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Local Ownership in Practice: Justice System Reform in Kosovo and Liberia

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1. Introduction

Achieving local ownership is crucial for the success of justice reform programmes as part of international rule of law assistance and security sector reform (SSR) activities.[2] In his 2004 report on the rule of law and transitional justice, the UN Secretary-General emphasized that 'Ultimately, no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable.'[3] He claimed that the United Nations 'must learn better how to respect and support local ownership, local leadership and a local constituency of reform, while at the same time remaining faithful to the United Nations norms and standards.'[4]

Yet what does this mean in practice? While policy-makers, academics and practitioners generally agree with these statements in theory, local ownership proves difficult to operationalise in post-conflict assistance and governance, and remains mere rhetoric in many international reform programmes. This paper examines and compares the UN approaches to and experiences with local ownership in its efforts to reform the justice system in Kosovo and in Liberia. It thereby seeks to foster a better understanding of the concept and its implementation in practice.

1.1. Local Ownership and Security Sector Reform

A few empirical studies, mostly in the context of SSR, have explored local-ownership-related best practices in detail by means of qualitative analysis.[5] Justice and security are understood as two interdependent sectors that converge under the broader scope of the rule of law and governance.[6] According to the UN Secretary-General, the security sector is 'a broad term often used to describe the structures, institutions, and personnel responsible for the management, provision and oversight of security in a country'.[7] In many instances this includes 'elements of the judicial sector responsible for the

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* The paper presents the justice-related findings of a two-year research project by the German Center for International Peace Operations entitled 'Local Ownership in Peacebuilding Processes in Failed States', funded by the German Foundation for Peace Research (DSF). The paper builds on and expands the DSF research report on the project. For more information see www.bundesstiftung-friedensforschung.de/projektfoerderung/ forschung/kuehne.html.

2 For a history of the origins of the concept see S. Chesterman (2007) 'Ownership in theory and in practice: Transfer of authority in UN statebuilding operations', *Journal of Intervention and Statebuilding*, 1: 7–9.

3 United Nations (2004) 'Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies', UN Doc. S/2004/616, 3 August, para. 17.

4 Ibid.

5 T. Donais (ed.) (2008) *Local Ownership and Security Sector Reform*, DCAF Yearbook. Munster: Lit Verlag; A. S. Hansen and S. Wiharta (2007) *The Transition to a Just Order – Establishing Local Ownership after Conflict*, policy report and practitioners' guide. However, the authors did not publish the extensive empirical material that was used as a basis for the report and handbook. For additional best-practice-oriented analysis see L. Nathan (2007) *No Ownership, No Commitment: A Guide to Local Ownership of Security Sector Reform*; A. H. Ebnöther and P. H. Fluri (eds) (2005) *After Intervention: Public Security Management in Post-Conflict Societies – From Intervention to Sustainable Local Ownership*. Vienna and Geneva: Austrian National Defence Academy/ DCAF.

6 UNDP (2007) *Strengthening the Rule of Law in Conflict and Post-Conflict Situations: A Global UNDP Programme for Justice and Security 2008-2011*, New York: UNDP, p. 30.

7 United Nations (2008) 'Report of the Secretary-General on securing peace and development: The role of the United Nations in supporting security sector reform', UN Doc. S/2008/39, 23 January, para. 14.

adjudication of cases of alleged criminal conduct and misuse of force'.[8] In other words, justice institutions form part of the security sector, mainly as oversight institutions.[9] But justice also constitutes a sector of its own, especially when justice reform is combined with legal systems reform. Given the interdependency of the justice and security sectors, it is worth reviewing at the outset of this paper the discussions in the 2008 and 2009 DCAF Yearbooks on the relationship between local ownership and SSR.[10] Bringing together theoretical and empirical perspectives, the DCAF research is among the most comprehensive attempts to date to define and analyse the concept and its implications for SSR.

Local ownership is defined as a state in which the reform of security policies, institutions and activities is designed, managed and implemented by domestic rather than external actors.[11] What is required is not local support for donor programmes and projects, but rather donor support for programmes and projects initiated by local actors. However, in particular in post-conflict situations, this maximalist definition of local ownership is likely to conflict with the strategic goals of the reform agenda. In many cases, it is the security sector's core institutions that stand at the heart of a given conflict and whose malfunctioning or abuse of power gave rise to an international intervention. Therefore it was argued that full local ownership should not be granted at the outset of most peace operations. International actors should rather apply local ownership as a 'guiding principle for action' and transfer decision-making power and authority to local actors gradually.[12] Possibly in a two-stage process, international actors might have to initiate SSR activities in a first stage themselves, and then work towards local ownership in the sense of a local buy-in to programmes and projects externally imposed but to be implemented by local actors.[13]

Local-ownership-friendly policies require international actors in principle to respect and prioritise local needs and requirements. Yet such an approach might alter timelines for project implementation, challenge Western notions of efficiency and be difficult to reconcile with the financial and bureaucratic systems of donor nations.[14] Moreover, the dilemma exists that most international actors are unable or unwilling to support reform activities with the commitment, patience and staying power that would be required to serve true local ownership. It was pointed out that donors at times misuse the principle

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8 Ibid.

9 C. T. Call (2007) 'Introduction', in C. T. Call (ed.) *Constructing Justice and Security after War*, pp. 7–9. This describes in more detail the relationship between the justice and security sectors.

10 Donais, note 5 above; H. Born and A. Schnabel (eds) (2009) *Security Sector Reform in Challenging Environments*, DCAF Yearbook. Munster: Lit Verlag. The UN Secretary-General defined the security sector as 'a broad term often used to describe the structures, institutions, and personnel responsible for the management, provision and oversight of security in a country. It is generally accepted that the security sector includes defence, law enforcement, corrections, intelligence services and institutions responsible for border management, customs and civil emergencies. Elements of the judicial sector responsible for the adjudication of cases of alleged criminal conduct and misuse of force are, in many instances, also included…' United Nations, note 7 above, para. 14.

11 L. Nathan (2008) 'The challenge of local ownership of SSR: From donor rhetoric to practice', in T. Donais (ed.) *Local Ownership and Security Sector Reform*. Munster: Lit Verlag, p. 21.

12 Cf. A. Hansen (2008) 'Local ownership in peace operations', in T. Donais (ed.) *Local Ownership and Security Sector Reform*. Munster: Lit Verlag, pp. 42–43, 48–49; H. Reich (2006) '"Local ownership" in conflict transformation projects', Berghof Occasional Paper No. 27, p. 15.

13 Cf. A. Schnabel (2009) 'Ideal requirements versus real environments in security sector reform', in H. Born and A. Schnabel (eds) *Security Sector Reform in Challenging Environments*. Munster: Lit Verlag, p. 27.

14 For an interesting overview of the donor-side reasons that hinder local-ownership-driven policies see Nathan, note 11 above, p. 20.

of local ownership to cover up their fatigue and pave the way for inadequate quick-fix solutions or other dubious compromises to withdraw their engagement.[15]

The selection of local partners constitutes another major problem with respect to local ownership. Whether international actors closely cooperate with state institutions and actors associated with the formal legal system or whether they target their programmes at the non-formal and/or traditional sector has enormous consequences for a sense of ownership in the different segments of local society. As SSR is an inherently political process, any intervention will inevitably create winners and losers who will either support or fight a given reform initiative.[16] Granting full local ownership to political elites in programmes that aim at limiting their powers will most likely sacrifice the programme's success. Yet any sustainable SSR requires cooperation with local political and security elites. But cooperating closely with existing elites might reinforce power structures that lack popular legitimacy and accountability.[17] International actors thus face a challenge to anticipate and manage their limitations, counterproductive motivations and negative inputs on the reform process.[18]

1.2. Limited Focus on Justice Sector

The DCAF research examined SSR-related practice in the field and includes a number of case studies, among them one on Liberia.[19] However, the large majority of these studies focused on the core security actors, i.e. the armed forces, police, paramilitary forces and other security services.[20] In general, justice institutions tend to be neglected in the context of SSR programmes.[21] Particularly in post-conflict situations, the international community's primary focus lies on security issues in the narrow sense, relegating the justice sector to the rear of its involvement. In many cases, judicial reform activity is not given a high priority or lags behind other SSR elements.[22] Yet the justice sector lies at the heart of the rule of law, which is both an essential goal of post-conflict peacebuilding and a basic element of good governance in the security sector.[23]

The UN peace operations in Kosovo and Liberia are two prominent examples of post-conflict interventions that heavily emphasised justice sector reform (including legal systems reform). Analysing their approaches to and experiences with local ownership

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15 Schnabel, note 13 above, p. 27. See also E. Scheye (2008) 'Unknotting local ownership redux: Bringing non-state/local justice networks back in', in T. Donais (ed.) *Local Ownership and Security Sector Reform*. Munster: Lit Verlag, p. 61, who points to the political realities in international development cooperation.

16 Scheye, ibid., pp. 62–63.

17 A. Martin and P. Wilson (2008) 'Security sector evaluation: Which local? Ownership of what?', in T. Donais (ed.) *Local Ownership and Security Sector Reform*. Munster: Lit Verlag, p. 84.

18 Schnabel, note 13 above, p. 28.

19 A. Ebo (2008) 'Local ownership and emerging trends in SSR: A case study of outsourcing in Liberia', in T. Donais (ed.) *Local Ownership and Security Sector Reform*. Munster: Lit Verlag, pp. 149–168.

20 For a definition of the core security actors see Schnabel, note 13 above, p. 9.

21 T. Donais (2008) 'Understanding local ownership in security sector reform', in T. Donais (ed.) *Local Ownership and Security Sector Reform*. Munster: Lit Verlag, p. 5.

22 H. Born (2009) 'Security sector reform in challenging environments: Insights from comparative analysis', in H. Born and A. Schnabel (eds) *Security Sector Reform in Challenging Environments*. Munster: Lit Verlag, p. 253.

23 Schnabel, note 13 above, p. 5. The rule of law is defined as 'a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.' United Nations, note 3 above, para. 6.

complements well the existing research on local ownership in SSR. Both missions also serve as important reference points for rule of law and justice sector assistance in international peacekeeping, as they belong to the first and biggest UN peace operations with such focus.[24]

Justice sector reform, especially when linked to legal systems reform, arguably touches more upon the normative underpinnings of the affected society than do core SSR activities such as police reform or the disarmament, demobilisation and reintegration of former combatants. In addition to the often technical nature of SSR-related institution building, efforts to reform a local justice system may challenge a population's sense of what is right or wrong, in particular in pluralistic legal orders. For example, justice-related law making that aims at making traditional dispute settlement mechanisms compatible with international human rights standards might stand in serious contradiction to existing local norms, values and belief systems. Can new justice programmes be locally owned if they challenge local social and legal traditions and bring about change in line with the liberal peace agenda? What forms of capacity building did the missions apply to foster the local expertise and technical skills required to implement the desired changes?

1.3. United Nations Assistance to Post-conflict Justice Sector Reform

In general, UN assistance to domestic justice systems is based on international norms and standards, including human rights law and criminal law.[25] This approach might conflict with the notion of local ownership. It is often the 'local owners' of justice sector institutions who are responsible for prevailing human rights violations and deplorable justice and security institutions.[26] If international norms and standards are seriously violated in post-conflict scenarios, the international community might step in and introduce reform initiatives without the will of local authorities and other relevant actors. However, the UN Secretary-General's report on the rule of law and transitional justice does not provide any guidance on how the two potentially conflicting interests of promoting international norms and standards and facilitating local ownership are to be prioritised or reconciled.[27] In reality, it rests upon the specific post-conflict peace operation to strike the right balance.

In this context it makes a significant difference whether a peace operation has an executive mandate like the UN Interim Administration Mission in Kosovo (UNMIK) or a non-executive mandate like the UN Mission in Liberia (UNMIL). For the purpose of implementing Security Council Resolution 1244, UNMIK was empowered to issue legislative acts and 'may change, repeal or suspend existing laws to the extent necessary for the carrying out of his functions, or where existing laws are incompatible with the

[24] Cf. L. von Carlowitz (2003) 'UNMIK lawmaking between effective peace support and internal self-determination', *Archiv des Völkerrechts*, 41: 337; T. Blume (2008) 'Implementing the rule of law in integrated missions: Security and justice in the UN Mission in Liberia (UNMIL)', *Journal of Security Sector Management*, 6: 5.

[25] United Nations, note 3 above, paras 9 and 35.

[26] Cf. Chesterman, note 2 above, p. 7; Scheye, note 15 above; Ebnöther and Fluri, note 5 above, p. 236.

[27] United Nations, note 3 above; S. Vig (2009) 'The conflictual promises of United Nations' rule of law assistance: Challenges for post-conflict societies', *Journal of International Peacekeeping*, 13: 155. See also T. Donais (2009) 'Empowerment or imposition? Dilemmas of local ownership in post-conflict peacebuilding processes', *Peace and Change*, 34: 5–7, who points at two conflicting approaches to international peacebuilding, i.e. the liberal and the communitarian approaches, which contain very different assumptions concerning the role and involvement of local actors in international assistance.

mandate, aims and purposes of the interim civil administration'.[28] These provisions gave UNMIK a far-reaching executive and legislative mandate that stands in some contradiction to the notion of local ownership. The latter principle comes into play, as UNMIK is obliged to respect the domestic applicable law 'insofar as it does not conflict with internationally recognized human rights standards or with previous UNMIK regulations'.[29] Further, local ownership is implied in UNMIK's mandate to establish self-governing institutions and carry out corresponding capacity building.[30]

In contrast, UNMIL only has a mandate to assist the Liberian government in re-establishing national authority, including a functioning administrative structure, and 'in developing a strategy to consolidate governmental institutions, including a national legal framework and judicial and correctional institutions'.[31] Unlike UNMIK, UNMIL is not responsible for the protection of human rights, but merely required 'to contribute towards international efforts to protect and promote human rights… within UNMIL's capabilities and under acceptable security conditions'.[32] Executive and legislative responsibility rests with the Liberian government, so local ownership could be presumed in principle. However, the question of local ownership remains an issue in the light of a potential domination of international expertise or possible conditionality of international aid.

Comparing the two missions' approaches to and experiences with local ownership in the justice sector does not only provide important insights in the justice reform programmes of two paratypical cases of rule-of-law-related peacekeeping work. It also allows elaborating on the differences in approach of an executive and a non-executive assistance mission with respect to the means applied and challenges faced in fostering local ownership while at the same time promoting international norms and standards in justice reform.

1.4. Scope of Research

The justice sector comprises a variety of institutions and actors, such as the judiciary, prosecutorial services, correctional institutions, bar associations and the police.[33] Research economy required that this study focused on local-ownership-related policies and issues concerning the core of the sector, i.e. the judiciary and prosecutorial services. Specific areas of judicial reform were selected as a focus of the empirical research based on considerations of strategic importance and comparability between the two peace operations.

Further, it was desirable to explore justice-related institution building and patterns of international-local cooperation, for example in the context of law making in specific

[28] United Nations (1999) 'Report of the Secretary-General on the United Nations Interim Administration in Kosovo', UN Doc. S/1999/779, 12 July, para. 39.
[29] Ibid., para. 36.
[30] Ibid., paras 79–81.
[31] UN Security Council Resolution 1509, 19 September 2003, UN Doc. S/Res/1509, para. 3(p)–(q).
[32] Ibid., para. 3(l).
[33] For an overview of the various justice sector institutions see Office of the High Commissioner for Human Rights (2006) *Rule of Law Tools for Post-Conflict States: Mapping the Justice Sector*. New York: United Nations, pp. 5–22. See also the categorization by A. Hurwitz (2008) 'Civil war and the rule of law: Towards security, development, and human rights', in A. Hurwitz (ed.) *Civil War and the Rule of Law: Security, Development and Human Rights*, Boulder, CO: Lynne Rienner, pp. 3–4.

areas, throughout the entire existence of the missions in order to learn about different approaches to local ownership in various mission phases until 2008. With Kosovo's declaration of independence, the adoption of the Kosovar constitution and the deployment of the EU Rule of Law Mission in Kosovo (EULEX) in 2008 mark an important turning point for UNMIK. Relinquishing its executive role, UNMIK *de facto* transformed into a political mission with monitoring and reporting functions as well as the objective of facilitating dialogue between Belgrade and Pristina.[34] In the same year, UNMIL began to implement its drawdown plan to reduce its military and police personnel gradually.[35] Even if UNMIL had not existed for as long as UNMIK (deployed in 1999) by that time, it is maintained that an analysis of the local-ownership-related practices from UNMIL's establishment in 2003 to the year 2008 provides sufficient grounds for a sound comparative analysis.

The text includes information and reflections by national and international stakeholders in justice sector reform gleaned in approximately 150 semi-structured interviews conducted during various field trips in 2007 and 2008 and, if appropriate, in telephone interviews thereafter. Relevant EULEX activities in the justice sector are mentioned in passing, but a detailed analysis and comparison with their UNMIK precedents would have exceeded the scope of this study. It should also be noted that interviews in Kosovo were conducted with a focus on the majority population, i.e. the Kosovo Albanians. Kosovo Serbs will most likely not share Kosovo Albanians' views concerning the judiciary and UNMIK's justice sector governance. Moreover, the study does not address the particular situation in northern Kosovo.

The lack of clarity concerning the definition of local ownership made it difficult to operationalise the concept for the research questions. Many interviewees had difficulties in understanding the term 'local ownership', mistaking it, for example, for property ownership. As a consequence, many conclusions on the understanding of and approaches to local ownership had to be drawn indirectly, for example by enquiring how patterns of interaction between local and international stakeholders worked in practice.

Given both UNMIK's and UNMIL's concentration on criminal justice and the relative neglect of the civil justice system that went along with it, interviews have been conducted with a focus on local ownership issues in institution building of and support to the criminal justice system (and related traditional justice mechanisms) only. The primary focus was placed on local-international cooperation and interaction relating to the appointment and removal of judges and prosecutors and judicial and criminal law reform, including related capacity-building measures. Although court administration (including the reform of case management systems) arguably belongs to the core concerns of any judicial reform, it was not studied because it attracted limited international attention in both missions: UNMIK addressed court administration issues at a fairly late stage – implementation efforts had only just began at the time of conducting the interviews – and UNMIL merely provided some advice in relation to record-keeping and case management. Moreover, international activities relating to the administration of justice and technical issues such as court refurbishment have only been addressed in passing.

[34] United Nations (2008) 'Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo', UN Doc. S/2008/354, 12 June, para. 16.
[35] UN Security Council Resolution 1777, 20 September 2007, UN Doc. S/Res/1777.

While their activities in justice sector reform resemble each other in various ways, both UNMIK and UNMIL spent considerable resources and thinking on justice programmes not mirrored in the other mission. On the one hand, there was the deployment of international judges and prosecutors in Kosovo. In 2005 the international community proposed a similar measure for Liberia to ensure an independent and effective judiciary, but the Liberian government rejected such international involvement with reference to its sovereignty. On the other hand, there was the area of traditional legal structures which UNMIL (and the Liberian legal community) must or should interact with to safeguard access to justice of all Liberian citizens. In contrast, the Albanian customary law, Code of Lekë Dukagjini, does not play a significant role for Kosovo's justice system nor for UNMIK's rule-of-law assistance even though the code still informs social relations in some rural areas of Kosovo.[36] Certainly, the international judiciary in Kosovo and the area of traditional justice in Liberia are so relevant to the missions' involvement and to local legal and judicial development that they were included in the interview process, even though they do not easily lend themselves to inter-mission comparison.

Finally, although training courses for judges and prosecutors are central measures to reach local ownership in justice reform and were conducted by UNMIK and UNMIL throughout their existence, training modules and learning results are too difficult to analyse in the context of this study and were thus only marginally thematised in the interviews.[37] The establishment of training institutions and their activities are nevertheless described in the section on capacity building below.

The following sections address the justice reforms in first Kosovo and then Liberia. In each case, a brief overview of the judicial system is provided, followed by subsections in which selected areas of empirical research are described in more detail. With regard to Kosovo, the study initially concentrates on one of the most important institution-building activities in the justice sector: the appointment of judges and prosecutors. This section provides a comprehensive case study of a gradual transfer of governance responsibilities into local hands and offers interesting insights into selection processes through which local partners are chosen by a peace operation. Then the study focuses on modes of local participation in pertinent regulatory processes in relation to the judicial system and criminal law. This includes a description of local-ownership-friendly practices in drafting important pieces of Kosovar legislation, such as the 2004 Provisional Criminal Code and Code of Criminal Procedure as well as the preparatory work for a new law on courts. In a third section, UNMIK's justice-related capacity-building activities are summarised. The interaction between the international judges and prosecutors and their local counterparts is outlined in this context.

The overview of Liberia's justice sector includes a description of the customary legal system and remarks on local attitudes to the formal and customary systems. UNMIL assistance to the vetting and appointment process of the judiciary, to pertinent judicial and criminal law reforms and with respect to capacity building is subsequently examined.

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[36] Cf. R. Büllesbach (2001) 'Aufgaben öffentlicher Sicherheit für KFOR-Soldaten im Kosovo', *Humanitäres Völkerrecht*, 14: 83.

[37] On the relationship between capacity building and local ownership see N. Wilén (2009) 'Capacity-building or capacity-taking? Legitimizing concepts in peace and development operations', *International Peacekeeping*, 16: 346–348.

The international community's approaches to cope with the persistent legal dualism in relation to formal and customary justice systems is addressed in the context of judicial and criminal law reform.

Following accounts of UNMIK's and UNMIL's assistance in these fields, the findings with respect to different aspects and understandings of local ownership are presented and analysed. Difficulties and differences in cooperation between local and international actors are compared between the executive mission in Kosovo and the non-executive mission in Liberia. Moreover, a rudimentary set of local-ownership-related best practices and lessons learnt is developed. The paper ends with some general thoughts on international expectation management, and calls for more sustainable international interventions in post-conflict peacebuilding.

2. Justice Reform in Kosovo

2.1. Judicial system

Kosovo's judicial system has been seriously affected by the various political changes that have taken place over the last decades. While there is relative continuity in terms of the court structure, the composition of the judiciary has drastically changed at least twice since 1974.

In principle, Kosovo's judicial structure is still based on the Yugoslav socialist legislation, which is influenced by Austrian-Hungarian traditions.[38] The applicable legislation governing the justice system is the 1978 Law on Regular Courts, the 1979 Law on Minor Offences (amended various times until 1988) and the 1976 Law on the Public Prosecutor Office of the Socialist Autonomous Province of Kosovo. Kosovo's judiciary consists of the Constitutional Court created by the new constitution in 2008, the Supreme Court, five district courts, two commercial courts (however, only the Pristina-based court is operating) and 24 municipal courts in operation; 25 minor offences courts and one higher court for minor offences are subordinated to the regular courts. In addition there is the office of the provincial public prosecutor located in Pristina, as well as district and municipal public prosecutors located in regional centres. Since 2005 considerable legislative efforts have been made by UNMIK and the provisional institutions of self-government (PISG) to introduce new laws on courts and prosecutors. In April 2010 the Law on Courts passed its first reading in the Kosovar Assembly, and it is expected to be adopted soon. A final draft of the Law on Prosecutors was submitted to the Office of the Prime Minister, where it is still pending at the time of writing.

In contrast to the prevailing court structure, the composition of Kosovo's judiciary underwent greater changes since its establishment in 1974 as part of the Socialist Autonomous Province of Kosovo. A first major change occurred in the aftermath of the events in March 1989. Following the suspension of Kosovo's autonomous status, many discriminatory policies were directed against the Kosovo Albanian majority.[39] The justice

[38] American Bar Association Rule of Law Initiative (2007) *Judicial Reform Index, Kosovo*, Vol. III, August. Washington, DC: American Bar Association, p. 6.

[39] N. Malcolm (1998) *Kosovo. A Short History*. New York: New York University Press, pp. 345–346.

system was affected in several ways: not only were Albanians largely excluded from serving in the judiciary – only 30 out of 756 judges and prosecutors were Albanian[40] – but the system became even more politicised to maintain Serb dominance over the province.

The armed conflict in 1999 destroyed nearly the whole judicial infrastructure and brought about a second major change in the composition of the judiciary. Given that after 1989 most judges and prosecutors were of Serb origin, they had fled to Serbia proper in fear of retaliation. Kosovo was thus left without a judiciary when UNMIK deployed in June 1999. However, most Kosovo Albanian jurists were inexperienced, as they had been out of the job since 1989.[41] Nevertheless, the Albanian leadership and legal elite demanded their (re-)employment despite their widespread lack of skills. Following the establishment of an emergency judicial system, UNMIK essentially went along with this pressure and appointed a mostly Albanian judiciary with some minority representation, according to appointment processes detailed below. A further change will soon occur in the course of a reappointment and vetting process for all present judges and prosecutors, to be carried out by the Independent Judicial and Prosecutorial Commission established by the SRSG (special representative of the UN Secretary-General) in 2006.[42]

Much turbulence also existed with respect to Kosovo's legal system in general. For the purpose of legal continuity, UNMIK had initially determined the local applicable laws to be those in force on 24 March 1999, the date on which the NATO bombing began.[43] After a few months this provision was repealed in response to the local judiciary's refusal to apply laws that were viewed as oppressive by the ethnic Albanian majority.[44] Consequently, Regulation No. 1999/24 specified that the law applicable in Kosovo was, on the one hand, UNMIK regulations and subsidiary instruments issued thereunder. On the other hand, it was the law in force in Kosovo on 22 March 1989, the day before the Serbian government unilaterally ended Kosovo's status as an autonomous province of Serbia.[45] A law in force after 22 March 1989 was declared to be applicable if a subject matter was not covered by the laws in force before 22 March 1989 and if the law in question was not discriminatory and complied with internationally recognised human rights standards.[46] Despite this provision, confusion prevailed regarding application of the law to specific cases, as several potential sources of law had to be evaluated and it was unclear which laws should take precedence. As a consequence of socio-political changes that had developed over the past decade, Kosovo's pre-1989 law in general did not reflect post-socialist realities of 1999–2000, which led to major legal uncertainties.[47]

These developments meant that the updated Serb criminal legislation, in particular the Criminal Code of the Republic of Serbia, was not applicable any more, but instead the

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[40] H. Strohmeyer (2001) 'Collapse and reconstruction of a judicial system: The United Nations missions in Kosovo and East Timor', *American Journal of International Law*, 95: 50.

[41] nternational Crisis Group (2002) 'Finding the balance: The scales of justice in Kosovo', ICG Balkans Report No. 134, p. 5.

[42] UNMIK Regulation No. 2006/25 on a Regulatory Framework for the Justice System in Kosovo, 27 April 2006, section 7.

[43] UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo, 25 July 1999, section 3.

[44] United Nations (1999) 'Report of the Secretary-General on the United Nations Interim Administration in Kosovo', UN Doc. S/1999/1250, 23 December, para. 55; United Nations (2000) 'Report of the Panel on United Nations Peace Operations' (Brahimi Report), UN Doc. A/55/305-S/2000/809, 21 August, para. 79.

[45] UNMIK Regulation No. 1999/24 on the Applicable Law in Kosovo, 12 December 1999, section 1.1.

[46] Ibid., section 1.2.

[47] von Carlowitz, note 24 above, p. 383.

pre-1989 Kosovar law, i.e. the 1977 Criminal Code of Kosovo, which had been abolished when Kosovo's autonomous status was revoked. With the aim of bringing the pre-1989 legislation in line with international human rights standards, UNMIK introduced a new modern criminal law, the Provisional Criminal Code and Provisional Criminal Procedure Code, that entered into force in April 2004.[48] These codes were UNMIK's primary legislative reform projects, and will be further explored below.

Post-conflict Kosovo suffered from a breakdown of public governance structures, a general absence of the rule of law and an ethnically heated environment in which ethnic cleansing strategies were to some extent practised against the former oppressors. Moreover, Kosovo Albanian society is characterised by tight clan and family structures that foster social pressure on the individual and clientelist relationships. Many instances were reported of judges and prosecutors being threatened by members of the former KLA (Kosovo Liberation Army) to decide in particular ways. These factors severely affected the impartiality of the judiciary and led to biased decisions against Kosovo Serbs in particular in cases relating to war crimes and ethnic discrimination. The situation was worsened by significant inefficiency resulting in part from the lack of professional experience of the Albanian judiciary and by corruption fostered by the low salaries paid to judges and prosecutors in comparison to the private sector.[49]

To address these concerns, the SRSG appointed first one international prosecutor and one international judge for criminal cases in the ethnically divided district of Mitrovica in February 2000, and subsequently international judicial and prosecutorial personnel for the remaining regions.[50] As part of the domestic judicial structure, the international judiciary operates within the jurisdiction of the court or office of the prosecutor to which the individual judge or prosecutor is assigned. International and local judges and prosecutors were to work alongside each other and respect internationally recognised human rights standards, including the right to a fair trial. Particularly in politically sensitive cases, however, it soon became apparent that international judges were outvoted by their Kosovo Albanian colleagues, who used the international judiciary as 'window dressing' to justify their biased decisions against Kosovo Serbs.[51] As a consequence, UNMIK adopted a new regulation in December 2000 that allowed the assignment of an international prosecutor and introduced so-called '64 panels' with a majority of international judges 'where this is considered necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice'.[52] At a high point in spring 2004, 16 international judges and ten international prosecutors served in Kosovo, handling about 10 per cent of all criminal cases.[53] Their interaction with the local judiciary and their respect for the domestic legal system are discussed below. Following the deployment of EULEX and Kosovo's declaration of independence, UNMIK's international judicial

[48] UNMIK Regulation No. 2003/25, Provisional Criminal Code of Kosovo, 6 July 2003; UNMIK Regulation No. 2003/26, Provisional Criminal Procedure Code of Kosovo, 6 July 2003.

[49] Cf. A. Schröder (2004) 'Der Beitrag internationaler Richter und Staatsanwälte zur Entwicklung der Rechtsstaatlichkeit im Kosovo', ZIF Report, pp. 5–9; M. E. Hartmann (2003) 'International judges and prosecutors in Kosovo. A new model for post-conflict peacekeeping', USIP Special Report No. 112, pp. 6–7.

[50] UNMIK Regulation No. 2000/6 on the Appointment and Removal from Office of International Judges and Prosecutors, 15 February 2000; UNMIK Regulation No. 2000/34 Amending UNMIK Regulation No. 2000/6, 27 May 2000.

[51] Hartmann, note 49 above, p. 10.

[52] UNMIK Regulation No. 2000/64 on the Assignment of International Judges/Prosecutors and/or Change of Venue, 15 December 2000, sections 1.1 and 1.2.

[53] Schröder, note 49 above, p. 12; Hartmann, note 49 above, p. 9.

involvement was terminated in summer 2008. Open cases were transferred to EULEX judges and prosecutors, who received access to the files of the UNMIK International Judicial Support Division.[54]

2.2. Judiciary and UNMIK support

From its arrival, UNMIK provided multifaceted support to Kosovo's justice system. On the one hand, international engagement concerned capacity and institution building; on the other hand it involved activities to maintain law and order in the province. Despite some turf battles between the UN-led Pillar II (civil administration) and Pillar III (democratisation and institution building) led by the Organization for Security and Co-operation in Europe (OSCE) as to their exact responsibilities, the UNMIK Department of Judicial Administration (Pillar II) and later the Department of Justice of Pillar I (police and justice) were responsible for the general administration of justice and for security issues, while the OSCE primarily undertook capacity-building activities and monitored human rights compliance.[55] OSCE capacity building included training programmes for various legal professions and the establishment of the Kosovo Judicial Institute – activities that will be discussed in more detail below – as well as establishing the Kosovo Law Centre and Criminal Defence Resource Centre, institutions mandated to provide legal and other resources to Kosovo's judicial and legal education sector. During the initial period the United Nations was preoccupied with rebuilding the basic judicial infrastructure, including identifying and appointing judges and prosecutors and implementing quick-start packages for office refurbishment and other logistical support required to make the judicial system operational. Especially after the creation of Pillar I, UNMIK focused primarily on security issues and judicial intervention. Until the riots in March 2004, justice-related policies were pursued mainly on an *ad hoc* basis without much consideration for judicial development or a transfer of functions to local actors.[56] The unspoken decision not to create a ministry of justice before status resolution was reversed when in summer 2004 Secretary-General's Special Envoy Eide called for increased ownership, responsibility and accountability of the PISG in the justice sector.[57] Strategic thinking became a priority: how to hand over justice-related reserved powers and what shape the Kosovar institutions should take. UNMIK intensified a consultation process on the transition plan with local stakeholders, the Justice Sector Expert Consultative Group (JSECG, further described below), and at the end of 2005 created the Kosovo Judicial Council,[58] an independent body for the administration of justice, as well as the Ministry of Justice[59] for policy and law making in the justice sector, including public prosecution. In 2006 Pillar I was dissolved and UNMIK began transferring various responsibilities to these institutions. However, UNMIK retains ultimate authority over

[54] United Nations (2008) 'Report of the Secretary-General on the United Nations Interim Administration in Kosovo', UN Doc. S/2008/692, 24 November, para. 24.

[55] For more detail see C. Rausch (2007) 'From elation to disappointment: Justice and security reform in Kosovo', in C. T. Call (ed.) *Constructing Justice and Security after War*. Washington, DC: US Institute for Peace Press, pp. 281–282.

[56] Interviews with UNMIK and EUPT officials, Pristina, October 2007 and March 2008. See also E. Scheye (2008) 'UNMIK and the significance of effective programme management: The case of Kosovo', in H. Hänggi and V. Scherrer (eds) *Security Sector Reform and UN Integrated Missions: Experience from Burundi, the Democratic Republic of Congo, Haiti and Kosovo*. Geneva: DCAF, p. 189.

[57] K. Eide (2004) 'The situation in Kosovo. Report to the Secretary-General of the United Nations. Summary and recommendations', UN Doc. S/2004/932, 15 July.

[58] UNMIK Regulation No. 2005/25 on the Establishment of the Kosovo Judicial Council, 20 December 2005.

[59] UNMIK Regulation No. 2005/53 Amending UNMIK Regulation No. 2001/19 on the Executive Branch of the Provisional Institutions of Self-Government in Kosovo, 20 December 2005.

the appointment and removal of judges and prosecutors, and international judicial involvement continues with the newly established EULEX.[60]

Institution building and transfer of responsibilities: Appointment and removal of judges and prosecutors

The most essential task in (re-)building Kosovo's judicial system from scratch was to appoint a domestic judiciary and develop local institutions responsible for the appointment and removal of judges and prosecutors. UNMIK tried to counterbalance the severe politicisation of judicial appointments resulting from decades of ethnic strife and conflict by proceeding in a transparent and professional manner that would give legitimacy to the undertaking. Based on a sound legal framework, capable candidates for the judiciary would have to be selected on the basis of objective and verifiable criteria and merit, but also with a view on an ethnic and political balance.[61] UNMIK implemented this policy in stages.

Emergency judicial system

Two weeks after the deployment of the first international staff, UNMIK created the Joint Advisory Council on Provisional Judicial Appointments (JAC), charged with nominating temporary members of the justice system.[62] The JAC had seven members, of whom four were Kosovars from different ethnic backgrounds but with extensive experience in the previous justice system (two Albanians, one Bosniak and one Serb) and three were international jurists. On 30 June 1999 the SRSG appointed nine local jurists to serve as judges and prosecutors in the 'emergency judicial system': five Albanians, three Serbs and one Bosniak whom the JAC had recommended on the basis of their professional reputation.[63] In the absence of any judicial infrastructure, they travelled around Kosovo in mobile teams holding hearings of persons detained by KFOR (Kosovo Force).

The selection of appropriate candidates was a time-consuming process carried out by the OSCE and UNMIK regional offices. Many candidates were drawn from OSCE lists of pre-1989 judges and prosecutors who were refugees or picked on the basis of information provided by local attorneys.[64] Until the emergency judicial system was dissolved in October 1999, UNMIK appointed altogether 55 judges and prosecutors, a group that comprised 36 criminal law judges, five civil law judges and 14 prosecutors, of whom seven were Serbs.[65]

The selection of a few emergency judges whose professional skills were beyond doubt but who were associated with the previous regime caused strong protests by local

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60 For more information on EULEX and recent developments in Kosovo's justice sector see International Crisis Group (2010) 'The rule of law in independent Kosovo', ICG Europe Report No. 204, pp. 12–21; S. Richter (2009) 'Rechtsstaatlichkeit fördern, ohne Eigenständigkeit zu stärken: Schafft die EULEX-Mission im Kosovo die Quadratur des Kreises?', in M. Asseburg and R. Kempin (eds) *Die EU als strategischer Akteur in der Sicherheits- und Verteidigungspolitik?*, SWP Studie. Berlin: German Institute for International and Security Affairs, pp. 32–49.

61 Strohmeyer, note 40 above, pp. 51–52.

62 UNMIK Emergency Decrees Nos 1999/1 and 1999/2 on the Establishment of a Joint Advisory Council on Provisional Judicial Appointments, 28 June 1999.

63 Interview with former Supreme Court judge, Pristina, March 2008.

64 Interview with OSCE national legal officer, Pristina, March 2008; Strohmeyer, note 40 above, p. 53.

65 Rausch, note 55 above, p. 280.

political forces and resentment within parts of the local legal community.[66] The Serb and Bosniak judges were threatened and accused of collaboration – circumstances that contributed to the Serbs' resignation or departure in September 1999.

Advisory Judicial Commission

Both the KLA and the LDK (Democratic League of Kosovo) demanded influence in the judicial appointment process.[67] There was also a need to replace the emergency system with a more permanent one. In September the decree-based JAC was replaced by the Advisory Judicial Commission (AJC), established by UNMIK Regulation No. 1999/6 with a broader mandate to cover not only judicial appointments but also disciplinary matters, including the removal of individual judges and prosecutors in certain cases.[68] To include wider legal expertise as well as representatives of the political parties, UNMIK expanded its membership to eight local and five international members appointed by the SRSG on the basis of their professional expertise and personal integrity, and with a view to a multiethnic composition of the commission. In contrast to the JAC, the regulation spelt out concrete selection criteria for the judiciary. Attempting to depoliticise judicial appointments, provision was made that applicants were not allowed to have participated in or implemented discriminatory measures, nor to be a member of a political party or be engaged in political activities.[69]

The AJC took up its work at the end of October and placed vacancy announcements in the local media for service in regular courts. Working quickly, without any chance to vet the candidates thoroughly, the AJC submitted on 13 December 1999 a list of 328 judges and prosecutors and 238 lay judges to be appointed by the SRSG. Despite the insufficient number of recommendations and hardly any multiethnic participation, on 29 December 1999 the SRSG appointed, on three-month renewable contracts, 296 judges and prosecutors and 238 lay judges, including two Serbs and eight other minorities as judges and one Roma and one Turk as prosecutors.[70] By September 2000 the number of judges and prosecutors had increased to 405, but Serb participation decreased even more.

UNMIK's decision to give Kosovars the majority in the appointment process was designed to enhance the feeling of local ownership of the judiciary.[71] While there seems to have been general content with the appointments to kick-start the justice system after the end of the armed conflict, local and international actors raised the criticism that the judiciary had not been selected on the basis of merit but with a view to ethnic background and political loyalty.[72] The provisions to prevent undue politicisation of the judiciary did not prevent the Albanian AJC members from appointing candidates on the

[66] Interview with KJC member and former emergency judge, Pristina, March 2008; International Crisis Group, note 41 above, p. 4.
[67] Interview with former Supreme Court Judge, Pristina, 12 March 2008.
[68] UNMIK Regulation No. 1999/7 on the Appointment and Removal from Office of Judges and Prosecutors, 7 September 1999, section 1.1.
[69] Ibid., section 6.1.
[70] Rausch, note 55 above, p. 280.
[71] Strohmeyer, note 40 above, p. 52.
[72] Interviews with local UNMIK staff, former Supreme Court judge and director of Legal Aid Commission, Pristina, September 2007 and March 2008; Rausch, note 55 above, p. 280.

basis of their 'political fitness' and opposing applications by qualified jurists viewed as 'disloyal' to the cause of independence.[73]

In addition to the reproach of ethnic and political bias, the reputation of the judiciary suffered from a lack of experience and professional efficiency because many of the appointed Albanian judges and prosecutors had been out of work since 1989.[74] Moreover, security concerns, threats against individual judges and prosecutors, limited contracts and comparatively poor salaries lowered professional morale and led to the violation of official duties and corruption.[75] The AJC was supposed to act as disciplinary body, but did not initiate one investigation despite evidence of misconduct.

Kosovo Judicial and Prosecutorial Council and Joint Inspection Unit

In line with its general policy to apply a tougher approach in enforcing the rule of law, for example by inserting international judges and prosecutors, and because of allegations of threats and intimidation, UNMIK dissolved the AJC and replaced it with the Kosovo Judicial and Prosecutorial Council (KJPC) in April 2001.[76] Unlike the AJC, in which locals had a voting majority, the KJPC was composed of five international and only four Kosovar legal professionals. The council had a similar mandate to the AJC, but included explicit mention of disciplinary actions of a lesser gravity than removal from office.[77] New lists of judges were then presented to the newly established Kosovo Assembly before the SRSG made final appointments.[78]

Although from January 2002 judicial personnel received more permanent contracts until the end of UNMIK's mission, many judges and prosecutors left the judicial and prosecutorial service because of the bad work conditions and went into private practice. Despite a recruitment campaign, UNMIK had serious difficulties filling the vacancies and continued to seek qualified candidates in March 2002.[79] Vacant positions were advertised and interview panels consisting of one international and two local KJPC members were organised to select candidates for recommendation to the Assembly and the SRSG. Cooperation between international and local KJPC members worked well, and neither the KJPC nor the SRSG objected to one recommendation made by the locally dominated interview panels.[80]

The KJPC was supported by the Joint Inspection Unit (JIU), set up in the Department of Justice in April 2001 to investigate accusations against individual judges and prosecutors.[81] Once the JIU found evidence of misconduct, the case was sent to the KJPC for a hearing and decision. The JIU had serious difficulties in finding local inspectors willing and capable of investigating the conduct of their judicial colleagues, and it was criticised for its linkage to the executive branch and its lack of any complaints

[73] D. Zaum (2007) *The Sovereignty Paradox: The Norms and Politics of International Statebuilding*. Oxford: Oxford University Press, p. 156.
[74] Interview with KJC member and chairman of Chamber of Advocates, Pristina, March 2008.
[75] According to the Kosovo Consolidated Budget, a municipal judge would earn approximately €300 per month.
[76] UNMIK Regulation No. 2001/8 on the Establishment of the Kosovo Judicial and Prosecutorial Council, 6 April 2001.
[77] Ibid., section 7.
[78] International Crisis Group, note 60 above, p. 7.
[79] Rausch, note 55 above, p. 282.
[80] Interview with Supreme Court judge and former KJPC member, Pristina, March 2008.
[81] Administrative Direction No. 2001/4 Implementing UNMIK Regulation No. 2000/15 on the Establishment of the Administrative Department of Justice, 11 May 2001.

mechanism for the public.[82] Yet, despite continuous funding shortages, the KJPC (with the support of the JIU) functioned better than its predecessor, the AJC. A Supreme Court judge found that the KJPC was able to operate as a more effective check in the justice system, disciplined Albanian judges for conflict of interest and accepting bribes and developed codes of conduct for judges and prosecutors in 2001. He believed that positive results stemmed from the involvement of local officials in establishing the institutions, as well as from a fruitful interplay of international and local perspectives within the KJPC.[83]

Kosovo Judicial Council

One of the main issues in the transition strategy for the justice sector was the creation of a local and independent body for the administration of justice. Following an intense consultation process within the JSECG, discussed below, UNMIK established the Kosovo Judicial Council (KJC) at the end of 2005.[84] The KJC replaced the KJPC and operates as an independent professional body to set administrative policies and provide administrative oversight for the judiciary and courts. It is responsible for the recruitment, training, appointment and disciplining of judges and judicial personnel, and of prosecutors for a transitional period until an entity regulating prosecutorial affairs is established.[85] The KJC is a local body with a clear majority of local members: it is composed of 11 members (seven judges and four non-judges), of whom the president of the Supreme Court, the minister of justice, the president of the Chamber of Advocates and the chairperson of the Assembly Committee on Legislative, Judicial and Constitutional Framework Matters serve as *ex officio*. It was also determined that for the first year of the KJC's existence, two international judges should be appointed as judicial members.[86]

Despite the remaining final authority of the SRSG and notwithstanding its mandate to ensure a comparably high minority representation in the judiciary, facts that many Kosovars view highly critically, the international and local legal communities find the KJC's establishment an important step towards local ownership in the justice sector.[87] Many Kosovars welcome the new institution, which can alter the contested distribution of judges and prosecutors throughout Kosovo, although they disapprove its slow start and limited management ability and criticise the prosecutorial service falling under the council's purview in the interim.[88]

Independent Judicial and Prosecutorial Commission

As a compensatory mechanism for the enlarged transfer of responsibilities to Kosovars, UNMIK made use of its reserved powers and introduced a regulatory framework for the justice system, with the aim of ensuring an integrated, impartial and independent justice

[82] C. Bull (2008) *No Entry without Strategy: Building the Rule of Law under UN Transitional Administration*. Tokyo: United Nations University Press, p. 141.
[83] Interview with Supreme Court judge and former KJPC member, Pristina, March 2008; Rausch, note 55 above, p. 281.
[84] UNMIK Regulation No. 2005/52 on the Establishment of the Kosovo Judicial Council, 20 December 1005.
[85] Ibid., sections 1.1–1.4 and 1.6.
[86] Ibid., sections 2 and 4.
[87] Interviews with UNMIK, OSCE and EUPT staff members, Pristina, March 2008; interviews with president of Association of Judges, KJC member and director of KJC Secretariat, Pristina, March 2008.
[88] Interviews with chief prosecutor, KJC member and KJC Secretariat staff, Pristina, March 2008.

system reflecting Kosovo's multiethnic nature and granting access to all Kosovars regardless of their ethnicity.[89] One of the measures envisaged was the creation of the Independent Judicial and Prosecutorial Commission (IJPC), an autonomous body of the KJC with the mandate to administer a one-time judicial and prosecutorial reappointment process for each post in Kosovo.[90] Established by administrative direction in late 2006,[91] the IJPC began its work, once funding was secured, with the appointment of its president in November 2008.

The (re)appointment process is conducted in three phases differentiating between the various court and prosecutorial levels. During the first phase, which focuses on Supreme Court judges and prosecutors in the office of the prosecutor, the IJPC is internationally dominated and consists of five international judges and prosecutors.[92] In the second (district court level) and third (municipal court) phases, the number of local IJPC members will increase to ten, with locals constituting the majority in phase three. At least one local IJPC member shall be a minority representative.[93] Adjusted to the phased appointment approach, there will also be an IJPC review panel, initially composed of three international members but then transforming to a mixed local and international composition. The review panel is mandated to determine reconsideration requests regarding IJPC decisions.[94]

From 2009 all judges and prosecutors had to reapply for their jobs, but the vetting progresses slowly. Several judges and prosecutors, mostly those on a lower level, failed the IJPC's ethics test, leaving the commission needing to explain its examination process with more clarity.[95] In February 2010 the IJPC finished approving the members of the Supreme Court and Public Prosecutor's Office. Meanwhile, candidates for the district courts are recommended for nomination and those applying for municipal court positions are being interviewed.

The IJPC is one of the last remnants of harsh reserved power interventions into Kosovo's justice system, and stands in some contrast to the general transition and handover policy. Although the vetting and (re)appointment will lead to full security of tenure, not all judges and prosecutors appreciate the process, some because they fear losing their jobs. Complaints have been raised about the lack of trust in the KJC shown by making the phase one and (possibly) phase two appointments internationally dominated.[96] However, the general public and the majority of the wider legal community seem to appreciate the process very much.[97] They hope it will rid Kosovo's judiciary of incompetence and corruption and thereby increase its status and work ethics. Moreover, many local politicians and stakeholders support the idea because they find the

[89] UNMIK Regulation No. 2006/25 on a Regulatory Framework for the Justice System in Kosovo, 27 April 2006.
[90] Ibid., section 6.
[91] Administrative Direction No. 2006/18 Implementing UNMIK Regulation No. 2006/25 on a Regulatory Framework for the Justice System in Kosovo, 28 December 2006.
[92] Administrative Direction No. 2008/2 Implementing UNMIK Regulation No. 2006/25 on a Regulatory Framework for the Justice System in Kosovo, 17 January 2008, section 7.2.
[93] Ibid., sections 7.3–7.5.
[94] Ibid., sections 6.3–6.6.
[95] Interview with international judge, Berlin, April 2010.
[96] Interview with Supreme Court judge and former KJPC member, Pristina, March 2008.
[97] Interviews with former minister of justice, chief prosecutor, former KJPC member and local attorney, president of Chamber of Advocates and KJC member and local UNMIK staff, Pristina, September 2007 and March 2008.

(re)appointment process will consolidate and revise where necessary a judiciary conceived to be a provisional kick-start measure from the outset.[98]

International law making and local participation: Judicial and criminal law reform

In contrast to judicial and prosecutorial appointment, in which UNMIK initially tried to involve local stakeholders as much as possible but then stepped up international control for most of the mission's lifespan before transferring powers to the PISG, UNMIK law making was in principle characterised by a more linear shift from exclusive international governance to local participation and power sharing.[99]

Early law making

In the first months before the establishment of the Joint Interim Administrative Structure (JIAS), UNMIK's regulatory efforts could be compared to quasi-absolutist decree ruling. Draft regulations, such as that establishing the AJC, were prepared by the UNMIK pillars, reviewed by the legal adviser and then forwarded for comments to the Office of Legal Affairs at UN headquarters in New York and, along with a provisional translation, to the Joint Advisory Council on Legislative Matters (JAC/LM). After finalisation of the draft, regulations were sent for approval to the UN Department of Peacekeeping Operations and, upon approval, signed by the SRSG. UNMIK regulations were issued in Albanian, Serbian and English and published by public announcement and in the *Official Gazette*.[100]

JIAS law making

With the creation of the JIAS, the law-making process became more formal and placed more emphasis on local ownership. The preparation of regulations became the responsibility of the (joint) administrative departments and the Interim Administrative Council became the central organ for local participation in the legislative process. While the law-making procedures were generally adhered to, some regulations were promulgated without prior consultation with the two main advisory organs, the Interim Administrative Council and the JAC/LM. Furthermore, UNMIK pillars, donors or local factions sometimes exerted high pressure to adopt certain regulations under any circumstances, for example to meet budgetary deadlines, ensure a timely coordination of several implementing project partners or present 'quick successes' to justify a programme's existence or satisfy popular opinion. Thus there was a tendency to consult the councils as a 'token gesture' only at the final stages of the drafting process when comprehensive changes could no longer be made.[101]

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98 Interviews with director of Legal Aid Commission and UNMIK official, Pristina, March 2008.

99 L. von Carlowitz (2004) 'Crossing the boundary from the international to the domestic legal realm: UNMIK lawmaking and property rights in Kosovo', *Global Governance*, 10: 324.

100 UNMIK Regulation No. 1999/1 on the Authority of the International Administration in Kosovo, section 5. The *Gazette* was criticised for not having been fully operational and published until 18 months after UNMIK's establishment. See W. S. Bretts, S. N. Carlson and G. Gisvald (2000/2001) 'The post-conflict transitional administration of Kosovo and the lessons learned in efforts to establish a judiciary and rule of law', *Michigan Journal of International Law*, 22: 383–384; M. G. Brand (2001) 'Institution-building and human rights protection in Kosovo in the light of UNMIK legislation', *Nordic Journal of International Law*, 70: 470.

101 von Carlowitz, note 24 above, p. 379; D. Marshall and S. Inglis (2003) 'The disempowerment of human rights-based justice in the United Nations Mission in Kosovo', *Harvard Human Rights Journal*, 16: 117–118.

With the exception of the Provisional Criminal Code and Provisional Criminal Procedure Code, discussed below, consultation was also limited in the drafting processes of the UNMIK regulations relating to the justice system, including the regulations establishing the KJPC and those relating to the international judiciary.[102]

Reserved power law making

The adoption of the Constitutional Framework and the creation of the PISG constituted a significant move towards self-government and local ownership in a variety of policy fields.[103] Following the provincial elections in September 2001, the Kosovo Assembly was formed as the highest representative and legislative institution, endowed with a detailed law-making procedure and the support of Assembly committees to review draft laws and make appropriate recommendations.[104] Intended as an exception to the general transfer strategy, UNMIK retained a set of specifically defined reserved powers and responsibilities, including final authority regarding the appointment, removal from office and disciplining of judges and prosecutors and the assignment of international judges and prosecutors.[105] Although the Constitutional Framework gave the PISG a wide range of responsibilities in the field of judicial affairs, the justice sector remained heavily dominated by UNMIK because of these reserved powers as well as the decision at the time not to create a ministry of justice and a local body responsible for the administration of the judiciary.[106]

As the Constitutional Framework was generally seen as a significant step in general mission policy towards local ownership and power sharing, there was a tendency within UNMIK to feel less inclined than during JIAS times to consult with local stakeholders on regulatory matters falling into its reserved power competence. UNMIK felt that the Constitutional Framework had separated international and local responsibilities clearly, and it was no longer obliged to consult local actors on reserved power issues. Whereas consultation was formalised within the JIAS, and at least should have been an essential element of this co-governing arrangement, there was discretion in reserved power law making whether or not to consult local actors in a given regulatory project.[107] In practice, members of the Supreme Court and Chamber of Advocates were usually consulted by the UNMIK Department of Justice in the early drafting phases of justice-related law making, for example with respect to the regulatory framework of the justice system.[108] Yet, while emphasising international efforts to create local ownership and judging the Constitutional Framework a success story, one high UNMIK official regretted that UNMIK had not made more efforts to foster local buy-in to international legislative projects.[109] Referring to the lack of local consultation, he deplored a prevailing international impatience in waiting for comments of local actors, and the bad quality of these comments. Another UNMIK official confirmed that the feedback of local

[102] Interviews with UNMIK official and former KJPC member and Supreme Court judge, Pristina, September 2007 and March 2008.
[103] UNMIK Regulation on a Constitutional Framework of Self-Government in Kosovo, 15 May 2001, section 5.
[104] Ibid., chapter 9, section 1.
[105] Ibid., chapter 8.1(g)-(h).
[106] Interview with UNMIK official, Pristina, October 2007.
[107] Interview with UNMIK official, Pristina, March 2008.
[108] Interview with UNMIK official, Pristina, March 2008.
[109] Interview with UNMIK official, Pristina, March 2008.

stakeholders was often disappointing, very much delayed or not forthcoming at all.[110] Moreover, she pointed at continuity issues relating to local consultation: usually, drafts were sent to the head of an institution with a request for comments, but this person was often a member of a political party and/or family who would be replaced at times of political change; the successor might then take a completely different stance on the discussed matter, a situation that would cause complications and delays in the drafting process.[111]

Transferred power law making

Impatience also existed in drafting processes concerning regulations falling into transferred responsibility. At times, representatives of the Office of the Legal Adviser were invited to attend public hearings in Assembly committees because this office gave final clearance to Assembly laws to be promulgated by the SRSG.[112] These instances did not produce fruitful consultation because either UNMIK officials did not show up due to their own workload or they were annoyed by the inefficient and unprepared discussion process in the meeting.[113] Complaints were raised that local stakeholders would appear in working group sessions without having read the draft laws or commentaries to be discussed, and that some local actors would give long speeches about irrelevant things and thereby waste everyone's time.[114]

Although the PISG could claim a large degree of local ownership in policy and law making falling into their competence, it was not always fully used. In many regulatory efforts, a lack of professional skills and a general culture of dependency led Kosovar politicians to seek the advice and assistance of international consultants, mostly from the United States.[115] Often, US experts are placed in central positions within the Kosovar ministries and the Office of the Prime Minister to ensure that 'US drafts' pass the legislative procedure without too many changes. In many cases Kosovar politicians are glad to have a desired law produced without scrutinising it with respect to legal technicality and coherence.[116] In other cases, Kosovars do not consent but are either afraid to push through their objections for fear of losing donor support or simply bow to international pressure, in particular from the United States.[117] Although ownership formally rests with the PISG, it is highly doubtful whether local ownership exists in substance in these instances.

Difficulties in participation

Effective and comprehensive local participation in UNMIK law making was difficult for numerous reasons. For example, legal experts disagreed on how local participation was best to be implemented. Should international legal experts first produce legislative drafts and then have them embraced by relevant local interlocutors? Or should relevant texts be jointly produced by local and international drafters, possibly following prior training in

[110] Interview with UNMIK official, Pristina, March 2008.
[111] Ibid.
[112] UNMIK Regulation No. 2001/9, chapter 9, section 9.1.45.
[113] Interviews with UNMIK official and former PISG consultant, Pristina, March 2008.
[114] Interview with UNMIK official, Pristina, March 2008.
[115] Interviews with former PISG consultant, National Center for State Courts official and EUPT official, Pristina, March 2008.
[116] Interview with former PISG official, Pristina, March 2008.
[117] Interview with former PISG consultant, March 2008.

legislative drafting?[118] A lack of adequate translation and interpretation resources contributed to making cooperation difficult. Legal experts needed to work simultaneously in Albanian, Serbian and English, and qualified translators and interpreters were difficult to find. Not only did they ideally need to be fluent in the three languages, but they should also have had a legal background. Candidates with such qualifications hardly existed and were difficult to attract. Since UNMIK's central language unit was chronically overloaded with work, significant delays in the finalisation of official translations of regulations were not uncommon.[119] Moreover, the motivation of the local JAC/LM members to cooperate in a substantive and speedy way was hampered because they were required to work *pro bono* and were left, at least in the initial stages, without resources such as computers, office space and secretarial assistance.[120]

Different legal approaches of the international and domestic actors were a further factor that made fruitful cooperation difficult. Although UNMIK was in principle obliged to respect the domestic law and legal traditions, it had a hard time doing so because its staff lacked, for the most part, sufficient knowledge of local languages, structures and legal systems.[121] UNMIK had engaged many international jurists whose legislative approaches significantly differed from domestic regulatory activity in some countries. While law making in a democratic state is normally based on a linkage between the legislator and the domestic system, with clear responsibilities and majority voting, international codification is heavily influenced by multilateral negotiation, consensus building and dispute resolution aimed at a unanimous decision. As was the case in Kosovo, legislation drafted by international lawyers tends to use unspecific terms and leave flexibility in its implementation. This contrasts sharply to Kosovo's civil-law-based system, influenced by a socialist heritage and relying on detailed codification in the administrative area.[122] In a similar way, many of the international consultants, particularly those from common law systems such as the United States and the United Kingdom, faced serious challenges in trying to match their legal language with the Kosovar legal culture.[123] Finally, problems also resulted from the dual role of the international staff as, on the one hand, international civil servants and, on the other, as temporary quasi-government officials. Confusion in approach resulted from the fact that UN staff are usually not trained in governmental activities such as legislative drafting or building state institutions. The dual role also entailed potentially conflicting responsibilities, and UNMIK staff were left without guidance on how to reconcile or prioritise them.[124]

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[118] Interview with former UNMIK official, Pristina, October 2007.

[119] A. J. Miller (2004) 'UNMIK: Lessons from the early institution-building phase', *New England Law Review*, 39: 13–14. The language unit mainly served the SRSG's office and the two political consultation organs, the Kosovo Transitional Council and the Interim Administrative Council. As a consequence, language services for the legal consultation organ, the JAC/LM, as well as for preparatory legislative work in administrative departments, had to be provided outside the UNMIK structures.

[120] Lawyers Committee for Human Rights (1999) 'A fragile peace: Laying the foundations for justice in Kosovo', report, October.

[121] The Brahimi Report, note 44 above, para. 80, suggests that it would take an international presence at least six months to get accustomed to the domestic applicable laws.

[122] von Carlowitz, note 24 above, p. 382.

[123] X. Forneris, C. Caldwell and A. Shinn (2001) 'Legal reform in post-conflict circumstances. The case of Kosovo', paper presented at World Bank conference, Empowerment, Security and Opportunity through Law and Justice, St Petersburg, 8–12 July, p. 7; L. von Carlowitz (2004) *Migranten als Garanten. Über die Schwierigkeiten beim Rechtsstaatsexport in Nachkriegsgesellschaften*, HSFK Standpunkte No. 2004/6, pp. 3, 12.

[124] R. Wilde (2001) 'The complex role of the legal adviser when international organizations administer territory', *American Society of International Law Proceedings*, 95: 252.

Despite these difficulties, UNMIK tried to involve local stakeholders seriously in two justice-related legislative undertakings. The first began at the outset of the mission and concerned UNMIK's key legislative achievement: the drafting of the new (Provisional) Criminal Code and (Provisional) Code of Criminal Procedure. The second was later-stage consultations relating to the rule of law transition strategy, to new laws on courts and prosecutors and, in a wider sense, to the UNMIK regulation establishing the KJC.

The Provisional Criminal Code and Provisional Criminal Procedure Code

Persuaded by respected members of the local legal community, the SRSG authorised the JAC/LM in August 1999 to develop new criminal legislation in accordance with international human rights standards. Subsequently, a JAC/LM working group was established, consisting of around ten representatives from relevant international organisations and non-governmental organisations (NGOs) and local legal experts. The group included two law professors from the University of Pristina who took the lead in discussions and regarded the drafting process as their responsibility.[125] The Council of Europe provided expert advice on modern developments in international and regional criminal law, the OSCE technical support and the American Bar Association Central and Eastern European Law Initiative (ABA/CEELI) a meeting room, interpretation services and editing support. While the working language in general was English with adequate translation support into Albanian, the leading Council of Europe expert, a Slovene national, and the two law professors discussed many issues in Serbian (or Croat), with English and Albanian drafts to follow.[126] Meeting on a weekly basis, the working group produced two draft codes that were broadly discussed with local judges, academics and other legal experts in summer 2001 before revised drafts were submitted for review to the Office of the Legal Adviser in November 2001.[127] Intense consultations between UNMIK and the law professors followed from March to August 2002, during which some language issues were clarified but no real substantive issues were altered. Changes related mostly to status issues, for example whether or not to call the codes 'provisional'.[128] Following New York review and Assembly adoption, the SRSG promulgated both codes in July 2003. They entered into force nine months later, in April 2004, to allow for judicial and prosecutorial training in the interim.[129]

As emphasised in the preambles of both regulations, the new provisional codes were 'mindful of the legal traditions underpinning the law applicable in Kosovo, recogniz[ed] recent developments in international criminal law and criminal law in the region, [and promulgated] with a view to ensuring that the criminal laws applicable in Kosovo are in conformity with established principles of international law and with general trends in modern criminal law'.[130] The Provisional Criminal Code incorporates new criminal offences and punishments reflecting the contents of existing UNMIK regulations as well as the practice of neighbouring ex-Yugoslav countries and modern international legal

[125] Telephone interviews with former UNMIK official, former ABA/CEELI staff and COE expert, September and October 2008.
[126] Telephone interview with former ABA/CEELI staff, October 2008.
[127] Telephone interview with former UNMIK official, September 2008.
[128] Ibid.
[129] Interview with former UNMIK official, Pristina, October 2007.
[130] Preamble of UNMIK Regulation No. 2003/ 25 on the Provisional Criminal Code of Kosovo, 6 July 2003, and UNMIIK Regulation No. 2003/26 on the Provisional Criminal Procedure Code of Kosovo, 6 July 2003.

developments.[131] Using principles taken from both inquisitorial and adversarial systems, the Provisional Criminal Procedure Code contains provisions to improve procedural efficiency and strengthen prosecutorial capacity.[132] While the code generally follows existing Kosovar civil law traditions, with an investigative judge obliged to take an active role in determining the truth, it also contains adversarial elements used in common law countries, for example in provisions relating to the documentation of evidence, testimonies in court and detention orders.[133]

The codes have been criticised for various reasons, including using ambiguous language from international legal instruments which does not fit the civil law context and for which no commentaries exist, and introducing new principles without providing for the necessary implementing legislation.[134] Moreover, criticism was raised that they did not work well in practice because they apply unrealistically high standards for Kosovo's underdeveloped justice system. For example, prohibiting a judge who was engaged in pre-trial actions from participating in the main trial, a modern innovative change to the pre-existing law, the Provisional Criminal Procedure Code is causing implementation problems because of the small pool of available judges.[135]

One international judge stated that the two codes were the best example of local ownership but also caused huge problems to the local legal system.[136] Certainly, many Kosovar politicians and legal professionals like the codes despite their implementation challenges because they represent an important break with the past.[137] The codes are understood as genuinely Kosovar despite the fact that they were developed under reserved power auspices. It seems that the statement by one UNMIK official that 'the Kosovars were happy with anything, as long as it was not Serb'[138] disregards the genuine and considerate efforts to achieve modern penal law reform taking into consideration existing legal traditions.[139] The insertion of adversarial elements alien to Kosovo's criminal law system was seen as something 'progressive' and strongly supported by the resident legal experts in charge of the drafting process.[140] Yet it was also welcomed because the prevailing civil law traditions were associated with the previous hated Serb regime.[141]

The JSECG, the draft Law on Courts and the KJC regulation

The second major participation exercise in UNMIK's regulatory activity concerned the transition plan on how to transfer international responsibilities for the administration of justice and related policy-making to newly created local institutions, including the KJC, as well as new draft laws on courts and prosecutors. Relying on the OSCE capacity-building mandate and being occupied with *ad hoc* policies reacting to specific events, UNMIK

131 A. Borg-Olivier (2003) 'Criminal codes sent for review', *Focus Kosovo*, April, available at: www.unmikonline.org/pub/focuskos/apr03/focusklaw1.htm.
132 Bull, note 82 above, p. 133.
133 Interviews with OSCE official and international judges, Pristina, October 2007 and March 2008.
134 Interviews with international judges, national OSCE staff and former UNMIK official, Pristina, March 2008.
135 Bull, note 82 above, p. 133.
136 Interview with international judge, Pristina, March 2008.
137 Interviews with former minister of justice and special prosecutor, March 2008.
138 Interview with UNMIK official, Pristina, September 2007.
139 Telephone interview with former ABA/CEELI staff, October 2008.
140 Telephone interview with former UNMIK official, September 2008.
141 Telephone interview with COE expert, Pristina, October 2008; see also Bull, note 82 above, p. 133.

Pillar I did not prioritise transfer thinking until the March riots in 2004.[142] A few months before, UNMIK had been approached by DFID (the UK Department for International Development) to establish a formalised discussion channel to bring local stakeholders into the judicial reform strategy. This idea originated from a local NGO, Kosovo Foundation for Open Society (KFOS), which had gathered a group of renowned members of the local legal community to act as a pressure group for certain judicial reform issues.[143] UNMIK was interested in receiving as much local input into the transition plan as possible, to foster local acceptance of the institutions to be established.[144] It took up the idea and formed the JSECG, a consultative group co-chaired by a Pillar I and a KFOS representative, with members from the key local legal institutions, to develop ideas on Kosovo's future justice system.[145] Pillar I and donor representatives participated as observers.

The JSECG met frequently for about one year, with the objective of developing policy recommendations for the competences of the Ministry of Justice, the KJC and the prosecutorial services. With respect to the KJC, the Kosovars had clear views that the institution should be 'truly local' and not UNMIK-dominated. In the name of judicial independence, they also strongly advocated that court administration and budgeting should be transferred from the Ministry of Public Services to the KJC (and not to the recently created Ministry of Justice).[146] Taking into consideration the JSECG discussions, Pillar I developed a transition plan for the justice sector in cooperation with New York headquarters and submitted it for discussion to the PISG in June 2005.[147] While discussions with the PISG were intensified and individual JSECG members were consulted on specific matters, the relevance of the JSECG gradually decreased. Although they realised that UNMIK used many JSECG ideas, some of its members were disappointed that the consultation process 'died quietly' and UNMIK neither shared information about the reform progress nor concluded the dialogue process properly. They resent UNMIK for having used JSECG input as a 'fig leaf' to give legitimacy to its law-making activities without feeling accountable to the group.[148]

Early in 2005 an informal transition working group was formed, in which UNMIK officials discussed with key PISG officials concrete issues and priorities to consider in any transitional arrangement, including the design of a ministry of justice.[149] At the same time, consultations took place on new laws on courts and prosecutors. In November 2004 UNMIK Pillar I had commissioned a US law firm to draft *pro bono* these laws, including provisions on the KJC and other issues previously discussed by the JSECG. Of approximately 20 legal experts who participated in the initial deliberations on the draft Law on Courts, only two were international consultants; the rest of the working group were well-known local jurists and legal stakeholders, among them some who had been

[142] Interview with UNMIK official, Pristina, October 2007.
[143] Interview with JSECG member, Pristina, March 2008.
[144] Interview with UNMIK official, Pristina, October 2007.
[145] JSECG members included the president of the Supreme Court and representatives from the Pristina law faculty, the Association of Judges, the Association of Prosecutors, the Chamber of Advocates, the KJPC and others.
[146] Interview with UNMIK official, Pristina, October 2007.
[147] Interview with UNMIK official, Pristina, October 2007.
[148] Interview with JSECG member, Pristina, March 2008; telephone interview with former UNMIK official, April 2009.
[149] Telephone interview with former UNMIK official, April 2009.

part of the JSECG. Representatives from interested international organisations joined the group as observers.[150]

In spring 2005 a workshop in Ohrid kick-started the process, and many follow-up sessions were organised in the next months at which the consultants presented formal policy papers on the major decisions to be taken in the drafting process.[151] The consultants submitted policy options based on comprehensive comparative research of the judicial systems of 25 countries. Following serious deliberation and discussion, decisions were taken and the consultants requested to produce drafts reflecting the group's policy decisions. The English language text was carefully translated into Albanian (and partly in Serbian) and then resubmitted to the group for further discussion.[152] Sufficient time and resources were spent on discussion and consensus-seeking before a first draft was produced in October 2005 and generally accepted as the basis for further consultations in the PISG.[153]

Meanwhile, the transition working group had reached agreement in September to provide a budget and a legal basis for the newly created justice institutions by the end of 2005. Given the severe time pressure, UNMIK decided to draft the KJC regulation quickly, without much local participation, on the basis of the draft Law on Courts. In fact, UNMIK cut and pasted the KJC-related passages of this draft law into the establishing UNMIK Regulation No. 2005/52.[154] The regulation includes many issues recommended by the JSECG, such as the council's independence and own budgetary competences for the judiciary.[155] An interim victim of the hurried regulatory process was the notion favoured by both the JSECG and UNMIK to separate judicial and prosecutorial responsibilities by also establishing a prosecutorial council. However, this split is intended to be implemented at a later stage dependent on the adoption of the draft Law on Prosecutors. Moreover, UNMIK Regulation No. 2005/52 is only intended to serve as an interim legal basis until the new Law on Courts is promulgated.[156] At the time of writing, the draft is still in the legislative process of the PISG.

As mentioned in the previous subsection, many Kosovars seem to appreciate the KJC as a significant step in the direction of local ownership in the justice sector. Even though the KJC regulation as such was quickly adopted in a non-participatory manner, it was nevertheless based on a serious twofold consultation process. The regulation was adopted with a view to reflecting the preferences of the local legal community, even if some PISG offices would like to have seen the Ministry of Justice exercising some authority over the KJC.[157]

[150] Telephone interview with former UNMIK consultants, April 2009.
[151] Interview with UNMIK official, Pristina, September 2007; S. Andrews (undated) 'My experiences in Kosovo, December 2006–March 2007', available at: www.newperimeter.com/kosovo_account/.
[152] Telephone interview with former UNMIK consultants, April 2009.
[153] Telephone interview with former UNMIK consultants, April 2009.
[154] Interview with UNMIK official, Pristina, October 2007.
[155] Telephone interview with former UNMIK consultants, April 2009.
[156] National Center for State Courts 'Kosovo Judicial Council marks transition in the justice sector', press release, December 2006; available at: www.ncscinternational.org/ks/news3.aspx (accessed: 4 February 2008).
[157] Interview with former PISG consultant, Pristina, October 2007.

Capacity building: Training, cooperation and mentoring

Capacity building in the justice sector took place in various forms, including judicial training and intra- and inter-office mentoring and support. Capacity building was claimed to be one of the purposes for inserting international judges and prosecutors into Kosovo's judicial system.

Judicial training and the Kosovo Judicial Institute

As mentioned, one of the primary tasks of the OSCE-led Pillar III was capacity building for the judiciary, mainly by providing training for judges, prosecutors and other justice-related professions. Realising that most Kosovo Albanian jurists had either been banned from their professions for the last decade or merely received training in the non-formal 'parallel education system', UNMIK wanted to have a quick-start training programme for judges and prosecutors in domestic and international law from the outset of the mission. However, early efforts to organise training in domestic law were hampered by the debate about the applicable law and the fear of some Kosovo Albanian lawyers that training courses would reveal their lack of experience and be used to disqualify them form judicial office.[158] In contrast, training in international human rights and humanitarian law was less controversial.

The OSCE organised a two-day workshop for all legal professionals in November 1999, and training sessions for the judges and prosecutors of the emergency justice system were prepared by the OSCE and other international organisations such as the Council of Europe, ABA/CEELI and UNMIK Pillar II.[159] However, no comprehensive training programme was provided for the judges and prosecutors appointed by the JAC before they took up office in January 2000. The newly appointed judiciary received their first legal training on the European Convention on Human Rights during seminars in May and September and a first induction course including the domestic applicable law was only held in November 2000.[160]

The OSCE Judicial Training Section was renamed the Kosovo Judicial Institute (KJI) in February 2000. Although the KJI provided Kosovo-wide training, the quality of the courses was criticised for various reasons. Its classroom training was said to be ineffectual because it used too many international trainers who did not speak any local language, and lacked sufficient knowledge of local traditions and mentalities and sometimes even methodological and teaching skills.[161] The heavy focus on European human rights law did not meet local needs, as the local judiciary needed to be trained on the application of international standards in the courtroom. Instead of gathering theoretical knowledge on international jurisprudence, Kosovo's lawyers should have learnt how human rights could be used to fill gaps in the domestic law and acquired basic legal skills such as the questioning of witnesses or legal reasoning.[162] Moreover, there was no special prosecutorial training and hardly any follow-up to training sessions.[163] The curricula

[158] Strohmeyer, note 40 above, pp. 56–57.
[159] Zaum, note 73 above, p. 151.
[160] Marshall and Inglis, note 101 above, p. 124.
[161] Bull, note 82 above, p. 137.
[162] Interviews with former judge and chairman of Chamber of Advocates, Pristina, September 2007 and March 2008; Marshall and Inglis, note 101 above, p. 124.
[163] Bull, note 82 above, p. 138.

remained largely reactive and were conducted on an as-needed basis concerning new mostly criminal legislation.[164]

The KJI gradually improved these shortcomings. In 2003 it moved away from *ad hoc* courses and offered for the first time systematic training with a fixed curriculum.[165] Over time the KJI developed a continuous and comprehensive training programme relying more and more on local trainers.[166] Despite the serious difficulty in finding good trainers, training is becoming less abstract and focuses more on concrete cases and issues.[167] While initially concerns about courses were only raised twice a year in OSCE reports, a monitoring system has now been installed which requires each training participant to complete an evaluation form.[168] Moreover, court presidents and chief prosecutors are asked whether and how training is required in their jurisdiction. There is also an institutional linkage with UNMIK and the OSCE, which will appoint a member of the KJI's managing board.

In some contrast to the general Kosovarisation policy, in which for example the Kosovo Law Centre was transferred into local hands (and budget), the OSCE continued to run the KJI until 2005. This allowed it to employ local KJI staff as OSCE staff members paid according to international salary scales that are significantly higher than those allotted by the Kosovo consolidated budget.[169] EU funding could, however, only be acquired in exchange for a management transfer into local hands.[170] Following a period of co-governance by an international and a local director, the former was replaced with an international adviser to the local director. Subsequently, the KJI was quickly transferred without much prior internal capacity building and put on the more modest local budget, which resulted in many qualified local staff leaving the institution.[171] In April 2006 the Assembly adopted a law giving the KJI a proper legal basis as an independent professional body of the PISG.[172] At present, discussions are going on about whether the KJI should transform itself in a proper magistrates' school offering a compulsory 15-month training course for future judges.[173]

Executive cooperation and mentoring

Pointing at the OSCE's capacity-building mandate and its own shortage of staff, the UN-led administration of justice, i.e. the Pillar II Department of Judicial Affairs during JIAS times and from 2001 Pillar I's Department of Justice, did capacity building mainly in the form of on-the-job training and learning by doing.[174] Although there was a gradual increase of local responsibilities in general, it remained mission policy even after the adoption of the Constitutional Framework and the establishment of the PISG to maintain ultimate international authority but leave the implementation to the

[164] International Crisis Group, note 41 above, p. 8.
[165] Zaum, note 73 above, p. 151.
[166] Interview with OSCE national legal officer, Pristina, March 2008; Amnesty International (2008) 'Kosovo (Serbia): The challenge to fix a failed UN justice mission', AI Report, p. 29.
[167] Interview with KJI director, Pristina, March 2008.
[168] Interview with OSCE official, Pristina, March 2008.
[169] Interview with former OSCE officials, Pristina and New York, March 2008 and June 2009.
[170] Interview with European Agency for Reconstruction official, Pristina, October 2007.
[171] Interviews with EAR and OSCE officials, Pristina, October 2007 and March 2008.
[172] UNMIK Regulation No. 2006/23 on the Promulgation of the Law on Establishing the Kosovo Judicial Institute Adopted by the Assembly of Kosovo, 24 April 2006.
[173] Interviews with former minister of justice and UNMIK official, Pristina, March 2008.
[174] Interview with UNMIK official, Pristina, March 2008.

Kosovars.[175] While the JIAS attempted to manage judicial affairs in a co-governing structure with an international and a local co-head, international dominance persisted and was increased with the creation of Pillar I.[176] Although the Constitutional Framework used the rhetoric of 'partnership', 'local ownership' and 'self-government', in reality legal initiatives or policy-related matters, particularly in the justice and police sectors, were rarely discussed with or disclosed to local officials and institutions.[177] As a consequence, policies were instituted that followed international rather than local priorities. For example, many local stakeholders advocated a reform of the assignment and numbering of judges and prosecutors to the various courts throughout Kosovo to cope better with the huge case backlog.[178] UNMIK in response initiated an expert study that proposed certain structural changes but failed to gather the political support to implement the project.[179] Instead of reforming the court structure, UNMIK continued to be engaged in other activities relating to inter-ethnic matters, the international judiciary and the transition plan. Another example of differing priorities concerns the local preference for the civil justice system and the resolution of property disputes, which UNMIK neglected for a long time in favour of the criminal justice system.[180]

There were fields in the justice sector where Kosovars were involved in executive decision-making, for example the above-discussed appointment of judges and prosecutors, and also in court administration and other technical and financial matters carried out by the Ministry of Public Services.[181] In other areas, UNMIK consulted local staff on concrete problems or to obtain information on local history and structures.[182] While consultation in general increased within given parameters, local expertise was not always used fully and there are many instances where local input was not included in the final policy product.[183]

Internationals argue that cooperation with local staff was often difficult because of insufficient professional skills and politicised attitudes.[184] In fact, most Kosovo Albanians who had been expelled from public institutions had not practised their profession since 1989. As a consequence, their experience with modern administrative structures and a post-socialist legal system was limited and their technical and managerial standards often outdated. In addition, many Kosovars had been traumatised by the recent history and vehemently opposed any conciliating policy towards the other ethnicity. This obstructed UNMIK's efforts to maintain a multiethnic Kosovo as envisaged by Security Council Resolution 1244. Qualified local counterparts were very difficult to attract because of the extremely low salaries offered to local public servants in comparison to the private

[175] Interview with UNMIK official, Pristina, March 2008.
[176] Interview with former OSCE official, New York, June 2009.
[177] Rausch, note 55 above, p. 302; Marshall and Inglis, note 101 above, pp. 129–130.
[178] Interviews with district court president and former KJPC member, Pristina, March 2008.
[179] Interview with UNMIK official, Pristina, March 2008. For the recommendations see G. N. Rubotham, L. Sejr, J. H. Tunheim, E. C. Wiggins and M. B. Zimmer (2004) 'Kosovo judicial system. Assessment and proposed options 2003–2004', report prepared pursuant to a request by the UNMIK SRSG and the Kosovo Judicial and Prosecutorial Council, Pristina, 2004.
[180] Interview with UNMIK official, Pristina, September 2007.
[181] For the justice-related responsibilities of the Ministry of Public Services see UNMIK Regulation No. 2001/19 on the Executive Branch of the Provisional Institutions of Self-Government in Kosovo, 13 September 2001, Annex IX, and UNMIK Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, 15 May 2001, section 5.3(b)–(m).
[182] Interview with local UNMIK staff, Pristina, September 2007.
[183] Interviews with OSCE national legal officer and National Center for State Courts consultant, Pristina, March 2008.
[184] Interviews with UNMIK officials, Pristina, March 2008.

sector.[185] Given that young drivers and interpreters were paid as local UNMIK staff according to a much higher UN salary scale and prices were skyrocketing in response to the sizeable injection of international money into the local economy, the motivation of highly qualified Kosovars to join the JIAS or PISG was limited.[186]

Employing local legal experts as national professional officers would have improved this situation, since their salaries are approximately four times higher than those paid by the JIAS and PISG. However, the UNMIK Department of Justice was only assigned three national professional officers, of whom two left UNMIK in 2002 and their posts have not been refilled.[187] Realising the potential of young, talented law graduates, the department's Legal Policy Division developed an innovative scheme to involve some internationally versatile Kosovars in international judicial cooperation and transborder cases. They were paid the regular PISG salary for legal assistants, but a mentoring programme and the job title of 'legal officer' motivated them to work hard and take on significant professional responsibilities.[188] They received some international training on legal drafting and EU standards, but were required to go through a steep learning curve, for example by writing complex memos in short periods of time with limited supervision in English only. According to the UNMIK official in charge, one-third of the graduates failed, but the successful remainder are now able to take over full responsibility.[189]

Younger Kosovars with a recent law education generally found it easier to work with the international administration than their older colleagues.[190] They do criticise international incompetence and disrespect for local priorities and traditions, in particular in the legislative realm.[191] But they also realise the above-mentioned lack of professional skills and motivation of their old(er) colleagues and local politicians, and appreciate the international community for having exposed them to alternative management cultures.[192] They deplore that UNMIK transferred powers to senior but inexperienced Kosovars whose sole interest was to stay in power and cover up their incompetence by using international consultants.[193]

Older Kosovars have more critical views on the ways UNMIK included locals in its decision-making. They often found that UNMIK was not interested in sharing or even transferring responsibilities into local hands. Instead, internationals wanted to hold on to their power and were trying to avoid losing their jobs in a 'five-star mission'.[194] A former local UNMIK staff member claimed that UNMIK did not care for any capacity building and merely used local staff as a 'fig leaf' for local participation and power sharing. UNMIK welcomed local contributions as long as they did not challenge international positions and dominance. But as soon as locals reached for real responsibility, their input was rejected by their international colleagues, who often showed condescending and

[185] Based on Kosovo's estimated future domestic revenues and donor grants as well as a comparison with public salary scales in neighbouring countries, the average salary for a local JIAS official was set at DM273 per month. See Central Fiscal Authority (2000) '2000 budget wage assumptions', 10 January.
[186] von Carlowitz, note 24 above, pp. 380–381.
[187] Interview with UNMIK official, Pristina, March 2008.
[188] Interview with UNMIK official, Pristina, October 2007.
[189] Interview with UNMIK official, Pristina, October 2007.
[190] Interview with OSCE official, Pristina, 1March 2008.
[191] Interviews with former PISG consultants, Pristina, March 2008.
[192] Interview with KJC official, Pristina, March 2008.
[193] Interviews with former PISG consultant and OSCE local staff, Pristina, March 2008.
[194] Interviews with local UNMIK staff member and former minister of justice, Pristina, September 2007 and March 2008.

missionary attitudes.[195] It was also observed that in general cooperation between internationals and locals functioned better in technical issues than in politically sensitive matters.[196]

Irrespective of whether or not these reproaches are well founded, UNMIK, like the OSCE with the KJI, did not engage in much capacity building for the newly created Ministry of Justice and KJC. In line with its general policy to leave implementation to the Kosovars, UNMIK quickly withdrew and left these institutions to themselves.[197] Their establishment is now supported by international donors, primarily from the United States.

International judiciary: Judicial cooperation and mentoring

Mentoring and on-the-job training also played a role in the context of the international judiciary. Capacity building of the local judiciary was one of the justifications used for inserting international judges and prosecutors into Kosovo's judicial system.[198]

Coaching and learning from international experiences were to take place in mixed panels and in the preparatory work for court cases. With the exception of Pristina, local and international judges were co-located in district court buildings and the local judiciary were to learn from their international colleagues by osmosis ('teabag theory').[199] In 2005 the international judges and prosecutors were withdrawn from the regions and forced to commute to district courts for concrete investigations or trials. UNMIK justified this move, which effectively ended any potential capacity building, by a lack of funds to provide adequate language services and implement an adequate mentoring strategy.[200] Some cases of misconduct also prompted UNMIK to ensure better oversight by concentrating the international judiciary in Pristina.

Except with respect to the Kosovo Special Prosecutors Office (KSPO), discussed below, UNMIK found the idea of capacity building both too expensive and too idealistic. Besides continuous high-quality interpretation, proper mentoring and coaching would have required the international judge or prosecutor 'to learn how to walk in the local judge's [or prosecutor's] shoes' and take sufficient time to understand the real challenges and stakes of the local judiciary.[201] But this could not happen in a situation in which international judges are 'parachuted' into a local justice system and expected to work under pressure without having received any previous training on the domestic laws, traditions and structures.[202] Cooperating closely with each other would also have required much personal energy and time which most international judges and prosecutors were

[195] Interview with former UNMIK local staff member, Pristina, March 2008.
[196] Interview with director of Legal Aid Commission, Pristina, March 2008.
[197] Interview with former OSCE official, Pristina, November 2006; telephone interview with former UNMIK official, April 2009.
[198] Interview with international judge, Pristina, March 2008; see also Amnesty International, note 166 above, pp. 4–5.
[199] Statement by first international prosecutor cited in I. King and W. Mason (2006) *Peace at Any Price: How the World Failed Kosovo*. Ithaca, NY: Cornell University Press, p. 109.
[200] Interview with UNMIK official, Pristina, March 2008.
[201] Interview with international judge, Pristina, March 2008.
[202] Interview with UNMIK official, Pristina, March 2008; see also Amnesty International, note 166 above, pp. 28–31. From 2002 to 2004 UNMIK organised some training on the applicable law for international judges and prosecutors and its legal officers. The training was provided in weekend seminars two or three times per year by local professionals. This system discontinued due to staffing shortages following a restructuring of the UNMIK Department of Justice. Interview with international judge, Pristina, March 2008.

not willing to invest. Having to cope with a heavy workload, they preferred to handle their cases in an expedient manner alone.[203] Moreover, the very usefulness of a mentoring and coaching programme for the judiciary was doubted: international judges found that 'mentoring, monitoring and coaching would be equal to patronising' and local judges would not like to be 'babysat'.[204] It was also observed that the idea of mentoring judges would contradict the principle of judicial independence.[205]

Instead of being engaged as capacity builders for their local counterparts, UNMIK and the majority of international judges and prosecutors understood their task as safeguarding international human rights standards in special high-profile cases involving politically sensitive issues or organised crime.[206] Although the international judiciary was constituted as an integral part of the domestic judicial system, it operates *de facto* as a parallel justice system.[207] The relevant legislation on the international judiciary foresaw mixed trials involving both international and local judges as one option, but cases were normally done by either internationals or locals separate from each other. International judges decided mostly in purely international trials.[208] There was not much room for exchange of opinions and experiences in mixed trials either, as Pristina-based international judges only arrive shortly before the beginning of a trial and leave directly after.[209] Similarly, there was not much cooperation between international and local prosecutors (outside the KSPO).[210]

One international judge's initiative in 2007 to bring together his colleagues with the local court presidents to discuss major legal issues in need of clarification was fruitless. Only technical matters of minor importance were discussed at the first meeting, and international judges showed their disinterest by staying away from the consecutive meeting.[211] However, despite considerable uncertainties relating to domestic applicable law, in particular with respect to the new provisional codes, international judges and prosecutors did feel bound by the domestic legislation in principle.[212] It was remarked that in the case of difficulties in implementing certain provisions of the Provisional Criminal Procedure Code, US judges sometimes applied legal concepts not found in the law at all but resolved the problem by 'doing what is in the spirit of the law'.[213]

The attitude of local judges and prosecutors to the international judiciary was ambiguous. Although Kosovars rejected the international judicial intervention, in particular with respect to the '64 panels', as an infringement on their sovereignty and judicial independence, many local judges and prosecutors appreciated the chance to share different experiences and learn from their international counterparts. This was particularly the case in mixed panels if the decisions were taken jointly and on equal

[203] Interview with international judge, Pristina, March 2008.
[204] Interviews with international judges, Pristina, March 2008.
[205] Interview with UNMIK official, Pristina, March 2008.
[206] Interviews with UNMIK officials, Pristina, March 2008.
[207] Interview with international judge, Pristina, March 2008.
[208] Bull, note 82 above, pp. 138–139; Schröder, note 49 above, p. 20.
[209] Interview with international judge, Pristina, March 2008.
[210] Schröder, note 49 above, p. 20, Rausch, note 55 above, p. 302.
[211] Interview with international judge, Pristina, March 2008.
[212] Interviews with international judges, Pristina, March 2008; interview with former international prosecutor, Monrovia, November 2007.
[213] Interviews with international judges and Supreme Court judge, Pristina, March 2008.

footing.[214] At the same time, they complained about insensitive and arrogant behaviour by their international colleagues and disliked various aspects of their involvement, including the random case allocation and their lack of accountability.[215] Yet overall the local judiciary seem to have accepted the international judiciary, realising the advantage that the latter took away pressure from them to decide in difficult and potentially dangerous cases.[216]

Following years of relative neglect of prosecutorial services in comparison to the courts,[217] a different approach was taken in the KSPO, an office in which co-located local and international prosecutors worked together to prosecute the most serious criminal offences, including 'cases of organized crime, corruption, criminal offences motivated by race, national or ethnic background, or religion, terrorism and trafficking in persons, in accordance with the applicable law'.[218] The explicit purpose of the KSPO was capacity building in the Public Prosecutor's Office through training and mentoring of special prosecutors. Training is mainly provided by 'on-the-job training by assisting and working under the direction of International Prosecutors on investigations and prosecutions in their field of competence'.[219] Using a train-the-trainers rationale, it was envisaged that the international involvement would gradually decrease, placing responsibility into the hands of the trained special prosecutors.[220] While in the first year ('transitional phase I') international prosecutors led and had ultimate responsibility for investigations and prosecutions, the relevant administrative direction determined that in a second transitional phase local special prosecutors would assume primary responsibility with international prosecutors acting in a monitoring and advising capacity.[221]

Although the international primary responsibility and authority was criticised on the political level in general terms,[222] the cooperation within the KSPO seemed to work well. Kosovar special prosecutors worked on their cases and consulted their international colleagues when necessary.[223] With sufficient language services at their disposal, international and local special prosecutors met two to three times per week to discuss relevant matters, including strategic issues as well as detention questions and interrogation techniques. Trying to combine ultimate responsibility with effective capacity building, international prosecutors applied a 'soft managerial touch' according to which

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214 Interviews with Supreme Court judge, former judges and local attorney, Pristina, September 2007 and March 2008.

215 UNMIK never officially published its guidelines for when a case should be allocated to an international panel. According to the guidelines, a petition for an international panel will be considered under the following criteria:
'- The existence of, or potential for, intimidation or manipulation of the local judiciary and/or local prosecutors in relation to the proceedings;
- The actual or potential existence of significant public demand for a particular judicial and/or prosecutorial action at any stage of the proceedings;
- Diversity among the accused, victims, or witnesses with regard to characteristics such as religion, ethnicity, native language, citizenship, or political affiliation;
- The nature of the criminal offences referred to in the charge, indictment, or verdict;
- The stage of the proceeding; and
- Any other factors that could affect adversely judicial and/or prosecutorial impartiality or create the appearance of judicial and/or prosecutorial partiality.' Cited in OSCE (2002) 'Kosovo: Review of the criminal justice system (September 2001–February 2002)', LSMS Report, pp. 31–32.

216 Interview with international judge, Pristina, 17 March 2008.

217 Cf. Scheye, note 56 above, p. 191; International Crisis Group, note 41 above, p. 9.

218 Administrative Direction No. 2006/15 Implementing UNMIK Regulation No. 2000/15 on the Establishment of the Administrative Department of Justice, 30 September 2006, sections 2 and 4.

219 Ibid., section 3.2.

220 Interviews with chief prosecutor and UNMIK staff, Pristina, March 2008.

221 Administrative Direction No. 2006/15, sections 5.1 and 5.3.

222 Interviews with chief prosecutor and EULEX staff, Pristina, March 2008.

223 Interview with special prosecutor, Pristina, March 2008.

work was organised in a cooperative way.[224] It was observed that the cooperation between local and international prosecutors worked better than between local and international judges, because prosecutors are used to team work in an executive environment, whereas judges deliberate more as individual file workers.[225]

The KSPO's start was delayed partly because of serious difficulties in finding Kosovar prosecutors willing to take the personal risks associated with special prosecutorial work on moderate salaries and without close protection.[226] Although it was still too early to judge the KSPO properly, a relevant UNMIK official was 'cautiously hopeful' that it would serve as a model for local and international cooperation in the justice sector.[227] The second transitional phase with local special prosecutors taking the lead did not materialise under UNMIK. With the adoption of the Law on the Special Prosecution Office of the Republic of Kosovo in June 2008, the KSPO ceased to exist.[228] The law determines that its newly founded successor institution, the 'SPRK', consists of ten Kosovar special prosecutors and five EULEX prosecutors, with the SPRK head being an international prosecutor unless otherwise decided by EULEX.[229] However, recruitment of local special prosecutors continues to be difficult, leaving the SPRK in April 2010 with only five Kosovar prosecutors but an increased number of EULEX prosecutors (i.e. 11 international prosecutors).[230] Despite the apparent international dominance in the office, Kosovar special prosecutors have expressed respect and appreciation for their international colleagues.[231]

3. Justice Sector Reform in Liberia

Liberia's justice sector is characterised by considerable legal and institutional pluralism. Many cases – according to some estimates 80 per cent of all disputes[232] – are not settled in the formal justice system but by taking recourse to customary law and institutions. Liberia posseses a dual legal system that (still) uses a colonial language with statutory law to govern the so-called 'civilised' people, i.e. American-Liberians and missionaries, while customary law remains the applicable law for the non-Christian, indigenous 'natives' who constitute the large majority of the people.[233] Until 1964 the statutory system only applied in five coastal counties and its use was prohibited for the indigenous population.[234] Moreover, chiefs cannot adjudicate cases between members of the two categories.[235]

The 'Rules and Regulations Governing the Hinterland of Liberia' attempt to bring the two systems together by establishing state-sponsored customary courts intended to

[224] Interview with international prosecutor, Pristina, October 2007.
[225] Interview with international judge, Pristina, March 2008.
[226] Interviews with special prosecutor and chief prosecutor, Pristina, March 2008.
[227] Interview with UNMIK staff, Pristina, 12 March 2008.
[228] Republic of Kosovo, Law No. 03/L-052 on the Special Prosecution Office of the Republic of Kosovo, 15 June 2008, Article 15(2).
[229] Ibid., Articles 3(1), 16(1) and 16(3).
[230] Interview with international judge, Berlin, April 2010.
[231] International Crisis Group, note 60 above, p. 17.
[232] L.-H. Piron (2005) 'Donor assistance to justice sector reform in Africa: Living up to the new agenda', Open Society Justice Initiative report, February, p. 9.
[233] International Crisis Group (2006) 'Liberia: Resurrecting the justice system', Africa Report No. 107, p. 7.
[234] Cf. T. S. Gongloe (2005) 'Rebuilding the Liberian justice system', Fellows Papers 2004–2005, Carr Center for Human Rights Policy, J. F. Kennedy School of Government, Harvard University, pp. 23–24.
[235] International Crisis Group, note 233 above, p. 7.

include traditional justice in the statutory system.[236] This approach is mirrored by Article 65 of the Liberian constitution, stipulating that 'Judicial Power shall be vested in a Supreme Court and such subordinate courts as the legislature may from time to time establish' and that these courts 'shall apply both statutory and customary laws'.[237]

In reality, there is a widespread perception of two parallel justice systems that coexist next to each other. This situation is not only caused by the lack of capacity of the statutory system and clientelist relationships in the country, but also fostered by a socio-economic rift between urban elites and the rural population. This cleavage is expressed in the discriminatory terminology of the Hinterland Rules and Regulations, confirmed in 2000, which continue to speak of the 'civilised' and 'native' populations in Liberia.[238]

As a consequence to Liberia's divisive history, different social groups prefer different justice mechanisms. The statutory legal and judicial system is one of the last remaining bastions of the American-Liberians and other settlers who favour in principle dispute settlement in the formal system. Members of this group generally believe in Western culture and live in urban areas, with sufficient resources to have access to the formal courts.

In contrast, the indigenous population mostly live in remote areas of the country, and often do not have any formal court to go to or need to travel long distances to reach one. Not only do indigenous people find traditional justice mechanisms more accessible, affordable and timely, but also more legitimate, believing that 'the [formal] court system only brings about more financial burden but not peace'.[239] Referring to trial by ordeal involving the poisonous sassiwood bark, discussed below, people in southern Liberia believe that a tree is more transparent in dispensing justice than the court system because, according to their saying, 'you cannot bribe a tree'.[240]

This lack of confidence in the courts partially results from a lack of understanding of the statutory system, and language barriers separating the rural population with their indigenous languages from the English-speaking judiciary. But there is also wide acceptance in the countryside of customary or traditional means of resolving disputes, because it is not considered good community spirit to go to the formal courts. Indigenous tradition is influenced more by collective values and geared towards collective reconciliation (in contrast to weighing individual interests and punishment). The Liberian state has also generally been a predatory one that has tried to coopt traditional systems in order to strengthen its own power, resulting in scepticism regarding the state and its institutions.[241]

[236] Interview with UNMIL official, Monrovia, November 2007.
[237] Constitution of the Republic of Liberia, 1986, see www.if.cx/conlib.html.
[238] See for example Revised Rules and Regulations Governing the Hinterland of Liberia, 7 January 2000, Articles 38(2) IV and V.
[239] Ibid., p. 30.
[240] Interview with minister of internal affairs, Monrovia, November 2008.
[241] International Crisis Group, note 233 above, p. 6.

3.1. The formal justice system

Following the model of the United States, Liberia's formal justice system consists of the Supreme Court headed by the chief justice and four associate judges, all of whom are appointed by the president, and subordinate courts established by the 1972 Judiciary Law[242] – circuit courts, specialised courts (debt, tax, traffic, juvenile delinquents), magistrates' courts and justices of the peace courts.

The Supreme Court has original jurisdiction over all cases affecting public ministers and diplomatic staff, as well as cases involving other states. It can also declare legislation unconstitutional. The next level is the circuit court, with original jurisdiction in the most serious cases such as aggravated assault, burglary, rape and murder. Circuit courts serve as appellate instance against judgments by the magistrates' and justices of the peace courts. The magistrates' courts have limited jurisdiction in civil matters up to a value of L$2,000 (approximately US$32) and involving petty crime. The lowest level of the formal system is the justices of the peace, who operate as a sort of mobile judges intended to grant access to justice in communities located far from the magistrates' courts. They have jurisdiction slightly more limited than that of the magistrates' courts, i.e. in civil cases not exceeding a value of the claim of L$100 and involving petty crime.[243]

As the justice system was almost completely destroyed during the civil war, the transitional government and UNMIL had to rebuild all judicial infrastructure almost from scratch. Besides refurbishing courthouses and procuring basic office supplies and legal texts, judges needed to be reappointed and vetted – a process that is now being criticised for having been flawed by power politics. A relative lack of interest and resources in the justice system meant that in 2006 still five of the 21 circuit courts and several of the magistrates' courts remained completely defunct or barely operational. There are also difficulties in attracting judges and magistrates to rural areas, as the physical infrastructure is weak, adequate transport facilities are missing and salaries can only be collected several hours away in Monrovia.

Low salaries – justices of the peace are not even on the state payroll – and political patronage have lead to widespread corruption and excessive fees among the judiciary, and there is a serious shortage of qualified lawyers in the country.[244] Out of approximately 130 magistrates serving in 2006, only five are believed to be law school graduates, although the Judiciary Law states that the position requires possession of a law degree.[245] Similarly, over half of the 300 justices of the peace are illiterate, although their main qualification is supposed to be literacy. As a consequence, there is a widespread lack of judicial competence leading to bad legal reasoning and poorly drafted or wrong decisions often overstepping jurisdiction or sentencing convicted persons to excessive penalties.[246]

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[242] Judiciary Law of the Republic of Liberia, 1972, Articles 3-8.

[243] For an overview of the hierarchy of Liberian courts see T. Parnall (1978) 'Liberia', in *International Encyclopedia of Comparative Law, Vol. I, National Reports*. Tübingen: J .C. B. Mohr, L-26.

[244] In 2007 there were only 275 lawyers registered with the Liberian Bar out of a total population of some 3.5 million. This ratio of one lawyer per 12,725 inhabitants is extremely low. In comparison, in the UK the ratio is one lawyer per 400, and in the US one lawyer per 270. Center for International Peace Operations (ZIF) (2007) 'Post-conflict peacebuilding in Liberia: Much remains to be done', report, Third Annual KAIPTC/ZIF-Seminar, Accra, 1-3 November, p. 65.

[245] Governance Reform Commission (2006) 'Concept paper on reforming Liberia's legal and judicial system and to enhance the rule of law', December, p. 8.

[246] ZIF, note 244 above, pp. 50 and 65.

Reflections on how to reform Liberian legal education have begun, but the Liberian government has not yet agreed on whether the system's output should be increased by shortening the education or by making the curriculum more practice-oriented, or a combination of both. For all these reasons, prosecution and judicial process are defunct or slow and many criminals have become used to a general culture of impunity, in particular with respect to serious crimes.

3.2. Traditional justice and dispute settlement

As mentioned, the Liberian state tried to link the statutory system with the customary justice system by creating a set of state-sponsored customary courts under the Rules and Regulations Governing the Hinterland. These courts were established to ensure access to justice in remote areas given the lack of capacity of the formal justice system. They were conceived as a compromise between the government's attempt to coopt the traditional sphere and the villages' desire to maintain their autonomy.[247]

In line of appeal, there are clan chiefs' courts, paramount chiefs' courts, joint courts of the district commissioner and the paramount chief, district commissioners' courts, provincial administrators' courts and the Provincial Circuit Court of Assize. The clan chiefs' and paramount chiefs' courts have original jurisdiction for family law cases and other civil cases arising within clans or tribes that do not exceed a value of L$25 (clan chiefs' court) or L$100[248] (paramount chiefs' court), as well as in criminal cases with punishment of not more than one month or three months, respectively. All cases between so-called 'civilised' people are to be tried in district commissioners' courts, while cases arising between 'civilised' and 'native' people need to be brought before joint courts of the district commissioner and the paramount chief.[249]

The Provincial Circuit Court of Assize was intended to be the highest appeals instance and have original jurisdiction over serious crimes. Unlike all subordinate courts, which are housed in the executive branch, the court is part of the judiciary but has never been established. Instead, final authority is exercised by the Ministry of Internal Affairs; this, in contrast to the chief justice and the Ministry of Justice, sees itself as the voice of the indigenous population (and not of the US Liberian elite who dominate the statutory system).

The Rules and Regulations Governing the Hinterland contain a few general procedural rules, such as that trials shall be public and no corporal punishment shall be imposed except in cases of petty larceny and only after having been approved by the district commissioner.[250] But overall, no precise guidelines exist on the conduct of trials and the enforcement of decisions.

Apart from the state-sponsored customary courts, there are other dispute settlement forums such as councils of elders in towns, villages or displaced persons camps, adjudicating disputes according to the traditions of the particular group involved.

[247] International Crisis Group, note 233 above, p. 6.
[248] About US$1.50.
[249] Rules and Regulations Governing the Hinterland of Liberia, Article 38(2) IV and V.
[250] ibid., Articles 44 and 45(a).

Moreover, there are secret societies that can resolve community disputes and condemn members who have violated established social norms.[251]

All these mechanisms are based on traditional power structures and seniority, and operate according to unwritten traditions passed on as wisdom of the elders by way of oral history. While there are similarities in approach, each tribe or clan has its own different traditions. Dispute settlement is sought by various means, ranging from apology to acknowledgement of wrongdoing, dialogue, mediation, restitution, compensation or a combination thereof. The primary objective of such traditional proceedings is the reconciliation of the community which is believed to have been violated as a whole (including its ancestors) by the criminal act. This stands in distinct contrast to the focus on individual parties in the criminal prosecution of the statutory justice system.[252]

A common tool to arrive at appropriate dispute settlement is to hold a 'palaver', which is a prolonged meeting of community elders and members of the families of the parties involved. Depending on the gravity of the issue, the palaver is held in a 'palaver hut' and done 'the family way' or conducted under a 'zoe bush' with the involvement of 'zoes', a sort of medical or witch doctor. The elders and family members discuss the dispute and try to ascertain the underlying causes of the conflict. The process might also involve a trial by ordeal which, in violation of the right to a fair trial, produces 'quick justice' with final decisions without any possibility of appeal. As discussed later, these trials often make use of harmful practices that injure or kill a suspect unwilling to confess. Usually when blood was spilt or in rape cases, a cleansing ceremony is held following certain rituals that often include libation and purification, attended by the parties, their families, the elders and other invited persons. The presentation of a white chicken, exchanging handshakes, sharing kola nuts or eating and drinking to appease the ancestors and divine powers might finally end the dispute.[253]

The unwritten nature of the traditional system and the lack of any efficient reviews allow much space for its abuse by village elders, clan chiefs and other persons in charge. Often, excessive charges are levied – officially to compensate for the 'judicial services', but in reality simply a source of revenue. There are also many incidents where chiefs adjudicate criminal cases outside their jurisdiction and detain people in their homes or use them as slave labourers on their property.[254]

Moreover, many Liberians submit to harmful traditional practices because they do not know they have been outlawed. Especially in rural areas, the belief exists that both the persons conducting the procedure and the applied instruments have mystical powers. Cases have been reported when even mothers believed in the rightfulness of the measures taken to purify their sons of alleged witchcraft.[255] But superstition is not the only reason why mainly rural Liberians may easily be subject to harmful practices and fail

[251] International Crisis Group, note 233 above, p. 8.
[252] For a sound overview of different forms of traditional justice mechanisms see F. Coleman (2007) 'Building a criminal justice system and traditional justice mechanisms', in ZIF 'Post-conflict peacebuilding in Liberia: Much remains to be done', report, Third Annual KAIPTC/ZIF-Seminar, Accra, 1–3 November, pp. 55–61.
[253] For more information on cleansing rituals see Resource Center for Community Empowerment and Integrated Development (2005) 'Traditional forms of reconciliation in Liberia', unpublished study, pp. 34–35.
[254] Ibid., p. 8.
[255] *New York Times* (2007) 'African crucible: Cast as witches, then cast out', *New York Times*, 15 November.

to seek appropriate protection and redress. Often, aggrieved parties lack awareness of existing rights and procedures. This applies in particular to the provisions stipulating that major criminal cases must be dealt with by the formal courts and that a public defender is provided by the state free of charge.

The possible abuse of power within Liberia's customary system is exacerbated by the large-scale destruction of traditional society in the civil war. War-related physical and social destruction affected the rural areas more than Monrovia, since law enforcement structures were weaker there and the countryside was the primary recruitment ground for child soldiers. Massive displacement and migration into cities prevented traditional learning processes and destroyed community networks and neighbourhood knowledge necessary for the functioning of the traditional justice system. Whereas it can be claimed that much pre-war dispute resolution was carried out by responsible chiefs and elders informed by tribal or clan traditions, nowadays authority is being exercised in many cases by warlords or other persons not trained in these practices. Furthermore, powerful indigenous elites can abuse the dualist system by means of forum shopping. For example, they can use the statutory system to protect their urban property, while in the countryside they use the customary mechanisms to grab ancestral lands from their communities.[256]

3.3. Judiciary and UNMIL support

In line with its mandate to provide assistance to the Liberian government to develop 'a strategy to consolidate governmental institutions, including a national legal framework and judicial and correctional institutions', UNMIL adopted a state-centric approach in supporting the Liberian justice sector. Its Legal and Judicial Systems Support Division (LJSSD) thus primarily focused on supporting formal justice institutions and reforming relevant statutory laws. Its main local partners are the Ministry of Justice, the chief justice and the legislature. In some way mirroring Liberia's legal dualism, the LJSSD as part of the Rule of Law Department headed by the DSRSG (deputy special representative of the Secretary-General) does not formally liaise with the Ministry of Internal Affairs responsible for tribal affairs. Communications with this ministry are conducted by the UNMIL Civil Affairs Section, which lies within the purview of the DSRSG for recovery and governance. Policies to include traditional actors in the national rule of law strategy have only recently begun, with NGOs such as the US Institute for Peace and the Carter Center playing a lead role in this context.[257] Until late in 2007, UNMIL's main effort to work towards harmonisation of the formal and informal legal systems was the establishment of the Law Reform Commission. Although the relevant law has been drafted and consulted for several years, it had not been adopted by the Liberian Parliament at the time of writing. As a statement of intent, the president issued an executive order in June 2009 establishing the commission for an initial period of one year and subject to future legislative enactment.[258] From 2008, several roundtable discussions were organised with the support of international actors such as the Carter Center and UNMIL to bring together representatives of key Liberian institutions such as the Ministry

[256] ZIF, note 244 above, p. 56.
[257] See for example the extensive study on traditional justice systems funded by USIP: D. H. Isser, S. C. Lubkemann and S. N'Tow (2009) 'Looking for justice: Liberian experiences with and perceptions of local justice options', *USIP Peaceworks*, 63, November.
[258] Executive Order No. 20 Establishing a Law Reform Commission, Government of Liberia, 11 June 2009.

of Justice, the Liberian Bar Association and the Ministry of Internal Affairs. During these events, empirical research findings and consultative papers on both the formal and informal justice systems were presented and discussed, with the aim of developing policy options for the Liberian government to foster the systems' complementarity. In May 2010 the process was crowned with a national conference on traditional justice opened by the Liberian president.

Strategic thinking had its limits in the formal justice sector. A general lack of communication between the chief justice and the relevant Liberian ministry actors of the formal sector hindered intra-governmental cooperation to a large extent. In particular, the chief justice refused to participate in intra-governmental policy-making arguing that the judiciary was independent and should stay apart from the work of the executive and legislature.[259] With a view on developing a comprehensive rule of law strategy, UNMIL made considerable efforts in trying to bring together relevant Liberian and international actors and formulate a joint policy document for legal and judicial reform and strengthening the law enforcement institutions.

In November 2005 UNMIL created a rule of law task force, consisting of representatives of relevant international agencies, donor countries and the Liberian transitional government. The task force was chaired by the DSRSG (rule of law and operations) and met several times before issuing an 'agreed strategy' report that sketched the priority tasks to be undertaken 'for strengthening the rule of law and addressing the culture of impunity in Liberia'.[260] This report primarily focused on measures to reform and consolidate the legal framework, build up human rights capacities and improve the quality of the judicial system, police and correctional institutions. The report was the first political document that addressed police, judicial and legal reform issues together. In May 2006 it was submitted to the president as a basis for further programming and funding assessments.[261] Subsequently, the Governance Reform Commission, a body set up by the Accra Peace Accords to promote good governance in Liberia, took up legal and judicial reform and submitted its own concept paper on justice reform in September 2007.[262] Arguing that there was minimal participation of government representatives in the rule of law task force, the Governance Reform Commission took only limited note of the task force report and provided a more detailed overview and analysis of 'core crisis areas' in the legal and judicial sector. However, its paper was of limited value as it neither established concrete programme objectives and timelines nor included the law enforcement sector in its analysis.

Justice-related thinking also takes place within the Liberian Reconstruction and Development Committee, whose Pillar 3 is responsible for governance and rule of law. However, as the chief justice refused to participate in a structure chaired by the minister of planning and dominated by the executive, inter-sectoral communication and cooperation were blocked until September 2008. The crucial UNMIL position of the DSRSG for rule of law remained vacant for three years until November 2007,

[259] Interviews with UNMIL officials, Monrovia, November 2007 and November 2008.
[260] Rule of Law Task Force (2005) 'Agreed strategy for strengthening the rule of law and addressing the culture of impunity in Liberia', Monrovia, December.
[261] Blume, note 24 above, p. 9.
[262] Governance Reform Commission, note 245 above.

contributing to the slow progress in strategic planning in the justice sector. From late 2004 rule of law issues were taken over in the interim by the DSRSG for recovery and governance; preoccupied by his original responsibilities, he had only limited interest in the LJSSD and the justice sector in relative terms.[263] His rule-of-law-related priorities concerned security issues and the police, while judicial reform projects remained scarcely funded.[264] One consequence of the prolonged vacancy was that UNMIL had insufficient leverage with the chief justice to join cross-sectoral strategic thinking.

Justice reform only became a priority after November 2007, when the post of DSRSG for rule of law was filled again and a new minister of justice was appointed. With the involvement of the Liberian president, a rule of law retreat was organised for two days in September 2008, at which all relevant Liberian government actors including the chief justice discussed for the first time a joint and comprehensive strategy for restoring the rule of law in Liberia. At the end of the retreat, a resolution was adopted to serve as a 'roadmap for all projects and programs in the Rule of Law Sector of the Republic of Liberia for the next three years and beyond'.[265] The resolution contains a set of policy guidelines aiming to increase access to justice and the capacity of the criminal justice sector, improve Liberian law making and continue justice-related cooperation and commitment by the three branches of government. Follow-up meetings continue the reform process and working groups are organised to develop three-year strategic plans for the judiciary and Ministry of Justice. UNMIL continues its high-level lobbying for joint strategic planning and supports the discussion process in workshop sessions by providing Ghanaian (not Western) facilitators to help the Liberian government formulate its own priorities and coordinate relevant policy-makers and stakeholders.[266] Despite all these efforts, the implementation of the strategic plan has been slow, which is attributed to internal problems in the judiciary and Ministry of Justice.[267]

Besides assistance directed to developing a comprehensive rule of law strategy, UNMIL supported the restoration of the Liberian justice system in various ways. At the outset of the mission, this included research and advice in the process of vetting and appointing judges and magistrates. UNMIL also assisted the Liberian government by refurbishing many courthouses, disseminating relevant legislation, developing a comprehensive database providing court-related information and capacity-building measures such as organising training workshops for judicial stakeholders and seconding private lawyers to the prosecutorial services. UNMIL provides legislative support with respect to various judicial and criminal law reform projects, and gives legal advice to the Ministry of Justice and other actors on specific legal issues arising in connection with justice reform and oversight.

[263] Interview with UNMIL official, Monrovia, November 2008.
[264] Interview with UNMIL official, Monrovia, November 2008.
[265] Liberian National Rule of Law Retreat, Final Resolution, Monrovia, 16 September 2008. The resolution was signed by the minister of planning and economic affairs, a representative of the judiciary, the minister of justice and the president of the Liberian Bar Association. The signing was witnessed by the president.
[266] Interview with UNMIL official, Monrovia, November 2008.
[267] United Nations (2010) 'Twentieth progress report of the Secretary-General on the United Nations Mission in Liberia', UN Doc. S/2010/88, 17 February, para. 31.

International support to local institution building: Vetting and appointment of judges and magistrates

Similar to the situation in Kosovo, the Liberian judiciary needed to be reinstituted from scratch after the end of the civil war. Moreover, the judiciary was seriously corrupted as part of the repressive power structures of the previous regimes, most notably the Taylor government.[268] As a consequence, the Accra Peace Accords determined that 'all members of the Supreme Court of Liberia i.e. the Chief Judge and all its Associate Justices shall be deemed to have resigned'. The accord foresaw a vetting and (re)appointment process for the judiciary to be undertaken by the national transitional government and the National Bar Association. The Bar Association was charged to prepare a shortlist of candidates to be nominated by the chief justice for appointment by the president.[269] Falling under the auspices of the Ministry of Justice, prosecutors were appointed by the respective county attorneys.

To fulfil its obligations, the Bar Association needed to conduct a widespread outreach campaign to collect applications from candidates and screen and propose eligible candidates for judicial and prosecutorial posts.[270] These tasks were not easy to implement given that the Bar Association did not have a functioning secretariat at its disposal, nor sufficient knowledge of courts and other legal structures outside Monrovia.[271] UNMIL stepped in and assisted the association in various ways: it transmitted information on the appointment process throughout the country on its radio program, and helped to bring candidates from rural areas to be interviewed by the Judicial Appointment Committee in Monrovia. UNMIL also provided secretarial support, for example by typing lists of candidates and setting agendas and dates for relevant meetings, and gave advice concerning the guidelines for the vetting procedure and in specific cases when it was doubtful whether or not a candidate fulfilled the vetting criteria.[272]

While Liberian stakeholders generally welcomed UNMIL assistance, they emphasise Liberian ownership over the appointment process.[273] They stress that UNMIL was not a member in the Judicial Appointment Committee but merely had observer status. Reportedly, some committee members were 'angry' that they were required to come to UNMIL, where relevant meetings were held.[274] Some interviewees even suggested that UNMIL tried hard to obtain and display at least some role in the crucial judicial vetting and appointment process.[275] However, there seems to be agreement that UNMIL did not unduly influence the process.

In fact, doubts were cast on the seriousness of the vetting process as such. The vetting guidelines only contained broad criteria for the eligibility of candidates for judicial and prosecutorial posts. Given the scarcity of qualified Liberian lawyers and the need to re-establish the judiciary quickly, candidates were generally appointed if no negative records,

[268] On the failure of the Liberian justice system see Gongloe, note 234 above, pp 8–30.
[269] Accra Peace Accords, 19 August 2003, Article XXVII, section 3.
[270] Interview with UNMIL official, Monrovia, November 2008.
[271] Interview with UNMIL national professional officer, Monrovia, November 2008.
[272] Interviews with UNMIL officials, Monrovia, November 2007 and November 2008; telephone interview with former UNMIL staff, Kabul, December 2008.
[273] Interview with UNMIL national professional officer, Monrovia, November 2008.
[274] Interview with UNMIL national professional officer, Monrovia, November 2008.
[275] Interviews with UNMIL officials, Monrovia, November 2007 and November 2008.

for example concerning a previous criminal charge, were found.[276] In a number of cases, the vetting and appointment procedure was rather an act of confirmation of judges who had already taken up office, particularly in rural areas.[277] Moreover, the Governance Reform Commission raised the criticism that the vetting process was highly politicised and flawed, as it was conducted by an appointment committee that did not have appropriate distance from the transitional government.[278]

Legislative assistance: Judicial and criminal law reform

Unlike in Kosovo, legislative competence does not lie with the United Nations but with the Liberian government. However, UNMIL played a considerable role in various regulatory efforts relating to the judiciary and criminal law reform. Shortly after its establishment, the LJSSD held initial discussions with the Ministry of Justice on legislative needs in the sector. With the aim of assessing legal areas of concern and start drafting relevant laws, UNMIL initiated the organisation of a symposium with local legal stakeholders in July 2004.[279] The event was organised by the Ministry of Justice with the support of UNMIL. Besides funding and logistical support, UNMIL provided technical assistance by producing relevant conference documentation and research material.[280]

In terms of familiarity with the domestic legal system, technical assistance by UNMIL was easier in comparison to UNMIK's legislative activity, since the Liberian legal system uses the English language and is based on US legal traditions. Moreover, many American-Liberians are proud of their relationship to the United States, which involved the drafting of Liberian laws by US elite institutions such as Yale and Cornell Universities.[281] Interviewees observed that hardly any capacity building took place in such law making, and noted that Liberian legal stakeholders often look up to their US colleagues and ask for their expertise.[282] Moreover, the Liberian legal system contains a 'reception statute' according to which US and UK common law is applicable if a subject matter is not regulated by Liberian law.[283]

During the two-day symposium four laws were discussed in more detail: the Jury Law, the Law on Financial Autonomy of the Judiciary, the Rape Law and the Law on the Prohibition of Child Pornography. In subsequent drafting sessions, working groups consisting of representatives from the Ministry of Justice, the National Bar Association and the Association of Female Lawyers in Liberia (AFELL) as well as renowned local lawyers delivered draft laws. With the exception of the Law on Financial Autonomy of the Judiciary, for which a previous draft existed, they were based on UNMIL working papers and research.[284] Interviewees observed that while UNMIL guided local partners in

[276] The UNMIL guidelines for the vetting of judges stipulate that successful candidates must be Liberian citizens of good moral character and have either practised at the Supreme Court Bar or as attorney-at-law for a specific period of time depending on the level of post applied to. In addition, applicants were to meet a set of criteria relating to professional conduct, moral integrity, ethical standards and human rights. Cf. UNMIL Guidelines for the Vetting of Judges, Monrovia, 2004.
[277] Interview with UNMIL official, Monrovia, November 2007.
[278] Governance Reform Commission, note 245 above, pp. 7–8.
[279] Interview with UNMIL official, Monrovia, November 2008; telephone interview with former UNMIL official, Kabul, December 2008.
[280] Interview with UNMIL national legal officer, Monrovia, November 2008.
[281] Interview with UNMIL official, Monrovia, November 2008.
[282] Interviews with UNMIL official and PAE official, Monrovia, November 2008.
[283] Interview with dean of Law School, Monrovia, November 2008.
[284] Telephone interview with former UNMIL official, Kabul, December 2008.

the law-making process and provided comments to the drafts, ownership remained with local actors, who set the discussion agenda and took the lead in text production.[285] Subsequently, the draft laws were revised by the Ministry of Justice and submitted to the legislature, where consultations were continued in the relevant Assembly committees.

The adoption of the Rape Law was delayed because of an argument on how progressive the prohibition of rape should be. The reform project was originally intended to counter a significant increase of gang rape in 2004 by widening the scope of the provisions on rape in the Penal Code and increasing penalties for rape and gang rape.[286] Lobbied by AFELL, the Gender Committee altered the first draft law to include an express provision against marital rape and a provision raising the age of consent from 16 to 18 years. Supporting the initiative, UNMIL assisted by providing research on comparative practice in other jurisdictions.[287] However, many male members of parliament objected to a provision on 'gross sexual imposition' within marriage that put the burden of proof on the husband, as well as to an age of consent causing a problem for traditional marriages involving persons below 18 years of age.[288] A motion of reconciliation was filed and the draft was reworked in the Assembly's Judicial Committee, again with substantive UNMIL assistance advising on the draft's compatibility with international human rights standards.[289] After many consultations, the law was finally adopted in December 2005 with a compromise, retaining the age of consent at 18 but excluding any provision on marital rape.[290]

The adoption of the Jury Law and the Law on Financial Autonomy of the Judiciary was also delayed, although there was not so much dissent with respect to their objectives in principle. In that it does not require unanimous jury decisions any more, the Jury Law promotes the judiciary's integrity by reducing unjust decisions brought about by individual corrupt judges who unduly influence judicial reasoning. The Law on Financial Autonomy of the Judiciary intends to foster judicial independence by granting it its own budget and making it financially independent from the presidency and Ministry of Finance. As in particular the latter law touched upon vested interests of powerful political actors, the draft laws were 'lost' in the legislative process.[291] After the Rape Law was adopted, the lack of progress on the other two draft laws became apparent and UNMIL started investigating the state of affairs. At a time when the transitional government was coming to its end, UNMIL, the Bar Association and other local stakeholders feared that the laws would not be passed in their entirety under the newly elected government.[292] They thus lobbied strongly, and used the window of opportunity so the departing government (which would soon lose its powers anyway) pushed through both laws in an accelerated procedure on the last day of its existence in January 2006.[293]

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285 Interviews with UNMIL national professional officers, Monrovia, November 2008.
286 Interview with UNMIL official, Monrovia, November 2008.
287 Interviews with AFELL and UNMIL officials, Monrovia, November 2008.
288 Interview with UNMIL national professional officer, Monrovia, November 2008.
289 Interview with UNMIL national professional officer, Monrovia, November 2008.
290 Act to Amend the New Penal Code Chapter 14 Sections 14.70 and 14.71 and to Provide for Gangrape, 29 December 2005, Ministry of Foreign Affairs of Liberia.
291 Interview with UNMIL national professional officer, Monrovia, November 2008.
292 Interview with UNMIL national professional officer, Monrovia, November 2008.
293 Act to Amend Chapter 18 of the New Judiciary Law, Chapter 22 of the Civil Procedure, and Chapters 20 and 23 of the Criminal Procedure Law to Provide for the Amendment Relating to Juries and Act to Amend Certain Provisions of Chapters 3, 7, 12, 14, 15, 18, and 21 of the New Judiciary Law to Provide Financial Autonomy to the Judiciary, both 14 January 2006, Ministry of Foreign Affairs of Liberia.

Compromising in customary law reform

UNMIL generally pursued a state-centric approach in justice and legal reform. Although access to the formal justice system is difficult in rural areas and the vast majority of the population prefer to settle disputes traditionally, not much reform activity was directed to the area of customary law and traditions. Partly because of a lack of capacity and knowledge, partly also because of the explosiveness of the issue, UNMIL has so far shied away from pushing too much the issue of reviewing and revising customary practices and regulation.[294]

Law Reform Commission

UNMIL's 2005 rule of law strategy does call for the establishment of the Law Reform Commission to carry out a comprehensive and systematic review of the criminal and civil laws of the country.[295] This commission, which is in the process of being created, should also review the Rules and Regulations Governing the Hinterland and thereby have to deal with the issue of legal pluralism in the country.

Although the Law Reform Commission is intended as the government programme to give direction on how to deal with traditional justice and customary law, there does not seem to be much interest among Liberian politicians in adopting the founding law.[296] From early 2006 a task force consisting of prominent Liberian lawyers drafted a law on the establishment of the Law Reform Commission. UNMIL assisted and promoted the undertaking by providing financial and logistical support, hiring legal consultants to help draft the law and organising a symposium during which the draft was discussed with the main legal and traditional stakeholders.[297] In September 2006 a first draft was submitted to the president (who had made the commission's establishment one of her priorities) and then forwarded for review to the Governance Reform Commission. More than 18 months later this commission presented a revised draft[298] and, following another symposium, submitted a harmonised version to the Assembly in summer 2008.

However, there continues to be no interest in the Law Reform Commission by important actors such as Parliament, the Ministry of Justice and the chief justice. These institutions are afraid of losing legislative competences and do not perceive the importance of including traditional structures in the Liberian legal system.[299] Moreover, the Ministry of Internal Affairs, which as guardian of indigenous interests generally supports harmonisation of the legal systems, is cautious as it fears that the Law Reform Commission would focus too much on statutory law reform but ignore the needs of the traditional structures. In other words, the international community and some local NGOs were the only actors pushing for the adoption of the commission.[300] In June 2009 the commission was established on an interim legal basis by presidential executive order

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The Child Pornography Law was, however, not passed because of a lack of research. Interview with UNMIL national professional officer, Monrovia, November 2008.

294 Interviews with UNMIL official and solicitor-general, Monrovia, November 2007 and November 2008.

295 Rule of Law Task Force, note 260 above.

296 Interview with UNMIL official, Monrovia, November 2008.

297 Interviews with UNMIL official and local lawyer, Monrovia, November 2008.

298 Act to Establish a Law Reform Commission of Liberia, Governance Reform Commission, 28 June 2008.

299 Interviews with UNMIL officials, Monrovia, November 2008.

300 Interviews with UNMIL officials, Monrovia, November 2008.

subject to future legislative enactment.[301] A permanent legal basis is still missing at the time of writing.

Although its chair was appointed at the same time, the commission's start was slow, with two of the three commissioners only appointed in March 2010. As was expected by some observers, the commission has thus far exclusively focused on matters relating to the formal justice system.

Fighting harmful traditional practices

While the overall issue of customary law reform has not yet been addressed in a substantive way, human-rights-related work was done in individual cases and concerning specific traditional practices. However, pointing at the limited alternatives to traditional justice mechanisms as long as the formal justice system is not well functioning, UNMIL generally refrained from researching and pushing certain topics too strongly if there were no local partners to take on the issue. But if local actors showed their interest in prior communication, then joint action was pursued.[302]

The most prominent activity in this context was a campaign by the Ministry of Justice with the support of UNMIL against trial by ordeals using the so-called 'sassiwood' procedure. In violation of international human rights standards, a suspect who refuses to confess a crime is made to drink a poisonous liquid made from sassiwood bark. If he or she dies or gets sick (as is to be expected) then the person is found guilty. A similar practice involves touching a suspect's leg with a red-hot knife, ascertaining guilt if the leg is burnt.[303]

Arguing that the Constitutional Court had outlawed sassiwood in 1916, the solicitor-general convicted and imprisoned 12 Liberians in 2007 who were found guilty of having administered sassiwood.[304] UNMIL had strongly lobbied for the initiation of judicial proceedings. These law enforcement measures were intended to be not just punishment but also a means of civic education deterring the rural population from continued use of harmful practices.[305] They were accompanied by a set of UNMIL-organised roundtables with traditional leaders and teachers as well as training sessions and radio programmes on the illegality of sassiwood and other harmful traditional rituals.[306] Moreover, the Ministry of Internal Affairs was pressured to remove a budget line for trial by ordeal and inform all superintendents of the Constitutional Court's prohibition of sassiwood. Subsequently, the message was passed on to the country's chiefs and zoes, and the number of sassiwood cases is said to have declined.[307] While the campaign was widely welcomed by the American Liberian legal elite and the international community, a traditional backlash occurred and in 2008 the president pardoned the convicted persons after only a few months' imprisonment. The decision is understood as a gift to the indigenous community and a reminder of Liberia's division of power in urban and rural areas.[308] The solicitor-

[301] Executive Order No. 20 Establishing a Law Reform Commission, Government of Liberia, 11 June 2009.
[302] Interview with UNMIL official, Monrovia, November 2007.
[303] Interview with ABA official, Monrovia, November 2007.
[304] L. von Carlowitz (2008) 'Local ownership and the rule of law in Liberia', *Law in Africa*, 11:. 79.
[305] Interview with solicitor-general, Monrovia, November 2008.
[306] Interview with UNMIL official, Monrovia, November 2008.
[307] Interviews with solicitor-general, minister of internal affairs and chief zoe, Monrovia, November 2008.
[308] Interview with UNMIL official, Monrovia, November 2008.

general observed, however, that the president's decision confirmed the supremacy of law (over the traditional sphere), as she had a right to pardon criminals according to the Code of Criminal Procedure.[309]

This campaign demonstrates the need to find the right balance of promoting international values and respecting local customs and local ownership. UNMIL officials and other members of the international community do acknowledge that the foreign imposition of international human rights standards is a serious problem.[310] For example, the provisions of the Rape Law against marital rape and concerning the age of consent are partly seen to be too progressive for Liberian society and thereby discredit the new law to some extent.[311] It is realised that traditional leaders have very critical attitudes towards international human rights and, as is the case with respect to the UN Convention on the Rights of the Child, at times blame them for the destruction of the 'Liberian way'. To avoid causing counterproductive reactions, UNMIL tries in principle to influence local leaders carefully and gradually.[312] Appreciating that traditional society and norms are also dynamic and flexible, UNMIL promotes 'non-negotiable' issues in a soft but determined manner, for example emphasising the fact that it was the war and not the rights of the child that destroyed traditional child-parent relations.[313] In other cases, for example when considering concerted action against genital mutilation in summer 2007, UNMIL refrained from starting a campaign against these harmful practices because it was felt (and advised by local partners) that the issue was too sensitive to address.[314]

Primarily concerned with the governmental sector, UNMIL leaves much of the work of communicating with traditional communities and dealing with customary practices to NGOs such as the Carter Center and the US Institute for Peace. UNMIL promotes and supports their efforts to engage traditional actors through dialogue and find ways of fruitful collaboration between formal and traditional justice sectors.[315] The Carter Center is convening workshops with traditional leaders to analyse customary practices and provide information on ongoing legal reforms. It also carries out outreach and community sensitisation programmes and provides access to justice through community legal advisers.[316] It believes that dialogue with traditional leaders without directly pushing for change is the most effective means to foster a gradual abolishment of harmful traditional practices.[317] The US Institute for Peace searches for solutions on how the customary justice mechanism can complement the formal justice system. It undertakes considerable research on how justice is sought and understood at the local level, and also intends to start a consultative process designed to engage local communities in generating ideas and solutions to address key problems in the justice sector.[318]

[309] Interview with solicitor-general, Monrovia, November 2008, referring to Article 25 of the Code of Criminal Procedure.
[310] Interviews with UNMIL and Carter Center officials, Monrovia, November 2008.
[311] Interview with UNMIL official, Monrovia, November 2008.
[312] Interview with UNMIL official, Monrovia, November 2008.
[313] Interview with UNMIL official, Monrovia, November 2008.
[314] Interview with UNMIL official, Monrovia, November 2007.
[315] Interviews with UNMIL officials, Monrovia, November 2007 and November 2008.
[316] Carter Center (2008) 'Access to justice in Liberia', Conflict Resolution Program information sheet, June.
[317] Interview with Carter Center official, Monrovia, November 2008.
[318] S. Lubkemann (2008) 'Local sources for the legal reform imagination: A consultative process', concept note, 10 November, unpublished.

These programmes are generally welcomed by representatives of the indigenous population, who understand the need for change and partly receive salaries from the Ministry of Internal Affairs.[319] However, traditional leaders point out that they need time to adjust and ask for public resources for roads and school education in return for changing their practices.[320] Members of the international community hope that a dialogue and reform process will be started during which harmful or lethal traditional practices will gradually be replaced by other traditional practices.[321]

Capacity building: Training, mentoring and secondment of personnel

UNMIL capacity building in the justice sector mainly consisted of delivering training for the judiciary and other relevant stakeholders, co-locating international staff and providing technical advice to Liberian partner institutions and seconding private lawyers to the Liberian prosecutorial services.

Judicial training and Judicial Training Institute

As mentioned, judicial competence is generally low in Liberia, particularly among magistrates and justices of the peace. Liberian judges had received their last training in 1998. UNMIL thus made the training of judges, magistrates and other judicial staff a priority from the start of its deployment. However, in spite of their general need for refresher courses and although it was intended to make their vetting dependent on prior training, judges were not included in the training scheme because the chief justice refused to allow their participation.[322] Referring to advice provided by the Council of Europe, he maintained that only judges (and not UNMIL) could train judges and that a judicial training institute would have to be established for this purpose.[323] By spring 2009 UNMIL had provided training for 336 magistrates, 220 justices of the peace, 226 prosecutors, 191 court clerks and 1,000 immigration officers.[324]

Until 2005 training was mainly delivered by international trainers, but was then successively taken over by national trainers. To increase national training capacity, UNMIL carried out programmes to train the trainers, although many Liberian jurists are said to prefer trainers from the United States.[325] Liberian trainers who have a US law degree play an important role as bridge builders in this context.[326] Training needs and curricula are general developed on the basis of information received from UNMIL monitors. However, guided by the intention to promote international legal standards, it was observed that training was at times too abstract and not practicable enough to suit the real needs of the trained.[327]

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[319] Interview with UNMIL official, Monrovia, November 2008.
[320] Interviews with traditional leaders, November 2008.
[321] With respect to trial by ordeal, it is hoped that lethal practices like sassiwood will either be replaced by non-lethal practices using hot knives or totally abandoned for dispute settlement through palaver. A compromise policy concerning genital mutilation could be to campaign strongly and with local support against unhygienic practices but to be tolerant with respect to other secret initiation rites, in particular in the countryside. Interviews with minister of internal affairs, UNMIL and American Bar Association officials, Monrovia, November 2008.
[322] Interview with UNMIL national professional officer, Monrovia, November 2008.
[323] Interviews with UNMIL officials, Monrovia, November 2008.
[324] Information provided on UNMIL webpage at: www.unmil.org/1content.asp?ccat=ljss&zdoc=1.
[325] Interviews with UNMIL and PAE officials, Monrovia, November 2008.
[326] Interview with PAE official, Monrovia, November 2008.
[327] Interviews with UNMIL officials, Monrovia, November 2007 and November 2008.

Despite these efforts, training for the judicial sector was in general provided in an *ad hoc* fashion, without much coordination between UNMIL and the many NGOs delivering training to different stakeholder groups.[328] Among them are the American Bar Association (ABA), the International Legal Assistance Consortium (ILAC), Pacific Architects and Engineers (PAE), the Carter Center, the UNHCR and the American Refugee Committee. Many of these NGOs feel UNMIL should play a more proactive role in coordinating the various training courses and distributing existing training material and useful information on quality standards.[329]

With respect to the judiciary, the organisation and coordination of training courses is to be carried out by the Judicial Training Institute. First proposed by the Governance Reform Commission in its 2007 concept paper, the chief justice formally established the institute by judicial order in June 2008. Generally following a Ghanian model, the institute still lacks a clearly defined mandate and governing structure. At the time of writing, it was not decided whether it would provide induction courses for prosecutors and paralegals, which the Ministry of Justice supports, or only for judges, magistrates and judicial clerks, as favoured by the judiciary.[330] In the meantime, the institute has begun to train future and present magistrates and developed a course curriculum for court clerks.[331] UNMIL supports the institute's establishment by providing policy papers and bringing together relevant political institutions.

Co-location, mentoring and cooperation

Capacity building was also done by co-locating UNMIL staff to local partner institutions. International staff were to cooperate closely with local actors and advise and mentor them in their activities.[332] One co-located UNMIL staff member observed that co-location is a very important strategy, with many benefits but also risks. Co-located persons operate as a mirror of the sending organisation and could function as bridge builders between the institutions involved. If the co-located person demonstrates to the local partner institution that he or she is a humble and mature character who pursues the latter institution's interests, local partners would view the co-located as 'part of the family'. Provided that local dignity is maintained, it is then much easier to transform international thinking into local ideas and get approval for relevant programmes and projects. On the other hand, a co-located person who appears to be very pompous and arrogant can do much harm to the cooperation between the institutions.

Whereas the Ministry of Justice and the legislature appreciated the support of co-located UNMIL staff, the chief justice was more reluctant to accept an international officer on his premises. When an UNMIL official was to be co-located to the Temple in August 2005, no agreement was reached for several years over the appropriate refurbishment and equipment of the office space assigned to the UNMIL official. Whether this was due to an exaggerated emphasis of judicial independence by the chief justice, undue refurbishment claims by UNMIL or simply a mismatch of the personalities involved may

328 Interviews with UNMIL, ABA and ILAC officials, Monrovia, November 2008.
329 Interviews with ABA and ILAC officials, Monrovia, November 2008.
330 Interviews with ABA and UNMIL officials, Monrovia, November 2008.
331 Information provided by UNMIL official, June 2010.
332 Interview with UNMIL official, Monrovia, November 2008.

remain an open question.[333] However, as a consequence of this argument no UNMIL official was co-located to the judiciary until 2008, although co-location was proclaimed official mission policy.

Some months later, following the rule of law retreat, the SRSG decided in September 2008 to reduce the co-location scheme and withdraw UNMIL staff from local partner institutions. The scheme was ended for several reasons. With the co-located staff spending nearly all their time at the local partner institutions, UNMIL superiors found there was a lack of accountability of the co-located persons to their home offices.[334] They no longer know what their co-located colleagues were actually working on. Moreover, it was noted that local partner institutions used the co-located UNMIL staff too often as a cheap labour force to complete assignments on their behalf.[335] Given the variety of possible assignments, UNMIL also felt that a stronger linkage of the co-located persons to their headquarters was necessary to ensure that an UNMIL staff member with matching skills for a given task is sent to the local partner institution.[336] Another interviewee stated that the co-location scheme was ended because 'it did not work'.[337] Mentoring should take place less at headquarters level, with its at times unclear mandates, but rather at the county level where most practical work is carried out.

However, despite the rhetoric the co-location scheme did not end entirely but was reduced to the usage of 'focal points' who commute between UNMIL and their national counterpart.[338] Instead of having an office there, formerly co-located staff now visit the local partner institutions three or four times per week and work there with a laptop for part of the day.[339]

Although local stakeholders strongly emphasise national sovereignty and generally refuse to accept any outside imposition, international UNMIL and NGO staff noted that in many cases Liberian officials *de facto* do not take an active role in policy-making, law drafting and other relevant work.[340] Particularly at the working level, locals are said to be reluctant to sit in the driver's seat and accept responsibility. This situation leaves international partners either to push softly for local action and risk a lack of progress in a given reform process or to do much substantive work themselves but risk the reproach of international domination. In one instance internationals and locals jointly developed certain projects over a period of time. At some point in the process the minister stormed in, claimed that he was in charge and proposed certain action in disregard of the previous work. Afterwards the subordinates were left to complete the job without having the capacity, and turned again to the international to provide the required expertise or policy recommendations. The subordinates welcomed the input, followed the international ideas without much reflection (or real ownership) and then submitted the document for approval by the minister.[341]

[333] Different opinions were given in interviews with UNMIL officials, November 2007 and November 2008.
[334] Interview with UNMIL official, Monrovia, November 2008.
[335] Interviews with UNMIL officials, Monrovia, November 2008.
[336] Interview with UNMIL national professional officer, Monrovia, November 2008.
[337] Interview with ABA official, Monrovia, November 2008.
[338] Interview with UNMIL national professional officer, Monrovia, November 2008.
[339] Interview with national and international UNMIL officials, Monrovia, November 2008.
[340] Interviews with UNMIL and Carter Center officials, Monrovia, November 2008.
[341] Interview with Carter Center official, Monrovia, November 2008.

In particular after the elections, UNMIL appreciates that it only has an assistance mandate and should foster local responsibility and ownership.[342] In most justice issues it merely promotes international standards and principles and 'negotiates its way through'.[343] Especially when overall policy issues are concerned, UNMIL tries to bring local partners together and push them to undertake the necessary actions themselves. With much persistence and often on a high level, it keeps on raising crucial issues in prominent meetings such as rule of law retreats or within the Liberian Reconstruction and Development Committee.

One interviewee deplored that UNMIL did not make assistance and support more conditional on the delivery of certain results.[344] However, others pointed to the fact that UNMIL used its leverage with local politicians by threatening to dissuade donors from continuing funding if local cooperation was missing, for example in fighting corruption or prioritising judicial reform.[345] Moreover, international influence was exerted very indirectly and without offending local authorities through UNMIL-contracted consultants seconded to the Ministry of Justice.[346]

Secondment of consultants to prosecutorial services

Supporting Liberia's prosecutorial services with urgently required legal staff was another UNMIL capacity-building measure. Instead of paying for expensive international legal expertise, UNMIL decided to hire local consultants to kick-start prosecutions in the counties.[347] In 2006 UNMIL seconded 12, later 15, private lawyers to the Ministry of Justice to be employed as county attorneys and defence counsel for an initial period of one year.[348]

Both UNMIL and the solicitor-general agree that the secondment was an important step in making the justice system operable throughout the country.[349] It was observed that the programme worked well at the beginning. At a later stage, however, seconded consultants were seen to do primarily their own law firm business in Monrovia instead of prosecuting or defending suspects in the countryside.[350] UNMIL tried to ensure accountability by requiring the Ministry of Justice to report back on the consultants' performance, which never happened.[351] The ministry insisted on controlling who to hire, which did not contribute to the programme's transparency, as it was not always clear whether consultants were selected solely on the basis of professional competence or primarily because of clientilist relations.[352]

After two years UNMIL's consultancy budget was spent, and the consultants' contracts expired in 2008. However, the Ministry of Justice, the judiciary and UNMIL had an

342 Interview with UNMIL official, Monrovia, November 2008.
343 Interviews with UNMIL officials, Monrovia, November 2008.
344 Interview with UNMIL official, Monrovia, November 2007.
345 Interview with UNMIL official, Monrovia, November 2007.
346 von Carlowitz, note 304 above, p. 80.
347 Interview with UNMIL official, Berlin, December 2006.
348 T. S. Gongloe (2007) 'Building a criminal justice system and traditional justice mechanisms', in ZIF 'Post-conflict peacebuilding in Liberia: Much remains to be done', report, Third Annual KAIPTC/ZIF-Seminar, Accra, 1–3 November, p. 49.
349 Interviews with UNMIL officials and solicitor-general, Monrovia, November 2008.
350 Interviews with UNMIL and PAE officials, Monrovia, November 2008.
351 Interview with UNMIL official, Monrovia, November 2008.
352 Interview with PAE official, Monrovia, November 2008.

interest in the continuation of the programme despite its questionable sustainability. Although no sound information existed on the programme's efficiency, i.e. how many cases were actually prosecuted or defended by the consultants, the UNHCR was prepared to fund 12 of the 15 consultants to be employed by the ministry as county attorneys.[353] With slightly altered contractual relations with the UNHCR, there is a quasi-continuation of UNMIL's secondment programme brought about by coincidence rather than design.[354]

4. Conclusions and Findings

There are essentially three unanswered questions underlying the relationship between local ownership and SSR. First, it is unclear what local ownership actually means; second, there is a lack of guidance concerning whom to select as local partners; and third, how and by whom should success in SSR programmes be measured best?355 If the premise made in the introductory section holds true, that justice sector reform is more closely connected to the normative underpinnings of the affected society than are core SSR activities, these questions are even more relevant to the relationship between local ownership and the justice sector.

The answers to the questions depend on the underlying objectives of international assistance in post-conflict peacebuilding. Should justice sector programmes be guided by a communitarian vision of peacebuilding that stresses the role of local society and indigenous actors? Or should they rather follow a liberal vision that emphasises the importance of human rights, good governance and a liberal market democracy, which local structures need to adopt?[356] Local ownership might possibly be easier to achieve if international activity applies a communitarian approach that aims to restore a given status quo than if the intervention engages in social engineering driven by a liberal peace agenda. It might be argued that the more international post-conflict assistance seeks change in local attitudes and beliefs, the more difficult it is to ensure local ownership. Whether a communitarian or a cosmopolitan lens is used to guide an international intervention also has a significant influence on the selection of local partners. How far does the international community cooperate closely with agents of change, or compromise for the sake of peace with existing power holders (who might be reluctant to change)? Is it the state and its institutions that matter as partners in international peacebuilding, or should international actors also engage with civil society and the general public?

4.1. Concept and definition

Most interviewees commented on local ownership as both a process and an outcome. It was stated that genuine local ownership exists when local actors design, manage and implement institutions or projects themselves.[357] However, international interview partners in Kosovo in particular argued that local ownership could also be implemented

[353] Interviews with UNMIL officials, Monrovia, November 2008.
[354] Interview with UNMIL official, Monrovia, November 2008.
[355] L. Panarelli (2010) 'Local ownership of security sector reform', USIP Peace Brief No. 11, p. 1.
[356] Cf. Donais, note 27 above, p. 6.
[357] Interviews with international judge, UNMIK and EUPT officials and former PISG consultant, Pristina, March 2008.

through buy-in of local partners to internationally designed and supervised programmes.[358] In general, interviewees identified or described three basic means to achieve local ownership in newly created institutions: besides a gradual handover of planning, management and oversight competencies to local actors, local participation in relevant decision-making processes and various forms of capacity building were seen as the main means to effect a local appropriation of international programmes and ideas.

4.2. Perspectives matter

As regards the selection of local partners, the research demonstrates that the United Nations applied in principle a state-centric approach to its justice sector assistance. In particular, UNMIL's approach to justice sector reform in Liberia until recently shows that traditional and/or informal actors are mostly left outside peace operations' purview. This finding does not come as a great surprise for a member-state organisation, the United Nations, which sees the state and its institutions as the entry point into the host country's society.

Whether this approach achieved or fostered local ownership in newly created institutions or systems depends to a good extent on the perspective of the viewer. For example, it may be argued that the Liberian judiciary is locally owned by state actors (who emphasise 'national' ownership) but not the rural population, who lack access to justice and often prefer traditional dispute settlement. It may also be maintained that Kosovo's Albanian majority population appreciate the Kosovar judiciary as 'theirs', whereas Kosovo Serbs mostly reject it.

Similar to SSR, justice reform is a political process that creates winners and losers. Winners tend to appreciate and own particular reforms, whereas it is the opposite for those who lose out. This finding does not just apply to sectors of or groups in society, such as formal or informal or Serb or Albanian, but also to individuals and their agency in a given reform process. For example, Kosovo's PISG seem to stand behind new legislation, even if it was mainly drafted by foreign consultants using different legal traditions.[359] In contrast, younger expert jurists who are still searching for their place in Kosovo and were not consulted in the law-making process tend to be more critical of such processes and reproach their politicians for allowing foreign domination.[360]

4.3. Anti-cyclical justice strategies

With respect to local ownership, it is surprising to note that international engagement in justice reform ran anti-cyclical to the general governance strategy of both missions. In Kosovo, UNMIK governance was, in principle, geared towards more local ownership by successively moving from absolutist emergency rule in the immediate post-conflict phase in 1999, to the attempt of joint governance by the JIAS from late 1999 to early 2001, to a power-sharing arrangement with Kosovo's PISG formed by the Constitutional Framework in 2001 and finally to the increased transfer of reserved powers to the PISG

[358] Interviews with UNMIK officials, Pristina, October 2007 and March 2008.
[359] Interviews with former minister of justice and National Center for State Courts official, Pristina, March 2008.
[360] Interviews with former PISG consultants, Pristina, March 2008.

with UNMIK assuming a monitoring role from 2006–2007 onward.[361] Kosovo's justice sector, however, went the opposite way. Initially, there was much local ownership in the pivotal judicial appointment process, in adjudication and in the choice of applicable law.[362] But from 2000 onwards, international control significantly increased by introducing a body responsible for the appointment and removal of judges and prosecutors – the Kosovo Judicial and Prosecutorial Council – with an international voting majority, inserting an international judiciary that could overrule its Kosovar counterpart in war crimes and other politically sensitive cases, establishing a new Pillar I with the objective of taking a hard-line approach in maintaining law and order, and making use of a legislative competence exclusively reserved for the SRSG.[363] Only from 2005 onward, in response to the March riots, did UNMIK start transferring the most significant justice-related responsibilities to the Kosovo Judicial Council and Ministry of Justice established that year.

In Liberia, the relationship between UNMIL's general governance strategy and the approach taken in the justice sector was somewhat similar. Given the total breakdown of public security after the civil war, there was increased UNMIL involvement from the start of the mission in 2003 until the end of the transitional government in early 2006.[364] The international military and police played – and still play – a significant role in maintaining law and order. One UNMIL staff member even argued that UNMIL should have been set up as an executive mission.[365] However, after the elections and the formation of the new government, UNMIL's role shifted from policy initiation and implementation to assistance and support. Despite UNMIL's increased focus on post-conflict rule of law, the judicial sector was neglected for various reasons, including a lack of funds and personnel problems within UNMIL and the Liberian government.[366] Only in 2007–2008, when UNMIL had already started thinking about scaling down, did justice reform become a priority: efforts were stepped up to push the main local actors to develop a comprehensive rule of law strategy, increase judicial efficiency and fight harmful traditional practices.[367]

4.4. Differences between executive and non-executive missions

The approaches undertaken to promote local ownership significantly differed in the executive mission, UNMIK, and the non-executive mission, UNMIL. Endowed with full governance powers and without recognised Kosovar partner institutions at the outset, local ownership was generally more problematic in Kosovo than was the case with UNMIL in Liberia, where a national government bore primary responsibility for public policy. While UNMIK needed to find the right balance of international intervention and achieving local acceptance of newly created institutions, UNMIL's main role was to

[361] For an overview of the governance structures before the Constitutional Framework see von Carlowitz, note 24 above, pp. 374–377; on the division of powers under the Constitutional Framework see C. Stahn (2001) 'Constitution without a state? Kosovo under the United Nations Constitutional Framework for Self-Government', *Leiden Journal of International Law*, 14: 553–560.

[362] Strohmeyer, note 40 above, pp. 51–52, 58–59.

[363] Zaum, note 73 above, p. 149. For a general overview of the developments in the justice sector see Rausch, note 55 above, pp. 271–311.

[364] For an overview of UNMIL's security-related involvement see M. Malan (2008) *Security Sector Reform in Liberia: Mixed Results from Humble Beginnings*. Carlisle, PA: Strategic Studies Institute, pp. 46–66.

[365] Interview with UNMIL official, Monrovia, November 2008.

[366] Blume, note 24 above, pp. 5–8.

[367] Interviews with UNMIL officials, Monrovia, November 2008.

provide international assistance in support of Liberian policies. Emphasising Liberian ownership, UNMIL refrained from putting undue pressure on the government, for example by withholding development funds if certain reform objectives were delayed or not implemented at all. As a result of its executive mandate, UNMIK was generally more preoccupied with regulation and institution building, requiring strategies for a buy-in of local stakeholders by means of local participation in corresponding decision-making processes. In contrast, UNMIL's main focus lay on technical advice and capacity building for existing local structures.

The research demonstrates that the relationship between international and local counterparts is in many ways asymmetric.[368] As was confirmed in UNMIK, there is a tendency in executive missions for international actors to dominate the setting and push programmes through that they deem to be necessary for the implementation of the mandate. In non-executive missions like UNMIL, local power structures and knowledge generally play a much more important role. If local actors cannot easily be forced to adopt or implement certain policies, there is more room for their priorities and pace. As the Liberian case demonstrates, this might also lead to a certain degree of reform inertia or the use of co-located international staff members for work assignments or purposes that contravene international mission policy.

Some surprising findings concerning local ownership were made in both missions. While some interview partners in Kosovo argued that the notion of local ownership could not be reconciled with an executive mandate, the statements of many local stakeholders indicate that certain UNMIK key projects in the justice sector do indeed enjoy significant support of relevant Kosovar circles. Focusing on the local judiciary as such, on the Kosovo Judicial Council and Ministry of Justice, and on the new criminal and criminal procedure legislation, there are some indications that UNMIK was able to create (at least some degree of) local ownership in relevant new institutions and systems despite its executive powers. Of course, the caveat must be made in this context that it is always extremely difficult to arrive at sound conclusions regarding acceptance by local stakeholders or even the general public. Moreover, the research design did not use a representative survey of relevant local opinions but relied on anecdotal evidence, particularly regarding the views and attitudes of local counterparts.

While these findings are positive in tenor, it should not be forgotten that the international intervention in Kosovo is a special case not just in terms of the abundant resources that UNMIK had at its disposal. Several factors contributed to the (at least partial) success of essential elements of the UNMIK-induced justice reform. Among them is the fact that Kosovo possessed a functioning justice system before the conflict that was accepted by the population in general. Kosovo shares European legal and institutional traditions and Kosovars were motivated to accept change with a view to eventual accession into the European Union. Albanian Kosovars also welcomed many changes as an indication of separation from the previous discriminatory Serb regime. Most post-conflict environments, including Liberia, do not enjoy such favourable conditions for an international intervention.

[368] Cf. Reich, note 12 above, pp. 13-17.

In terms of local ownership, the research revealed a somewhat inverted situation with respect to the non-executive mission UNMIL. Although the Liberian government strongly insisted on national sovereignty and might thus be presumed to be the local owner in justice-related policy, doubts arise as to how far this ownership is just of a formal nature. Various interview partners stated that much of the substantive preparatory work for relevant policy- and decision-making was undertaken by UNMIL or other international staff who remained in the background. Moreover, the argument can be made that real Liberian ownership would have required much more international intervention to ensure that the majority population living in rural areas actually have access to (and therefore appreciation of) the justice system and other state institutions legitimised by the international assistance.

4.5. Leadership and personalities matter

How the cooperation between international and local counterparts works concretely depends to a large degree on the mission leadership. For example, decisions by the senior management have a great influence on how the mission mandate is interpreted. Whether the leadership applies a heavy-handed approach or walks softly in crucial political situations has a significant impact on local ownership. In most cases it is the mission leadership that determines when and under which conditions international responsibilities are transferred to local actors. It also depends on the foresight and persistence of the senior managers to implement relevant transfer strategies. Many interviewees observed that local-ownership-related policies are often based on *ad hoc* decisions rather than long-term planning. Moreover, local ownership might remain rhetoric because international actors are unwilling to allow their local counterparts to make their own mistakes. Furthermore, a transfer of responsibilities from international into local hands might be delayed because international staff are afraid of losing their jobs.

Adequate social competence and cultural awareness of international actors are decisive for a fruitful work relationship between local and international partners and, hence, the creation of local ownership. This applies to each working level of a peace operation. In many cases the leadership style of the senior management towards local counterparts is reproduced in the interactions between international and local actors at lower levels. The research revealed that changes in mission leadership that entailed substantial alterations of local-ownership-related attitudes and policies had a significant effect on the field level. However, it was also observed that misconduct or failures at the lower levels compromise the reputation of a peace operation as such, and might thus seriously impact on the willingness of local actors to cooperate with the international presence.

4.6. Best practices to foster international-local cooperation

International actors mostly lack sufficient knowledge of local structures and traditions. Local actors often lack adequate technical knowledge and professional skills. It can be maintained that successful peacebuilding is best achieved when both international and domestic resources are mobilised and complement each other to reach a common goal, for example in building up new public institutions or systems. In the words of Donais, such cooperation requires 'an ongoing conversation across the international-local cultural

divide' to achieve 'a basic consensus on the shape of the peace to be built'.[369] The research showed that there are no blueprints on how to bring about this conversation. However, there are a couple of best practices that a mission should explore to improve the international-local interface and interaction.

These include, in principle, the early and continuous involvement of local stakeholders in relevant decision-making processes, in particular in the case of an executive mission. Sound local participation can only function if adequate language support is provided throughout the process. Moreover, local participation is only meaningful if international actors respect local thinking and take local proposals seriously. A serious participation process will most likely involve different timelines and decision-making procedures than originally envisaged, and therefore calls for much flexibility on behalf of all actors involved.

Co-location schemes have great potential to bring local and international actors closely together and help them to benefit from each other. However, they also carry the risk that international-local cooperation worsens, especially when international staff do not possess sufficient soft skills. Interview partners indicated that co-location programmes are likely to fail if the disparities between international and local partners are too high, for example if co-located international staff arrive with big cars and receive well-equipped offices, while their local counterparts struggle with everyday living conditions. Local actors may also abuse co-location schemes to some degree, for example by employing co-located international personnel for purposes not envisaged by general mission policy. The specific circumstances in a mission environment might necessitate a withdrawal or reduction of a co-location scheme.

A mission should certainly consider increasing local capacity building by means of mentoring, advising and on-the-job learning. However, it is not easy to make the work relationship between local actors and international mentors and advisers fruitful. Internationals must be very careful not to appear to be patronising or babysitting their local counterparts, who will possess important knowledge and resources required for a sustainable intervention.

The research also showed that the increased engagement of and cooperation with younger local staff members can be a beneficial undertaking. This group might be less involved in the conflict history and more willing to accept international ideas and working styles than their older colleagues. Yet youth can also be extremist and adopt retrograde attitudes. And even if young and able local counterparts are available to promote new thinking and management strategies, international actors must be aware that the involvement of the young might come at the cost of the older generation of local professionals. Such a policy might unduly disrupt local traditions and seniority, and therefore hamper the creation of local ownership in general.

Similarly, the involvement of the diaspora or regional expertise offers many chances to bridge the local-international divide.[370] For example, for UNMIL it proved very useful to

[369] Donais, note 27 above, p. 19.

[370] While several case studies exist on the chances and challenges of including members of the diaspora in peace processes, more comparative research would be useful that focuses on diaspora involvement at the community level and in

engage West African facilitators to break up a Liberian reform deadlock; Western facilitators would most likely not have been accepted so well, partly because of their colonialist past. Another example is the active cooperation with qualified legal experts (and translators) from Slovenia and Albania in the drafting of the new criminal and criminal procedure legislation in Kosovo. This approach ensured regional compatibility and contributed to the acceptance of the new legal systems by the Kosovar legal community and other relevant circles. However, local stakeholders might also resent the input of experts of the diaspora or neighbouring countries. Moreover, such experts might not be neutral actors, but be strongly affiliated with the conflict history and promote one-sided governance strategies or reform policies.

At least in the short run, the use of national professional officers (NPOs) is an important tool to bring qualified local knowledge into international programme planning and implementation. However, a heavy reliance on NPOs tends to create an alternative structure that stands in some rivalry to the local administration. International organisations are likely to attract the best-qualified local professionals because they pay much higher salaries than local authorities. This situation might weaken local authorities, and also raises the question of sustainability in employment and capacity building. In particular in post-conflict societies with much brain drain, international actors should consider employing qualified local professionals as NPOs, but allow them to accept assignments for local administrations or universities in addition to their service to the peace operation.

Training is not just a major tool to improve technical knowledge and skills, but should also foster social competence and cultural awareness. Both local and international stakeholders need these qualities in post-conflict peace operations. This means that successful peacebuilding requires both local and international actors to receive training for hard and soft skills they are missing. When it comes to training for local professionals to learn about newly established institutions and systems, qualified local trainers will be the best persons to transmit knowledge to the trainees in most cases. However, the UNMIL case study has shown that local stakeholders such as lawyers might prefer that international colleagues provide training because they are regarded to be more competent than their local colleagues. In terms of methodology, it appears that concrete and interactive training is in general more fruitful than abstract and theoretical classroom teaching. Moreover, a combined approach to legislative drafting and training is helpful, as the legislative process concerning the new Law on Courts in Kosovo demonstrates.

4.7. Final remarks

A study on local ownership would not be complete without some general remarks on the nature and objectives of international post-conflict assistance, whether relating to SSR or to justice reform. As stated, success is difficult to measure in international peacebuilding. Yet it is safe to say that many post-conflict scenarios exist where international assistance seems to produce only unsatisfactory results, and thus fails in terms of local ownership.

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concrete field projects. For a recent study on the issue see L. Vimalarajah and R. Cheran (2010) 'Empowering diasporas: The dynamics of post-war transnational Tamil politics', Berghof Occasional Paper No. 31, Berlin. See also von Carlowitz, note 124 above; Y. Shain (2002) 'The role of diasporas in conflict perpetuation or resolution', *SAIS Review*, 22: 115–144.

To some extent, this is due to unrealistic or undefined definition of the objectives of a given international engagement. Is a peace operation set up to promote change in the sense of implementing a liberal peace agenda, or is it driven by a desire to stabilise a post-conflict society, if necessary with the support of local power structures that violate or compromise international standards and principles? The required length and duration of an international engagement in a post-conflict scenario depend to a large extent on the approach taken.

What is certainly needed to improve the situation is better and more realistic expectation management of what a peace operation is able to achieve. This relates to both target societies and donor nations. Too often, post-conflict populations attach high hopes to the international engagement at the outset of a peace operation, but become very frustrated once they realise that their deplorable living conditions will not change quickly. It goes without saying that new institutions and systems established by or with the support of the international community are not likely to become locally owned if they fail to deliver the promised results on the ground.

But donor governments must also relay the aims and costs of international peacebuilding to their electorates better. Irrespective of whether a peace operation engages in social engineering or simply *ad hoc* crisis management, successful international assistance requires sustainable and long-term efforts. To arrive there, Western politicians and taxpayers must better understand that managing failed states belongs to the genuine governance tasks of the international community (and not just the broken state authorities) and that a sound and successful engagement will possibly involve substantial international involvement on a long-term basis. Abolishing or integrating harmful or disruptive social structures or even changing a post-conflict society's traditions and beliefs is in most cases a task that will take generations to be completed.

It seems clear that if the international community wants real change in a post-conflict society, it must invest in it and also alter its own approaches to post-conflict assistance and governance. To mitigate the dilemmas relating to the intrusiveness of and dependency on the international intervention, international actors should, sooner rather than later, grant substantial ownership to local key actors in the planning and implementation of peacebuilding projects and programmes. Such a policy would require local actors to define their priorities and make them responsible for implementation. It would involve a learning-by-doing approach that allows local actors to make their own mistakes and progress at their own pace.

If substantial ownership is not an option in certain phases of a peace process, international actors should at least spend considerable energy and resources on achieving a buy-in of local stakeholders to newly established institutions or systems. This would include a better 'conversation' between international and local actors, building upon the best practices outlined above. As an exception and based on prudent reflection, international actors should also consider making their support conditional on the implementation of certain reform activities by local actors.

It has often been pointed out (and is reiterated here) that meaningful international assistance must be flexible in approach, efficient in delivery and sustainable in support.[371] Besides better expectation management of its constituencies, the peacebuilding community should introduce longer budget cycles than presently used. It should also consider simplifying its procurement and deployment procedures and make them more flexible to suit the local context better. Moreover, international organisations and donor nations should rethink their coordination mechanisms to ensure that international assistance is delivered in a sound and coherent manner.

This research indicates that international interventions can work in terms of local ownership if they are well designed and implemented in a sustainable manner. For example, the adoption of the provisional codes in Kosovo shows that it is possible for locals to take pride in and 'own' new legislation drafted under international auspices. Of course, this can only happen if such a process is based on a sound and serious participation process in which local and international partners discuss on equal terms. In such processes, new laws can override local legal traditions and still be liked – although they cause implementation problems and legal uncertainty, as is the case with the Provisional Criminal Procedure Code.

Meaningful international assistance is context sensitive, takes time and requires substantial financial commitments. Quick fixes do not exist, even if donor countries use a different rhetoric. International peacebuilding will only produce positive results if international actors match their interventions with a willingness to invest in change. It may be argued that the harsher the change desired, the more resources and time need to be invested. The smaller the investment, the more a peace operation will have to cooperate with local actors who violate international norms and standards. Initiating changes without sufficient backup and persistence might severely compromise international values and credibility. The more intervention there is, the more the international actor becomes part of the local power dynamics and can be held responsible. Initiating serious changes – for example by empowering local reform constituencies through institutional reform – but then quickly losing interest and withdrawing engagement does not just undermine international values but also causes local harm. Local ownership is not created that way. One open question is whether entering a post-conflict context half-heartedly causes more harm for the local context than does local 'self-regulation' without any international involvement.

[371] For an overview of the supply-side problems in international assistance see Nathan, note 11 above, p. 20.

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