

# The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo

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Hybrid domestic-international tribunals offer an important approach to transitional justice, the process by which societies provide accountability and reconciliation for mass atrocity. Hybrid courts are courts in which both the institution and the applicable law consist of a blend of the international and the domestic: foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries; and at the same time, the judges apply domestic law that has been reformed to include international standards. These courts have developed in an ad hoc way, the result of on-the-ground innovation rather than grand institutional design. Typically, they have emerged in post-conflict situations to address cases involving mass atrocity, usually where no politically viable full-fledged international tribunal exists, as in East Timor or Sierra Leone, or where an international tribunal exists but cannot cope with the sheer number of cases, as in Kosovo. Yet despite a growing literature on transitional justice,<sup>1</sup> hybrid courts have received little attention so far, at least less attention than international tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC).

Part of the reason these hybrid courts have received so little attention is that they have faced resistance from two sides. On the one hand, many of those who favor international justice appear to see hybrid tribunals as mere

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1. See generally, JASON ABRAMS & STEVEN RATNER, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY; ALEX BORAINÉ, A COUNTRY UNMASKED (1997); PRISCILLA HAYNER, UNSPEAKABLE TRUTHS (2001); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz, ed. 1995).

second-best alternatives to international courts. Indeed, it is striking that even two government officials who played a key role in establishing such tribunals recently resisted the notion that such courts could serve as a model for the future.<sup>2</sup> Perhaps one reason for the resistance on this front is the concern that such courts might be supported as an alternative to, and perhaps as a means to undermine, international justice. On the other hand, those who are resistant to the idea of international justice for mass atrocities, such as Bush Administration officials who have opposed the ICC, may see mixed tribunals as carrying too many of the trappings of international courts. This dual resistance to hybrid courts is unfortunate, since they hold a good deal of promise and actually offer an approach that may address some of the concerns about purely international justice, on the one hand, and purely local justice, on the other.

In this Essay, I will look at one example of hybrid courts, those established in Kosovo to hear cases involving war crimes, genocide, and other mass atrocities. I will then address some of the advantages and disadvantages that such courts hold, and assess how well the Kosovo courts have fulfilled their promise. Finally, I will discuss ways in which hybrid courts might fit into the ICC's complementarity regime. I will argue that such courts are best seen not as alternatives to international or local justice, but rather as a complement to both.

### I. HYBRID COURTS IN KOSOVO

In June of 1999, after a NATO-led bombing campaign had helped to halt ethnic cleansing and other mass atrocities committed primarily by Serb forces against the ethnic Albanian population in Kosovo, the United Nations Security Council issued a resolution establishing the United Nations Mission in Kosovo (UNMIK).<sup>3</sup> UNMIK's mandate required it to maintain peace and security in the territory: to perform basic civilian administrative functions including the establishment of civil law and order, coordinate humanitarian and disaster relief, facilitate the return of refugees, promote human rights, support the reconstruction of key infrastructure,

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2. See discussion of David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues, and Hansjörg Strohmeyer, Director of the Office of Humanitarian Affairs at the United Nations, Panel on Hybrid Domestic-International Courts, International Law Association Annual Conference, Oct. 24, 2002. Amb. Scheffer helped establish the special court for Sierra Leone and was deeply involved in the efforts to create a hybrid court in Cambodia; Hansjörg Strohmeyer served as an assistant legal advisor to the U.N. transitional administrators in both Kosovo and East Timor, and in this role helped establish the hybrid courts in both places. Yet Scheffer and Strohmeyer rejected the notion that such hybrid courts might be touted as a model. *See id.*

3. See S.C. Res. 1244, U.N. SCOR, 54th Sess. 4011th mtg., U.N. Doc. S/RES/1244 (1999).

help to establish substantial autonomy and self-government in Kosovo, and facilitate a political process to determine Kosovo's future status.<sup>4</sup> UNMIK's responsibilities thus specifically entailed the institution of law and order, which included the apprehension, trial, and punishment of those who had committed past atrocities as well as those who committed crimes after the establishment of U.N. authority.<sup>5</sup>

This task was not easily fulfilled. Much of the physical infrastructure of the judicial system—court buildings, law libraries, and equipment—had been destroyed or severely damaged during the conflict.<sup>6</sup> Local lawyers and judges were scarce, and those available lacked experience, as most ethnic Albanians had been barred from the judiciary for many years and Serb judges and lawyers had mostly fled or refused to serve.<sup>7</sup> Detainees suspected of committing atrocities, once apprehended by U.N. security forces, were crowding prison facilities, with little prospect of trial.<sup>8</sup> Devastated by the conflict and by years of discrimination against the ethnic Albanian minority, the local judicial system did not have the capacity or the independence to conduct such trials. Yet the ICTY was also ill-equipped to handle such cases. The prosecutor for the ICTY made it clear that the international tribunal was only prepared to try those who had committed the worst atrocities on the widest scale.<sup>9</sup> As the detainees continued to languish in prison, many argued that the continued detention itself violated international human rights standards,<sup>10</sup> and ethnically motivated violence

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4. *See id.*; *see also* United Nations Interim Administration Mission in Kosovo, at <http://www.unmikonline.org/intro.htm> (last visited Mar. 24, 2003). The United Nations divided these responsibilities into four groups, two of which are to be led by non-U.N. organizations, but all of which fall under U.N. jurisdiction: Police and Justice (United Nations); civil administration (United Nations); democratization and institution-building (OSCE); and reconstruction and economic development (European Union). *See id.*

5. For an overview of efforts to establish the rule of law in post-conflict Kosovo, see Wendy S. Betts, Scott N. Carlson, & Gregory Gisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law*, 22 MICH. J. INT'L L. 371 (2001); Hansjörg Strohmeyer, *Making Multilateral Interventions Work: the United Nations and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25:2 FLETCHER FOR. WORLD AFF. 107 (2001) [hereinafter *Multilateral Interventions*]; Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46 (2001) [hereinafter *Collapse*].

6. *See* Betts et al., *supra* note 5, at 376-77.

7. *See Collapse*, *supra* note 5, at 49-50, 53.

8. *See Multilateral Interventions*, *supra* note 5, at 114.

9. *See* Carla Del Ponte, Prosecutor of the ICTY, Statement on the Investigation and Prosecution of Crimes Committed in Kosovo, (Sept. 29, 1999), available at <http://www.un.org/icty/latest/index.htm> (last visited Mar. 20, 2003).

10. *See, e.g.*, OSCE LMS, Report No. 4, Update on the Expiration of Detention

remained widespread.<sup>11</sup>

To address what was rapidly becoming an accountability and justice crisis, support grew for the creation of a special court, to be called the Kosovo War and Ethnic Crimes Court, which was intended to have jurisdiction over war crimes, other serious violations of international humanitarian law, and serious ethnically motivated crimes.<sup>12</sup> The court was to have concurrent jurisdiction with the ICTY, but would focus on the less high-profile offenders that the ICTY did not have the capacity to try.<sup>13</sup> Yet due to a lack of resources and other political obstacles, the establishment of the court was subjected to repeated delay.<sup>14</sup> Quietly, and with little fanfare, in an effort to achieve similar results by different means, U.N. authorities issued a series of regulations allowing foreign judges to sit alongside domestic judges on existing local Kosovar courts, and allowing foreign lawyers to team up with domestic lawyers to prosecute and defend the cases.<sup>15</sup> The hope was that the infusion of foreign experts would jumpstart the judicial process, providing badly needed capacity and independence.<sup>16</sup>

And indeed, with foreign support, the trials proceeded.<sup>17</sup> As of June

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Periods for Detainees (Mar. 18, 2000), at 4, *available at* <http://www.osce.org/kosovo/documents/reports/justice/report4.pdf> (last visited Mar. 20, 2003). When the UNMIK issued a regulation allowing for longer pre-trial detention of suspects, the OSCE's Legal System Monitoring Section concluded that the new regulation was a "clear breach" of the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). *See* OSCE LMS, Kosovo: Report No. 6: Extension of Time Limits and the Rights of Detainees: the Unlawfulness of Regulation 1999/26 (April 29, 2000), at 3, *available at* <http://www.osce.org/kosovo/documents/reports/justice/report4.pdf> (last visited Mar. 20, 2003).

11. *See* OSCE, Assessment of the Situation of Ethnic Minorities in Kosovo (Period Covering Nov. 1999 through January 2000), at 1, *available at* [http://www.osce.org/kosovo/documents/reports/minorities/min\\_rep\\_04\\_eng.pdf](http://www.osce.org/kosovo/documents/reports/minorities/min_rep_04_eng.pdf) (last visited Mar. 20, 2003).

12. *See* Betts et al., *supra* note 5, at 381.

13. *See id.*

14. *See Multilateral Interventions, supra* note 5, at 119.

15. *See* Betts et al., *supra* note 5, at 381.

16. *See* Organization for Security and Co-operation in Europe Mission in Kosovo, Department of Human Rights and the Rule of Law, Legal Systems Monitoring Section, *Report 9 – On the Administration of Justice*, Mar. 2002, at 5-6 [hereinafter March 2002 OSCE Report], *available at* [http://www.osce.org/kosovo/documents/reports/justice/Report9\\_eng.pdf](http://www.osce.org/kosovo/documents/reports/justice/Report9_eng.pdf) (last visited April 6, 2003).

17. For example, as of December, 2000, there were ten international judges and three international prosecutors serving in the five regions of Kosovo. They completed a total of 35 trials and investigations. *See United Nations Interim Administration Mission in Kosovo*, Report of the Secretary-General, U.N. Doc. S/2000/1196 (2000); *see also*, OSCE,

2002, Kosovo courts had held trials in seventeen war crimes cases.<sup>18</sup> Initially, international judges had minimal impact, as they did not comprise a majority on the trial panels.<sup>19</sup> A new UNMIK regulation enacted in December 2000 sought to rectify this problem, however,<sup>20</sup> and after that date all war crimes cases have been held in front of courts composed of a majority of international judges, with international prosecutors primarily in charge of prosecutions.<sup>21</sup> The courts have had difficulty in finding qualified international personnel to serve as judges and prosecutors, have been plagued by a lack of funding, and have issued decisions that commentators have criticized.<sup>22</sup> Yet at least one report, though critical of the tribunals in many respects, suggests that the presence of international actors has improved the quality of justice delivered in these cases.<sup>23</sup>

The substantive law applied in these cases was also a blend of the international and domestic. Initially, with little consultation with the local population, UNMIK authorities declared the applicable law in Kosovo to be Federal Republic of Yugoslavia (FRY)/Serbian law, modified to conform to international human rights standards.<sup>24</sup> This decision outraged many ethnic Albanian Kosovars, who identified FRY/Serbian law as the law of the oppressive Serb regime.<sup>25</sup> Kosovar Albanian judges refused to apply the law, resulting in widespread confusion.<sup>26</sup> In response, UNMIK issued new resolutions describing the applicable law to be the law in force

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Department of Human Rights and the Rule of Law, Report, Kosovo: A Review of the Criminal Justice Division, Sept. 1, 2000 to Feb. 28, 2001, at [http://www.osce.org/kosovo/documents/reports/justice/criminal\\_justice2.pdf](http://www.osce.org/kosovo/documents/reports/justice/criminal_justice2.pdf) (last visited Feb. 3, 2003); OSCE, REPORT, Feb. 2000 to July 2000, at [http://www.osce.org/kosovo/documents/reports/justice/criminal\\_justice.pdf](http://www.osce.org/kosovo/documents/reports/justice/criminal_justice.pdf) (last visited Feb. 3, 2003).

18. OSCE, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *Kosovo's War Crimes Trials: A Review*, at 12 (Sept. 2002), at <http://www.osce.org/kosovo/documents/reports/justice/> (last visited Feb. 3, 2003) [hereinafter *Kosovo's War Crimes Trials*].

19. *See id.*

20. *See* UNMIK Regulation 2000/64, (Dec. 15, 2000) at <http://www.unmikonline.org> (last visited Feb. 3, 2003).

21. *See Kosovo's War Crimes Trials*, *supra* note 18, at 11.

22. *See generally id.* (describing deficiencies)

23. *See id.* at 10-11 (describing the need for international judges); *see also, e.g., id.* at 38 (discussing improvement, after the addition of international judges, in procedures for permitting defense testimony).

24. *See* UNMIK Regulation 1999/1, (July 25, 1999) at <http://www.unmikonline.org> (last visited Feb. 16, 2003).

25. *See Multilateral Transitions*, *supra* note 5, at 112-13.

26. *See id.*

in Kosovo prior to March 22, 1989.<sup>27</sup> But like the initial decision, the applicable law was to be a hybrid of pre-existing local law and international standards. Local law was only applicable to the extent that it did not conflict with international human rights norms.<sup>28</sup>

## II. ADVANTAGES AND DISADVANTAGES OF THE HYBRID COURTS

The process leading to the establishment of the hybrid domestic-international courts in Kosovo, while somewhat improvised, nonetheless reveals a few potentially enduring positive attributes of this newly-emerging form of accountability. Of course, the success of any effort to confront past atrocities, whether through criminal trials, truth commissions, civil compensation schemes, vetting of public officials, or some combination thereof, will depend on the particular social, political, and cultural context. The need for such an effort to confront the past, and the role it might play in establishing peace and democratic institutions of governance likewise varies considerably depending on the unique circumstances of each case: there are no cookie-cutter solutions to these highly complex problems. The Kosovo case shares enough similarities with other potential post-conflict situations, however, that one can use it to draw a few tentative conclusions about the promise that mixed tribunals might hold in other settings.

Until recently, the primary mechanisms for imposing individual criminal responsibility for grave human rights abuses fell into two categories. Either new regimes attempted domestic trials, or the international community established international tribunals to hold wrongdoers accountable. Both of these approaches, however, have significant limitations. Such limitations can be conceptualized along two axes: first, problems of legitimacy, and second, problems of capacity-building. Focusing on the lessons learned from Kosovo, this Part first outlines the problems of both purely domestic and purely international tribunals, and then suggests ways in which hybrid domestic-international courts might address some of these problems.

### A. Legitimacy Problems

In some circumstances, hybrid domestic-international courts may have greater legitimacy in the adjudication of serious human rights crimes than either purely domestic trials, on the one hand, or purely international processes on the other. In post-conflict situations, the legitimacy of

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27. See UNMIK Regulation 1999/24, (Dec. 12, 1999) at <http://www.unmikonline.org> (last visited Feb. 16, 2003); see also UNMIK Regulation 1999/25, (Dec. 12, 1999) at <http://www.unmikonline.org> (last visited Feb. 16, 2003).

28. See *Multilateral Transitions*, *supra* note 5, at 112.

domestic institutions is often in question. Of course, the precise nature of the legitimacy crisis varies and is inseparable from the unique history and culture of a given society. In this brief Essay, I am not attempting to provide a comprehensive overview of the various types of legitimacy problems facing such societies. Nonetheless, in most cases, to the extent that domestic institutions exist at all, they typically have suffered severely during the conflict.

With respect to the judiciary, the physical infrastructure has often sustained crippling damage. In addition, the remaining available personnel is likely to be severely compromised by association with the prior regime or lacking in essential skills. Judges and prosecutors from the prior regime—who failed to prosecute or convict murderers, torturers, or ethnic cleansers—may remain in place, or, alternatively, the new regime may have replaced the old personnel almost completely, resulting in an enormous skills and experience deficit, as well as the danger of show trials and overly zealous prosecution for past crimes.

Kosovo represents one type of extreme case. After the period of conflict that produced mass atrocities, no fully functioning domestic institutions existed.<sup>29</sup> Indeed, the lack of domestic institutions led the international community, with the support of large segments of the local population, to establish an interim transitional administration, run by the United Nations.<sup>30</sup> The purpose of this interim governing entity was to restore peace and stability and to develop the democratic institutions, including a fully-functioning judiciary, necessary to pave the way for self-governance.<sup>31</sup> In such circumstances, there is no clear way to legitimize institutions through a normal political process. Not only is there no functioning court system, but there are no other political institutions, executive or legislative, to establish such a system. Moreover, if the lack of formal institutional legitimacy is difficult to confer on a fledgling justice system, the establishment of *informal* legitimacy—broad societal acceptance of institutions—is even more difficult to establish.

In Kosovo, not only was the physical infrastructure of the legal system severely damaged by the conflict, but the system was also tainted by the former oppressive regime, undermining public confidence in, and the broad societal legitimacy of, the system as a whole. Indeed, the justice system had been run by perceived oppressors, the Serbs;<sup>32</sup> and ethnic Albanians had been systematically excluded from the system.<sup>33</sup>

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29. *See supra*, text accompanying notes 6-11.

30. *See supra*, text accompanying notes 3-5.

31. *See id.*

32. *See Collapse, supra* note 5, at 49-50.

33. *See id.*

Even if a new local system can be established quickly after the conflict, over-correction for these imbalances can create new problems. In the case of Kosovo, for example, it was initially easier to appoint ethnic Albanian judges than ethnic Serb judges. Only a few Serb judges were willing to serve, and even those who were appointed subsequently stepped down, in response to pressure from Belgrade.<sup>34</sup> Yet without representation of Serbs within the judiciary, the independence of the decision-making, key to legitimacy among the entire local population, was severely in question.<sup>35</sup> In fact, due to concerns about lack of due process and insufficient evidence, several judgments imposed against Serb defendants by panels of ethnic Albanian judges were later thrown out by panels that included international judges.<sup>36</sup> Under these circumstances, there was little ability for the local justice system to deliver verdicts perceived to be legitimate in trials of those suspected of committing mass atrocities.

Yet at the same time, the legitimacy of purely international processes is often difficult to establish. In the case of Kosovo, an international tribunal—the ICTY—did exist as a forum to try those few individuals responsible for the most egregious atrocities. Yet this institution was ill-equipped to address more than a handful of cases, as international courts undoubtedly will always be. And establishing the legitimacy of an international institution such as the ICTY, within a country that does not support its creation, is quite difficult. The ICTY was established by Security Council resolution, without the consent of the Federal Republic of Yugoslavia.<sup>37</sup> In light of the continuing ethnic tensions within the region and the scale of the atrocities, the creation of an international court based in the Hague, removed from the scene of the crimes, and run by international judges and staff, may have been necessary to create the kind of independence required to impose individual criminal responsibility. Many segments of the local population, particularly the predominantly Muslim and Croat victims of the atrocities, have supported the work of the ICTY.<sup>38</sup>

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34. March 2002 OSCE Report, *supra* note 16, at 5.

35. See generally Andrew McKay, *Judicial Affairs: Delivering Effective Law and Order*, FOCUS KOSOVO, (Oct. 2001) at <http://www.unmikonline.org/pub/focuskos/oct01/focusklaw1.htm> (last visited Feb. 2, 2003).

36. See Susan Mangali, *Detentions: Tale of Two Prisoner Groups*, FOCUS KOSOVO, (Feb. 2002) at <http://www.unmikonline.org/pub/focuskos/feb02/focusklaw1.htm> (last visited Feb. 2, 2003).

37. See U.N. SCOR, 48th Sess., 3175th mtg. at 2, U.N. Doc. S/RES.808 (1993), available at <http://www.un.org/docs/scres/1993/scres93.htm> (last visited Feb. 2, 2003); U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES.827(1993), available at <http://www.un.org/docs/scres/1993/scres93.htm> (last visited Feb. 2, 2003).

38. See The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, & the Centre for Human Rights, University of Sarajevo,



Yet support within the Serb population of any of the countries and regions that now comprise what was the former Yugoslavia has been more difficult to elicit.<sup>39</sup> And within all ethnic groups, the work of the court has often been misunderstood.<sup>40</sup> Moreover, some consider the ICTY an imposition of Western European powers and the United States and thereby tainted by imperialism.<sup>41</sup>

A recent empirical study of the perceptions of the ICTY within Bosnia and Herzegovina illustrates this point.<sup>42</sup> The study indicates that a wide cross-section of lawyers and judges from all ethnic groups, while playing different roles within Bosnian society, were similarly ill-informed about the ICTY's work and were often suspicious of its motives and its results.<sup>43</sup> Possible reasons for this lack of legitimacy include the location of the tribunal in the Netherlands, far from the local population, the failure of the ICTY to publicize its work within Bosnia, particularly within the legal community, the lack of participation of local actors, even as observers, and the use of predominantly common-law approaches to criminal justice that were unfamiliar to local legal professionals, trained in a civil law tradition.<sup>44</sup>

While no such study exists for Kosovo, similar problems might be expected there. Indeed, evidence suggests that a general mistrust of the ICTY took root within the Serbian Kosovar population. Further, even among Albanians in Kosovo the long delays in the proceedings and the limited number of prosecutions have resulted in serious criticism of the institution.

It would be too simple to say that international tribunals have legitimacy with respect to the international community, but not with respect to local populations. In fact, the story is always much more complicated. Many segments of the local population, as in the case of Kosovo, often strongly support international justice in the wake of mass atrocities. Likewise, the international community does not always support the establishment of such institutions. Moreover, it is misleading to say that there is one, monolithic international community. In truth there are multiple international communities, including, for example, communities of nation-states (such as U.N. members, Security Council members, NATO countries, the Council of Europe, and the Organization of American States), communities of non-

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*Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 127-36 (2000) [hereinafter Joint Study].

39. *See id.*

40. *See id.* at 136-39.

41. *See id.* at 143-45.

42. *See id.*

43. *See id.* at 153-55.

44. *See id.* at 144.

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governmental organizations (NGOs) (such as human rights NGOs, humanitarian NGOs, or development NGOs), and communities of other actors such as corporations, academics, and on and on. Indeed, the division between the international and the local may make little sense in a globalized era, for example when international NGOs partner with local NGOs, foreign governments give aid to local civil society organizations, and public policy networks routinely bridge gaps between local and international actors. Nonetheless, despite these complexities, it does appear that international courts such as the ICTY do face greater obstacles in establishing local legitimacy in the places from which the accused perpetrators come than they do in establishing legitimacy within broader international communities.

### B. Capacity-Building Problems

Purely domestic and purely international institutions also often fail to promote local capacity-building. In post-conflict situations, the need to develop local capacity in the justice sector is often an urgent problem. Kosovo again provides an extreme example of this problem. The conflict had virtually eliminated the physical infrastructure of the judiciary—court buildings and prisons were destroyed, equipment was virtually nonexistent.<sup>45</sup> But even more devastating than the physical loss was the loss in human resources. In Kosovo, only Serbs had the experience and training to work as judges and prosecutors, yet these Serbs often refused to work in the new system because doing so would constitute a betrayal of their ethnic heritage.<sup>46</sup> Albanians had some training but little experience, as they had been excluded from the system for many years.<sup>47</sup> Under these circumstances, a domestic system cannot be established for a significant period of time, due to extreme lack of capacity in the local sector.

At the same time, a purely international process that excludes local participation does not help build local capacity. An international court staffed by foreigners, or a justice system run by the U.N. transitional administration, also staffed by foreigners, does little to train local actors in necessary skills. In short, local actors are incapable of running the system themselves, but a system run by the international community does not help improve capacity of the local population.

### C. Advantages of Hybrid Tribunals

Hybrid tribunals, as suggested by their use in Kosovo, can offer at least partial solutions to both these legitimacy and capacity problems. The

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45. See *Collapse*, *supra* note 5, at 49-50.

46. See *id.*

47. See *id.*

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sharing of responsibilities among international and local actors in the administration of justice, particularly with respect to accountability for serious human rights crimes, helps to establish the legitimacy of the process as well as strengthen the capacity of local actors.

In Kosovo, the addition of international judges and prosecutors to cases involving serious human rights abuses enhanced the legitimacy of the process, both in the eyes of the local population and the international community. The initial failure of U.N. authorities to consult with the local population in making governance decisions generally, and decisions about the judiciary specifically, sparked public outcry. Of course, without normal political processes in place consultation is inherently difficult. When no elected officials exist to give advice, and civil society has been badly damaged by years of oppression and conflict, there is no easy answer to the question of who should be consulted, without creating an impression of bias. Nonetheless, the appointment of foreign judges to domestic courts to sit alongside local judges, and the appointment of foreign prosecutors to team up with local prosecutors, helped to create a degree of collaboration that generally enhanced the perception of the institution's legitimacy. By working together and sharing responsibilities, not only were perceptions enhanced, but international and local officials necessarily began consulting with each other.

At the same time, the appointment of international judges to the local courts in these highly sensitive cases helped to enhance the perception of the independence of the judiciary and therefore its legitimacy within a broad cross-section of the local population. In Kosovo the previous attempts at domestic justice had failed to win support among Serbs.<sup>48</sup> Indeed, Serbian judges had refused to cooperate in the administration of justice, and the verdicts in the cases tried by ethnic Albanians were regarded as tainted by the ethnic Serbian population.<sup>49</sup> In contrast, the verdicts of the hybrid tribunals have alleviated some impartiality concerns, even among Serbs.<sup>50</sup>

The sharing of responsibilities among local and international officials is, of course, not a complete cure for legitimacy problems. Indeed, such hybrid relationships can raise new questions about who is really controlling the process. When international actors wield more power than local officials—when the majority of judges on a given panel is international, for example, or when the local prosecutors merely serve as deputies to

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48. See March 2002 OSCE Report, *supra* note 16, at 5-6 (describing resignation of Kosovo Serbian judges, low-level of participation by Serbs in courts, and resulting unrest prior to appointment of international judges).

49. See *id.* at 5-6.

50. See *id.*

international prosecutors—some may charge that the international actors control the process, and that such control smacks of imperialism. On the other hand, too little international control may lead to concerns about the independence and impartiality of overly locally-controlled processes.<sup>51</sup> And the devil is, of course, often in these details. Nonetheless, the shared arrangement does offer more promise of working out these difficulties than a purely international or a purely domestic process.

The hybrid process offers advantages in the arena of capacity-building as well. The side-by-side working arrangements allow for on-the-job training that may prove more effective than abstract classroom discussions of formal legal rules and principles.<sup>52</sup> And the teamwork allows for sharing of experiences and knowledge in both directions. International actors have the opportunity to gain greater sensitivity to local issues, local culture, and local approaches to justice at the same time that local actors can learn from international actors.

To be sure, hybrid courts face difficulties in capacity-building. A lack of resources has proven to be the most serious problem so far. Hybrid courts are often given an enormous mandate without receiving sufficient funding to carry out that mandate. Court personnel lack even the most basic equipment necessary for them to do their jobs, translators and other administrative personnel are in short supply, and, perhaps most significantly, the courts have had trouble attracting and retaining qualified international personnel to serve as judges, prosecutors, and defense counsel.<sup>53</sup> To the extent that hybrid courts are touted as a means of doing justice on the cheap, and then deprived of even the most basic resources, they cannot fulfill their potential.

Nonetheless, such concerns about funding are issues more of implementation than conception. And, of course, lack of resources can be a problem regardless of the legal framework adopted. In the end, perhaps the greatest indication of the promise of hybrid tribunals is found in the fact that they are increasingly being used in post-conflict situations. After many years of efforts, an accord has been reached to create a hybrid

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51. See, e.g., *id.*, at 6. Efforts to establish a mixed tribunal in Cambodia stalled due to an inability to agree about the balance of international and local control. See Seth Mydans, *U.N. Ends Cambodia Talks on Trials for Khmer Rouge*, N.Y. TIMES, Feb. 9, 2002, at A4. Nevertheless, an accord has now been reached. See Seth Mydans, *U.N. and Cambodia Reach an Accord for Khmer Rouge Trial*, N.Y. TIMES, Mar. 18, 2003, at A5.

52. Joel C. Beauvais, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT'L L. & POL. 1101, 1157-59 (2001).

53. See, e.g., *id.* at 1160; Laura A. Dickinson, *The Dance of Complementarity: Relationships Among Domestic, International, and Transnational Accountability Mechanisms in East Timor and Indonesia*, in AVENUES TO ACCOUNTABILITY: NATIONAL AND INTERNATIONAL RESPONSES TO ATROCITIES (Jane Stromseth ed., forthcoming 2003).

domestic/international court in Cambodia.<sup>54</sup> Meanwhile, the project to establish a free-standing hybrid court in Sierra Leone is well underway,<sup>55</sup> and hybrid courts are currently operating in East Timor. Even within the Bush Administration, which is quite often resistant to international justice, there is some support for hybrid domestic-international tribunals, such as the proposed special court for Sierra Leone.

### III. THE RELATIONSHIP BETWEEN HYBRID COURTS AND INTERNATIONAL COURTS

Some critics have suggested that hybrid courts are a mere second-best alternative to international courts.<sup>56</sup> Yet the Kosovo case illustrates that such courts need not be a replacement for international justice (or indeed, for local justice, either). Rather, the use of hybrid courts in Kosovo suggests that such courts may be a necessary complement to international tribunals. Indeed, their use in Kosovo, in the shadow of the ICTY, may have implications for the relationship of such courts to the newly established ICC.

The U.N. established hybrid courts in Kosovo precisely because the ICTY could not handle the volume of atrocities cases from the region. The ICTY prosecutor made it clear that the ICTY would be reserved for only the highest profile cases from Kosovo, leaving many suspects without a forum for trial.<sup>57</sup> Because the ordinary Kosovo courts could not plausibly provide fair trials in these cases, provision was made for the hybrid courts to close this gap.

Similarly, the ICC will not be equipped to try more than a handful of cases arising from any given post-conflict situation. Yet local courts may not be able to try such cases either. In fact, it is highly likely that in any circumstance in which the ICC assumes jurisdiction, the number of cases crying out for some form of international adjudication, due to the inability of local courts to handle them, will vastly exceed the ICC's capacity. Apart from circumstances in which the Security Council determines that the court should exercise jurisdiction, the court's complementarity regime ensures that the court can only assume jurisdiction where national courts are unwilling or unable to investigate.<sup>58</sup> Yet it is precisely in these

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54. See Mydans, *U.N. and Cambodia Reach an Accord for Khmer Rouge Trial*, *supra* note 51, at A5.

55. See U.N. SCOR, 4186th mtg. at 2, U.N. Doc. S/RES/1315 (2000), available at <http://www.un.org/docs/scres/2000/sc2000.htm> (last visited Feb. 20, 2003).

56. See *supra* note 2 and accompanying text.

57. See *supra* note 9 and accompanying text.

58. See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome Statute of the International

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circumstances that huge numbers of cases cannot be adequately resolved by local courts—and the number of the cases that cannot be resolved adequately will likely far outnumber the ones that might come before the ICC.

Under these circumstances, hybrid courts can play a useful role in shoring up the capacity and legitimacy of criminal proceedings to try those accused of committing mass atrocities. Their success will depend in part on whether they receive adequate material and human resources. Certainly, the Kosovo hybrid courts have suffered on these grounds. Nonetheless, failures in implementation should not lead to an indictment of the model itself. These courts hold considerable promise, even in a world after the ICC.