A. INTRODUCTION

At the beginning of 2000, the only international humanitarian law or criminal law judges and prosecutors were part of international tribunals at The Hague and Arusha, which stood separate from local judicial systems. Peacekeeping missions had often involved international rule-of-law assistance and expertise provided by the United Nations (UN), the Organization for Security and Cooperation in Europe (OSCE), and the American Bar Association’s Central and Eastern European Law Initiative (ABA/CEELI) and many other international organizations. Peacekeeping missions with “heavy footprints” sometimes involved monitoring and even supervision by international authorities, such as the UN Mission in Bosnia & Herzegovina (UNMIBH)—for police—and the Office of the High Representative and UNMIBH’s Judicial System Assessment Programme—for judiciary. But international judges and prosecutors in missions were limited to assistance, monitoring or oversight: They did not participate or act within the domestic judicial system.

Then, in February 2000, for the first time, the United Nations inserted international judges and prosecutors (IJP) into a local criminal justice system to work alongside local judges. Internationals in the United Nations Mission in Kosovo (UNMIK) were granted the same competencies as the locals, except that the IJP were limited to criminal cases. A year later, the Kosovo IJP program had evolved into a system of special international-majority trial and appellate panels, which were assigned by UNMIK to all war crimes cases, as well as all significant cases of organized crime and “power vacuum” and “payback” crimes,” including terrorism, inter-ethnic violence, political assassinations, and corruption.

Soon thereafter, IJP were also appointed in East Timor, and later to the Special Court of Sierra Leone and the Special Chamber of Bosnia & Herzegovina.
Cambodia’s Extraordinary Chambers were recently approved by the UN and are under consideration by the Cambodian National Assembly. The Kosovo IJP were unlike these internationalized courts that followed, however, in that Kosovo IJP had the broadest jurisdiction; its IJP could take on any case of any crime, including new cases and cases already assigned to local judges, while IJP subject-matter jurisdiction in other countries was usually limited by law to certain categories—war crimes, or crimes committed in conjunction with war crimes during a specific conflict.

The ability of Kosovo’s IJP to take on any crime by selecting any case and any type of crime proved to be a double-edged sword. On the one hand, the unlimited flexibility of Kosovo’s IJP to select any case is an advantage because an impartial international panel can provide justice in any politically explosive case for which the local judges do not yet have the appearance of partiality or the capacity to withstand pressure or threats, such as a domestic-violence case of an organized crime kingpin or a political assassination by feuding party factions. On the other hand, this flexibility in case selection is arguably vulnerable to political abuse and has been criticized by some as a violation of judicial independence because, in the absence of transparent criteria defining international jurisdiction, the UNMIK administration can take any case from the local judiciary and require an international panel. Others regard it as a threat to the judicial principles, valued heavily in civil law especially, of certainty and legality. Nor can the potential negative effect upon the local judiciary’s capacity and professionalism be ignored, for without an effective transitional phase-out of IJP, the local judges will lack experience in trying such politically sensitive cases that would otherwise build their capacity for justice.

This article will discuss the three phases of international involvement in justice in Kosovo. First, the period from June 1999 through February 2000, during

1 For example, even if a case had already been assigned by the local court President to a local investigative or presiding judge, or by the local District Prosecutor to a deputy district prosecutor.

2 Under the UN Transitional Administration in East Timor (UNTAET), IJP-majority panels with a third local judge have exclusive jurisdiction of war crimes, crimes against humanity (CAH), genocide, and torture, and of murder and rape committed between 1 January 1999 and 25 October 1999. Sierra Leone’s Special Court IJP and Cambodia’s IJP will adjudicate only war crimes, CAH, and genocide; Sierra Leone’s IJP also have jurisdiction over wartime violations of sexual abuse of girls and arson during the conflict. Bosnia & Herzegovina’s State Court level will have two special chambers for IJP: one for war crimes, CAH and genocide, and one for trans-entity organized crime and economic crime. (The entities referred to are Serbia and Bosnia & Herzegovina.)

3 The currently discussed transition models assume a simple linear phase-out (e.g., only minority IJP representation in trial courts, then no IJP in trial courts but minority IJP representation on the Supreme Court, etc.), and some even assume that if the final status of independence is granted, then the presence of IJP should cease. This is not necessarily the best policy, nor is it necessary. The use of IJP and oversight of the court system in Bosnia by OHR demonstrate that state status is not a bar to continued use of IJP or international oversight.