

# FROM NUREMBERG TO KOSOVO—TWO IOWA JUDGES STEP OUTSIDE THEIR JURISDICTION TO PROMOTE INTERNATIONAL LAW

*Larry J. Eisenhower\**

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\* Judge, Iowa Court of Appeals. B.A., Emporia State University, 1968; J.D., Drake University, 1974. Special thanks to Drake University Law School students Megan Erickson, Laura Jontz, and Amber Rutledge for their assistance with this project.

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## I. INTRODUCTION

This Article describes my experience as a judge in Europe, as well as that of another Drake University Law School graduate—Charles Wennerstrum. Wennerstrum went to Nuremberg, Germany, in 1946.<sup>1</sup> He presided over the trial of several high ranking German officers charged with war crimes committed in Yugoslavia—applying the law that had developed in the major international trial of Herman Goering and other Nazi leaders. The trials at Nuremberg set the stage for the current tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). I was part of the United Nations Mission in Kosovo (UNMIK) for six months in 2005. I sat in a hybrid court with other international as well as local Kosovar judges, applying local law.

No telling of these experiences would be complete without reference to the history of the attempts to civilize war and to hold war criminals accountable. As an undergraduate I majored in history and as a graduate student I studied the history of the Balkans. Despite attending law school and becoming a lawyer, I never lost interest in history and while attending a course on war crimes sponsored by the National Judicial College I was asked about my knowledge of Charles Wennerstrum and Nuremberg. Knowing nothing about Wennerstrum led to my investigation and discovery of his papers at Drake University.<sup>2</sup> With this background, in the fall of 2004 I found a copy of a letter on my desk. The letter, from Judge Mark Bennett of the Northern District of Iowa, referred to a request by Judge Jack Tunheim of Minnesota looking for Iowa state court judges interested in serving in Kosovo.<sup>3</sup> The letter was left on my desk by Justice

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1. Charles Wennerstrum, a 1914 graduate of the Drake University Law School and Justice of the Iowa Supreme Court, presided over *United States v. List*. Wennerstrum died on June 1, 1985 at the age of ninety-six.

2. Wennerstrum's papers relating to the Nuremberg cases and his legal career are currently stored in the Rare Books Room of Opperman Law Library at the Drake University Law School.

3. Judge Tunheim has been to Kosovo ten times since the war ended there in 1999, the first time being within months of when the fighting ended. He has been a key person in drafting many of the proposals for the reestablishment of the local court system. Because of his lobbying, the U.N. finally agreed to take American judges into

Michael Streit of the Iowa Supreme Court—and a hand-written note attached to the letter said: “Here is your next job.” Justice Streit knew of my interest in both war crimes and the Balkans. I contacted Judge Tunheim, who referred me to the appropriate person at UNMIK. By early 2005, I had completed the application, been vetted, been interviewed over the phone with a panel from Pristina, Kosovo, and had been hired.<sup>4</sup>

I began my Kosovo adventure on March 28, 2005.<sup>5</sup> During my six-month stay in Kosovo, I witnessed several instances of ethnic violence, but those events, however, were nothing compared to the horrors of the 1998–1999 conflict, the bombing of a busload of Serbs in February 2000, or the riots of 2004. They also did not compare to the horrors presented to Justice Wennerstrum at Nuremberg.

Wennerstrum went to Germany in the wake of the largest conflagration to ever engulf the world. World War II, which ended in Europe in 1945, left Germany devastated and the world thirsting for revenge. The attempt by Serbia to drive ethnic Albanians from Kosovo and the NATO bombing campaign of 1999 left Kosovo similarly devastated, without a functioning judiciary and with a divided population seeking revenge against each other. Separated by almost sixty years, two Iowa judges, Charles Wennerstrum and I, participated in the early attempts to bring justice to these war-ravaged areas.

## II. A BRIEF HISTORY OF THE DEVELOPMENT OF INTERNATIONAL LAW

### A. *Ancient Laws of War*

War crimes and the tribunals that oversee the prosecutions of war criminals are not a recent phenomenon. While there is broad familiarity with war crimes trials from Nuremberg in the 1940s to the present day tribunals, war crimes trials that took place centuries before World War II are largely unknown. This is unfortunate because “[t]he concepts of war crimes, laws of war, and international humanitarian law can be traced back to antiquity.”<sup>6</sup>

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the international judge program.

4. I was interviewed by Director of the Department of Justice, Thomas J. Monaghan, and international judges Carol M. Peralta (Malta) and Ioan Tudorache (Romania).

5. With the agreement of my eight colleagues on the Iowa Court of Appeals, I was able to take a six-month unpaid leave from the court.

6. Steven Feldstein, Comment, *Applying the Rome Statute of the International Criminal Court: A Case Study of Henry Kissinger*, 92 CAL. L. REV. 1663,

In the sixth century B.C., Sun Tzu, the Chinese warrior, drafted the first writings detailing the strategy of war in *The Art of War*.<sup>7</sup> Tzu detailed several limitations to war strategy based on humanitarian considerations.<sup>8</sup> “Tzu instructed that prisoners of war were to be treated kindly and that injured enemy soldiers were to be given care. He also declared that punitive and excessive military measures against an enemy country were not to be countenanced.”<sup>9</sup> Although *The Art of War* is the earliest example of an ancient society’s attempt to limit inhumane conduct during wartime, ancient China was certainly not the only society to do so.<sup>10</sup> One scholar has noted that the laws of war originated in ancient times and were based upon the principle of necessity and the principle of humanity.<sup>11</sup> The principle of necessity generally permitted world militaries to do whatever needed to be done to win the conflict.<sup>12</sup> Counterbalancing the potential cruelty of the

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1675 (2004); see also GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 201 (3d ed. 2006) (“All civilizations have fought wars according to rules designed to make them marginally less bloody.”).

7. Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 684 (1997).

8. *Id.*

9. *Id.* at n.4 (citation omitted).

10. Many other ancient civilizations also advocated restraint in wartime for humanitarian considerations. *Id.* at 684–85. For example, before and during the life of Sun Tzu, other cultures including the Sumerians, Babylonians, Persians, and Hittites “formulated rules or codes that were designed to regulate and provide structure to armed conflict.” Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 177 (2000). Only one century after Sun Tzu wrote *The Art of War*, a Spartan commander structured a body resembling a modern tribunal to determine the appropriate punishment for Athenian POWs who had violated the laws of war. McCormack, *supra* note 7, at 685–86. Soon thereafter, in approximately 200 B.C., Hindus in South Asia developed the Code of Manu which is the “oldest and most authoritative repository of Hindu Law.” *Id.* at 686. The Code of Manu not only included “principles of civilized warfare” but provided for judicial processes to deal with violations of the laws of war. *Id.* at 686–87. The Romans compiled two sets of military laws in sixth century A.D., the *Strategica* (Articles of War) and *Military Laws From Ruffus*. *Id.* at 687. The publications not only listed “humanitarian limitations on the conduct of war,” but listed penalties for exceeding the limitations imposed. *Id.* at 687–88. Soon after the Roman codification of the rules of war, the second “Mohammedan oath” was taken in 621 A.D. *Id.* at 688. The oath required a commitment to jihad, but with the limitation of no mutilation of the bodies of the slain. *Id.* Christianity and Judaism also contributed to the evolution of international law as humanitarian values provide the basis for some rules of law in the Old Testament. Noone, *supra* at 182–83.

11. ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE 12 (1998).

12. *Id.*

principle of necessity was the principle of humanity, which prohibited tactics causing “unnecessary suffering.”<sup>13</sup>

### B. *The Middle Ages*

The Middle Ages in Europe were marked by “a growing acceptance of limitations on the conduct of armed conflict and of a doctrine of personal responsibility for violations of proscribed activities.”<sup>14</sup> The first documented international war crimes trial took place in Breisach, now a city in Germany, in 1474.<sup>15</sup> Peter von Hagenbach, the governor of Breisach, was tried, convicted, and ordered to be executed by judges of the Holy Roman Empire for violations of the “laws of God and man.”<sup>16</sup> The violations were committed against the citizens of Breisach and included rape, murder, confiscation of private property, and illegal taxation.<sup>17</sup> Interestingly, von Hagenbach unsuccessfully raised what is now called the “Nuremburg defense” by asserting that he was acting on superior orders.<sup>18</sup>

In the centuries prior to the von Hagenbach trial, the customary rules of war were largely ignored and violations of the rules largely unpunished.<sup>19</sup> The trials that did take place in response to “crimes committed in connection with armed conflict [took place] before national courts.”<sup>20</sup> Examples of these national or domestic adjudications, as opposed to international adjudications, took place in 1268 and 1305.<sup>21</sup> Although the tribunals overseeing these trials were national, at times the rule of law applied included “violations of treaties and customary international law.”<sup>22</sup>

13. *Id.*

14. McCormack, *supra* note 7, at 689.

15. Noone, *supra* note 10, at 181.

16. NEIER, *supra* note 11, at 12. The tribunal that convicted von Hagenbach consisted “of twenty-eight judges from the allied States” of the Holy Roman Empire and because of this, some scholars dispute the international character of the von Hagenbach tribunal. *See* McCormack, *supra* note 7, at 691.

17. Noone, *supra* note 10, at 181–82.

18. *See id.* at 182 n.25. The Nuremburg defense raised in von Hagenbach’s trial was rejected “as being contrary to the law of God.” Jordan J. Paust, *Selective History of International Tribunals and Efforts Prior to Nuremberg*, 10 ILSA J. INT’L & COMP. L. 207, 207 (2003).

19. Noone, *supra* note 10, at 181 (discussing Genghis Khan and the Mongol army’s infamous ruthlessness in battle as well as the brutality exhibited by both sides during the Crusades).

20. *Id.*

21. *Id.*

22. Paust, *supra* note 18, at 207.

In 1268, Conradin von Hohenstafen was executed after trial by a domestic tribunal in Naples “for initiating an unjust war or what we term . . . [a] war of aggression.”<sup>23</sup> In 1305, famed Scottish nationalist, Sir William Wallace, was tried, convicted, and sentenced to death by a domestic English Court for “excesses in war sparing neither age nor sex, monk nor nun.”<sup>24</sup>

The Middle Ages were marked by many other developments in the field of international law, including the adoption of laws of war in both Sweden and the Free Netherlands.<sup>25</sup> “The trend among various states toward the codification of the laws of armed conflict, and the creation of judicial structures for the enforcement of those rules, established important precedents for other regions of the world . . . and acceptance of international instruments regulating the conduct of armed conflict.”<sup>26</sup> Additionally, “the Christian writings of St. Augustine and St. Thomas Aquinas . . . offered some guidance in this period.”<sup>27</sup> These writings included the concept of a “Truce of God,” which created the right of asylum in churches.<sup>28</sup> These Christian writings were complemented by “the rules of chivalry that prohibited attacks on the sick and the wounded or on women and children . . . [and] were comprehensively codified as early as 1625 by a Dutch scholar, Hugo Grotius.”<sup>29</sup>

23. *Id.*

24. McCormack, *supra* note 7, at 689 (internal quotation marks omitted) (quoting George Schwarzenberger, *The Judgment of Nuremburg*, 21 TUL. L. REV. 329, 330 (1947)).

25. *Id.* at 692.

26. *Id.* at 693.

27. Noone, *supra* note 10, at 185–86.

28. *Id.* at 186.

29. NEIER, *supra* note 11, at 13. Grotius is often called “the father of modern international law” due to this codification, published as *De jure belli ac pacis*, and his “insiste[nce] that war should be governed by a strict set of laws.” Noone, *supra* note 10, at 187 (quoting Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49, 61 (1994)) (internal quotation marks omitted). Whether Grotius’s work had any real impact or represented a true change in humanitarian law is a matter of debate. Compare MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS 1789–1914*, at 44 (2004) (describing the effect of Grotius’s work as “produc[ing] a wonderful impression on the public mind of Christian Europe, [which] gradually wrought a most salutary change in the practical intercourse of nations in favour of humanity and justice” (quoting H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW WITH A SKETCH OF THE HISTORY OF THE SCIENCE* 30 (1836))), with ROBERTSON, *supra* note 6, at 202 (“Scholars like Grotius . . . who rationalized war law in the seventeenth and eighteenth centuries were at pains to identify ‘just’ wars and to protect non-combatants, but always subject to military exigency and to the policy requirements of rulers for whom wars . . . were necessary diplomatic activities.”).

### C. Developments Prior to World War I

At the end of the Middle Ages and the beginning of modern times, “the firearm was invented, and . . . armies consist[ing] of hir[ed] mercenaries” were created.<sup>30</sup> The mercenaries were not well-versed in the chivalric codes that governed medieval knights and “made no distinction between combatants and the civilian population.”<sup>31</sup> Much of the brutality of the hired armies during the Thirty Years War can be attributed to the lack of pay, supplies, and food which forced the mercenaries to “ravage the countryside” in order to survive.<sup>32</sup> After it was discovered that “soldiers who were regularly fed and paid, and who did not have to forage for food and shelter, could be disciplined and trained, . . . the customs and rules governing the conduct of occupying troops, requiring respect for the lives . . . of the civilian inhabitants” evolved.<sup>33</sup>

The customary rules of war were not widely embodied in binding international agreements until the nineteenth century.<sup>34</sup> Many international law scholars attribute the acceptance of these rules by governments, along with the promise to abide by them, to the development of the war correspondent.<sup>35</sup> The use of war correspondents during the Crimean War (1854–1856), along with the increased use of the telegraph, is thought to have invited public scrutiny and incited public outcry to sometimes brutal wartime practices.<sup>36</sup> One noted example during this era “was that the British public became aware of the dismal state of the army’s medical services, prompting Florence Nightingale to sail to the Crimea with thirty-eight nurses to provide the needed care.”<sup>37</sup> Nightingale’s experience heightened public concern for the medical treatment of the wounded and the Red Cross Convention was adopted soon after.<sup>38</sup>

30. Noone, *supra* note 10, at 186.

31. *Id.* at 186–87.

32. *Id.* at 187.

33. *Id.* (internal quotation marks omitted) (quoting TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 6 (1992)).

34. NEIER, *supra* note 11, at 13.

35. *Id.*

36. *Id.* at 13–14. War correspondents “were first employed during the Crimean War, of 1854–56, when Samuel F. B. Morse’s new invention, the telegraph, had just come into general use.” *Id.* at 13.

37. *Id.* at 14.

38. *Id.* The 1864 Geneva conference included “twelve European nations [that] signed the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. . . . This convention . . . stated ‘that wounded enemy soldiers were to be collected and cared for in the same way as members of friendly armed forces.’”

The countries of Europe and Asia were not alone in their growing desire to somewhat limit the brutal manner in which wars were often waged—the United States of America also contributed to this development. In the wake of the American Civil War (1861–1865), Americans began to question the savage consequences of war as correspondents “gave the American public a window on the battlefields.”<sup>39</sup> The most notable American contribution to international law was the Lieber Code developed in the aftermath of the Civil War.<sup>40</sup> Francis Lieber immigrated to the United States after serving as a German soldier against Napoleon, became a U.S. citizen in 1832, and subsequently a professor at Columbia Law School.<sup>41</sup> Lieber’s personal connections to the trauma of war went beyond his own experience. His three sons fought in the Civil War—two for the Union Army and one for the Confederacy.<sup>42</sup> The son fighting for the Confederacy was killed and one of the sons fighting for the Union lost an arm.<sup>43</sup> It was when Lieber went to Tennessee to visit his wounded son that he met General Henry W. Halleck, who was later appointed as President Lincoln’s military adviser.<sup>44</sup> After this appointment, General Halleck commissioned Lieber “to propose a code of regulations for the government of Armies in the field of battle authorized by the laws and usages of war.”<sup>45</sup> The Lieber Code “deals with prisoners, the rights of noncombatants, partisans and spies. In a few instances it prohibits particular means of warfare, such as the use of poisons.”<sup>46</sup> The Lieber Code “established standards for compliance with the rules and for their enforcement by courts-martial and other disciplinary measures.”<sup>47</sup>

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Noone, *supra* note 10, at 193 (quoting THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 18 (Dieter Fleck ed., 1995)).

39. NEIER, *supra* note 11, at 14. It is estimated that 500 war correspondents from the North traveled to cover the American Civil War. *Id.*

40. One scholar has noted that the Lieber Code was “[t]he first set of war rules to show any genuine concern for the enemy.” GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 159 (1999). Telford Taylor, a major prosecutor in the Nuremberg trials, heralded Lieber’s efforts as a major improvement upon the unwritten customary military laws and credited the Lieber Code as “recogni[z]ing the necessity of systematizing and articulating the accumulated experience and practices of the previous century.” TAYLOR, *supra* note 33, at 8.

41. TAYLOR, *supra* note 33, at 8.

42. *Id.*

43. *Id.*

44. *Id.* at 8–9.

45. *Id.* at 9.

46. *Id.*

47. *Id.*



Although the Lieber Code was intended as the basis for the United States' regulation of its own armed forces and not as a piece of international law, this code made an important contribution to the development of war crimes laws at the 1899 Hague Convention.<sup>48</sup> The Hague "Convention leaned heavily on the Lieber Code and accordingly dealt chiefly with prisoners of war and the relations between occupation troops and noncombatant civilian inhabitants."<sup>49</sup> The specific provisions of the Hague Convention of 1899 were reiterated by a second Hague Convention in 1907 that was signed by "over forty nations."<sup>50</sup> Although the Conventions were certainly landmark efforts to make general standards for the waging of war, "neither the means of enforcement nor the penalties for violation [were] specified."<sup>51</sup> The Hague Conventions comprised the laws of war or international law leading up to the beginning of World War I in 1914 and "internationalized the whole subject of limits on warfare and laid the basis for an extraordinary expansion of public and political concern with 'war crimes' throughout the course and aftermath of World War I."<sup>52</sup>

#### D. *World War I*

For all the promise of the Hague Conventions, reality set in as many of the new "rules" were disregarded in World War I—which "produced gas warfare, a genocide, and each state proclaiming 'its respect for the laws while condemning the "[i]llegal" acts of its adversary."<sup>53</sup> Although "there was a strong movement among the victorious Allies to hold accountable those who violated international humanitarian law,"<sup>54</sup> they were ultimately unsuccessful in their many attempts to provide post-conflict justice.<sup>55</sup> A

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48. *Id.* at 10.

49. *Id.* The Hague Convention also forbade certain other military weapons and methods, including expanding bullets. *Id.* Another notable provision in the Convention prohibited the destruction of "hospitals, churches, universities and historic buildings" unless they were being used for military purposes. ROBERTSON, *supra* note 6, at 204.

50. TAYLOR, *supra* note 33, at 10.

51. *Id.* Taylor also notes that although the Lieber Code and the Hague Conventions were dramatic steps forward in the field of war crimes, they did not impose any limits on the right of sovereign nation-states to make war. *Id.* at 11.

52. *Id.* Ironically, a third Hague Conference was scheduled to begin in 1914 but was never held "as hopes for international peace were dashed by a bullet in Sarajevo." PETER MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* 69 (2001).

53. Noone, *supra* note 10, at 200 (quoting Jochnick & Normand, *supra* note 29, at 80).

54. *Id.*

55. *Id.* at 201.

primary problem was that the Hague Conventions simply did not include prohibitions on many of the World War I human rights violations now characterized as war crimes.<sup>56</sup>

One example of a massive human rights violation that went largely unpunished was the attempted genocide by the “Young Turk” government of the Ottoman Empire.<sup>57</sup> Allied with Germany, the government “began the deportation of Armenians to the Syrian desert, where they were massacred by the thousands.”<sup>58</sup> Although these actions were publicly denounced by the Allies as “‘crimes against humanity and civilization,’” the Hague Conventions were inapplicable to the Turks because the Armenians and Turks were both citizens of the same nation and no formal state of war existed between them.<sup>59</sup> In 1919, following the war, the Allies pushed for the formation of a Turkish military tribunal in order to hold responsible those who had engaged in the massacre of the Armenians and mistreated British soldiers.<sup>60</sup> The Turkish tribunal resulted in two convictions including one execution.<sup>61</sup> However, the Allies were unable “to establish the criminality of the massacres by judicial process” and in 1923 the alleged perpetrators were granted amnesty in the Treaty of Lausanne.<sup>62</sup>

Another example of the Hague Conventions’ shortcomings in World War I was the lack of any regulations governing submarine warfare.<sup>63</sup> This effectively rendered German U-boat attacks unpunishable.<sup>64</sup> Moreover, the Hague Convention’s seemingly clear prohibition on the use of poisonous gas was not effective because “even here, questions might be raised under the Hague Convention on ‘asphyxiating or deleterious gases,’ which was limited to their diffusion by ‘the use of projectiles.’”<sup>65</sup>

Kaiser Wilhelm II fled to Holland from Germany following the end of the war, but this did not stop the Allies from demanding he be brought before an international tribunal.<sup>66</sup> When the Paris Peace Conference assembled in 1919 the first issue on the agenda was war crimes, and a

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56. TAYLOR, *supra* note 33, at 13.

57. See Noone, *supra* note 10, at 200.

58. TAYLOR, *supra* note 33, at 12–13.

59. *Id.* at 13.

60. Noone, *supra* note 10, at 201.

61. *Id.*

62. TAYLOR, *supra* note 33, at 18.

63. *Id.* at 13.

64. *Id.*

65. *Id.*

66. *Id.* at 14.

commission dedicated to this purpose was formed.<sup>67</sup> The commission came back with a report charging Germany and its allies with widespread violations.<sup>68</sup> It included the recommendation that some alleged war criminals be tried before national courts and that the Kaiser and other high ranking officials be tried before an international tribunal.<sup>69</sup> The High Tribunal was to promulgate its own procedural rules, but apply as substantive law “the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience.”<sup>70</sup> Although both the French and British governments desired prosecution of the Kaiser, President Woodrow Wilson had concerns of “victors’ justice” that foreshadowed those of Charles Wennerstrum as he urged Secretary of State Lansing (himself a staunch opponent of any “supranational law”) to oppose the trial of the Kaiser based on these considerations.<sup>71</sup>

The result was a compromise embodied in the Treaty of Versailles, signed in June of 1919, which provided that “the Kaiser w[ould] be tried before a ‘special tribunal’ of five judges, one each from the United States, Great Britain, France, Italy, and Japan.”<sup>72</sup> However, instead of being charged with committing war crimes, the Kaiser was charged “with ‘a supreme offence against international morality and the sanctity of treaties.’”<sup>73</sup> Many scholars remain critical of the role U.S. opposition played in daunting the hopes of “European statesmen to use the victorious peace as an occasion for confirming and expanding the international law of war.”<sup>74</sup> In the end, the Dutch refused to cooperate and make the Kaiser available for his trial because they did not recognize the charge against him and because the charges “appeared to be of a political rather than a criminal character.”<sup>75</sup> The Kaiser remained free in Holland until his death in 1941.<sup>76</sup>

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67. *Id.* at 15.

68. *Id.*

69. *Id.*

70. McCormack, *supra* note 7, at 702 (quoting *Report on the Responsibility of the Authors of the War and on Enforcement of Penalties to the Preliminary Peace Conference* (Mar. 1919), reprinted in 14 AM. J. INT’L L. 95 (1920)) (internal quotation marks omitted).

71. TAYLOR, *supra* note 33, at 15.

72. *Id.* at 15–16.

73. *Id.* at 16.

74. *See id.*

75. *Id.*

76. *Id.*

The Allies and the Germans negotiated the handling of others accused of war crimes resulting in the Leipzig trials.<sup>77</sup> These trials, however, were not “international” in character, but were conducted by the German Supreme Court.<sup>78</sup> The results were mixed. The British were equally successful in securing convictions of three German soldiers for the beating of British prisoners, but were unsuccessful in attempting to convict a U-boat commander responsible for the sinking of a hospital ship based on the commander’s use of a “superior orders” defense.<sup>79</sup> The Belgians were unsuccessful in securing the conviction of a German military policeman for the torture of small children he arrested on sabotage charges.<sup>80</sup> Following this acquittal, the Belgians denounced the trials and refused future participation.<sup>81</sup> Similarly, the French withdrew their approval and participation in the trials following the acquittal of a German general charged with ordering a subordinate officer to shoot wounded French soldiers.<sup>82</sup> The officer who had actually committed the killings was, however, sentenced to two years in prison.<sup>83</sup>

Perhaps the most noteworthy result from “the enormous carnage of World War I [was that it] stimulated public demand for measures to prevent a recurrence of such slaughter and destruction.”<sup>84</sup> A primary goal among the Allies was to fill the void present in the Hague Conventions and address the technological progress that had occurred between the Hague Conventions and the end of World War I—which included the development of airplanes, submarines, and poisonous gas.<sup>85</sup> The use of poisonous gas was prohibited in 1925 with the Geneva Protocol.<sup>86</sup> In 1930, the London Treaty regulated for the first time submarines, subjecting them to the same rules as surface vessels, and included a prohibition on the sinking of noncombative merchant ships with passengers onboard.<sup>87</sup> In 1928, the Kellogg-Briand Pact was ratified by forty-four nations, including all those that would become major actors in World War II—with the

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77. *Id.* at 17.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 18.

85. *Id.* at 18–19.

86. *Id.*

87. *Id.* at 19.

exception of the Soviet Union.<sup>88</sup> The Pact condemned the use of war as a mechanism to solve international controversies.<sup>89</sup>

In 1929, two conferences met in Geneva and redrafted the prior Geneva Conventions as well as set new standards to complement the 1907 Hague Convention.<sup>90</sup> The representatives of forty-seven nations were present and “[t]he 1929 treaties were technically much superior to their antecedents, but did not break new ground in terms of doctrine or general scope.”<sup>91</sup> These Conventions and the promise of the Kellogg-Briand Pact established the climate of international law leading up to World War II, during which some of the most atrocious human rights violations in history occurred.

### III. DEVELOPMENTS IN WORLD WAR II

#### A. “The record on which history will judge us tomorrow”<sup>92</sup>

Allied governments announced plans to punish Nazi war criminals by 1942, and “the leaders of the United States, Great Britain, and the Soviet Union issued the first joint declarations officially . . . resolving to prosecute those responsible for violence against civilian populations” wherein key players “whose crimes could be assigned no particular geographic location, would be punished by joint decisions of the Allied governments.”<sup>93</sup> Top German officials were tried by the multinational International Military Tribunal (IMT), the most well-known of the war crimes trials that took place in Nuremberg after World War II.<sup>94</sup> “Each of the four Allied nations—the United States, Great Britain, the Soviet Union, and France—supplied a judge and a prosecution team.”<sup>95</sup>

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88. *Id.* at 20.

89. *Id.*

90. Noone, *supra* note 10, at 203.

91. TAYLOR, *supra* note 33, at 20.

92. II TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG 14 NOV. 1930–NOV. 1945, at 101 (1947) (Justice Robert H. Jackson, Prosecutor’s Address of Nov. 21, 1945 to the International Military Tribunal) [hereinafter II TRIAL OF THE MAJOR WAR CRIMINALS].

93. United States Holocaust Memorial Museum, Holocaust Encyclopedia: War Crimes Trials, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005140> (last visited Mar. 15, 2007) [hereinafter War Crimes Trials].

94. *Id.*

95. United States Holocaust Memorial Museum, Holocaust Encyclopedia: International Military Tribunal at Nuremberg, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007069> (last visited Mar. 15, 2007).

United States Supreme Court Justice, Robert H. Jackson, Chief Prosecutor for the original IMT, asserted in his opening statement the importance of the task that faced the participants in the trial: “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.”<sup>96</sup>

B. *Subsequent Nuremburg Proceedings—The Hostage Case*

After the original IMT concluded the Allied nations failed to reach another agreement establishing a joint international trial, but each country was allowed to separately try its own detainees.<sup>97</sup> United States military tribunals, under the auspices of the IMT, conducted what became known as the Subsequent Nuremburg Proceedings.<sup>98</sup> These proceedings were led by General Telford Taylor as the Chief Prosecutor.<sup>99</sup>

One of these subsequent trials “had a significant Iowa connection, [and] was marked by a controversy that led to much debate about the quality of justice” handed down by military tribunals.<sup>100</sup> The United States Military Government for Germany established Military Tribunal V in the summer of 1947 to try twelve defendants in what became known as the Hostage Case.<sup>101</sup> “The presiding judge was Charles F. Wennerstrum of Chariton, [Iowa,] who was on leave as chief justice of the Iowa Supreme Court.”<sup>102</sup> Wennerstrum was a 1914 graduate of Drake Law School.<sup>103</sup> He was appointed by President Truman to serve on the military tribunal for the Hostage Case, which largely focused on abuse of prisoners of war and civilian captives on orders from military commanders.<sup>104</sup> The trial began on

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96. II TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 92, at 101; *see also* Benjamin Ferencz, *The Holocaust and the Nuremberg Trials*, 42(4) UN CHRON. 26 (2005) (quoting Justice Jackson’s opening statement).

97. Ferencz, *supra* note 96, at 26.

98. *Id.*

99. *Id.*

100. Larry J. Eisenhower, Editorial, *Can the Victor be Fair?*, DES MOINES REG., Mar. 1, 1998, at 4AA.

101. United States Holocaust Memorial Museum, Holocaust Encyclopedia: Subsequent Nuremberg Proceedings, Case #7, The Hostage Case, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007078> (last visited Mar. 15, 2007) [hereinafter *The Hostage Case*].

102. Eisenhower, *supra* note 100, at 4AA.

103. Drake News Release, Law School Alumnus Donates Nuremberg Transcripts (June 1, 2005), <http://www.drake.edu/newsevents/releases/june05/060105law.html> (last visited Mar. 11, 2007).

104. Eisenhower, *supra* note 100, at 4AA.

July 15, 1947 and concluded on February 9, 1948; eight defendants were found guilty and two were acquitted.<sup>105</sup> The three-judge panel<sup>106</sup> on which Wennerstrum served confronted a weighty task: “The trial was conducted in two languages, English and German, and consumed 117 trial days. The prosecution offered 678 exhibits and the defendants 1025 that were received in evidence. The transcript of the evidence taken consists of 9556 pages.”<sup>107</sup> The opinion in the Hostage Case acknowledged the difficulty of its assignment.<sup>108</sup> The panel’s opinion noted that the prosecution of these high ranking military officials carried with it serious questions of law and policy.<sup>109</sup> The judges noted that concerns arose in part because of the possibility that future wars may render the vanquishers of today the vanquished of tomorrow.<sup>110</sup> The opinion, however, stressed that such considerations simply “impress the tribunal with the absolute necessity of affording the defendants a fair and impartial trial. Unless this be done, the hand of injustice may fall upon those who so vindictively contend for more far-reaching pronouncements, sustained by precedents which would hereby establish.”<sup>111</sup> Wennerstrum expanded on these sentiments shortly after the trial, and he unwittingly found himself surrounded by controversy.<sup>112</sup>

### C. Chief Judge Falls into Accidental Controversy

Wennerstrum granted an interview to Hal Foust, a *Chicago Tribune* reporter, in which Wennerstrum made several comments describing disillusionment and frustration over his service in Germany.<sup>113</sup> Foust

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105. See The Hostage Case, *supra* note 101. The case originally involved twelve defendants, but one committed suicide and another was too ill to go to trial. *Id.*

106. Justice George Burke of Michigan and Justice Edward F. Carter of Nebraska served as the other two judges on the panel. Eisenhower, *supra* note 100, at 4AA.

107. United States v. List, Military Tribunal V, Case No. 7, Opinion & Judgment, 41 (Nuremberg 1948).

108. See *id.* at 35 (“The issues in the present case raise grave questions of international law.”).

109. *Id.*

110. *Id.*

111. *Id.*

112. See Letter from Charles F. Wennerstrum, Justice, Iowa Supreme Court Justice, to Hal Foust, Chicago Tribune Reporter (Mar. 26, 1948) (on file in the Rare Books Room, Drake University Law Library) (noting that he was greeted by news reporters from across the nation and that the uproar “was all a surprise to [him] as [he] had no idea as to developments”); see also Eisenhower, *supra* note 100, at 4AA.

113. Hal Foust, *Presiding Judge at Nuernberg is Disillusioned*, CHI. TRIB., Feb.

reported that Wennerstrum would not have taken the assignment in Germany if he had truly known the circumstances, and Wennerstrum was quoted as saying, “the victor in any war is not the best judge of the war crime guilt.”<sup>114</sup> He went on to note that “[t]he prosecution has failed to maintain objectivity aloof from vindictiveness, aloof from personal ambitions for convictions,” and that “[t]he entire atmosphere [in Germany was] unwholesome.”<sup>115</sup> Wennerstrum criticized the prosecutorial strategies employed, and said, “[t]he trials were to have convinced the Germans of the guilt of their leaders. They convinced the Germans merely that their leaders lost the war to tough conquerors.”<sup>116</sup> Wennerstrum also said he was left “with a feeling that justice [had] been denied” because the defendants had no possibility of appeal.<sup>117</sup>

Telford Taylor, chief counsel for the United States in the case, attacked Wennerstrum in an open letter responding to his comments.<sup>118</sup> The harshness of Taylor’s rebuke certainly boosted the attention given to Wennerstrum.<sup>119</sup> The controversy also intensified because Taylor’s blast surfaced before Foust’s story was published, eliciting questions related to the military’s surveillance of journalist communications.<sup>120</sup> After the justice returned to Iowa, he stated: “I thought the story would be only in the Chicago paper, instead it seems to have gone around the world.”<sup>121</sup> His conversation with Foust had unanticipated repercussions. Even at his death, nearly forty years later, Wennerstrum was still known as the Iowa judge who criticized the Nuremburg military tribunals.<sup>122</sup>

Many commended Wennerstrum for taking a courageous stand,<sup>123</sup>

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23, 1948, at 5.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *See id.* (noting Taylor “should not have known about [the story] until after it had been published, unless the Army is secretly monitoring press correspondents’ material before it is sent to America”).

121. Eisenhauer, *supra* note 100, at 4AA.

122. Upon his death, the Associated Press story framing Wennerstrum as “a former Iowa Supreme Court Judge who presided over and sharply criticized some of the Nuremburg war crimes trials after World War II” appeared in newspapers throughout the United States. Associated Press, *Charles F. Wennerstrum, 96; Served on Iowa’s High Court*, N.Y. TIMES, June 6, 1986, at D18.

123. *See* Letter from Charles F. Wennerstrum, *supra* note 112 (noting that various representatives in Washington expressed their approval of his comments and



while others publicly condemned him.<sup>124</sup> The controversy was exacerbated by journalistic framing, exploited by its historical timing with the looming cold war, Taylor's aggressive response, and questions of military subterfuge in news reporting. A key element in examining the tension between Taylor and Wennerstrum is accomplished by stripping the story of journalistic slant, and instead recognizing their common goal: establishing a sound framework upon which future international tribunals could build.

Justice Wennerstrum was not the only American uneasy with elements of the Nuremberg trials—a handful of political figures spoke out with similar criticisms.<sup>125</sup> In his letter to Hal Foust commenting on the news story, Wennerstrum wrote: “I had one letter from a young lady connected with one of the offices there in which she said that she had the same ideas that I had but did not feel that she could not give any expression to them inasmuch as her comments would carry no weight.”<sup>126</sup> That a man of his stature would speak out against perceived injustices, and then stand firm in those convictions,<sup>127</sup> helped shed light on deficiencies of the tribunals.

Throughout their experiences with the Nuremberg tribunals, both Wennerstrum and Taylor embraced two key principles: setting precedent and learning from shortcomings. Taylor himself later acknowledged that

[t]he legal procedures at Nuremberg were largely the product of evolution based on actual experience there. Certainly some difficult and unusual problems arose out of the mixture of different legal systems and the novelty of the situation, and there is room for honest

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that the majority of letters he received were complimentary).

124. See, e.g., *id.* (noting that he did receive negative correspondence). An anonymous note found stashed in Wennerstrum's personal files also demonstrates hostility toward him: “I hope ypu [sic] croak you Nazi swine. And I hope you don't live long enough to render another judgment.” (on file in the Rare Books Room, Drake University Law Library).

125. See, e.g., ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 716 (1956) (noting that then-Chief Justice, Harlan Fiske Stone, was critical of the prosecutions in the subsequent Nuremberg trials); see also Robert A. Taft, *Equal Justice Under Law*, in FROM NUREMBERG TO MY LAI 107, 113 (Jay W. Baird ed., 1972) (speech delivered by then-Senator Robert A. Taft, wherein Taft criticized the Nuremberg proceedings, saying, “[t]he trial of the vanquished by the victors cannot be impartial no matter how it is hedged about with the forms of justice”).

126. Letter from Charles F. Wennerstrum, *supra* note 112.

127. See *id.* (“As you know I retracted none of the statements that I had made in the interview.”).

differences of opinion on a number of points.<sup>128</sup>

Wennerstrum's criticism of the surrounding circumstances, the generally prosecutorial attitude, and overall treatment of Germans did not mean he believed the system itself was incapable of rendering a just verdict.<sup>129</sup> Rather, Wennerstrum explained that his key criticism was "the manner in which certain situations developed which ha[d] a bearing on the final acceptance of the various judgments of the Nürnberg Tribunals by the German people."<sup>130</sup> He explained that, "[i]n the main it [was] largely a question of public relations—German public relations."<sup>131</sup> Wennerstrum cautioned his colleagues that the United States may not win the next war and that the system and procedures founded in Nuremberg "may haunt our officers and men who may be defendants in subsequent War Crimes trials."<sup>132</sup> Taylor proclaimed during "The Justice Case" that "[w]e seek . . . to reinvigorate those ideals that have been so long desecrated. The people of Germany sense the need for this, but they will measure our efforts by the measure of our own devotion to the ideals which we proclaim."<sup>133</sup> Wennerstrum went to Germany hoping to carry out that objective, but he felt it had been thwarted. The heart of his argument was that "[d]espite a sincere effort to do so, it is difficult for a court, conscientious as it may be, to impress the defendants and their counsel with the thought that they are the recipients of the same kind of treatment they would have received if the court had not been selected by the victorious nation."<sup>134</sup> Wennerstrum said that he did not aim to console any German soldier guilty of atrocities,

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128. Telford Taylor, Chief of Counsel for War Crimes, Office of Military Gov., Address at the Academy of Political Science Spring Meeting, Hotel Astor, New York City: *The Nuremberg Trials: An Appraisal* 5 (Apr. 7, 1949) (transcript available in the Rare Books Room, Drake University Law Library).

129. See Charles F. Wennerstrum, War Crimes Trials 2-3 (Sept. 7, 1948) (Paper presented at a Joint Luncheon Meeting of Section of International and Comparative Law and Junior Bar Conference at the annual meeting of the American Bar Association, Seattle, Wash.) (on file in the Rare Books Room, Drake University Law Library) (stating "[i]t was a conclusion of our tribunal that there was ample international legislature to justify holding the defendants in our case responsible for the reprisal actions taken" and clarifying that the problem was with the impression left by the trials on the Germans).

130. *Id.* at 3.

131. *Id.*

132. *Id.* at 5.

133. *United States v. Altstoetter (The Justice Case)*, in III TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 107 (1951).

134. Wennerstrum, *supra* note 129, at 5.

but he was concerned with the establishment of certain processes that “were not in keeping with our generally accepted concept of proper administration of justice. The fact that mistakes were made is not surprising. It would have been surprising indeed if mistakes were not made. But to refuse to profit by such mistakes would be inexcusable.”<sup>135</sup> That sentiment essentially mirrors Telford Taylor’s expressions upon his return to the United States. That is also exactly what has happened in the time since the Nuremberg Tribunals. Compared to the established law of individual countries, international law is, even today, relatively young. It was nearly sixty years ago in a speech given in New York that Telford Taylor explained:

International law and government are still in infancy, if not the womb. We do not gag the infant because his speech is inarticulate and he cannot comprehend Latin maxims, nor do we bind him because his steps are tottering and he often falls. Yet it sometimes seems the critics of the Nuremberg idea have reacted in just that fashion, and have gauged it by comparison with highly developed modern governments, and by standards which were not attained until after centuries of practical experience, and the gradual growth of the law case by case. And therein lies the true significance of Nuremberg in time to come. Here is a series of great cases which, in a very few years, have added enormously to the body and the living reality of international penal law. Here the whole world has been able to see the international judicial process in action. It is in these terms that the ultimate appraisal of Nuremberg will be made.<sup>136</sup>

These general sentiments continue to ring true. Had it not been for the framework established and the lessons learned in Nuremberg, the current tribunals—the ICTY, the ICTR, and the pending tribunal for Cambodia—would not have been possible, and I may not have had an opportunity to go to Kosovo. Despite criticism from some, the progress made post-Nuremberg would not have been possible without the efforts of Wennerstrum and Taylor. The improvement is obvious when contrasting the current tribunals’ inner workings against those employed in Nuremberg.<sup>137</sup> The charge of victor’s justice can no longer be made as the tribunals are composed of multinational judges and the tribunals have “leaned over backwards to be fair in drawing up its rules of procedure.”<sup>138</sup>

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135. *Id.* at 8.

136. The Nuremberg Trials: An Appraisal, *supra* note 128, at 13.

137. *See supra* Part III.B.

138. BRIEFING OF THE COMM’N ON SECURITY AND COOPERATION IN EUROPE,

There is also an appeals chamber, a safeguard Nuremberg lacked and the focus of one of Wennerstrum's chief criticisms of the early tribunal.<sup>139</sup> "Today, 60 years after the International Military Tribunal (IMT), the body of international law addressing crimes against humanity has grown dramatically. . . . The framework and the guiding vocabulary for [international tribunals today] rest on precedents established at Nuremberg."<sup>140</sup>

#### IV. KOSOVO

Events in Kosovo in 1999 led to the establishment of a United Nations protectorate that continues to date.<sup>141</sup> Crimes committed prior to U.N. involvement and the lack of an adequate local judiciary led to calls for a new international tribunal. With the ICTY (in existence since 1993) holding jurisdiction for war crimes committed in the former Yugoslavia, including Kosovo, a hybrid system using international and local judges was adopted for the new tribunal. My experience differed from Wennerstrum's because he sat with other American judges and applied newly developing international law, while I was instead integrated into a local judicial system that applied a combination of local and international law. A full understanding of the events leading to my presence as part of an international force in Kosovo requires some additional history.

##### A. Kosovo History

Kosovo, a country shrouded in myth, is slightly larger than Rhode Island and about the size of six central Iowa counties. Home to about two million people, its history is one of conflict, mass relocations of populations, and human rights violations.<sup>142</sup> Events in Kosovo's history

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104th CONG., THE WAR CRIMES TRIALS FOR THE FORMER YUGOSLAVIA: PROSPECTS AND PROBLEMS 15 (1999).

139. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, UPDATED STATUTE OF THE INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA art. 11 (2006), <http://www.un.org/icty/legaldoc-e/index.htm> (follow "Statute of the Tribunal" hyperlink; then follow "Updated Statute of the Tribunal, February 2006 HTMC" hyperlink; then follow "Article II" hyperlink).

140. United States Holocaust Memorial Museum, Holocaust Encyclopedia: How Were the Crimes Defined?, <http://www.ushmm.org/wlc/en/index.php?ModuleId=10007102&Type=normal+article> (last visited Mar. 15, 2007).

141. See Associated Press, *Serbia Rejects U.N.'s Kosovo Plan*, CNN.COM, Feb. 15, 2007, <http://www.cnn.com/2007/WORLD/europe/02/15/werbia.kosovo.ap/index>.

142. NOEL MALCOLM, KOSOVO: A SHORT HISTORY xxxiii (1998); Ted Baggett, Recent Development, *Human Rights Abuses in Yugoslavia: To Bring an End*

help explain the current situation of polarization between the ethnic Albanians and Serbians.<sup>143</sup> Two concepts stand out as antecedents to the current situation: the Kosovo covenant,<sup>144</sup> arising from the battle of Kosovo Polje, and the idea of a Serbian Orthodox Jerusalem in Kosovo. These concepts cannot be separated from a discussion of the more recent events in Kosovo.

### 1. *The Battle of Kosovo Polje*

The battle of Kosovo Polje occurred on June 28, 1389.<sup>145</sup> The battle has been described as “the foundation of a myth that would hang like a stone around the neck of most Serbs in the future.”<sup>146</sup> The battle and its mythical re-creations have been characterized as “underscor[ing] three concepts: assassination, martyrdom, and betrayal.”<sup>147</sup>

The war between the Ottoman Empire and Serbia began when the Ottoman Sultan Murad unsuccessfully tried to exert his power over Serbian Prince Lazar.<sup>148</sup> Neither leader survived the battle of Kosovo Polje.<sup>149</sup> Sultan Murad was killed by Miloš Obilić, a Serb who had been accused of disloyalty toward Prince Lazar prior to the battle.<sup>150</sup> Obilić assassinated Sultan Murad in an attempt to regain the Prince’s respect.<sup>151</sup> After the battle, it was discovered that it was Lazar’s son-in-law, not Obilić, who had been disloyal to the Prince.<sup>152</sup> Prince Lazar, however, was beheaded by the Turks and did not live to learn the truth.<sup>153</sup>

According to myth, prior to the Serbian defeat Prince Lazar was

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*to Political Oppression, the International Community Should Assist in Establishing an Independent Kosovo*, 27 GA. J. INT’L & COMP. L. 457, 459 (1999).

143. Fredrick Egonda-Ntende, *Justice After Conflict: Challenges Facing ‘Hybrid’ Courts: National Tribunals with International Participation*, J. INT’L L. PEACE & ARMED CONFLICT, Jan. 2005, at 24, 27.

144. BRANIMIR ANZULOVIC, HEAVENLY SERBIA: FROM MYTH TO GENOCIDE 5–6 (1999).

145. See Lene Kühle & Carsten Bagge Laustsen, *The Kosovo Myth: Nationalism and Revenge*, in KOSOVO BETWEEN WAR AND PEACE 19, 19 (Tonny Brems Knudsen & Carsten Bagge Laustsen eds., 2006).

146. ANDRÉ GEROLYMATOS, THE BALKAN WARS 20 (2002).

147. *Id.* at 28–29.

148. Kühle & Laustsen, *supra* note 145, at 23.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

visited by “[a] falcon representing Saint Elijah and a swallow representing the Virgin Mary.”<sup>154</sup> They offered him a choice: winning the battle or losing the battle and gaining eternal peace in heaven.<sup>155</sup> The loss of the battle confirmed his decision to forsake this earth and to win an eternal kingdom in Heaven.<sup>156</sup> This deal with God, known as the Kosovo covenant, forms a part of the Serbian national understanding, still in existence today, that Serbia is a “nation of a suffering, but also a chosen people, who will eventually be rewarded for that suffering.”<sup>157</sup>

Later defeats led to the collapse of medieval Serbia, and myth turned into truth with the battle of Kosovo Polje becoming a “dramatic watershed between independence and servitude.”<sup>158</sup> This transformation into myth came about most notably in the second half of the nineteenth century with paintings and literature depicting Prince Lazar as a Christ-like figure. National celebrations of rituals of remembrance of the battle also became prominent at this time. Most significant among these celebrations is St. Vitus Day, or Vid’s Day, on the anniversary of the battle.<sup>159</sup>

In 1989, the 600th anniversary of the battle of Kosovo was commemorated and Lazar’s remains were taken to the monastery at Gracanica in central Kosovo.<sup>160</sup> Slobodan Milošević observed the anniversary of the battle by traveling to Kosovo and speaking to a multitude of observers.<sup>161</sup> In his speech, Milošević said Serbians had

regained their state, national, and spiritual integrity. . . . Hitherto, thanks to their leaders and politicians and their vassal mentality [Serbs] felt guilty before themselves and others. This situation lasted for decades, it lasted for years and here we are now at the field of Kosovo to say that this is no longer the case.<sup>162</sup>

This speech paved the way for future wars and ethnic violence in the area

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154. *Id.*

155. *Id.*

156. GER DUIJZINGS, RELIGION AND THE POLITICS OF IDENTITY IN KOSOVO 176–202 (2000); Kuhle & Laustsen, *supra* note 145, at 23.

157. *Id.* at 19.

158. THOMAS A. EMMERT, SERBIAN GOLGOTHA: KOSOVO 1389, at 82 (1990).

159. Milorad Ekmečić, *The Emergence of St. Vitus Day as the Principal National Holiday of the Serbs*, in KOSOVO: LEGACY OF A MEDIEVAL BATTLE 331, 333 (Wayne S. Vicinich & Thomas A. Emmert eds., 1991).

160. GER DUIJZINGS, *supra* note 156, at 197–98.

161. TONY JUDT, POSTWAR: A HISTORY OF EUROPE SINCE 1945, at 673 (2005).

162. *Id.*

and strengthened the ties between the historic and current battles.<sup>163</sup>

## 2. *Serbian Orthodox Church*

The large number of Serbian Orthodox churches and monasteries in Kosovo, including the Patriarchate buildings, led some to refer to Kosovo as the Serbian Jerusalem.<sup>164</sup> Although this claim is an exaggeration, it does reflect the importance of the Serbian Orthodox Church in explaining the Serbian attachment to Kosovo.<sup>165</sup> The Serbian Orthodox Church is a powerful entity that separates Serbs from Albanians.<sup>166</sup> The Church became a fully independent branch of Orthodoxy in 1346, and it continues to create unity among Serbs.<sup>167</sup> Politicians have been quick to accept the Kosovo myth of a Serbian Jerusalem in order to claim a special Serbian interest in Kosovo despite its overwhelming Albanian population.<sup>168</sup> In the centuries between the battle of Kosovo Polje and the late 1980s, most Serbs migrated north into Serbia, and Albanians emigrated from the mountains of Albania. Today, Kosovo has a resident population of approximately two million, of which, an estimated ninety percent are ethnic Albanians.<sup>169</sup>

### B. *The Need for International Judges in Kosovo*

In 1389, Serbs and Albanians fought as allies in the battle of Kosovo.<sup>170</sup> However, these two ethnic groups have been in conflict with each other for the past one hundred years.<sup>171</sup> Conflicts during the 1990s in Bosnia-Herzegovina and Croatia overshadowed the seemingly less violent conflicts in Kosovo.<sup>172</sup> When the violence in these areas ended and Serbs

163. Kühle & Laustsen, *supra* note 145, at 19.

164. MALCOLM, *supra* note 142, at xxxi.

165. *See id.* (stating no Christian denomination has a location comparable to Jerusalem).

166. *Id.* at 12, 14 (comparing the religious unity of the Serbs with the lack of religious unity of the Albanians).

167. *Id.* at 12.

168. *Id.* at 13 (stating the Serbian Orthodox Church “may help to explain why the Serbian people have been, at some moments in their history, persuaded to follow political causes with an uncritical and absolute loyalty”).

169. The World Bank, Kosovo Country Brief 2006, <http://www.worldbank.org> (click on “Countries”; scroll to K; click on “Kosovo”; click on “Overview”) (last visited Mar. 15, 2007) (stating “no census has been conducted recently”).

170. MALCOLM, *supra* note 142, at xxix.

171. *Id.*

172. Lene Mosegaard Søbberg, *The Kosovo Experiment: Peacebuilding Through an International Trusteeship*, in KOSOVO BETWEEN WAR AND PEACE 57, 57

began forcibly expelling Albanians from Kosovo, however, international organizations began to take notice.<sup>173</sup>

Throughout the 1980s, Albanians in Kosovo were slowly stripped of many of their individual rights.<sup>174</sup> Serbian constitutional amendments eventually prevented Albanians from having political representation or any autonomy.<sup>175</sup> The Albanian majority in Kosovo attempted to gain its independence from Serbia during this time, but the attempts were unsuccessful.<sup>176</sup> In the early 1990s, the Croats and Bosnians voted to secede from Yugoslavia and the growing power of Slobodan Milošević.<sup>177</sup> Remaining true to his recent statements made at the 600th anniversary of the battle of Kosovo, Milošević and the Yugoslav army responded by attacking and “cleansing” the area of non-Serb citizens.<sup>178</sup> By 1999, international leaders were aware that acts of genocide were being committed against Kosovar Albanians and NATO sent in air strikes to attack Serbia.<sup>179</sup> These air strikes likely prevented the complete expulsion or destruction of the Albanian population in Kosovo.<sup>180</sup>

The Albanians and Serbs who survived the extreme violence of the 1980s and 90s had no confidence in their justice system or other government institutions, and their concerns were validated.<sup>181</sup> Because ethnic tensions continued after the NATO air strikes, witnesses, judges, and prosecutors were often the victims of both threats and violence.<sup>182</sup> Many local judges and prosecutors refused to participate in the judicial system and Kosovo was thus “left in a law-and-order vacuum.”<sup>183</sup> Therefore, because the national court system had become unreliable and

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(Tonny Brems Knudsen & Carsten Bagge Lausten eds., 2006).

173. *Id.*

174. *See* JUDT, *supra* note 161, at 673.

175. *Id.*

176. *See* Rasmus Abilgaard Kristensen, *Administering Membership of International Society: The Role and Function of UNMIK*, in *KOSOVO BETWEEN WAR AND PEACE* 133, 137 (Tonny Brems Knudsen & Carsten Bagge Lausten eds., 2006).

177. JUDT, *supra* note 161, at 675.

178. *Id.*

179. Søjberg, *supra* note 172, at 55.

180. JUDT, *supra* note 161, at 674.

181. Egonda-Ntende, *supra* note 143, at 24, 27.

182. *Id.* at 26–27 (stating a president of a district court was attacked with an iron bar while he was on his way to work).

183. John Cerone & Clive Baldwin, *Explaining and Evaluating the UNMIK Court System*, in *INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA* 41, 43 (Cesare P.R. Romano et al. eds., 2004); Egonda-Ntende, *supra* note 143, at 24, 27.



unable to administer justice, it was believed international tribunals were needed to reclaim law and order in Kosovo.<sup>184</sup>

### C. UNMIK and International Judges

After Serbian and Yugoslav forces withdrew, Kosovo continued to be an ethnically divided and volatile area.<sup>185</sup> Security Council Resolution 1244 (1999) established the U.N. Administration for Kosovo (UNMIK) to administer justice and “provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia.”<sup>186</sup> Initially, local judges remained in control of the judicial system.<sup>187</sup> However, because a majority of the Kosovar judges were ethnic Albanians, Albanians charged with crimes against Serbs typically received only minor punishments, while Serbs charged with crimes against Albanians could not get fair trials.<sup>188</sup>

U.N. leaders recognized international involvement was needed to give both Serbs and Albanians the advantages of an impartial judiciary and proposed the creation of a Kosovo War and Ethnic Crimes Court (KWECC).<sup>189</sup> The KWECC was intended to provide a separate court for international judges to hear cases regarding ethnic violence.<sup>190</sup> However, the proposal to create a separate court with special jurisdiction over war and inter-ethnic crimes was rejected because of the high cost in forming a separate court and the possibility of interference with the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>191</sup> Soon after the KWECC was rejected, many Serbs were killed when a bus in Mitrovica was

184. See Antonio Cassese, *The Role of Internationalized Courts and Tribunals in the Fights Against International Criminality*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 3, 4 (Cesare P.R. Romano et al. eds., 2004).

185. Jean-Christian Cady & Nicholas Booth, *Internationalized Courts in Kosovo: An UNMIK Perspective*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 59, 59 (Cesare P.R. Romano et al. eds., 2004) (stating Serbs and other minorities were victims of violence after NATO forced the Serbian army out of Kosovo).

186. Cerone & Baldwin, *supra* note 183, at 42; see also Daphna Shrager, *The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdictions*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 15, 32 (Cesare P.R. Romano et al. eds., 2004).

187. Cady & Booth, *supra* note 185, at 59.

188. *Id.*

189. Cerone & Baldwin, *supra* note 183, at 49.

190. Cady & Booth, *supra* note 185, at 60.

191. *Id.*; Cerone & Baldwin, *supra* note 183, at 49.

attacked by rockets and a local café was bombed.<sup>192</sup> The Albanian suspects were quickly released by the local judiciary, after which, the UNMIK responded, and, on February 17, 2000, the first international judge was appointed to a court in Mitrovica.<sup>193</sup> Three months after international judges became part of the Mitrovican courts UNMIK Regulation 2000/6 was amended permitting international judges to hear cases in any Kosovar court.<sup>194</sup>

### 1. *Kosovo's Hybrid Courts*

Unlike the criminal tribunals set up for the former Yugoslavia and Rwanda, the court system in Kosovo is composed of “hybrid” or “internationalized” courts.<sup>195</sup> The courts were established by UNMIK Regulations and their authority comes “from a Chapter VII Resolution of the United Nations Security Council.”<sup>196</sup> The hybrid court system is unique because “there is no fixed international court or panel” and the system is composed of national and international judges who “permeate the court system, sitting on panels throughout Kosovo on a case-by-case basis.”<sup>197</sup> All legislative and executive authority vests in UNMIK and is carried out by the Special Representative of the Secretary-General (SRSG), UNMIK’s chief administrator.<sup>198</sup> The UNMIK regulations exercised by the SRSG are considered the supreme law of Kosovo.<sup>199</sup>

In the summer of 1999, the SRSG established the law to be applied by the national and international judges in the hybrid court system.<sup>200</sup> According to UNMIK Regulation 1999/24, the hybrid court system would be based on the Kosovo law in force on March 22, 1989—a point in time when Kosovo was autonomous and controlled by the Kosovar legislature.<sup>201</sup> Although UNMIK law primarily consists of Kosovo

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192. Cady & Booth, *supra* note 185, at 60. Mitrovica is a city in northern Kosovo and is a symbol of ethnic divisions. *Id.* at 60 n.3.

193. *Id.* at 60.

194. *Id.* “By the summer of 2000, six international judges and two prosecutors were appointed among the courts of Mitrovica, Pristina, Gnjilane, and Prizren.” *Id.*

195. Cerone & Baldwin, *supra* note 183, at 41.

196. *Id.*

197. *Id.* at 41–42.

198. *Id.* at 42.

199. *Id.*

200. *Id.* at 43.

201. *Id.* The initial UNMIK Regulation set March 24, 1999—a point in time during the reign of Milošević—as the basis for current law. Cady & Booth, *supra* note 185, at 69.

domestic law, the hybrid courts also apply international criminal and human rights law.<sup>202</sup> International criminal law is applied by the hybrid courts indirectly through pre-existing legislation, and UNMIK Regulation 1999/24 incorporated international human rights laws.<sup>203</sup> New Provisional Criminal Codes and Provisional Criminal Procedure Codes became part of the Kosovar body of law in April 2004.<sup>204</sup> The codes, designed to increase efficiency, reformed the areas of international law and sex offenses.<sup>205</sup>

Although the legal authority of the Kosovo court system is currently based on UNMIK Resolution 1244, the structure of the hybrid courts is based on the existing Kosovo court system.<sup>206</sup> The system has four different courts with jurisdiction over various types of civil and criminal cases.<sup>207</sup> Twenty-four minor offense courts have jurisdiction over matters punishable with fines or prison sentences of less than sixty days.<sup>208</sup> Each Kosovo municipality has one court with jurisdiction over civil and criminal matters carrying prison sentences up to five years.<sup>209</sup> Five district courts hear appeals from the municipal courts and all criminal cases with punishment greater than five years.<sup>210</sup> The highest court in the judicial system is the Kosovo Supreme Court.<sup>211</sup> Members of the Supreme Court determine whether the laws enforced are compatible with the constitutional framework.<sup>212</sup>

## 2. *The Role of International Judges*

The role of international judges in the Kosovo court system is extremely broad.<sup>213</sup> According to UNMIK Regulations 2000/6 and 2000/64, international judges are supposed to “assist . . . in the judicial process in Kosovo.”<sup>214</sup> The international judges serve in Kosovo courts with local

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202. Cerone & Baldwin, *supra* note 183, at 44–45.

203. *Id.* at 44–47 (noting the Federal Republic of Yugoslavia Code (FRY) has many provisions regarding genocide).

204. Cady & Booth, *supra* note 185, at 70 (indicating that the new codes addressed both criminal law and procedure).

205. *Id.*

206. *See* Cerone & Baldwin, *supra* note 183, at 48.

207. *See id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *See id.* at 51.

214. *Id.*

judges and perform many of the same duties.<sup>215</sup> Both international and local judges in Kosovo follow the same procedural rules and apply the same law.<sup>216</sup>

International judges are U.N. staff members who report to the SRSG through the Director of the Department of Justice.<sup>217</sup> The judges come from every continent and from various civil and common law jurisdictions.<sup>218</sup> Their U.N. positions are typically six-month appointments with an option to renew the contract.<sup>219</sup> Under the Constitutional Framework of Kosovo, the SRSG is responsible for appointing international judges and assigning them “to participate in any case in their court whenever . . . an international judge . . . should be present.”<sup>220</sup>

UNMIK Regulation 2000/6 was amended in May 2000 to allow international judges to serve on any court in Kosovo.<sup>221</sup> However, because two local judges and three lay judges typically preside over cases involving serious crimes, a single international judge in these groups had little influence.<sup>222</sup> Regulation 2000/64 addressed this problem by granting the UNMIK the authority to form three-judge panels with at least two international judges.<sup>223</sup> The prosecutor, the accused, or the defense counsel can ask the UNMIK to intervene and form a three-judge panel at any time before the actual trial or appeal begins.<sup>224</sup> International panels are generally used in cases involving political figures, organized crime, crimes between ethnic groups, and war crimes.<sup>225</sup> UNMIK Regulations 2000/6 and 2000/64 do not place any conditions on the cases an international judge or panel may hear.<sup>226</sup>

The hybrid court system began in February 2000 with the appointment of two international judges to serve in the U.N.’s Kosovo mission.<sup>227</sup> Although the number of international judges in Kosovo has

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215. Cady & Booth, *supra* note 185, at 61.

216. *Id.*

217. *Id.* at 62.

218. *Id.* at 70.

219. *Id.* at 62.

220. *Id.* at 61, 62.

221. *Id.* at 60.

222. *See id.* at 61.

223. *Id.*

224. *Id.*

225. *See id.* at 65.

226. *Id.* at 64.

227. *Id.* at 63.

dramatically increased, international judges only preside over three percent to four percent of cases involving serious crimes.<sup>228</sup> International judges are in demand in the hybrid court system, but recruitment has been a constant problem.<sup>229</sup> Because the U.N. accepts only “exceptional” judges, individuals in the candidates’ home communities are typically reluctant to let the judges leave their local jurisdiction.<sup>230</sup> In addition, all judicial candidates must be able to work in English, the official language of the mission, and deal with the various hardships of living in Kosovo.<sup>231</sup>

#### V. MY EXPERIENCE<sup>232</sup>

To the general description of the work of international judges in Kosovo, I will now add my own experiences as a judge in this region. In 2005, I arrived in Pristina and was met by a driver from the U.N.—the first Kosovar I encountered. The driver also picked up a police officer from India and transported us to the Grand Hotel. The first days in Pristina were spent meeting with officials, taking the oath of office—which was administered by the head of the UNMIK justice department, obtaining a driver’s license, checking out a car, and other personal matters. I was then assigned to Prizren in the southern part of Kosovo.

The courthouse in Prizren where I spent most of my working hours was a twenty-minute walk from my apartment. I usually left my U.N. vehicle at the courthouse and walked because U.N. security officials suggested that we not leave cars on the street. The route of my daily walk passed by numerous shops selling jewelry, clothing, and electronics goods, and barbershops, markets, blacksmith shops, internet cafes, coffee shops, and restaurants—as well as kiosks selling trinkets, magazines, and newspapers. One men’s clothing store had a row of about ten mannequins that were put out every morning and taken in each evening and had signs advertising “Suits Complete—30 Euros.” Many days I would see armored

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228. *Id.* at 64. In March 2003, sixteen international judges from the United States, Germany, the U.K., Moldova, Poland, Cameroon, Italy, Hungary, Uganda, the Philippines, Mauritius, and Canada were serving with the U.N. in Kosovo. Cesare P.R. Romano, *The Judges and Prosecutors of Internationalized Criminal Courts and Tribunals*, in *INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA* 235, 245 (Cesare P.R. Romano et al. eds., 2004).

229. *See* Cady & Booth, *supra* note 185, at 64.

230. *Id.* at 63.

231. *Id.* at 63–64.

232. The following section is based upon Judge Larry Eisenhauer’s experience and personal journal entries from his time in Kosovo.

vehicles sitting outside with fully armed German or Turkish soldiers waiting for their comrades to try on a new suit.<sup>233</sup> My first impression of Kosovo culture was that of an industrious people intent on leading as normal a life as possible given the uncertain political situation and occupation by foreign troops—and that impression never changed.

#### A. Panel Work

My first assignment required me to drive to Pristina to sit on a three-judge panel of Kosovo's Supreme Court. Judge Agnieszka Klonowiecka-Milart from Poland (the presiding judge) and Judge Vinod Boolell from Mauritius were the other panel members. We decided that a second appeal from a prior ruling of the Kosovo Supreme Court was not available. Under the former Yugoslav Federal Code, a third appeal was available under certain circumstances; however, the new Rules of Procedure in Kosovo did not allow for such an appeal.

The drive from Prizren to Pristina was only twenty-five miles—but took one and one-half hours due to the traffic. The central part of the drive from Suva Reka to Stimlje is very mountainous and heavy trucks can only go about five miles an hour down certain sections. Animals present road hazards as well. As I drove across the countryside, I often encountered slow-moving horses and tractor-drawn wagons. Often, shepherds grazed livestock in the roadside grass.

My first weeks in Prizren were filled by reading the legal codes, meeting the local judges, and meeting the other international judge for the region, Claudia Fenz from Austria—who had been in Prizren since December 2004.<sup>234</sup> An experienced judge, she provided me with a wealth of information on the law and the continental system. Fenz also had experience as an investigative judge and was accustomed to sitting on the three-judge panels. Our legal officer was Virginie Monchy from France—who had been with UNMIK for about three years and was another

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233. The territory was and continues to be occupied by the Kosovo Force (KFOR) consisting of troops from all over the world. The region around Prizren was occupied by German, Austrian, Swiss, and Turkish troops. See Kosovo Force, Multinational Brigade Southwest, [http://www.nato.int/kfor/kfor/mnb\\_southwest.htm](http://www.nato.int/kfor/kfor/mnb_southwest.htm) (last visited Mar. 15, 2007).

234. Judge Fenz has now been appointed by King Norodom Sihamoni to serve as a reserve judge on the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. See U.C. Berkeley War Crimes Studies Ctr., Cambodia, <http://socrates.berkeley.edu/~warcrime/Cambodia/index.htm> (last visited Mar. 15, 2007).

excellent source of advice and guidance. Ms. Monchy informed me of what actions were pending in Prizren and what I needed to read and how to prepare for the cases. My first trial involved three defendants charged with both trafficking in persons and rape.<sup>235</sup> The case was assigned to an international panel because a local judge was suspected of being involved. This suspicion turned out to be unfounded. The case was interesting because it required application of Kosovo's new Criminal Code and Rules of Criminal Procedure. The other panelists included an international judge from Minnesota and a local judge of Albanian descent. It was my responsibility to schedule the case which included summoning the witnesses. I also held a pretrial conference—something foreign to the local system. I wanted to meet the lawyers and find out how long they expected the trial to take and see if the issues could be narrowed. They were very wary and had little to say. They did know the International Prosecutor, Jude Romano, from the Philippines—as they had worked with him in the past and therefore trusted him. I reviewed the entire case file and scheduled the trial for the last two weeks in May. The trial resulted in many unexpected events—including the main victim (the injured party in the local parlance) showing up on the first day of trial in the company of one of the defendant's family. The mother of one of the defendants claimed the injured party was married to her son. She was only fifteen. After clearing the courtroom and separating the girl from the defendant's family, we determined she was not married to the defendant.

After many delays (because of the problems associated with scheduling) the trial concluded in July. The panel deliberated for one day, and then took a day to prepare for the announcement of the verdict, and on the third day finally announced the verdict. In Kosovo, the announcement of a verdict requires everyone in the courtroom to stand while the presiding judge reads what is known as the “enacting clause”—which includes a recitation of the charges, the conclusions of the trial panel, and the sentence. I read the clause aloud in English and this pronouncement was then translated into Albanian. It was only then that the defendants learned they had been sentenced to twelve years in prison. Everyone was then seated as I explained the panel's reasoning. The U.N. issued a press release about the sentences because these were the longest sentences ever handed down in a trafficking case in Kosovo. Trafficking in persons, particularly young women for prostitution, is a major problem in the region. Extreme poverty combined with the promise of a better future

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235. Prosecutor v. Ukaj, P. No. 02/2005 (Prinzen Dist. Ct. 2005) (Kosovo) (decision on file in the Rare Books Room, Drake University Law Library).

makes young women in Albania and Moldova particularly susceptible to this problem—justifying the severity of this sentencing.

I sat on one other trial as a panelist.<sup>236</sup> The presiding judge of this panel was from Sweden and the other member was a Serbian Kosovar. The trial took about a month primarily because everything had to be translated twice, into Albanian for the witnesses and for the injured party's lawyer, and into Serbian for the defendant and his lawyers. The translators were adept but we had no equipment for simultaneous translation and we had to wait for each in turn. The trial was held in Mitrovica, a city in the north of Kosovo. The Ibar River divides the city into the Serbian section to the north and the Albanian section to the south. The courthouse was north of the river and the largely Albanian courthouse staff was bused in each day with armed guards. The defendant, a member of the Yugoslavian army, was charged with several counts of murder. In 1999, the defendant and a carload of Serbs had driven into an Albanian village and started shooting. He had been tried and convicted, but the conviction had been overturned on appeal. The presiding judge in the original trial had not been convinced of guilt but was outvoted two to one. Under the law, no dissenting opinion was allowed. He wrote the verdict and clearly indicated he was not convinced of guilt, but in the end found him guilty. The Supreme Court reversed because the reasoning did not support the verdict. We acquitted the defendant. Although the incident was proven to have occurred, the specific identification of this defendant was not convincingly proven.

#### B. *Service as an Investigating Judge*

I acted as an investigative judge in additional cases. In one, bombers had attempted to blow up a railroad bridges as a passenger train full of Serbs crossed. The bomb, however, exploded prematurely and killed the two bombers. The remaining defendant was alleged to have conspired with the deceased bombers. Evidence from the defendant's car suggested the presence of explosives. The defendant had also made many phone calls to both of the deceased bombers in the days leading up to the blast and had visited a website of the Albanian National Army (AKSH)—a known terrorist organization. My role as investigating judge required me to assume a quasi-prosecutorial role. Generally speaking, the process is as

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236. Prosecutor v. Mihajlovic, Case No. P. 215/05 (Dist. Ct. of Mitrovica/Mitrovice) (Kosovo) (decision on file in the Rare Books Room, Drake University Law Library); *see also* Prosecutor v. Mihajlovic, Case No. AP-KZ 15/2006 (Supreme Ct.) (Kosovo) (decision on file in the Rare Books Room, Drake University Law Library) (affirming the district court's conviction).



follows: Once a prosecutor receives an arrest report from the police requesting that an investigation be conducted, the investigating judge reviews the report. Within seventy-two hours of an arrest, the suspect is brought before the investigating judge, who then questions the suspect about their involvement in the crime. The international prosecutor and local defense counsel are present for this questioning. An interpreter translates the questions from English into the witness's native language—Albanian or Serbian. After hearing from the suspect, the investigating judge determines whether there are grounds for an investigation; the judge is then empowered to take any action deemed necessary—including the questioning of additional witnesses. This process may span several months, and the suspect, not yet charged with a crime, may remain in custody. After the investigating judge determines that the matter has been “sufficiently clarified,” the judge declares the investigation to be at an end. All statements are then forwarded to the prosecutor, who has fifteen days to decide whether or not to file an indictment. The investigative judge may not act as the trial judge in these future proceedings.

In the bombing case, I completed my investigation and forwarded all statements to the prosecutor a week before I returned to Iowa. I examined eight witnesses, including all former owners of the defendant's car, and those with the defendant when he was arrested. Before leaving, I ordered the defendant's release on bond after his family raised sufficient cash to ensure his future presence at trial.

### *C. Appellate Work*

In the middle of my tour in Kosovo I sat with two other American judges on an appeal by four defendants convicted of war crimes.<sup>237</sup> All four defendants were alleged to have been members of the Kosovo Liberation Army during that period. The arguments took place over two full days and the courtroom was full of onlookers and the soldiers responsible for transporting the prisoners. The temperature in the courtroom must have been near 100 degrees. Again, the arguments were made in Albanian and translated into English. The issues were very technical, requiring the court to analyze the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY)—specifically Articles 22, 24, 26, and 30 which were made applicable through UNMIK Regulation 1999/24 and amended by UNMIK Regulation 2000/59. In a lengthy decision, we reversed the convictions and remanded the case for retrial.

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237. Prosecutor v. Gashi et al., AP-KZ 139/2004 (Supreme Ct.) (Kosovo) (decision on file in the Rare Books Room, Drake University Law Library).

#### D. Training

Part of the role of the international judges is to assist in the training and education of the local judiciary. I had the opportunity to lead a group discussion at the Kosovo Judicial Training Council on the law of international trafficking in persons. I also met regularly, both formally and informally, with my Kosovar colleagues. The topics of the weekly judges meetings ranged from the mundane (parking) to the profound. The local judges, poorly paid and with little staff support, faced challenges to their independence and were susceptible to bribes. These issues were freely discussed at these meetings as well as in private meetings with individual judges. Local judges understand that the rule of law requires a judiciary which has the support and respect of the people, and Kosovar judges are striving to achieve this and break free from the legacy of Communist rule.

#### VI. SUCCESS OF THE HYBRID COURT SYSTEM

Many individuals assume that international judges only hear cases concerning ethnic violence and war crimes, but this assumption is far from accurate.<sup>238</sup> As is clear from my experiences in Kosovo, international judges are working to establish and influence an overall system of justice, and “progress has been made towards establishing a culture in which everyone understands that no one is above the law.”<sup>239</sup>

Unlike the ICTY, which is scheduled to conclude in 2008, UNMIK has no plans to remove international judges from Kosovo’s courts.<sup>240</sup> UNMIK, in short, cannot and will not leave Kosovo until it has created “a functioning, well-trained, and effective police and judiciary capable of continuing the fight against organized crime.”<sup>241</sup>

International judges have played an important role in reforming Kosovo’s judicial system since arriving in the area in 2000. Although international judges make up only a small percentage of all judges in Kosovo, they have led investigations, reviewed most war crimes judgments,

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238. Cady & Booth, *supra* note 185, at 66–69.

239. *Id.* at 66.

240. *Id.* (stating that the ICTY will refer some cases to the Kosovo hybrid court system as it wraps up and decreases its caseload); Göran Sluiter, *Legal Assistance to Internationalized Criminal Courts and Tribunals*, in INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 379, 393 (Cesare P.R. Romano et al. eds., 2004) (concluding it is uncertain when U.N. administration in Kosovo will end).

241. Cady & Booth, *supra* note 185, at 68–69.

and have added impartiality to an embattled and ethnically-divided judicial system.<sup>242</sup>

Despite these contributions, both the international judges and the hybrid court system have been criticized for lacking autonomy and for submitting to the control of the SRSG and the Department of Justice.<sup>243</sup> However, granting the SRSG complete control over international judges likely has little effect on the mission's ultimate goal—securing the future of Kosovo's legal system.<sup>244</sup> International judges are not part of Kosovo's future—“[t]hey are a special force for intervention, to enable UNMIK to administer impartial justice at this early phase, when the local judiciary is too weak to be able to withstand the societal pressures on it in the aftermath of the conflict.”<sup>245</sup> Therefore, “the deployment of international judges . . . is complementary, not alternative, to direct capacity-building of local judges and prosecutors.”<sup>246</sup>

## VII. CONCLUSION—EXAMINING THE FUTURE

This Article illustrates the contributions of two graduates of Drake University Law School to the field of international justice. Justice Wennerstrum and I each left the Iowa courts for an assignment in Europe. However, Wennerstrum came back far more disillusioned than I. Wennerstrum's criticisms of both the atmosphere surrounding the Nuremberg trials as well as the actual proceedings led to a healthy debate on both the structure and rules to be used by international tribunals. I, on the other hand, perhaps expecting less was greatly impressed with the efforts of the U.N. to bring the rule of law to Kosovo. The primary difficulty I faced, of learning a system and becoming engaged in a six-month assignment, could be resolved through longer appointments. However, the recruitment of active judges makes it difficult to expect anything more than a six-month stay. Generally, the infusion of international judges into Kosovo has worked well and has greatly improved the quality of justice in the region.

In sum, my experience reminded me that the art of judging is universal and transcends international borders and legal systems. I have visited courtrooms in both Germany and Ukraine. I have now presided

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242. See Cerone & Baldwin, *supra* note 183, at 50–52.

243. *Id.* at 55–57.

244. See Cady & Booth, *supra* note 185, at 76.

245. *Id.*

246. *Id.* at 78.

over courtrooms in Iowa and Kosovo. I have extensively studied the cases and the transcripts of the Nuremberg proceedings presided over by Justice Wennerstrum. Additionally, as an appellate judge, I have read transcripts of hundreds of Iowa trials. The expectations of citizens in all of these proceedings is for a judge who will listen respectfully, allow everyone the opportunity to present evidence within the applicable rules, and to apply the law equally to everyone—a goal which international justice should seek to secure for all citizens, whether in the farm fields of Iowa or the mountainous hamlets of far-off Kosovo.