COLLAPSE AND RECONSTRUCTION OF A JUDICIAL SYSTEM: THE UNITED NATIONS MISSIONS IN KOSOVO AND EAST TIMOR

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Within the span of only a few months in 1999, the United Nations was faced with one of the greatest challenges in its recent history: to serve as an interim government in Kosovo and East Timor.

In Kosovo, in response to massive attacks on the Kosovar Albanian population, including orchestrated and wide-scale "ethnic cleansing," the North Atlantic Treaty Organization (NATO) conducted an eleven-week air campaign against Yugoslav and Serbian security forces and paramilitary groups.[1] The campaign resulted in the agreement of the Federal Republic of Yugoslavia to withdraw all Yugoslav and Serbian security forces from the territory. On June 10, 1999, one day after the suspension of NATO's air strikes, the United Nations Security Council adopted Resolution 1244 (1999), establishing the United Nations Interim Administration in Kosovo (UNMIK).

Only three months later, in the aftermath of the UN-organized "popular consultation" in which the overwhelming majority of East Timorese had voted for independence, the Security Council created the International Force for East Timor (INTERFET),[2] to halt the violent campaign of killing, burning, and looting that had been waged by heavily armed militia supporting the integration of East Timor into Indonesia, at times with the support of the Indonesian security forces. Following INTERFET's successful restoration of peace and security to the half-island, the Security Council adopted Resolution 1272 (1999) on October 25, 1999, establishing the United Nations Transitional Administration in East Timor (UNTAET).

The scope of the challenges and responsibilities deriving from these mandates was unprecedented in United Nations peacekeeping operations. Both resolutions vested the United Nations with a comprehensive mandate, in effect empowering it to exercise all legislative and executive authority in Kosovo and East Timor and to take responsibility for the

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[1] The conflict between Serbian military and police forces and Kosovar Albanian forces had flared up in the course of 1998, leaving over 1,500 Kosovar Albanians dead and approximately 400,000 expelled from their homes. The deteriorating situation led the NATO Council to authorize activation orders for air strikes on October 13, 1998. On March 24, 1999, NATO actually began "Operation Allied Force," following the refusal of the Federal Republic of Yugoslavia to sign the Rambouillet accords. The two-round negotiation of the accords in February and March 1999 had been facilitated by the contact group for the Balkans (France, Germany, Russia, Italy, the United Kingdom, and the United States) and was aimed at reinstating substantive autonomy and self-government in Kosovo. The representatives of the Kosovar Albanian community signed the accords.

[2] SC Res. 1264 (Sept. 15, 1999). On August 30, 1999, some 98% of East Timorese voters had gone to the polls and decided, by a margin of 21.5% to 78.5%, to reject autonomy for East Timor, proposed by the Republic of Indonesia, and to begin, instead, a process of transition toward independence. Following Indonesia's failure to control the security situation in East Timor, as guaranteed in the political agreements leading up to the popular consultation of August 30, 1999, the Security Council established INTERFET. *See also* Agreement on the Question of East Timor, May 5, 1999, Indon.-Port., Agreement Regarding Security Arrangements, May 5, 1999, UN-Indon.-Port., UN Doc. S/1999/513, Anns. I, III, respectively.

administration of justice,[3] the third branch of government. The latter alone was an enormous task, which essentially required the complete re-creation of the judiciary. In addition, however, each mission had to rebuild the entire public sector, including the reconstruction and operation of public utilities, ports, airports, and a public transport system; establish a functioning civil service, requiring the selection and payment of civil servants; create a network of social services, including employment offices and health care; rehabilitate and maintain road systems; ensure the provision of primary, secondary, and higher education; create the necessary conditions for economic development, including the establishment of a banking system, the formulation of budgetary and currency policies, the attraction of foreign investment, and the establishment of a comprehensive tax, customs, and levies scheme; and develop public-broadcasting and mass-media capabilities.

Above all, the United Nations needed to create a legal framework within which these activities could be carried out. The legislative powers granted by the Security Council could not be exercised until each mission took steps to draft, promulgate, and enforce a range of United Nations regulations,[4] which would have the force of law in the administered territories. This daunting task was further complicated by the fact that, in both Kosovo and East Timor, the armed interventions had led to the withdrawal, in their entirety, of the political and administrative cadres that had previously governed the territories, including the security and law enforcement apparatus.

The initial operational strategy of both missions instinctively gave priority to traditional peace-building efforts, including ensuring peace and security in the territory to be administered and facilitating the return of hundreds of thousands of refugees. The experiences of both Kosovo and East Timor have proven, however, that from the outset the administration of justice must be counted among the top priorities of such an operation. Indeed, while emergency humanitarian assistance, physical rebuilding, and political negotiations are being carried out in postconflict situations, criminal activity does not cease; in fact, it often flourishes. Moreover, evidence of violations of international humanitarian and human rights law can be destroyed, while the perpetrators of serious crimes remain at large. The failure to address past and ongoing violations promptly and effectively, and to create a sense of law and order, can impede the broader objectives of the operation. At the same time, the United Nations civil police forces, which were entrusted in both undertakings with law enforcement, cannot do so in a meaningful way in the absence of a functioning judiciary.

Thus, it is essential that such missions, commonly referred to as "nation-building" operations, function within a framework of law and order, and that they be enabled, from the

[3] *See* SC Res. 1244, para. 11(a), (b), (i) (June 10, 1999), 38 ILM 1451 (1999) ("[p]romoting the establishment . . . of substantial autonomy and self-government in Kosovo"; "[p]erforming basic civilian administrative functions where and as long as required"; and "[m]aintaining civil law and order"); SC Res. 1272, para. 1 (Oct. 25, 1999), 39 ILM 240 (2000) ("establish . . . a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice"); *see also* UNMIK Regulation 1999/1, §1.1 (July 25, 1999) ("All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General"); UNTAET Regulation 1999/1, §1.1 (Nov. 27, 1999) ("All legislative and executive authority with respect to East Timor, including the administration of the judiciary, is vested in UNTAET and is exercised by the Transitional Administrator"). All the regulations promulgated by UNMIK and UNTAET are available online at <http://www.un.org/peace/kosovo/pages/regulations> and <http://www.un.org/peace/etimor/untaetR/UntaetR.htm>.

[4] The United Nations, which traditionally promotes international law, was actually mandated, both in Kosovo and in East Timor, to legislate and create new law in areas that normally fall within the competence of a national legislature. By promulgating UN regulations that have the status of laws and supersede any other law on the regulated matter at issue, the head of the UN mission, in effect, becomes the exclusive legislator of the administered territory. *See* SC Res. 1272, *supra* note 3, para. 6 (stating that "the Transitional Administrator . . . will . . . have the power to enact new laws and regulations and to amend, suspend or repeal existing ones"). As the experience in Cambodia has shown, many of these regulations remain in force even after the completion of the UN transitional administration, or serve as a blueprint for subsequent national legislation.

earliest stages, to carry out minimal judicial and prosecutorial functions, including arrests, detention, investigations, and fair trials. Moreover, the effective reconstruction of the justice sector requires a coherent approach that places equal emphasis on all its elements: police, prosecution, judiciary, and the correctional system.

Nevertheless, taking on the administration of justice in Kosovo and East Timor was no simple task, even if based on a comprehensive mandate. How can a justice system be administered when there is no system left to be administered; when the personnel needed to carry out judicial tasks have departed or are tainted by their perceived affiliation with the previous regime; when the courthouses and related facilities have been destroyed, looted, or even mined; and when the laws to be applied are politically charged and no longer acceptable to the population and the new political classes?

I. THE SITUATION UPON ARRIVAL

To understand fully the daunting tasks awaiting the United Nations upon its arrival in Priština and Dili, respectively, one has to look more closely at the circumstances that prevailed in the early days of each mission.

Kosovo

The situation encountered by the first UNMIK officials to arrive in Kosovo on June 13, 1999, was devastating: as a result of the systematic cleansing of the Kosovar Albanian population by the Yugoslav and Serbian security forces, the majority of Kosovo's population had been expelled and was living in refugee camps abroad.[5] Soon after the arrival of the United Nations, however, the refugees started to return from Macedonia and Albania at a historically unprecedented scale and speed. Those returning to the abandoned, and in many cases burned and looted, towns and villages of Kosovo[6] were often highly traumatized—not only by the months of violence preceding the deployment of the UN mission, but also by the decades of oppression and discrimination they had suffered under Serbian rule. By June 25, 1999, the number of spontaneous returns had reached 300,000, with some 50,000 refugees crossing into Kosovo every day, by car, by tractor, and on foot. Only two weeks later, by July 8, more than 650,000 refugees had returned to the territory, creating a tense humanitarian and security situation. In need of immediate housing and material support, an increasing number of returnees resorted to violence and intimidation as a means of retrieving some semblance of their previous lives. Looting, arson, forced expropriation of apartments belonging to Serbs and other non-Albanian minorities, and, in some cases, killing and abduction of non-Albanians became daily phenomena.[7] Moreover, organized crime, including smuggling, drug trafficking, and trafficking in women, soon flourished. It was apparent, within the first few days, that the previous law enforcement and judicial system in Kosovo had collapsed.[8] Criminal gangs competing for control of the scarce re-

[5] At the end of the Kosovo conflict, out of a population estimated at 1.7 million, almost half (800,000) had sought refuge abroad, mainly in neighboring Albania, the former Yugoslav Republic of Macedonia, and Montenegro. In addition, an estimated 500,000 people were internally displaced within Kosovo. *See* Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, UN Doc. S/1999/779, para. 8 (July 12, 1999), <http://www.un.org/Docs/sc/reports/1999/s1999779.htm> [hereinafter Secretary-General's Kosovo Report].

[6] According to a preliminary survey of 141 villages by the United Nations High Commissioner for Refugees, 64% of homes were severely damaged or destroyed, and household waste and human remains had contaminated 40% of the water resources. *See Chronology UN Interim Administration in Kosovo (UNMIK), 8 July* [1999] <http://www.un.org/peace/kosovo/news/kos30day.htm>.

[7] *See* HUMAN RIGHTS WATCH, FEDERAL REPUBLIC OF YUGOSLAVIA: ABUSES AGAINST SERBS AND ROMA IN THE NEW KOSOVO (HRW Report, No. 10(D), 1999).

[8] *See* Matthew Kaminski, *UN Struggles with a Legal Vacuum in Kosovo; Team Improvises in Effort to Build a Civil Structure*, WALL ST. J., Aug. 4, 1999, at A14.

sources immediately started to exploit the emerging void.[9] In addition, the Kosovo Liberation Army (KLA)[10] returned and rapidly penetrated the entire territory of Kosovo, often installing its own administrative structures—parallel to those of the United Nations—and urging Serbs to leave.[11]

Besides establishing a civilian administration, Security Council Resolution 1244 had created the Kosovo Force (KFOR), an international force composed of NATO troops that was charged with ensuring "public safety and order until the international civil presence can take responsibility for this task."[12] In response to the rising security concerns and pursuant to its mandate, KFOR started to carry out large-scale arrests to restore public peace and order to the territory. In just two weeks, this policy led to a backlog of more than two hundred detainees, many of them held for such serious criminal offenses as arson, violent assaults, and murder, but also for grave violations of international humanitarian and human rights law.[13] In view of the gravity of these offenses, and the possible effect of their prosecution and trial on the peace and reconciliation process in Kosovo, UN personnel considered it particularly important to observe fair-trial standards to the maximum extent possible. Using the code of criminal procedure of the Federal Republic of Yugoslavia as its basis, but applying those laws within the framework of recognized international human rights standards,[14] UNMIK strove to accord initial judicial hearings to detainees within seventy-two hours of their arrest, and to determine whether or not to detain them and commence investigations. In addition, UNMIK had to ensure that detainees were provided with sufficiently qualified defense counsel. The fact that most of the detainees would accept defense counsel only from their own ethnic group did not make the task any easier.

This emergency situation made it imperative for UNMIK to turn its immediate attention to the reestablishment of the core functions of the Kosovo judiciary.[15] KFOR itself was neither ordered nor prepared to exercise these functions, which, according to Resolution 1244, was a civilian task falling under the mandate of UNMIK.

Nevertheless, the conditions for accomplishing this task were not favorable. As a result of the policy of gross, government-sanctioned discrimination, applied with particular vigor since 1989,[16] virtually no Kosovar Albanians remained in the civil service. Most severely

[9] *See* Secretary-General's Kosovo Report, *supra* note 5, para. 6.

[10] The KLA (also known under its Albanian acronym UCK for Ushtria Clirimtare e Kosoves) was the main military organization fighting for the liberation of Kosovo from Serbian rule. Its origins go back as far as 1996. Only in November 1997, however, did UCK members identify themselves for the first time to the public.

[11] By early July, approximately 58,000 members of ethnic minorities in Kosovo, mainly Serbs, had left the territory and registered for assistance with the Yugoslav Red Cross. See further LAWYERS COMMITTEE FOR HUMAN RIGHTS, KOSOVO: PROTECTION AND PEACE-BUILDING: PROTECTION OF REFUGEES, RETURNEES, INTERNALLY DISPLACED PERSONS, AND MINORITIES 2 (1999).

[12] SC Res. 1244, *supra* note 3, para. 9(d). "Operation Joint Guardian" commenced on June 12, 1999.

[13] *See Controversy Erupts as Kosovo Judges Sworn in*, SHAPE News Morning Update, July 1, 1999 <http://www.fas.org/man/dod-101/ops/docs99/mu010799.htm>.

[14] *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 5(3), 213 UNTS 221: ("Everyone . . . shall be brought promptly before a judge or officer authorized by law to exercise judicial power . . ."). The term "promptly" represents a stringent standard. In Brogan v. United Kingdom, 145 Eur. Ct. H.R. (ser. A) at 28–30, paras. 49–53 (1988), *obtainable from* <http://www.echr.coe.int/eng/Judgments.htm>, the European Court of Human Rights held that four days and six hours was too long a period to meet this standard. *See also* International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 9(3), 999 UNTS 171.

[15] UN Secretary-General Kofi Annan was quoted as saying: "The security problem in Kosovo is largely a result of the absence of law-and-order institutions . . . ." *See* John J. Goldman, *Kosovo Tense But Getting More Stable, UN Reports*, L.A. TIMES, July 14, 1999, at A12.

[16] In February 1989, ethnic Albanians held widespread strikes in Kosovo, a province of the Republic of Serbia, to protest proposed constitutional amendments to the Serbian constitution aimed at limiting the province's autonomy status. The federal authorities of Yugoslavia imposed "special measures"—a de facto state of emergency—and sent troops into the province. On March 23, 1989, the constitutional changes were approved, effectively giving Serbia control over Kosovo's police and judiciary. In July 1990, following a resolution approved by 114 Kosovar Albanian delegates to Kosovo's assembly declaring the territory "an equal and independent entity within the

affected was the judicial sector: politically and ethnically motivated appointments, removals, and training had led to a judiciary in which only 30 out of 756 judges and prosecutors were Kosovar Albanian.[17] The exodus of the non-Albanian population of Kosovo, among them many of the Serb and Montenegrin lawyers who had administered Kosovo's justice system for the last decade, had accelerated the total collapse of the judicial system. The few judicial officials who decided to stay behind were considered to be representatives of the previous regime and soon faced death threats.

East Timor

As difficult as the situation was in Kosovo, the United Nations faced even greater challenges in East Timor.[18] UNTAET staff members will never be able to forget the panorama of devastation that awaited them upon their arrival in East Timor: most public and many private buildings ruined and smoldering in the midst of what had once been towns and villages, now all but abandoned by their former inhabitants, cut off from transport and communication, and lacking a governmental superstructure. Immediately after the popular consultation of August 30, 1999, heavily armed groups and forces sympathetic to the integration of East Timor into Indonesia had conducted a "scorched earth" campaign in which they had burned and looted entire towns and villages, attacked and killed at random in the streets, and forcibly "evacuated" or kidnapped people to the western half of the island, which was still part of Indonesia. In response, thousands of East Timorese had abandoned their homes, fleeing into the mountains of central East Timor or across the border into West Timor.[19] Many East Timorese towns and villages had turned into ghost cities in which virtually all houses, apartment buildings, and shops were demolished.

The preexisting judicial infrastructure in East Timor was virtually destroyed. Most court buildings had been torched and looted,[20] and all court equipment, furniture, registers, records, archives, and—indispensable to legal practice—law books, case files, and other legal resources dislocated or burned. In addition, all judges, prosecutors, lawyers, and many judicial support staff who were perceived as being members de facto of the administrative and intellectual privileged classes, or who had been publicly sympathetic to the Indonesian regime, had fled East Timor after the results of the popular consultation were announced. Fewer than ten lawyers were estimated to have remained, and these were believed to be so inexperienced as to be unequal to the task of serving in a new East Timorese justice system.

In this situation, it quickly became apparent to UNTAET officials that a justice system in East Timor, including the necessary regulatory framework, first had to be *built*—and built within the shortest possible time—before it could be *administered*, as called for in Security Council Resolution 1272.[21]

framework of the Yugoslav federation," Serbian authorities abolished both the assembly and the government of Kosovo, closed down the only Albanian daily, and took over the state-owned television and radio stations. *See* NOEL MALCOLM, KOSOVO, A SHORT HISTORY 346 (Harper Perennial 1999) (1998).

[17] *See* Secretary-General's Kosovo Report, *supra* note 5, para. 66.

[18] *See* James Traub, *Inventing East Timor*, FOREIGN AFF., July/Aug. 2000, at 74, 82–83.

[19] To date, the exact number of refugees and internally displaced persons in East Timor in October 1999 has not been definitely established. It has been estimated, however, that more than one-third of East Timor's pre–September 1999 population of some 800,000 was at least temporarily dislocated. According to UNTAET sources, a total of 162,444 refugees had returned to East Timor from abroad by May 31, 2000. In addition, tens of thousands of people who had temporarily left their homes and escaped to safer locations in the mountainous regions of East Timor had returned to their places of origin.

[20] According to the World Bank–sponsored Joint Assessment Mission to East Timor, over 70% of all administrative (i.e., government) buildings were partially or completely destroyed, and almost all office equipment and consumable materials totally destroyed. WORLD BANK, JOINT ASSESSMENT MISSION REPORT 4, para. 15 (Dec. 17, 1999), *obtainable from* <http://www.wbln0018.worldbank.org/eap/eap.nsf>; *see also* Report of the Secretary-General on the Situation in East Timor, UN Doc. S/1999/1024, paras. 11–13 (Oct. 4, 1999).

[21] *See* Hansjörg Strohmeyer, *Building a New Judiciary for East Timor: Challenges of a Fledgling Nation*, 11 CRIM. L.F. 259 (2000).

Most pressing was the need for a mechanism to review the arrests and detentions that had been carried out by the Australian-led INTERFET.[22] At the same time, the United Nations civil police force was faced with a growing number of ordinary crimes, including such serious offenses as violent assault, rape, and murder. INTERFET had established a temporary arrest and detention system that was run by military personnel but was neither mandated nor equipped to try, convict, or sentence criminal offenders.[23] Because of the scheduled gradual withdrawal of INTERFET from East Timor, beginning in December 1999, and the scarcity of immediately deployable international lawyers, UNTAET needed to install a civilian mechanism that, if nothing else, would provide the minimum judicial functions required upon arrest and detention.

The enormous task of rebuilding a judicial system had to be carried out in the initial stages of both missions, when the operation had a very small staff, logistics and a communications infrastructure were just being set up, mass media to support activities such as the search for qualified lawyers were not yet available, and construction materials for the building or refurbishment of destroyed judicial facilities and prisons were an extremely scarce commodity.[24] In addition, the lack of sufficient numbers of domestic translators—a problem common to most United Nations missions—affected cooperation with the local population in virtually all sectors of civil administration, but most tangibly in law enforcement.[25]

II. Immediate Measures

It was against this backdrop that the United Nations missions in Kosovo and East Timor began their respective efforts to plan, design, and put in place initial arrangements aimed at addressing urgent needs and serving as the nucleus for a future judiciary in each territory. The enormity of the task, and the extent to which it would mirror the obstacles being experienced in the political, economic, and humanitarian sectors of each mission, soon became evident.

Appointment of Judges and Prosecutors

In any legal system, the appointment of judges and prosecutors is a complex and multilayered effort. Despite the United Nations' comprehensive mandate and the urgent need to fill judicial positions as swiftly as possible, political considerations prevented the heads of the two missions from simply appointing candidates of their choosing. In view of the political and symbolic significance of such appointments in a postcrisis situation and the United Nations' desire to act in sharp contrast to the flagrant politicization of judicial appointments that had characterized the previous regimes, it was essential to proceed in a transparent and professional manner that would give legitimacy to the undertaking. First, capable candidates

[22] *See* SC Res. 1264, *supra* note 2. The INTERFET-run Forced Detention Center delivered over 25 detainees into the custody of the UNTAET civilian police and the East Timorese judiciary on January 14, 2000. Many of these detainees had been arrested by or handed over to INTERFET on charges of serious violations of international humanitarian and human rights law committed during the postballot violence.

[23] Based on its mandate to restore peace and security in East Timor, the Australian INTERFET contingent had created a temporary detention system. Individuals apprehended by INTERFET were held in the Forced Detention Center and granted an initial hearing by an INTERFET legal adviser within 24 hours. If not released, they were transferred, within 96 hours, to the Detention Management Unit for review of the detention order. The Detention Management Unit consisted of four additional INTERFET legal advisers (one reviewing officer, one prosecutorial officer, one defending officer, and one visiting officer) who reported to the commander of INTERFET on a daily basis. In addition, the International Committee of the Red Cross, the UN High Commissioner for Refugees, and family members were granted regular visits to ensure adherence to generally accepted prison standards.

[24] In Kosovo, since the Serb withdrawal was still ongoing and the public buildings subsequently required extensive de-mining and cleanup efforts, the de facto headquarters of UNMIK in the first two weeks was located in the residential building that had served as the living quarters of the initial UN staff since their arrival on June 13, 1999.

[25] See further *infra* note 41.

had to be identified; next, selections had to be made in accordance with objective and verifiable criteria and merit, but also in mind of the need for political or ethnic balance; and finally, the entire process had to be transparent and based on a sound legislative framework.

In both Kosovo and East Timor, the establishment of independent judicial commissions became the primary mechanism for the selection of judges and prosecutors and served as an important safeguard for the establishment of an independent and impartial judiciary.[26] The commissions were designed as autonomous bodies; they were to receive applications from persons with a law degree, at a minimum. The commission would then select candidates for judicial or prosecutorial office on the basis of merit and, eventually, make recommendations on appointments to the head of the UN mission. The East Timorese commission was also entrusted with drawing up codes of ethics for judges and prosecutors and acting as a disciplinary body to review complaints of misconduct.

Both commissions were to include local and international legal experts. In Kosovo, the Joint Advisory Council on Judicial Appointments,[27] later succeeded by the Advisory Judicial Commission,[28] was set up only two weeks after the arrival of the first UNMIK staff members. It initially comprised seven lawyers, including two Kosovar Albanians, one Bosniak (Muslim Slav), and one Serb, all of whom had extensive previous experience in the administration of justice in Kosovo, and three international lawyers from different international organizations. In East Timor, the Transitional Judicial Service Commission was a five-member body that included three East Timorese and two international experts, and was chaired by an East Timorese of "high moral standing."[29] The United Nations deemed it essential to recruit the majority of the commission members among local experts and to empower them to overrule the international members so as to build a strong sense of ownership over the new judiciaries and to inject as much domestic expertise as possible into the process. Over time, the international membership of the commissions was expected to be phased out, but a suitable mechanism would meanwhile have taken root through which future local governments could make nonpartisan judicial appointments.

Whereas the East Timorese leadership endorsed the composition of the Transitional Judicial Service Commission,[30] the appointment of the commission members in Kosovo prompted a more controversial reaction among UNMIK's local interlocutors, in particular representatives of the KLA. One of the Kosovar Albanian experts, who had been the last president of Kosovo's abolished Supreme Court, was considered to stand for the old Yugoslav order and was criticized for his involvement in the trials of Kosovo Albanian leaders in the aftermath of the 1989 strikes.[31] The Serb member was evicted from his apartment after only a few days in office. He then joined the general Serb exodus to Serbia proper and was threatened with death if he returned. For his part, the Bosniak member was immediately accused of having collaborated with the previous Serb-dominated regime in Kosovo. These reactions were perhaps to be expected, given the political turmoil taking place in

[26] *See* AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL'S 16 RECOMMENDATIONS TO THE PARTIES AT RAMBOUILLET, para. III (AI Index No. EUR 70/08/99, 1999).

[27] *See* UNMIK Emergency Decree 1999/1 (June 28, 1999).

[28] *See* UNMIK Regulation 1999/7 (Sept. 7, 1999). According to section 2.1 of this regulation, the composition of the commission was changed to eight local and three international lawyers, of different ethnicity and reflecting varied legal expertise.

[29] *See* UNTAET Regulation 1999/3, §2 (Dec. 3, 1999). The current chairman of the commission is Bishop Dom Basilio de Nascimento from the diocese of Baucau.

[30] The membership of the Transitional Judicial Service Commission was determined by the UN transitional administrator, in concert with the National Consultative Council (NCC). The NCC was the supreme body established by UNTAET to provide a consultative mechanism to ensure the participation of the East Timorese people in the decision-making process during the transitional administration in East Timor. The council consisted of 15 members, 11 of them East Timorese, appointed by the transitional administrator. In October 2000, the NCC was expanded into a 33-member body, in effect serving as the nucleus of an East Timorese parliament. *See* UNTAET Regulation 1999/2 on the Establishment of a National Consultative Council (Dec. 2, 1999).

[31] On the strikes, see *supra* note 16.

Kosovo and the clear divisions being created along ethnic lines. At the same time, as described in greater detail below, the efforts to achieve ethnic balance in accordance with the mission's stated policy,[32] coupled with the dearth of lawyers from which to draw in the setup phase of the mission, made it difficult to avoid such an outcome.

While obstacles such as these posed serious challenges to the missions' efforts to build new judicial systems in both territories, perhaps the greatest difficulty lay in identifying candidates who had the necessary professional experience and were also politically acceptable to the general public.

In Kosovo, from the outset the declared goal of the United Nations administration was to establish a judiciary that reflected the various ethnic communities.[33] Clearly, no reconciliation efforts, including the prosecution and trial of individuals suspected of grave violations of international humanitarian and human rights law, could succeed without an ethnically and politically independent and impartial judicial system that enjoyed the confidence of the population. As a practical matter, however, many Kosovar Albanian lawyers had belonged to the persecuted intellectual classes and had thus either gone underground or taken refuge abroad in the weeks and months preceding the deployment of UNMIK. Most of those who remained were considered to be collaborators with the previous regime. Even an immediate cross-organizational effort in neighboring Macedonia and Albania to screen refugee camps for lawyers did not yield the hoped-for results. Over the next few months, the time-consuming search for qualified legal personnel was taken up by the regional offices in Kosovo of the United Nations and the Organization for Security and Co-operation in Europe (OSCE),[34] which operated by word of mouth, district by district, networking through the few remaining lawyers and seeking nominations from the KLA and the Democratic League of Kosovo, Kosovo's main political forces at the time. Only gradually were a number of sufficiently qualified lawyers identified.

On June 30, 1999, two weeks after the arrival of the first UNMIK staff in Priština, the search had already yielded its initial results: the head of the United Nations mission was able to appoint nine judges and prosecutors, among them three Serb jurists, on the basis of recommendations of the Joint Advisory Council. They served as mobile units with jurisdiction throughout the territory of Kosovo. By mid-July, these judges and prosecutors had conducted hearings on 249 detainees in all of Kosovo's five districts, releasing 112. The initial appointments were controversial because of a perceived overrepresentation of Serb lawyers.[35] Nevertheless, by July 24, 1999, as the mission had gradually identified more lawyers, the number of UNMIK-appointed judges and prosecutors had risen to twenty-eight,[36] comprising twenty-one Kosovar Albanians, four Serbs, one Roma, one member of the Turkish community in Kosovo, and one Bosniak.

Although less complex politically, the task of identifying candidates for judicial or prosecutorial office in East Timor was equally herculean. The exodus of all Indonesian and pro-Indonesian lawyers, judges, and prosecutors, as well as many law clerks and secretaries, had left East Timor with a huge void in experienced legal personnel.[37] Under Indonesian rule, no East Timorese lawyers had been appointed to judicial or prosecutorial office. As a result,

[32] *See* SC Res. 1244, *supra* note 3, para. 10 ("to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo"); *see also* Secretary-General's Kosovo Report, *supra* note 5, paras. 40, 66.

[33] *See* Secretary-General's Kosovo Report, *supra* note 5, para. 66 ("There is an urgent need to build genuine rule of law in Kosovo, including through the immediate re-establishment of an independent, impartial and multi-ethnic judiciary.").

[34] The OSCE mission in Kosovo forms one of the four integral components of UNMIK and is responsible for matters relating to institution- and democracy-building, and human rights in Kosovo.

[35] The nine judges and prosecutors included five Kosovar Albanians, three Serbs, and one ethnic Turk. *See Controversy Erupts as Kosovo Judges Sworn in*, *supra* note 13.

[36] *See* UNMIK Press Release, July 24, 1999, UN Doc. UNMIK/PR/18; *see also* LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 11, at 5.

[37] The Australian Section of the International Commission of Jurists (ICJ) supported this assessment. *See* ICJ, REPORT ON VISIT TO EAST TIMOR FOR EAST TIMOR PROJECT COMMITTEE MARCH 2000 (2000).

there were no jurists left in East Timor with any relevant experience in the administration of justice or the practical application of law. Thus, immediately upon its arrival in Dili, UNTAET began the process, through word of mouth and with the support of its local staff and civil-society groups, of identifying lawyers, law graduates, and law students. In the absence of a functioning broadcasting network, INTERFET volunteered to drop leaflets from airplanes throughout the territory, calling for legally qualified East Timorese to contact any UNTAET or INTERFET office or outpost. Only a week later, an initial group of seventeen jurists had been identified. In their first meetings, the lawyers sat on the ground outside the former governor's headquarters, since the departing Indonesian security forces and pro-integration militias had left behind no chairs or other furniture in the looted and burned court buildings.

Within two months, over sixty East Timorese jurists had formally applied for judicial or prosecutorial office. All the applicants had completed law school—mostly in Indonesian universities—and were enthusiastic about the opportunity to play a historic role in the first criminal and civil trials of a free East Timor. They also took pride in being part of a judicial system that would strive to respect the rule of law and encourage, rather than inhibit, the professional participation of East Timorese. After a rigorous interview and selection process, conducted by the previously established Transitional Judicial Service Commission,[38] the transitional administrator appointed the first-ever East Timorese judges and prosecutors on January 7, 2000.[39] Further appointments have since followed. However, only a few of these jurists had any practical legal experience, some in law firms and legal aid organizations in Java and other parts of the Indonesian archipelago, and others as paralegals with Timorese human rights organizations and resistance groups; none had ever served as a judge or prosecutor.

In both missions, the rationale for the rapid appointment of local judges and prosecutors was based on numerous similar considerations. The most critical reason, as noted above with regard to East Timor, was the territories' lack, soon after the establishment of the missions, of a review mechanism for those who had been arrested and detained by KFOR and INTERFET. Neither the United Nations nor the international community at large was able, on such short notice, to deploy an adequate number of international lawyers with enough knowledge of the legal traditions of the administered territories.[40] In addition, the political sensitivity to the euphoria and excitement that had followed international intervention in both Kosovo and East Timor required accommodating the general expectation that the international community would demonstrate an immediate commitment to domestic involvement in democratic institution building, especially in the legal sector. Hopes for self-determination and self-government meant that the appointment of local judges—an unprecedented move, for example in East Timor, that was unknown even under Portuguese colonial rule—took on enormous symbolic significance. Moreover, both missions considered that the immediate involvement of local lawyers would avoid, or at least minimize, any disruptive effect on the judiciary once the limited international funds earmarked for financing international lawyers inevitably dwindled and forced their withdrawal. Finally, the experience of other United Nations missions has shown that the appointment of international lawyers leads to a myriad of practical concerns that would have overburdened the

[38] *See* UNTAET Regulation 1999/3 on the Establishment of a Transitional Judicial Service Commission (Dec. 3, 1999).

[39] The appointments on January 7, 2000, included eight judges and two prosecutors. Their swearing-in ceremony, held in the still-devastated shell of the courthouse in Dili, was an emotional experience for both the East Timorese and the internationals involved. Before some 100 members of the general East Timorese public and numerous representatives of the international community, UNTAET Transitional Administrator Sergio Vieira de Mello took the oath from each appointee and handed each one a black robe.

[40] Since the legal systems in both Kosovo and East Timor were based on civil law, potential international judges and prosecutors were required to have sufficient practical experience in the administration of justice in a civil-law system to be immediately operational. Moreover, those lawyers had to be proficient in English—the working language of the missions—and able to make a longer-term commitment.

missions in their setup phases, such as the costly requirements of translating laws, files, transcripts, and even the daily conversations between local and international lawyers,[41] as well as the enormous time and expense of familiarizing international lawyers with the local and regional legal systems.

Legal Assistance

The scarcity of experienced legal personnel affected the legal-assistance sector as well. Neither Kosovo nor East Timor boasted a developed legal aid system before the United Nations arrived in its territory. Faced with the high number of arrests carried out in the first weeks of the missions, the United Nations was impelled to live up to the due-process and fair-trial standards it itself had promoted for more than fifty years, and to ensure the provision of adequate legal counsel to the detainees. This was particularly important since many of those arrested belonged to certain ethnic or political groups or, in some cases, were suspected of grave violations of international humanitarian and human rights law, which made their cases politically sensitive.

In Kosovo, UNMIK identified lawyers of different ethnic backgrounds who were qualified and willing to serve as defense counsel in such cases, and it provided each detainee with a list of their names. The enormous number of detainees, however, by far exceeded the number of available lawyers. In East Timor, section 27 of UNTAET Regulation 2000/11 of March 6, 2000, expressly recognized the basic right to legal representation and the obligation to ensure effective and equal access to lawyers. Consequently, UNTAET set up the nucleus of an UNTAET-financed public-defender system; but owing to the scarcity of experienced lawyers, UNTAET identified only a relatively small pool of defenders.

Legal Training

The dearth of experienced lawyers placed a particular burden on the United Nations to ensure that adequate legal and judicial training programs were immediately put in place, so that the few available jurists, including the newly appointed judges and prosecutors, would be prepared, as soon as possible, to discharge their much-needed functions.

In East Timor, unlike other contexts in which the international community has supported judicial training programs, it soon became clear that professional legal training would need to extend beyond technical assistance: legal training was a pivotal element in building and empowering local judicial ranks and in creating a stable legal system. Such training had to focus not only on conveying legal and practical skills but, equally important, on fostering appreciation of the crucial role of the judiciary in society and the benefits of a culture of law. In a society that had never before experienced respect for the rule of law, and in which the law was widely perceived as yet another instrument for wielding authority and control over the individual, the meaning of independence and impartiality of the judiciary had to be imparted gradually.

To lay the foundation for comprehensive practical and theoretical training upon which the new East Timorese judiciary could be built, UNTAET developed a three-tiered approach consisting of (1) a series of one-week, compulsory "quick impact" training courses for judges, prosecutors, and public defenders prior to their appointment to office; (2) mandatory ongoing training for judges, prosecutors, and public defenders upon their appointment

[41] Extensive involvement of international lawyers would inevitably have led to the need for translation of every court session and every court-produced and legal document, the interpretation of every communication with other lawyers, and, more important, the creation of an extensive translation apparatus for plaintiffs and defendants. Also, in East Timor in particular, it has proven to be virtually impossible to deploy a sufficient number of international jurists with a civil-law background who are able to make a minimum commitment of six months to one year in East Timor and, ideally, have some knowledge of the applicable law and traditions of East Timor.

to office; and (3) a "mentoring scheme," in which a pool of experienced international legal practitioners who were familiar with civil-law systems would serve as "shadow" judges, prosecutors, and public defenders without actually exercising judicial power. This was essentially an interim approach; the mission recognized that it would ultimately be necessary to establish a judicial training center that functioned independently of the government and that afforded an important role in defining the curriculum to the East Timorese themselves.[42] However, its extremely stretched resources, and difficulties in recruiting a sufficient number of experienced trainers and mentors with a background in civil law, prevented the United Nations, at least at the outset, from fulfilling its objective of providing the newly appointed judges, prosecutors, and public defenders with sufficient legal training and assistance.

The need for judicial training also surfaced similar attention in Kosovo, although it was less dramatic because of the availability of a larger number of lawyers with practical experience in the administration of justice. The Secretary-General of the United Nations reported on July 12, 1999, that "it will be important to provide immediate 'quick start' training programmes in domestic and international law for those Kosovo Albanian lawyers who were trained during the time of the 'parallel institutions' or were banned from practising their profession."[43]

Nevertheless, the issue of training had to be tackled carefully. Bearing in mind the long legal tradition of the former Yugoslavia, many of the lawyers educated in Yugoslav universities considered the emphasis on professional training to be somewhat patronizing. For their part, Kosovar Albanian lawyers, particularly those schooled during the decade of "parallel institutions,"[44] reacted extremely cautiously to the notion of training for fear that the inadequacy of their experience and skills might disqualify them for judicial office or, yet again, provide an advantage to those who had "collaborated" with the previous regime. More readily accepted was the notion of training in international legal instruments, including the European Convention on the Protection of Human Rights and Fundamental Freedoms and the 1966 International Covenant on Civil and Political Rights, so as to ensure that, in conformity with UNMIK Regulation 1999/1, judicial officials observed internationally recognized human rights standards.[45]

UNMIK's plans to start legal training courses and create a judicial training center were severely hampered by a vigorous debate on the applicable law in Kosovo. Although Regulation 1999/1 provided that the laws previously in effect in Kosovo—that is, the currently appli-

[42] Supported by the New Zealand Institute of Judicial Studies, UNTAET has been developing plans to establish a Judicial Studies Board (JSB) since January 2000, in order to institutionalize judicial training and education. The JSB was intended to comprise seven members, four of whom would be East Timorese jurists, who would identify and set priorities regarding training needs, coordinate donor assistance on legal training, and promote judicial excellence, including awareness of the social context of law.

[43] Secretary-General's Kosovo Report, *supra* note 5, para. 69 (also stating that "[g]enerally, newly appointed judges should receive continuous training, particularly in the area of the law and application of international instruments on human rights").

[44] Following the abolition of Kosovo's autonomy status in 1989 and the subsequent closing of ethnic Albanian institutions in the territory, the Kosovar Albanian population established a system of so-called parallel institutions, essentially the creatures of a separate republic, among others in the educational sector, that were intended to continue Kosovo's self-government and to maintain a distinct Albanian culture and identity outside the official Serb- or Yugoslav-dominated institutions. With the closing of the Albanian wing of the law faculty of the University of Priština in 1991, the Kosovar Albanian teaching staff and students were forced to find shelter in private homes and buildings so as to continue a distinct legal education for those students. Despite the lack of governmental funding and severe practical difficulties—for example, all literature was kept in the libraries of the Serb faculty building, which was barred to Kosovar Albanians—the Faculty of Law, like all other faculties of the University of Priština, maintained its struggle to provide adequate education throughout the period of Serb administration of Kosovo. See further MALCOLM, *supra* note 16, at 348–49.

[45] UNMIK Regulation 1999/1, *supra* note 3, §2, which states:

> In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards and shall not discriminate against any person on any ground such as sex, race, color, language[,] religion, political or other opinion, national, ethnic or social origin, association with a national community, property, birth or other status.

cable laws of Serbia and the Federal Republic of Yugoslavia—were to be applied, political representatives of the Kosovar Albanians demanded a return to the legal system that had existed before the abolition of Kosovo's autonomy status in 1989.[46] This debate significantly delayed the mission's ability to carry out the urgently needed quick-impact training.

Reconstruction of the Physical Infrastructure

Both Kosovo and East Timor had just emerged from violent and highly destructive conflicts, which had heavily damaged their physical infrastructure. As a result, one of the most crucial steps in rebuilding their judicial systems was the physical reconstruction of the judicial infrastructure, including court buildings and offices.

In Kosovo, virtually all public buildings, including the courts, had to be cleared of mines and booby traps before they could be reclaimed for public purposes. In the course of the conflict, files had been dislocated, official forms and stationery had been destroyed, and valuable office equipment had been appropriated by the withdrawing security apparatus. The situation was so grave that the first UN-appointed judges and prosecutors had to bring their own dated typewriters to the initial hearings to be able to draft decisions and court records.

In East Timor, the situation was far worse: it was estimated that between 60 and 80 percent of all public and private buildings had been destroyed in the violence of September 1999.[47] As noted above, the destruction encompassed most court buildings and their office equipment and legal resources.

Step by step, UNTAET had to start rebuilding courthouses, police stations, and prisons. The first judges to be sworn in were required to work in smoke-blackened chambers and courtrooms that were devoid of furniture—much less computers and other apparatus—and nearly bereft of legal texts. None of the buildings had electricity or running water, since even the wiring and pipes had been stripped by the withdrawing Indonesian army and militia forces. Basic stationery and office equipment had to be provided out of UNTAET's own supplies, and official forms and stamps had to be re-created. More significantly, UNTAET struggled, on a daily basis, to identify and collect copies of the laws that, in accordance with its Regulation 1999/1, formed the applicable body of law. Sometimes UNTAET staff members were able to retrieve copies of law books from the ruins of official buildings, but mostly they sought donations from private law firms and law schools in Indonesia and Australia. The support of the Australian legal profession for UNTAET's efforts in this respect was exemplary,[48] the donations extending beyond law texts to include robes for the new judges and prosecutors and folding chairs for the court building in Dili.

The Correctional System

The correctional facilities met with the same fate as most of the other buildings and infrastructure during the violence in Kosovo and East Timor. The identification of suitable facilities in which to hold those apprehended and arrested by the international forces and the United Nations civil police thus became one of the most dramatic challenges faced by both missions.

In Kosovo, the withdrawing Yugoslav security forces had emptied all the prisons and "transferred" the inmates, among them many political prisoners of Kosovar Albanian origin, to unknown locations in Serbia proper. Moreover, many prisons had been damaged or destroyed and the guards had fled with the withdrawing forces. As a result, the hundreds of individuals detained in the first few weeks had to be held in makeshift military facilities,

[46] For more detail, see the section "Legal Framework" *infra* p. 58.

[47] *See supra* note 20 and corresponding text.

[48] In January 2000, Australian Legal Resources International appealed to the Australian legal profession, on behalf of UNTAET and through the Law Council of Australia, for law texts, courtroom furniture, computers, and judges' robes. The response was overwhelming.

which usually consisted of army tents in KFOR camps that were guarded by military officers who had no experience in the administration of prisons and international standards on the detention of civilians.

In East Timor, the situation was even worse. Not only had all the prison guards left during the exodus of the Indonesian security forces, but also all prison facilities had been burned and rendered unusable.[49] The limited capacities of the makeshift detention center inherited by the United Nations from INTERFET had been stretched to the maximum, leaving no more space for detainees and ordinary criminals. Consequently, the United Nations had to limit the number of arrests. At times, UN civil police officers were even forced to release suspects who had been arrested for serious criminal offenses so that they could detain returning militia members implicated in the commission of grave violations of international humanitarian and human rights law in the violence of August and September 1999. The failure to arrest such individuals would have been unacceptable in the eyes of both the general public and its political leadership.

The inadequacy of the interim facilities and the fact that the UN civil police were neither trained nor equipped to carry out the functions of prison wardens made it clear that the United Nations urgently had to reconstruct suitable facilities, identify experienced international wardens, and develop local capacities. These essential tasks were made difficult, however, by the reluctance of donors to fund, whether directly or indirectly, the reconstruction or erection of prison facilities, and of United Nations member states to provide contingents of prison personnel.

Legal Framework

All of these challenges were surpassed by the need to establish a basic legal framework for the judiciary in each territory. Judicial appointments, legal training, and the performance of judicial, prosecutorial, and other legal functions, all depended on the existence of a clear body of applicable law. Neither in Kosovo nor in East Timor did the previous legislation constitute a sufficient legal basis for the establishment of an independent and effective judiciary. Thus, in both territories the United Nations first had to draft regulations indicating which previously existing laws still applied, or setting forth entirely new laws, before it could establish the corresponding judicial and other public institutions.[50]

In their Regulation 1999/1, both UNMIK and UNTAET had decided in effect that the laws that had applied in each United Nations–administered territory prior to the adoption of Security Council Resolutions 1244 and 1272, respectively, would apply, *mutatis mutandis*, insofar as they conformed with internationally recognized human rights standards and did not conflict with the Security Council's mandate to each mission or any subsequent regulation promulgated by the mission.[51] This decision was made solely for practical reasons: first, to avoid a legal vacuum in the initial phase of the transitional administration and, second, to avoid the need for local lawyers, virtually all of whom had obtained their law degrees at domestic universities, to be introduced to an entirely foreign legal system.

Especially in Kosovo, this decision prompted vigorous protest by local politicians and the legal community. The Yugoslav criminal laws, in particular, were considered to have been one of the most potent tools of a decade-long policy of discrimination against and repres-

[49] On this subject, see the findings of Human Rights Watch, Unfinished Business: Justice for East Timor, Press Backgrounder (Aug. 2000).

[50] *See* UNMIK Regulations 1999/1, *supra* note 3; 1999/2 (Aug. 12); 1999/5 (Sept. 4); 1999/6 (Sept. 7); 1999/7 (Sept. 7) (replacing UNMIK Emergency Decree 1999/1); *see also* UNTAET Regulations 1999/1, *supra* note 3; 1999/3, *supra* note 29; 2000/11 (Mar. 6); 2000/14 (May 10); 2000/15 (June 6); 2000/16 (June 6).

[51] *See* UNMIK Regulation 1999/1 and UNTAET Regulation 1999/1, *supra* note 3, §§2, 3. The wording of section 3.1 of UNTAET Regulation 1999/1 (the factual statement "the laws applied" is used rather than "the applicable laws") carefully avoids the retroactive legitimation of the Indonesian occupation in East Timor.

sion of the Kosovar Albanian population.[52] The political representatives of the Kosovar Albanian community thus threatened to cease cooperating with the United Nations, and newly appointed judges and prosecutors resigned from office, demanding an immediate return to the laws applicable in Kosovo before the revocation of its autonomy status within Serbia. This demand was made primarily for political reasons, since these laws were by no means more democratic than the Yugoslav criminal laws. On December 12, 1999, UNMIK finally promulgated a regulation providing that the law in force in Kosovo prior to March 22, 1989, would serve as the applicable law for the duration of the UN administration, effectively superseding the relevant provisions in UNMIK Regulation 1999/1.[53]

In practice, moreover, the formula laid out in UNMIK and UNTAET Regulations 1999/1 proved to be rather difficult to apply in both Kosovo and East Timor, because it did not actually spell out the laws or specifically identify the elements that were inconsistent with internationally recognized human rights standards. Rather, it required the lawyers, many of whom were inexperienced, to engage in the complex task of interpreting the penal code or the criminal procedure code through the lens of international human rights instruments, applying those provisions that met international standards, while disregarding those that did not, and substituting for the latter the appropriate standard under international law. The difficulties that can arise are obvious. For example, whereas determining that a provision allowing twenty or more days of detention without a judicial hearing[54] violates international human rights standards is relatively easy, consistently defining the standard that should apply instead under such a provision is much more difficult. In both territories, only a few local lawyers were even familiar with the practical application of international human rights norms, which aggravated the situation.

Yet another challenge faced by both missions was to obtain, from the government that had just withdrawn, all the legislation constituting the applicable body of law and to translate these rules so that international experts could assist their local colleagues in the practical application of the formula contained in section 3 of UNMIK and UNTAET Regulations 1999/1, requiring consistency with international standards.

Thus, in practice, the formula introduced by the United Nations administrations in Kosovo and East Timor, which was aimed at avoiding a legal vacuum and ensuring that the laws applied conformed with international standards from the outset, led to considerable legal and political difficulties. In consequence, both United Nations missions ultimately had to conduct comprehensive reviews of all the legislation that was pivotal to the establishment of an independent and impartial judiciary, and the law-and-order sector more generally, and amend or supersede these laws as necessary through subsequent UN regulations. In the meantime, however, the United Nations civil police and the judiciary had to apply the existing legislation on a daily basis, trying their best, but struggling to do so in accordance with the requirements of UNMIK and UNTAET Regulations 1999/1.

III. CONCLUSION

The establishment of a functioning governmental structure, including the re-creation of the judicial branch, from "ground zero" is a daunting task. In recent years, the United Nations has been entrusted with providing assistance to the legal and judicial systems of several countries in postconflict situations, including, most recently, Cambodia, Haiti, and

[52] *See* Kaminski, *supra* note 8.

[53] According to section 1.1 of UNMIK Regulation 1999/24 (Dec. 12, 1999), "[t]he law applicable in Kosovo shall be: a. The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and b. The law in force in Kosovo on 22 March 1989." According to section 3, "[t]he present regulation shall be deemed to have entered into force as of 10 June 1999."

[54] *See* REPUBLIC OF INDONESIA, DEPARTMENT OF INFORMATION, LAW-BOOK ON THE CODE OF CRIMINAL PROCEDURE Arts. 20, 24 (n.d.) (Act No. 8/1981).

Bosnia and Herzegovina. Nowhere other than Kosovo and East Timor, however, did this task require the establishment of a coherent judicial and legal system for an entire territory virtually from scratch.

The experiences of the United Nations in Kosovo and East Timor have shown that the reestablishment, at a minimum, of basic judicial functions—comprising all segments of the justice sector—must be among a mission's top priorities from the earliest stages of deployment. Indeed, the absence of a functioning judicial system can adversely affect both the short- and the long-term objectives of the peace-building effort, including the restoration of political stability necessary for the development of democratic institutions, the establishment of an atmosphere of confidence necessary for the return of refugees, the latitude to provide humanitarian assistance, the implementation of development and reconstruction programs, and the creation of an environment friendly to foreign investment and economic development. The lack of adequate law enforcement and the failure to remove criminal offenders can inevitably affect both the authority of the mission and the local population's willingness to respect the rule of law. In the worst of cases, such an atmosphere can push self-proclaimed vigilante forces to take law enforcement into their own hands and resort to illegal detention, which can threaten the safety and security of the local population and the international staff. Finally, a functioning judicial system can positively affect reconciliation and confidence-building efforts within often highly traumatized postcrisis societies, not least because it can bring to justice those responsible for grave violations of international humanitarian and human rights law.

The United Nations' most recent experiences in transitional administration demonstrate that justice, and law enforcement more broadly, must be seen as effective from the first days of an operation. The inability to react swiftly to crime and public unrest, particularly in postconflict situations when criminal activity tends to increase, and the failure to detain and convict suspected criminals promptly and fairly, can quickly erode the public's confidence in the United Nations. In Kosovo, a total of 14,878 criminal offenses were reported from January to August 2000 alone; over the same period 3,734 people were arrested.[55] Thus, the establishment of effective judicial institutions can be critical to the long-term success of a mission and the sustainability of its governance and democratic-institution-building efforts.

Given the current prevalence of intrastate conflicts and the likelihood that such conflicts will lead to the emergence of autonomous regions or independent states in the future, the United Nations may be asked to establish a transitional administration for other situations, which will inevitably include the creation of a judicial system. The enormous difficulties encountered in Kosovo and East Timor in this respect have shown that the United Nations and the international community at large must enhance their rapid-response and coordination capacities so that the necessary attention and resources can be directed to this key area of civil administration. While international civilian policing resides at the core of prototypical peacekeeping operations, this element cannot be focused on at the expense, or without due consideration, of the other elements of a functioning law enforcement and judicial system.

In addition to early and sensible mission planning, involving representatives of the local legal profession, and committing the necessary financial and human resources, implementing the following recommendations would further enhance the United Nations' capacity to build or reconstruct postcrisis judicial systems.

1. Establishment of judicial ad hoc arrangements. A law enforcement vacuum in the early days of a mission should be avoided by establishing ad hoc judicial arrangements to facilitate the detention and subsequent judicial hearings on individuals who are apprehended on crim-

[55] *See* INTERNATIONAL CRISIS GROUP, KOSOVO REPORT CARD 31, 44 (ICG Balkans Report No. 100, 2000) (stating that the criminal offenses "included 172 murders, 116 kidnappings, 160 attempted murders, and 220 grievous assaults").

inal charges. The UN experience in both Kosovo and East Timor demonstrates that, where there has been a complete breakdown of the judicial sector, the quick deployment of units of military lawyers, as part of either a United Nations peacekeeping force or a regional military arrangement such as KFOR and INTERFET, can fill the vacuum until the United Nations is staffed and able to take over what is ultimately a civilian responsibility.[56]

The advantage of such an arrangement would be that military lawyers, who would make up an integral part of the peacekeeping force, could be rapidly deployed together with the troops. In contrast, civilian United Nations staff, many of whom must go through a lengthier recruitment process, cannot be immediately deployed. In this emergency phase, military lawyers would have to be in a position to execute legal functions, including arrest, detention, prosecution, and initial adjudication, immediately, without engaging in the time-consuming task of assembling and familiarizing themselves with local laws. Thus, as a practical matter, they would all have to come from the same country and to apply the laws in force in that country.[57] It would be understood, however, that such military arrangements would remain in place only for a limited and clearly defined period of time, until responsibility could be handed over to an adequately functioning civilian body. Moreover, any such arrangements would have to accord strictly with internationally recognized human rights and other relevant legal standards.[58]

Intuitively, one would hesitate to involve military actors in this sensitive area of civil administration, but in the absence of sufficient and immediately deployable civilian resources, it may be the only appropriate response to avoid the emergence of a law enforcement vacuum. The experiences in both Kosovo and East Timor have proved that the emergence of such a vacuum can ultimately be more detrimental to the objective of developing an independent judicial system and effectively protecting a population's human rights than the establishment of a temporary military-run judiciary.

The establishment of ad hoc military arrangements for a transitional period would provide the United Nations with the time and space to devise the appropriate legal system for the duration of the transitional administration and to take the necessary steps toward building the foundation for a truly independent judicial branch. Such a system would help the mission avoid the sense of urgency that could drive it to fill judicial positions with individuals who might turn out not to enjoy the general acceptance of the local population and its leadership, as happened in Kosovo, or to grapple early on with the practical problems posed by the lack of experienced lawyers, as happened in East Timor. Moreover, this approach would permit the United Nations to carry out a proper assessment of the available human and physical resources, possibly including the screening of applicants for serious violations of international law, to give due consideration to existing political and cultural sensitivities, and to provide initial legal training as necessary.

2. Formation of a standby network of international lawyers. Regardless of the institution of ad hoc military arrangements, the United Nations must enhance its own capacity to establish a functioning judiciary as rapidly as possible, by ensuring that the fundamental task of judiciary building is part of its emergency first-phase response. It is thus imperative for the

[56] Compared to the improvised policy in Kosovo, the existence in East Timor of the INTERFET-sponsored Detention Management Unit, *see supra* note 23, until early January 2000 allowed UNTAET at least to engage in more in-depth planning of the future judicial system and to carry out the difficult search for East Timorese jurists.

[57] Ideally, they would apply the set of interim rules on criminal procedure and substantive criminal law referred to in the fourth recommendation at p. 62 *infra*.

[58] The United Nations' Model Agreement with member states that contribute personnel and equipment to peacekeeping operations includes the following standard provision: "[The United Nations peacekeeping operation] shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel." *See* Daphna Shraga & Ralph Zacklin, *The Applicability of International Humanitarian Law to United Nations Peace-Keeping Operations: Conceptual, Legal and Practical Issues, in* INTERNATIONAL COMMITTEE OF THE RED CROSS, SYMPOSIUM ON HUMANITARIAN ACTION AND PEACE-KEEPING OPERATIONS 39, 44 (Umesh Palwankar ed., 1994).

United Nations to develop a standby network (as opposed to a costly standing capacity) of experienced and qualified international jurists that can be activated at any given time. In view of the significant practical differences between the common-law and civil-law systems, experts in both systems should be recruited in sufficient numbers to ensure that they can adequately respond to the specific needs of the territory to be administered. Since quick deployment is crucial to the effectiveness and credibility of an operation in its early stages, the United Nations should create a network based on standby agreements with member states, agencies, and academic institutions to facilitate the mobilization of these jurists on short notice, within a few days, if required. If provided with ongoing training in international legal and human rights standards, and updated information on international instruments and judicial developments, the members of this network would eventually constitute a sufficient number of qualified international lawyers, who could work as trainers, mentors, judges, and prosecutors.

3. Immediate reconstruction of the correctional system. In view of the enormous difficulties experienced in both Kosovo and East Timor in this sector, urgent priority must be given to the immediate establishment of an adequate prison infrastructure. A functioning correctional system is not only complementary, but also inextricably linked, to the creation of a functioning law enforcement mechanism. Despite the reluctance of many donors to finance correctional facilities, such a mechanism cannot be established without sufficient and quickly disbursable funding for immediate reconstruction efforts. Thus, the United Nations must make a concerted effort to convince donor countries that funding for this crucial task must be incorporated, from the outset, in the consolidated budget for the activities of a transitional administration, and based on assessed rather than voluntary contributions. In this connection, the United Nations should not fail to include a sufficient number of professional international prison guards and wardens in its mission planning and budgeting.

4. Creation of an immediately applicable legal framework. The availability of an immediately applicable legal framework is an important prerequisite for the building of judicial institutions. Capacities within and outside the United Nations must thus be identified for quickly drafting new legislation in accordance with internationally recognized standards and with due consideration to the legal traditions (i.e., civil law or common law) of the territory at issue. To facilitate this effort, the United Nations must develop standby arrangements with partner agencies such as the World Bank, the International Monetary Fund, and the Council of Europe, as well as with universities and nongovernmental organizations. Particularly in the setup phase of a mission, and at its request, these agencies could prepare initial drafts that would subsequently be finalized by the United Nations in concert with local lawyers. Significantly, such arrangements would promote early cooperation, without requiring lengthy assessment and approval procedures in advance.

In this regard, a body of law-enforcement-related legislation should be developed as part of a "quick-start package" for United Nations–administered territories. Readily applicable criminal procedure and criminal codes, as well as a code regulating the activities of the police, have proved to be essential to the unimpeded functioning of the UN civil police component of peace-building missions. First of all, the UN civil police need to act with legal certainty and in accordance with clearly spelled-out legal provisions so as to carry out their daily law enforcement activities effectively and without fear of breaching the law. Second, the civil police need a clear legal framework in which to train the future local police force in democratic policing. Third, newly appointed judges, prosecutors, and lawyers must be clear as to what the applicable law is in order to execute their functions. Thus, as an indispensable initial step, the United Nations must draft a set of interim rules of criminal procedure and substantive criminal law in core areas of police activity, including arrest/detention and searches/seizures. In the long term, the United Nations could promote the development of a model criminal procedure code that would be used by all UN missions

that are mandated to rebuild a legal system, including the temporary ad hoc military arrangements referred to above. In areas other than criminal law, UN regulations from previous missions could serve as model regulations where applicable.

5. Prioritization of legal training. The international community must play an active role in providing adequate professional training to newly appointed lawyers, judges, and prosecutors so that the judiciary will be equipped with the highest level of technical competence, will be strongly committed to the principles of judicial independence, and as an institution will respect human rights and understand how to protect these rights in its day-to-day work.

Professional legal training in complex postcrisis situations such as those in Kosovo and East Timor extends beyond technical assistance. It is a pivotal element of capacity building and empowerment for the creation of a stable legal system. For example, given the lack of East Timorese experience in the administration of justice, the United Nations should ideally have been in a position immediately on deployment to provide quick-impact training and mentoring programs on core issues such as pretrial standards, the conduct of hearings, and the drafting of detention orders. For, in addition to enhancing appreciation of the judiciary's role in society, such training would also advance the concept of an independent and impartial judiciary as protecting rights and freedoms, rather than as serving as an instrument of repression, power, or control. However, the necessary training and mentoring programs for local lawyers cannot be implemented unless sufficient financial and human resources are obtained. The initial establishment of a comprehensive database, including reference to potential providers of judicial training and their programs, would help to ensure a quicker response in this regard.

None of the above recommendations is intended to provide the final answer on how best to build a judiciary from scratch, since every postcrisis situation is unique and requires an adapted response. The international community will have to accept that such a process requires its commitment and that of the United Nations system from the very start and, even then, is bound to experience serious setbacks. Yet careful consideration of how an independent and operational judicial system can enhance the long-term objectives for the territory to be administered maximizes the chances that the United Nations will succeed in creating a secure environment and guiding a postconflict society toward political stability, economic recovery, and reconciliation.