Bosnia and Herzegovina was mandated in the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement). It was established in March 1996 and closed at the end of 2003. In contrast to the Constitutional Court of Bosnia and Herzegovina, it was an international court headed by an international court president, managed by an international registrar and was functioning according to international rules of procedure. International judges held a majority over their local colleagues at a ratio of 8:6.

The Human Rights Chamber was responsible for appeals against discrimination and violations of human rights according to the European Convention of Human Rights and accompanying protocols and 15 additional international agreements listed in Annex 6 to the Dayton Peace Agreement. Violations could only be claimed if they occurred after the Dayton Peace Agreement had been put into effect (14 December 1995) and if one of the three signing parties could be held responsible for the act.\textsuperscript{15} The Chamber was needed as long as BiH had not joined the Council of Europe and had not ratified the European Convention of Human Rights and Bosnian

\textsuperscript{13} Article VII Nr.1a Constitution of Bosnia and Herzegovina.
\textsuperscript{15} The State of BiH and the two entities Republika Srpska and the Muslim-Croat Federation of BiH.
citizens thus could not appeal directly to the European Court of Human Rights in Strasbourg. Yet giving Bosnian citizens the option of claiming discrimination and violations of the Convention before an independent court was very important for the post-war reconciliation process. In particular, discrimination on ethnic grounds was typical when refugees returned home. The rights of the respective ethnic minorities were violated on a daily basis, especially when they tried to repossess their homes and workplaces.

Since BiH has, in the meantime, joined the Council of Europe (April 2002) and ratified the European Convention of Human Rights (July 2002), Bosnian citizens can now appeal directly to the Strasbourg European Court of Human Rights. The Human Rights Chamber as a provisional “branch office” of the Strasbourg court is not needed any longer. The remaining backlog of pending cases before the Human Rights Chamber will be dealt with by a newly created special “Human Rights Commission” within the Constitutional Court.

Eight of the total of 14 judges at the Human Rights Chamber were appointed by the Committee of Ministers of the Council of Europe in consultation with the signatory parties. The six local judges were appointed through the same procedure as at the Constitutional Court: the parliament of the Republika Srpska appointed two judges, while the parliament of the Muslim-Croat Federation of BiH appointed four.

The legal advisors of the Human Rights Chamber worked in eight mixed teams of international and local jurists. Each of these teams consisted of one international and one local jurist supported by one or more local assistants. Just as at the Constitutional Court, at the Human Rights Chamber international judges came to Bosnia only once a month for the session week which was prepared for by their legal advisors.

3) The State Court

The State Court of Bosnia and Herzegovina is a newly created national court. It was opened in January 2003 as the supreme court for criminal cases on BiH state level. It has criminal and administrative jurisdiction as well as jurisdiction over cases related to electoral and state-level law and appellate jurisdiction over cases initiated in the entities.\(^\text{16}\)

International judges and prosecutors are involved in the work of a special section for organized crime, economic crime and corruption.\(^\text{17}\) A special War Crimes Chamber is expected to be in operation in early 2005. While hearings in cases relating to organized crime, economic crime

\(^{16}\) Article 13, 14, 15 of the Law on Court of BiH, Official Gazette of BiH, 29/00.
\(^{17}\) Article 6 and 7 of the Law on Amendments of the Law on Court of Bosnia and Herzegovina, Official Gazette of BiH, 24/02.
and corruption are mostly conducted by purely Bosnian panels, the actual trials and appeal trials are conducted by mixed special panels which consist of one local and two international judges. Thus, international jurists constitute a majority over their local colleagues. International prosecutors work at the special department for organized crime, economic crime and corruption in co-operation with Bosnian prosecutors. At present, 7 international judges and 6 international prosecutors are working on this special caseload.

The War Crimes Chamber currently being established will be competent for cases referred to it from the ICTY and for domestic criminal war crimes cases upon approval of the ICTY. As a result, the caseload at the ICTY should be eased because some trials will in the future be held in the region where the crimes were committed. The War Crimes Chamber will extend the State Court’s activities significantly and will consist of more than a hundred judges and prosecutors operating in mixed panels of international and local judges according to the model of the existing Special Panels.

International jurists at the State Court are appointed by the Office of the High Representative (OHR) for a two-year term of office. Their local colleagues are elected by the Parliamentary Assembly of BiH.¹⁸ Unlike the situation at the Constitutional Court and the Human Rights Chamber, international jurists at the State Court remain permanently in BiH and do not just spend a few days a month there. Thus far, in contrast to the other courts with international participation, international legal advisors are not involved in the work of this court. All legal preparation is done by the judges and prosecutors themselves.

¹⁸ Article 4, 5 of the Law on Court of BiH, Official Gazette of BiH, 29/00.
B. International Judges and Prosecutors – Why Are They Needed in Post-Yugoslav Societies?

Bringing international judges and prosecutors to post-conflict societies is not only expensive and requires immense organizational and managerial efforts. It also slows down judicial proceedings and might even give the impression of neo-colonialism. Are such missions worth their price? The following pages will present four major arguments in favor of the participation of international jurists in Kosovan and Bosnian judiciaries.

I. Partiality and Appearance of Partiality

A typical phenomenon in post-conflict societies is the continuance of nationalist thought patterns and therefore mutual mistrust between the former conflict parties. Politically sensitive cases like war crimes or other ethnically motivated crimes, therefore, must be tried by jurists who not only are de facto impartial but who also are perceived by the public as impartial. Otherwise their decisions will not be accepted by the local community and therefore cannot contribute to the reconciliation process.

In order to avoid charges of neo-colonialism, the early UNMIK administration in Kosovo, already holding broad executive and legislative powers, initially tried to re-establish a local judiciary without international experts. But from the very beginning, this local judiciary, at first entirely staffed with jurists of Albanian origin, was suspected of a bias against Non-Albanians. Soon it became obvious that some Albanian jurists in fact did not apply the law to Albanians and Serbs in the same way. While Serbs were often permanently arrested on minor suspicions and despite poor evidence, Albanian perpetrators who had been caught red-handed were often not arrested at all or released after a short time. Such partiality was often shown when the suspects were former KLA fighters or connected with organized crime.

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19 This was contrary to the recommendations of the OSCE, which originally, in the scope of its Kosovo Verification Mission, had planned that international judges and prosecutors would work with local jurists. See further: Hartmann, note 5, p. 4.
20 In 1999/2000 the newly recruited local judiciary was entirely of Albanian origin. Since then, a number of minority jurists have been recruited. In April 2004, out of 305 Kosovan judges 12 were of Serbian origin and 11 from other ethnic minorities; Interview with the President of the Supreme Court of Kosovo, Rexhep Haxhimusa.
21 More about the appearance of partiality: OSCE Mission in Kosovo/Legal Systems Monitoring Section (LSMS), Human Rights Challenges following the March Riots, 25.5.2004, p. 12; Hartmann, note 5, p.6;
Delcourt vs. Belgium, European Court of Human Rights, judgment of 17.1.1970: "justice must not only be done, it must also be seen to be done".
The necessity of deploying international judges and prosecutors became particularly pressing when in May 2000 Serbian prisoners in the town of Mitrovica went on hunger strike and demanded their cases to be tried before panels of international jurists.23

In BiH, too, local judges at the Human Rights Chamber as well as at the Constitutional Court often took political aspects of a case into consideration or decided depending on the parties' ethnicity. As soon as a case was relevant for the balance of power between the State of BiH and one of the three ethnic groups, Bosnian judges would always vote in favor of their own ethnicity. This imbalance was particularly obvious in the case of the Serb judges who served at the Constitutional Court until 2002 and who argued as a matter of principle in favor of the constitution and laws of the Republica Srpska.24 Their arguments were political, not legal ones.

One of the main reasons for the partiality of local jurists in Kosovo as well as in BiH seems to be the small size of the Kosovan and Bosnian societies and their traditional structures. In particular, the Kosovo Albanian society with its persisting clan structures often brings severe social pressure to bear on Albanian officials.25 Attempted bribery and threats occur on a regular basis.26 Kosovan jurists involved in convicting Albanians are often threatened and even physically attacked. Therefore, some Kosovan judges and prosecutors have refused to participate in criminal procedures against ethnic Albanians or have just not appeared at the court hearings.27 Another reason for the bias of Kosovo-Albanian jurists against Serbs is the long-standing discrimination by the Milosevic regime. From 1989, the Belgrade government systematically removed Albanian jurists from the administration and judiciary in order to establish Serb predominance in Kosovo.28

In contrast, international jurists are neither affected by this experience nor are they subject to the local social-ethnic pressure. Therefore, in many cases objective legal proceedings and purely legally motivated decisions can be achieved only through their involvement.

23 Hartmann, note 5, p. 1.
24 Marko, note 14, p. 411.
25 ICG, note 1, p. 5.
26 ICG, note 1, p. 7.
27 ICG, note 1, p. 5; more about the reasons of partiality of Kosovan jurists: Hartmann, note 5, p. 6; Preamble of UNMIK-Regulation 2000/64: "Recognizing that the presence of security threats may undermine the independence and impartiality of the judiciary..."
28 In 1989, Slobodan Milosevic deprived Kosovo of its status as an autonomous province of Serbia. The Parliament of Kosovo, the Supreme Court, and the office of the Public Prosecutor were abolished.
II. Lack of Experience with an Impartial Judicial System and International Law

BiH as well as Kosovo are not only in a post-war situation with persistent ethnic conflicts but also in transition from a socialist to a western legal system. The vast majority of incumbent local judges and prosecutors were educated in socialist Yugoslavia under Marshall Tito. Accordingly, they lack both knowledge of and professional experience in rule of law principles. They held office in a legal system in which law was just a tool of the powerful to dominate the individual. Independence and impartiality of the judiciary were a dead letter. “Telephone justice” was the name of the favored mechanism by which the ruling political party controlled judicial and prosecutorial actions.29

Most Kosovan and Bosnian jurists have very little theoretical knowledge of or practical experience in complying with procedural and substantial rule of law principles. International human rights standards and even national constitutions are not understood as legally binding but rather as political statements of the respective governments. This perception is particularly problematic because Kosovo and BiH are in the process of changing their applicable laws. As long as old Yugoslav laws are still in force, they can be applied only if they are in accordance with international legal standards. International rule of law and human rights standards have to be read into the existing local law. Their application requires a thorough knowledge of international law as well as experience in interpretation techniques.

These prerequisites for sound legal judgments could not immediately be met by the local jurists. In the beginning, the local jurists’ decisions often showed weak legal argumentation, misinterpretations and unclear structure. The arguments were often based only on quotations of some sections, possibly compared to a roughly similar case and finished with the simple statement that the case at hand was or was not a violation of the law.

These deficits are due to the fact that judges in the Yugoslav legal system had very little competence in interpreting the law. When uncertainties arose about the application of a section to an individual case, a particular commission of the respective parliament was asked to resolve the impasse. This commission would then, referring to the alleged aim of the legislature, provide the “right” interpretation. Therefore, laws were, at best, interpreted from an historical point of view, and this interpretation was provided by the political decision makers and not by the judiciary. This exclusion of judges from the interpretation of laws is a clear violation of the principle of the separation of powers. Under the socialist legal system judges were in effect not much more than executive organs of the ruling party.

29 Hartmann, note 5, p. 5; ICG, note 1, p. 5; Hansjörg Strohmeyer, Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor, American Journal of International Law, Vol.95/01, p. 55.
Moreover, Yugoslav jurists in the past had no chance to gain experience in dealing with the newly created instruments of witness protection. Without effective witness protection programs, however, many witnesses and victims will not give evidence against the perpetrators of crimes for fear of revenge. As a result, most war crimes trials lead to nothing, as witnesses are often the only sources of evidence. Being able to apply the instruments of witness protection is therefore an important precondition to the successful prosecution of war crimes and organized crime.

An additional reason why international expertise is necessary in Kosovo is the lack of general professional experience on the part of Kosovo-Albanian jurists. Due to Slobodan Milosevic’s repressive policy after 1989, Albanian jurists were systematically removed from their positions in the administration and the judicial system. Most of them were not able to practice as jurists for about ten years. The predominantly Serb jurists, who held the positions of judges and prosecutors during the 1990s, left Kosovo together with most of the Serbian population during the NATO air strikes in 1999. The remaining jurists after the end of the conflict were ethnic Albanians, who in most cases had not practiced as judges or prosecutors for the last decade or did not have any professional experience at all. And even after their appointment the number of judges and prosecutors were not sufficient to bring all those who were arrested for ethnically motivated crimes to trial.

Thus, the transitional participation of international jurists is a necessity for dealing with this lack of experience, especially in applying rule of law principles, international law, and modern legal interpretation techniques, as well as for successfully applying witness protection programs.

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31 Even court files and office equipment of the courts were taken to Serbia. See further: ICG, note 1, p. 1.
32 Hartmann, note 5, p. 5; OSCE Mission in Kosovo/Legal Systems Monitoring Section, The Administration of Justice in the Municipal Courts, 30.3.2004, p. 10; Rexhep Haxhimusa, President of the Supreme Court of Kosovo, in: Radio broadcast "Deutsche Welle/Kosova life", 12.5.04; ICG note 1, p. 5; As the local judiciary was unable to decide all detention cases within the statutory 6-months period, UNMIK used its legislative power to extend the pre-trial detention to 12 months. See further: Hartmann, note 5, p. 5; Carsten Stahn, International Territorial Administration in the Former Yugoslavia: Origins, Developments and Challenges Ahead, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, 2001 Nr.61/0, p. 156.
III. Passivity of Local Institutions

Another reason for the initial involvement of international judges and prosecutors is the widespread passivity in Bosnian and Kosovan state institutions including the courts. Very rarely do local officials take the initiative in reforming local institutions or work processes.

Many judges in BiH did not even show an understanding of the necessity of opening a court like the Human Rights Chamber which is the competent court for judgments on human rights abuses. If covered at all at Yugoslav Law Faculties, human rights were only dealt with as something of historical importance and were considered irrelevant in a jurist’s everyday life. This attitude also affected the re-opening of the Bosnian Constitutional Court, although BiH showed first signs of a constitutional jurisdiction.\(^33\) From 1963 onwards, Yugoslavia had a constitutional court facilitating – at least in theory – the constitutional protection of civil rights and the judicial review of the constitutionality of laws. However, the adaptation of the Bosnian jurisdiction to international rule of law standards and human rights was an innovation that would not have been made without the participation of international jurists.

In Kosovo, Albanian war criminals would not have been taken to court to this day if international prosecutors and judges had not dealt with those cases. Putting an end to the pervasive culture of impunity will not be possible without the assistance of international jurists.

In sum, international jurists in post-Yugoslav judiciaries are needed to guarantee the de facto impartiality and the appearance of impartiality, to ensure that certain crimes are brought to court and to improve the quality of legal decisions, particularly their compliance with international rule of law standards and human rights. In BiH, the large number of claims submitted to the Human Rights Chamber with a majority of international judges strongly indicates a higher acceptance of the Chamber’s decisions through international participation. In particular, rejections of claims are more likely to be accepted by the claimants if taken by an international judge. The fact that judgments passed with international participation are often quoted by lower local Bosnian courts is a further sign of growing acceptance. International participation within local jurisdictions also offers an excellent opportunity for the education and practical training of local jurists.

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\(^{33}\) Marko, note 14, p. 387.
C. Problems of International Judicial Participation in Kosovo and Bosnia and Herzegovina and Lessons Learned

International judges and prosecutors might be seen as an impediment to the process of achieving local responsibility for judicial reforms and of supporting local reformatory efforts. Should the international community leave judicial reforms in the hands of local jurists and institutions instead of involving international experts who take over local responsibility? In fact, international participation often gives local professionals the impression that their own commitment is not required. On the other hand, international experts cannot impede a local judicial reform movement which does not exist. Both the Kosovan and the Bosnian societies are still very much paralyzed by their inter-ethnic conflicts and thus by a persistent passivity of local institutions and decision-makers. At the beginning, therefore, external experts are needed to trigger a reform process and overcome that stagnation. As long as international participation is limited in time, is focused on a sustainable hand-over to local institutions, and supports local capacity-building as well as emerging local reform movements, it might be the only way leading out of stagnation.

I. English as Additional Court Language

Due to the participation of international jurists, English is needed in addition to the national languages as a working language at the respective courts.\(^{34}\) International jurists normally do not speak the languages of the host countries, while the vast majority of local judges does not speak English. The need for translation of almost every legal document does not only cause considerable financial costs, it also delays court proceedings and could possibly affect the applicant's right to efficient legal protection.

Moreover, the absence of a common court language causes problems for the international jurists who cannot read the original court files and the accompanying documents. In most cases the jurists are provided with English summaries of the files and, at their request, translations of certain documents. Judges often decide without knowing the exact wording of the lower court's decision. The language barrier also prevents international jurists from being up to date on the latest legal developments and including them in their decision-making. Except for a very few cases, international and local judges cannot talk directly to each other and conduct direct legal discussions. Exchanges of legal opinions between the judges take place – if at all – only during simultaneously translated court sessions. Therefore, misunderstandings and frictional losses are inevitable.

\(^{34}\) Albanian and Serbian in Kosovo and Serbian, Bosnian, and Croatian in BiH.
These problems are aggravated by the fact that the court interpreters are not specially trained for translating in a judicial context. Although they normally have good command of common English, almost none of them is specialized in legal translating. They lack crucial legal knowledge which is essential for a precise translation of important judicial details, nuances and phrasings. It is difficult enough to use English common law terms when operating in a continental legal system. Therefore, expert court interpreters are urgently needed. The absence of specialized legal interpreters is a serious obstacle to communication and efficient cooperation between international and local judges.

The quality of written translations of court decisions is also often not acceptable. English and local versions of a decision tend to differ, and sometimes it is not clear which version is legally binding. Local translations of English decisions are sometimes simply unintelligible. Of course, such lack of clarity has a tremendous effect on the comprehensibility of the particular legal argument. And the local translations are the ones read by the parties, as well as by the local press. The acceptance of international court decisions suffers severely, if, due to poor translations, they cannot be understood by the people subject to them.

But aside from the above-mentioned difficulties, the introduction of English as the working language at some Bosnian and Kosovan courts may also have one important long-term benefit: the stimulation of command of the English language on the part of the local jurists and, as a result, the long-term opening of local courts to European and international jurisdiction. Without English-speaking local jurists, the sustainable adaptation of the Bosnian and Kosovan judiciary to international standards is unthinkable.

The difficulties connected with the use of English as an additional court language cannot be avoided totally. But they can be reduced by well-trained, specialized court interpreters. If such professionals cannot be found, efficient on-the-job training programs must be established as quickly as possible in order to ensure sufficient quality of the court interpretation services.

II. Lack of Familiarity with the Local Laws and Judiciary System

While Kosovan and Bosnian jurists lack knowledge of international law, most of the international jurists, upon arrival, are not familiar with the local laws and culture. Since most of the international jurists come from western legal systems, it is particularly difficult for them to understand specific socialist legal institutions e.g. the institution of “socially owned property”, which is a widespread hybrid of tenancy and property in former Yugoslavia. Most apartments that were expropriated and are now claimed back by the pre-war tenants were held as “socially owned property”. The judges at the Bosnian Constitutional Court and at the Human Rights Chamber had to decide if, and how, these apartments could be re-possessed, and therefore they needed to understand the full implications of “socially owned property”.

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Local judges also criticized the fact that not all of their international colleagues showed sufficient knowledge and understanding of the recent history of their countries and the significance of their inter-ethnic conflicts. The political implications of a legal decision were not always adequately understood by the international judges. If, and to what extent, such deficiency actually affected the quality of the judgments is not clear. This would require close scrutiny and would go beyond the scope of this review.

However, some decisions taken with international participation show, in fact, serious legal shortcomings. Although most of the international jurists try very hard, some have considerable problems applying the complicated local law appropriately. As is typical of transitional situations, the local law both in Kosovo and BiH is constantly changing and consists of a confusing mixture of old and new norms plus international rules that have to be read into the local laws. In Kosovo, the local criminal law alone consists of a complicated mixture of old Yugoslav, Serbian and Kosovan laws from the times of Kosovan autonomy. Some of the new laws drafted quickly by the international community (UNMIK in Kosovo and OHR in Bosnia and Herzegovina) after the war have significant loopholes or are not consistent with the local legal system.

Immediately upon arrival, and in most cases without any preparatory training, the international jurists have to be operational. For example, an international judge in Kosovo from a common law background had to conduct a murder trial two days after his arrival. (The different legal backgrounds of common law and the continental legal system lead to further problems which will be elaborated upon below.) In addition, some international jurists come from countries in which the rule of law is not practiced either. Others simply apply the law of their home countries. Some international jurists even do not have sufficient command of English.

The problems described above could be addressed by better selection and training procedures for international jurists. Judges and prosecutors should be deployed to post-conflict missions only if they have substantial experience in rule of law based judiciaries, that they are able to adapt to a different legal system, and that they have sufficient command of the English language in general and of legal terminology in particular. It is also advisable to deploy jurists only from legal systems that correspond to the ones in which they are meant to serve. In any case, international jurists should be prepared for their missions prior to their deployment through job-specific and country-specific training programs.

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35 Hartmann, note 5, p. 4.
36 ICG, note 1, p. 5.
III. Different Legal Backgrounds of International Jurists

The origin of international jurists from diverse legal systems causes serious problems. The different use of common law and continental legal system principles leads to uncertainties and confusion on the part of both the international and the local jurists.37 The different understanding of the roles of criminal judges, public prosecutors and defense lawyers, in particular, often prevents undisturbed proceedings and has, in several cases, even caused severe arguments about the legality of judgments and personal animosities between the international jurists from different systems. In Kosovo, therefore, judgments made with international participation are quite frequently reversed by higher courts. These revisions have a detrimental effect on the acceptance of international participation.

As recommended in the last paragraph, the mission administration in post-conflict situations should consider whether or not it is possible to employ only jurists from a legal system that corresponds to the one in which the jurists are meant to work. Jurists coming from another legal system should at least receive special training in order to ensure that they understand the local legal structures and roles correctly.

IV. Lack of Sustainability

In the long run, international judicial participation in post-conflict situations only makes sense if it also builds local legal capacities and thus promotes sustainability. In BiH the constant cooperation of international and local judges in mixed panels and the cooperation of legal advisors in the phase of decision-drafting, in particular, have led to considerable improvement in the performance of local jurists. However, the participation of international jurists in Kosovo has not yet proven to be sustainable. International judges and prosecutors solve important and sensitive cases, but they are not used for urgently needed capacity-building measures of their local colleagues.38 According to all interviewees, the atmosphere between international and local jurists is friendly, but there is almost no exchange of opinions in everyday court life. Although, according to UNMIK Regulations 2000/64 and 2000/06, mixed panels are possible, in practice they are not used very often. International judges spend most of their time serving on international panels. Here, communication is easier, and they are, for security reasons, justified in particularly sensitive cases.39 But even if a decision is made by a mixed panel, international and local judges often meet only in the courtroom for the actual hearing. Joint preparatory meetings or follow-up meetings are rarely held. Also, international and local prosecutors do not

38 Regarding the need of local capacity-building: ICG, note 1, p. 1; Hartmann, note 5, p. 3, 5, 7, 13, 15.
39 In those cases, even the court translators are not Kosovo Albanians, but Albanians from Albania. See: Hartmann, note 5, p. 8.
cooperate regularly in practice. Although the OSCE and some NGOs conduct seminars for local jurists, these training programs cover only the transfer of theoretical knowledge. But vocational training is also needed at the courts. There is no comprehensive concept which includes the present international jurists as mentors or advisors.

The support staff at Kosovan courts is also divided into international and local members: international jurists have an international support staff while Kosovan jurists work with local personnel. Although UNMIK officials often stress the integration of international jurists into the Kosovan judiciary, de facto international and local jurists operate in separate legal systems. Until now, UNMIK has missed the opportunity to make use of the expertise of international jurists appointed to Kosovan courts for training the local judiciary. Without close cooperation with and practice-oriented training programs for local judges and prosecutors, international jurists will be indispensable for the Kosovan judicial system in the future. In spite of this fact, UNMIK has started the phase-out of international legal experts.

Concerns about sustainability relate to the mission in Kosovo in particular. Mixed panels of international and local judges should be the rule rather than the exception. In highly sensitive cases, Kosovan jurists could at first be involved in early stages of the proceedings when they would not be as visible to the public as during the actual trial. In the field of public prosecution, international and local judges could carry out sensitive investigations together. In these cases there ought to be similar provisions made for the personal security of the local jurists involved as for the internationals.

Instead of a premature phase-out of international experts, the responsible UNMIK Department of Justice should develop a comprehensive strategy for building local judicial capacities and a realistic exit strategy. Kosovan jurists should be involved in the drafting of this strategy. A main objective of the international jurists’ performance should be capacity-building of local colleagues so that rule of law reforms can be made sustainable. Given the international jurists’ present caseload, the expansion of their activities to mentoring local colleagues might require the temporary appointment of additional international jurists. While international jurists should train and advise their local colleagues, well-trained Kosovan jurists could support the work of their international colleagues by using their knowledge of the local law. Another consideration in terms of capacity-building should be the possibility of gradual participation of young Kosovan jurists in the work of international judges and prosecutors. If possible, the offices of the international jurists should be located in the same buildings as those of their local colleagues.

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40 Hartmann, note 5, p. 15.
41 ICG, note 1, p. 2, 27.
A phase-out strategy currently discussed would confine the participation of international jurists to the Public Prosecutor’s Office and the Supreme Court. International jurists would no longer be involved in first instance decisions. While giving more responsibility to local jurists in first instance cases, the participation of international jurists at the Supreme Court would, through the appeal proceedings, ensure international supervision over sensitive cases.\textsuperscript{42}

V. High Turnover of International Jurists and Organizational Shortcomings

The fact that, particularly in Kosovo, international jurists work on short-term contracts has a detrimental effect on the efficiency and sustainability of international judicial participation. International judges and prosecutors in Kosovo receive 3-6 months contracts that are normally extended upon request, but, nevertheless, the average length of stay is 12 months only.\textsuperscript{43} Some experts actually stay in Kosovo for only 6 months, in part because of personal reasons, in part because they cannot stay away from their work places at home for a longer period of time. Since it actually takes several months to settle in and get familiar with the new living and working conditions, the employment of international jurists for only 6 months is cost-intensive and inefficient. In some cases, criminal procedures had to be initiated twice because an international judge involved returned home. Institutional memory and knowledge of local legal developments get lost in this frequent turn-over.

In addition, the UNMIK administration often fills vacant positions in a hesitant manner. Many are left vacant for several months after an international judge or prosecutor has returned home. As a result, the remaining international jurists, being already strained with heavy caseloads, have to spend precious time travelling to different courts throughout Kosovo in order to deputy for their departed colleagues.

Another organizational problem is caused by the fact that international jurists in Kosovo spend a lot of time on logistical issues and pre-trial procedure matters. Because of their heavy caseloads, some of the interviewed judges could not participate in actual hearings for several months. They were totally occupied with pre-trial interrogations and with time-consuming searches for witnesses and even for defendants who often could not be found at the prisons referred to in the case-files. Moreover, the cooperation with the local police and law enforcement authorities is often unsatisfactory. Evidence is not properly secured by the offices in charge. Some of the interviewed judges do not feel sufficiently prepared for these organizational tasks which require being proactive and having a talent for improvisation. In addition, the number of support staff often does not meet the standards judges are used to in their home countries.

\textsuperscript{42} Hartmann, note 5, p. 15.
\textsuperscript{43} Helmken, note 37, p. 6.
In order to address these problems, international judges and prosecutors should be employed for a minimum period of one year, if possible for longer. At the beginning, a realistic assessment of the shortest period of time necessary for an international judicial mission is needed. Even in regions influenced by European legal traditions like BiH and Kosovo, the rule of law cannot be established within a short period of time. Patience is needed as well as serious efforts in terms of finance and personnel. Politically, this might not be a popular statement, but any premature phase-out will probably cause a relapse into old structures and destroy all previous efforts to establish the rule of law.

Vacant positions should be filled quickly and, if possible, experts with prior experience in similar missions should be brought in to reap the benefits of their experience. Experienced legal support staff in sufficient numbers should also be made available.

VI. Kosovo: Problems of Judicial Independence from UNMIK

According to the preamble of UNMIK Regulation 2000/64, the participation of international judges and prosecutors is supposed to ensure “the independence and impartiality of the judiciary and the proper administration of justice”. However, the participation of international jurists is organized in a manner which, in several respects, is not in line with international standards of judicial independence. Reservations exist with regard to institutional and functional independence.

Institutional independence requires that the judiciary be composed of officials whose appointments, performances and disciplinary accountabilities enjoy an effective institutional autonomy, particularly from interference by other state authorities. It is the obligation of the state to provide an institutional structure that guarantees the independence of courts and of individual judges. Appointments and removals from office of judges, their disqualification for prejudice, and case assignments must follow clear and transparent rules.

Independence in a functional sense implies the actual non-interference of non-judicial organs in the performance of judicial functions. The reference here is, in particular, to the question of

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44 Hartmann, note 5, p. 15, estimates at least a decade.
45 "For the purpose of ensuring the independence and impartiality of the judiciary and the proper administration of justice...
46 The right to a fair and impartial hearing is guaranteed in Article 14 (1) International Covenant on Civil and Political Rights and Article 6 (1) European Convention of Human Rights. Concerning judicial impartiality see: OSCE, note 32, p. 20.
48 OSCE, note 47, p. 34.
whether or not executive organs do in fact interfere with the judiciary by giving definite instructions to judges.

1) Legal Status and Term of Office of International Judges

In Kosovo, status and term of office of international judges do not meet the standards of institutional independence. International judges are regular UN staff employed by the UNMIK administration with renewable 6-month contracts.\(^{49}\) The six-monthly decision about an extension of a contract is taken by UNMIK as the executive organ.\(^{50}\) Therefore, the possibility of undue executive interference in purely judicial matters arises. Even if the UNMIK administration does not actually use this opportunity to put judges under pressure, the possibility of political interference alone impairs the appearance of the judiciary as independent from other state powers and diminishes further the already low level of trust which the Kosovan population has in the legal institutions.\(^{51}\)

2) Disqualification of Judges Because of Partiality

UNMIK also has undue opportunities to interfere in judicial matters in the procedure for disqualifying an international judge for reasons of partiality. Since 2003, the Kosovan rules for the abstention of a judge\(^{52}\) have also applied to international jurists (UNMIK Regulation 2003/20).\(^{53}\) However, the very determination of the judge’s partiality is made by a special chamber consisting of a majority of internationals set up by the UNMIK administration.\(^{54}\) This, again, is a case of executive interference in judicial matters that is not in accordance with the independence of the judges and rule of law principles.\(^{55}\)

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\(^{49}\) Regarding the recruiting procedures for international judges in Kosovo: Helmken, note 37, p. 3; Hartmann, note 5, p. 8; since mid-2004, international jurists have received only 3-month contracts for "reasons of flexibility".

\(^{50}\) These decisions are made by the UNMIK Department of Justice or by the SRSR himself. The very wording of a vacancy notice posted by UNMIK for positions of international judges and prosecutors in Kosovo is illustrative: "under the overall supervision of the Deputy Special Representative of the Secretary-General for Police and Justice and the Director of the Department of Judicial Affairs, the incumbent serves as an international judge...", OSCE, note 47, p. 27.

\(^{51}\) OSCE, note 47, p. 27; concerning the low trust of the Kosovan population in an independent judiciary: Articles 39-44 of the FRY Criminal Procedures Code.

\(^{52}\) UNMIK Regulation 2003/20: On International Judges and Prosecutors.

\(^{53}\) Section 6 of UNMIK Regulation 2003/20.

\(^{54}\) OSCE, note 47, p. 33.
3) Case Assignments

The principle of institutional independence also includes the right of the accused to the “legally competent judge”. This is the right to be tried by a judge or panel of judges whose competence is determined in advance by law. This principle is meant to prevent any wrongful interference through the choice of a specific judge. Therefore, the assignment of a judge to a case after it has arisen is considered unlawful.\(^5\)

Kosovan law regulates the appointment of judges in detail.\(^5\) However, these rules are not applicable to international judges. Their assignments to specific cases follow three different procedures:

- **Referral of the case through an international prosecutor:**
  International prosecutors in Kosovo normally refer their cases to international judges at the competent court.\(^5\) This referral is neither subject to special preconditions nor does it require any reasoning.

- **Referral of the case through UNMIK / Department of Justice:**
  At any stage in a legal proceeding, the Special Representative of the Secretary General (SRSG) can, on the recommendation of the UNMIK Department of Justice, refer a case that is already pending with a local judge to one of the “64 panels” which have a majority of international judges. The only precondition for this referral is that it is considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice. Further criteria do not exist. Thus, the SRSG can take a case away from a local judge or panel and refer it to the “64 panels” without any particular justification.\(^6\)

\(^5\) OSCE, note 47, p. 25; OSCE, note 15, p. 18; "The right to be tried by a tribunal established by law", articles 14 (1) ICCPR and article 6 (1) EMRK.

\(^6\) In addition, this is a violation of the principle that the assignment of judges is an internal matter of the court to which they belong, Principle 14 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations’ Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 1985; Helmken, note 37, p. 4.

\(^5\) Articles 44 – 47 of the Book on Rules on Internal Activity of the Courts, Official Gazette No. 7/81.

\(^6\) International prosecutors assume responsibility for a case either upon referral by the UNMIK Department of Justice or at the request of the (mostly international) police with approval of DOJ. These assignments are not made according to transparent and binding criteria, nor is the distribution of cases regulated before a case arises.

\(^6\) According to UNMIK Regulation 2000/64, Article 1.1.: At any stage in the criminal proceedings, the competent prosecutor, the defendant or the defense counsel may "submit a recommendation to the Special Representative of the Secretary General (SRSG) for the assignment of international judges/prosecutors if it determines that this is necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice." (Article 1.2.) Accordingly, the SRSG shall review the recommendation and either signify his approval or rejection thereof (Article 1.3.).

\(^6\) UNMIK Regulation 2000/64 Article 1.2.

\(^6\) UNMIK Regulation 2000/64 Article 1.3.
• Individual selection of cases by international judges themselves:

International judges can also take responsibility for cases at their own discretion.\textsuperscript{63} They can even take on cases which are already pending with Kosovan judges and need not give any reasons for their decision.\textsuperscript{64}

All of the mentioned procedures lack clear and binding criteria, transparency, and predictability for the assignment of an international judge to a particular case.\textsuperscript{65} The conditions under which an international judge is competent for a case are not defined, nor are there set rules stating for which cases a particular international judge at the competent court is responsible. In particular, the referral of cases by the UNMIK Department of Justice subjects them to undue, possibly even politically motivated interference.\textsuperscript{66} Even if case referrals simply follow practical criteria, the very possibility of interference is incompatible with the UN’s claim of establishing judicial independence in Kosovo. This possibility allows the local press and the defendants to question the impartiality of the judiciary. As a result, the acceptance of judgments with international participation is weakened and the reputation of the UN is threatened.\textsuperscript{67}

When pending cases are taken over by internationals, at least one local judge is excluded from the trial. Such proceedings are detrimental to the trust and atmosphere of cooperation between Kosovan and international judges. A draft regulation addressing most of the above mentioned shortcomings was developed at the instigation of the OSCE. However, it has so far not been signed by the SRSG.\textsuperscript{68}

4) Executive Interference

Apart from institutional independence, the basic concept of the separation of powers requires the actual functional independence of the judiciary.\textsuperscript{69} It is not enough to organize the judicial institutions in a way that prevents external interference in theory. They must be totally free of interference in practice. Executive instructions to judges are incompatible with this concept.\textsuperscript{70}

\begin{footnotesize}
\textsuperscript{63} UNMIK Regulation 2000/6 Article 1.2.

\textsuperscript{64} UNMIK Regulation 2000/6 Article 1.2. gives international judges the "...authority to select and take responsibility for new and pending criminal cases...".

\textsuperscript{65} Helmken, note 37, p. 5; Hartmann, note 5, p. 3; OSCE, note 47, p.30.

\textsuperscript{66} OSCE, note 47, p. 29.

\textsuperscript{67} Helmken, note 37, p. 7.

\textsuperscript{68} OSCE, note 30, p. 28; Helmken, note 37, p.1.

\textsuperscript{69} Regarding functional independence: OSCE, note 47, p. 34.

\textsuperscript{70} OSCE, note 47, p. 34.
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The OSCE\textsuperscript{71} and some of the interviewed judges and prosecutors reported cases in which the UNMIK Department of Justice gave instructions to judges and prosecutors to decide cases in specific ways. These instructions did not only determine certain interpretations of laws, they also contained requests that indictments be filed or convictions passed, for instance, for acts of terrorism. According to the interviewed jurists, while UNMIK was strongly interested in sentencing those accused of certain violent acts, in most of these cases the responsible judge or prosecutor did not find enough usable evidence for filing an indictment or passing a conviction. Some international jurists have terminated their stay in Kosovo due to severe arguments with the UNMIK administration about such cases.

UNMIK denies the existence of such instructions. However, OSCE reviews also contain similar cases. Several times the SRSG was reported to have issued instructions to re-arrest persons who had already, due to lack of sufficient evidence, been released by a court. As only the competent court itself can, under specific circumstances, re-open a procedure,\textsuperscript{72} this act constitutes undue executive interference in a judicial matter.

When evaluating rule of law standards in Kosovo, one has to bear in mind that Kosovo is in a post-war situation in which certain restrictions on the rule of law might be necessary for re-establishing public order. Therefore, when the Regulations 2000/6 and 2000/64 were issued in 2000, the described limitations to the principle of judicial independence might have been justified by the need for quick and efficient action. In 2000, Kosovan prisons were heavily overcrowded and many detainees were held in pre-trial detention beyond the stipulated deadline without indictments. At the same time, many Albanian war criminals were not prosecuted at all. In this situation, it was highly important to conduct independent trials for the large number of pre-trial detainees and to end the impunity of Albanian war criminals as soon as possible. In a situation like this, details of judicial independence such as precise rules for the assignment of cases and schedules of responsibilities within the courts had to take second place.

However, if - due to an emergency situation - rule of law standards must be restricted, regular reviews should assess if the reasons for the restrictions continue to persist. The four-year experience of international jurists in Kosovo and the improvements made within the Kosovan judiciary have given the opportunity to evaluate the organization of the mission and to return to international rule of law standards.\textsuperscript{73}

\textsuperscript{71} OSCE, note 47, p. 34.
\textsuperscript{72} "The power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a tribunal." ECHR, Van de Hurk vs. Netherlands, 19 Apr 1994; OSCE, note 47, p. 34, 60; OSCE, note 30, p. 29.
\textsuperscript{73} According to Helmken, note 37, p. 6, in February 2002, the OSCE had already expressed the view that the necessity for restricted implementation of the rule of law was no longer given.
5) Recommendations

The following measures would significantly improve the implementation of international rule of law standards in Kosovo:

- As a guarantee of effective institutional independence, decisions about extending the contracts of international jurists should be made outside of the authority of UNMIK. These decisions should be made by an independent judicial organ, possibly by the existing Kosovo Judicial and Prosecutorial Council (KJPC), provided the KJPC becomes an entirely independent body. At the moment, KJPC members themselves are appointed by the SRSG and therefore give at least the impression of being influenced by the executive.

- A minimum term of contract of 1 or 2 years (as practiced in BiH) would at least reduce the dependence of international judges and prosecutors on the UNMIK administration.

- International judges and prosecutors should be subjected to the same mechanism of disqualification for reasons of partiality as their Kosovan colleagues. This decision on disqualification should be taken by an independent judicial organ. UNMIK should not be involved.

- The independence of international judges should be ensured by clear and binding criteria for their competencies. A new UNMIK regulation should define precisely in which cases international judges must be involved. Under no circumstances should the decision about the participation of an international judge lie with UNMIK. Such decisions should have a well founded legal and factual basis. Some of the interviewed jurists recommend that the decision about the participation of international judges should be made solely by the international prosecutors. In order to revise legally questionable decisions of local judges, international prosecutors should have the competency to initiate the resurrection of cases before an international panel. The international judges’ competency to select cases might be dispensable. Furthermore, a mechanism should be established for randomly selecting and assigning judges to the cases.

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74 KJPC was established by UNMIK Regulation 2001/8 of 6.4.2001 (Regulation on the Establishment of the Kosovo Judicial and Prosecutorial Council). International and Kosovan jurists serving at KJPC have the power to initiate disciplinary proceedings against Kosovan judges and prosecutors.

75 For details regarding the independence of KJPC: OSCE, note 47, p. 31, 43.

76 Hartmann, note 5, p. 2; OSCE, note 47, p. 43.

77 Additionally, the decision on the appointment of international judges or prosecutors should be open to appeal. See further: Helmken, note 37, p. 9.

78 Concerning the establishment of a functional distribution schedule, which ensures a random case assignment (either following the chronological order of case entry or according to the first letters of the defendants’ last names: OSCE, note 47, p. 29, 43; Helmken, note 37, p. 4, footnote 24.)
• As a guarantee for judicial independence, UNMIK should abandon any kind of executive interference in judicial competencies such as instructions for specific interpretations of a certain law and interferences in judicial proceedings and detention decisions.

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D. List of Abbreviations

BiH  Bosnia and Herzegovina
CC  Constitutional Court of Bosnia and Herzegovina
DOJ  Department of Justice (Judicial Department of UNMIK)
ECHR  European Court on Human Rights (Strasbourg)
       European Convention of Human Rights (of 4.11.1950)
FRY  Federal Republic of Yugoslavia
GFAP  General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton
       Peace Agreement)
HRC  Human Rights Chamber for Bosnia and Herzegovina
ICCPR International Covenant on Civil and Political Rights (of 16.12.1966)
ICG  International Crisis Group
ICTR  International Criminal Tribunal for Rwanda
ICTY  International Criminal Tribunal for the former Yugoslavia
KJPC  Kosovo Judicial and Prosecutoral Council
KLA  Kosovo Liberation Army (Ushtria Clirimtare E Kosoves)
LSMS  Legal Systems Monitoring Section (Department of the OSCE Mission in Kosovo)
NGO  Non Governmental Organization
OHR  Office of the High Representative in Bosnia and Herzegovina
OSCE  Organization for Security and Co-operation in Europe
SRSG  Special Representative of the Secretary-General
StGH BiH  State Court of Bosnia and Herzegovina
UN  United Nations
UNMIK  United Nations Interim Administration Mission in Kosovo
ZaöRV  Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
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The Special Representative of the Secretary-General,
Pursuant to the authority given to him under United Nations Security Council [resolution 1244 (1999)] of 10 June 1999,
Taking into account United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 1999/1 of 25 July 1999, as amended, on the Authority of the Interim Administration in Kosovo,
For the purpose of assisting in the judicial process in Mitrovica,
Hereby promulgates the following:

Section 1
APPOINTMENT AND REMOVAL FROM OFFICE OF INTERNATIONAL JUDGES AND INTERNATIONAL PROSECUTORS

1.1 The Special Representative of the Secretary-General may appoint and remove from office international judges and international prosecutors, taking into account the criteria set forth under sections 2 and 4 of the present regulation. Such appointments shall be made to the District Court of Mitrovica, other courts within the territorial jurisdiction of the District Court of Mitrovica and offices of the prosecutor with corresponding jurisdiction.

1.2 International judges shall have the authority and responsibility to perform the functions of their office, including the authority to select and take responsibility for new and pending criminal cases within the jurisdiction of the court to which he or she is appointed.

1.3 International prosecutors shall have the authority and responsibility to perform the functions of their office, including the authority and responsibility to conduct criminal investigations and to select
and take responsibility for new and pending criminal investigations or proceedings within the jurisdiction of the office of the prosecutor to which he or she is appointed.

Section 2
CRITERIA FOR INTERNATIONAL JUDGES AND INTERNATIONAL PROSECUTORS

International judges and international prosecutors shall:
(a) have a university degree in law;
(b) have been appointed and have served, for a minimum of 5 years, as a judge or prosecutor in their respective home country;
(c) be of high moral integrity; and
(d) not have a criminal record.

Section 3
OATH OR SOLEMN DECLARATION

Upon appointment, each international judge and international prosecutor shall subscribe to the following oath or solemn declaration before the Special Representative of the Secretary-General:

“I,_______________, do hereby solemnly swear (or solemnly declare) that:

In carrying out the functions of my office, I shall act in accordance with the highest standards of professionalism and with utmost respect for the dignity of my office and the duties with which I have been entrusted. I shall perform my duties and exercise my powers impartially, in accordance with my conscience and with the applicable law in Kosovo.

In carrying out the functions of my office, I shall uphold at all times the highest level of internationally recognized human rights, including those embodied in the principles of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols.

In carrying out the functions of my office, I shall ensure at all times that the enjoyment of these human rights shall be secured to all persons in Kosovo without discrimination on any ground such as ethnicity, sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
Section 4

REMOVAL FROM OFFICE OF INTERNATIONAL JUDGES AND INTERNATIONAL PROSECUTORS

4.1 The Special Representative of the Secretary-General may remove from office an international judge or international prosecutor on any of the following grounds:

(a) physical or mental incapacity which is likely to be permanent or prolonged;
(b) serious misconduct;
(c) failure in the due execution of office; or
(d) having been placed, by personal conduct or otherwise, in a position incompatible with the due execution of office.

4.2 An international judge or international prosecutor shall not hold any other public or administrative office incompatible with his or her functions, or engage in any occupation of a professional nature, whether remunerative or not, or otherwise engage in any activity that is incompatible with his or her functions.

Section 5

APPLICABLE LAW

The present regulation shall supersede any provision in the applicable law relating to the appointment and removal from office of judges and prosecutors which is inconsistent with it.

Section 6

ENTRY INTO FORCE

The present regulation shall enter into force on 15 February 2000.

Bernard Kouchner
Special Representative of the Secretary-General
REGULATION NO. 2000/64
UNMIK/REG/2000/64
15 December 2000

ON ASSIGNMENT OF INTERNATIONAL JUDGES/PROSECUTORS AND/OR CHANGE OF VENUE

The Special Representative of the Secretary-General,

Pursuant to the authority given to him under United Nations Security Council resolution 1244 (1999) of 10 June 1999,

Recognizing the responsibility of the international civil presence to maintain civil law and order and protect and promote human rights,

Taking into account United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 1999/1 of 25 July 1999, as amended, on the Authority of the Interim Administration in Kosovo and UNMIK Regulation No. 2000/6 of 15 February 2000, as amended, on the Appointment and Removal from Office of International Judges and International Prosecutors,

Recognizing that the presence of security threats may undermine the independence and impartiality of the judiciary and impede the ability of the judiciary to properly prosecute crimes which gravely undermine the peace process and the full establishment of the rule of law in Kosovo,

For the purpose of ensuring the independence and impartiality of the judiciary and the proper administration of justice,

Hereby promulgates the following:

Section 1
Recommendation for Assignment of International Judges/Prosecutors and/or Change of Venue

1.1 At any stage in the criminal proceedings, the competent prosecutor, the accused or the defence counsel may submit to the Department of Judicial Affairs a petition for an assignment of international judges/prosecutors and/or a change of venue where this is considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.
1.2 At any stage in the criminal proceedings, the Department of Judicial Affairs, on the basis of the petition referred to in section 1.1 above or on its own motion, may submit a recommendation to the Special Representative of the Secretary-General for the assignment of international judges/prosecutors and/or a change of venue if it determines that this is necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.

1.3 The Special Representative of the Secretary-General shall review a recommendation submitted by the Department of Judicial Affairs and signify his approval or rejection thereof. Such a review shall not stay the ongoing criminal proceedings.

Section 2
Designation of International Judges/Prosecutors and/or New Venue

2.1 Upon approval of the Special Representative of the Secretary-General in accordance with section 1 above, the Department of Judicial Affairs shall expeditiously designate:
(a) An international prosecutor;
(b) An international investigating judge; and/or
(c) A panel composed only of three (3) judges, including at least two international judges, of which one shall be the presiding judge, as required by the particular stage at which the criminal proceeding has reached in a case.

2.2 Upon designation by the Department of Judicial Affairs, in accordance with the present regulation, international judges and international prosecutors shall have the authority to perform the functions of their office throughout Kosovo.

2.3 Upon approval of the Special Representative of the Secretary-General, in accordance with section 1 above, the Department of Judicial Affairs shall expeditiously designate a new venue for the conduct of criminal proceedings.

2.4 A new venue or panel shall not be designated:
(a) For a trial, once a trial session has already commenced. This will not bar the designation of a new venue or panel, in accordance with the present regulation, during a subsequent review of an appeal or an extraordinary legal remedy; and

(b) For appellate review once an appellate panel session has already commenced. This will not bar the designation of a new venue or panel, in accordance with the present regulation, during a subsequent review of an extraordinary legal remedy.
2.5 A decision of the Department of Judicial Affairs regarding the designation of a new venue, an international judge, an international prosecutor and/or an international panel shall be communicated immediately to the president of the competent court, the prosecutor, the accused and the defence counsel.

Section 3
Applicable Law
3.1 The present regulation shall supersede any other provision in the applicable law which is inconsistent with it.

3.2 Nothing in the present regulation shall affect the authority and responsibility of an international judge or an international prosecutor to perform the functions of his or her office, including to select and take responsibility for new and pending criminal cases, in accordance with UNMIK Regulation No. 2000/6, as amended.

Section 4
Entry into Force
The present regulation shall enter into force on 15 December 2000 and shall remain in force for an initial period of twelve (12) months. Upon review, this period may be extended by the Special Representative of the Secretary-General.

Bernard Kouchner
Special Representative of the Secretary-General