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Laura T. Dickinson

*George Washington University Law School, ldickinson@law.gwu.edu*

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# TRANSITIONAL JUSTICE IN AFGHANISTAN: THE PROMISE OF MIXED TRIBUNALS

LAURA A. DICKINSON\*

In the wake of the September 11th attacks on the World Trade Center and the Pentagon, how to apprehend, question, and punish the perpetrators remains a difficult question to answer. Despite the United States-led military response in Afghanistan, which ousted the Taliban regime, Osama bin Laden and the leaders of al Qaeda remain at large. United States' forces in Afghanistan captured and then jailed several hundred suspects on Guantanamo Naval Base, in Cuba, but the relationship between these suspects and al Qaeda is unclear.<sup>1</sup> United States allies, such as Great Britain, France and Germany, also detained individuals suspected of supporting the September 11th attacks and other terrorist plots.<sup>2</sup> Even countries long considered hostile to the United States, such as Syria, have detained and questioned suspects.<sup>3</sup> Yet with a few exceptions, most of those apprehended appear to have played only a minor role, if any, in the September 11th plot itself. And on U.S. soil, while authorities had at one point detained over 1,000 people believed to be involved in the attacks, only a handful appear to have any link at all to al Qaeda or the September 11th attacks.<sup>4</sup>

If capturing suspects has been difficult, the question of how (or whether) to hold these suspects individually accountable has proven to be even more vexing.

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\* Associate Professor, University of Connecticut School of Law. This article was presented as part of the Sutton Colloquium, *International Terrorism, Ethnic Conflicts, and Self-Determination*, held at the University of Denver College of Law on March 23, 2002. I owe thanks to: Mark Weston Janis, Richard S. Kay, Harold Hongju Koh, Diane F. Orentlicher, and Jeremy Paul. I also acknowledge the diligent research assistance of Cara Cutler and Justine Parker.

1. See *34 More Detainees from Afghanistan Jailed at U.S. Base*, N.Y. TIMES, June 13, 2002, at A15 (noting that just under 500 prisoners were detained at Guantanamo naval base as of June 13, 2002) [hereinafter *34 More Detainees*]; Katharine Q. Seelye, *Rumsfeld Backs Plans to Hold Captives Even if Acquitted*, N.Y. TIMES, Mar. 29, 2002, at A18 (observing that none of the detainees has been charged with any crime and reporting statement of top officer in charge of anti-terror intelligence that some of those being held in Guantanamo "were essentially lost souls who could provide scant intelligence").

2. See, e.g., *France Investigates a Terror Suspect*, N.Y. TIMES, June 9, 2002, at A22; Edmund L. Andrews, *German Officials Find More Terrorist Groups, and Some Disturbing Parallels*, N.Y. TIMES, April 26, 2002, at A12; Alan Cowell, *A Suspect's Story; Algerian Pilot Says Detention Has Made Him a Sept. 11 Victim*, N.Y. TIMES, Feb. 16, 2002, at A9.

3. See Steven Erlanger, *Germans Say Man Tied to Sept. 11 is in Syria Jail*, N.Y. TIMES, JUNE 19, 2002, at A8; James Risen & Tim Weiner, *C.I.A. Is Said to Have Sought Help From Syria*, N.Y. TIMES, Oct. 30, 2001, at B3.

4. See Susan Sachs, *U.S. Deports Most of Those Arrested in Sweeps after 9/11*, N.Y. TIMES, July 11, 2002, at A20; Christopher Drew & Judith Miller, *Though Not Linked to Terrorism, Many Detainees Cannot Go Home*, N.Y. TIMES, Feb. 18, 2002, at A1.

The Bush administration has not pursued a consistent course but has, in the main, eschewed the usual criminal law approaches in favor of military solutions. For example, the suspects apprehended in Afghanistan and brought to Guantanamo Naval base are now languishing in legal limbo. The administration asserts that these detainees, who are not U.S. citizens, will not be tried in U.S. courts.<sup>5</sup> Rather, administration officials suggest that they will be brought before newly established military commissions, where they would be afforded fewer rights than would be provided in ordinary criminal proceedings or even in military courts-martial.<sup>6</sup> The administration has also suggested that some of the Guantanamo detainees might be returned to their home countries, or, possibly, not tried at all but rather held until the end of hostilities, whenever that might be.<sup>7</sup> At the same time, administration officials have refused to be strictly bound by the Geneva Convention's requirements for the treatment of detainees. Indeed, Secretary of Defense Rumsfeld has said that the standards imposed by the Conventions will be observed only "for the most part," and that detainees will not be given individual hearings to determine whether they should be awarded prisoner of war status.<sup>8</sup>

Meanwhile, authorities treat suspects captured in the United States inconsistently. Zacarias Moussaoui, a non-citizen accused of participating in the September 11th plot itself, is being tried in federal district court.<sup>9</sup> But Jose Padilla, an American citizen suspected of participating in a new al Qaeda plot, was

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5. See Katharine Q. Seelye, *Rumsfeld Lists Outcomes for Detainees Held in Cuba*, N.Y. TIMES, Feb. 27, 2002, at A10.

6. See *id.* For a comparison of the rights provided to the accused in the proposed military commissions, those afforded in ordinary criminal trials, and those afforded in courts-martial, see Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L. J. 1259 (2002).

7. See Dickinson, *supra* note 6; see also Seelye, *supra* note 5.

8. See Donald H. Rumsfeld, Department of Defense News Briefing (Jan. 11, 2002) available at [http://www.dod.gov/news/Jan2002/t01112002\\_t0111sd.html](http://www.dod.gov/news/Jan2002/t01112002_t0111sd.html) (last visited Oct. 21, 2002). Rumsfeld also categorically asserted that the detainees would "be handled not as prisoners of war, because they're not, but as unlawful combatants," and that no hearings would be held to assess individuals' status, even though the Geneva Conventions require a "competent" tribunal to make an individualized determination as to whether a detainee qualifies as a prisoner of war. *Id.*; see also Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter POW Convention]. This position was immediately criticized, particularly overseas, as demonstrating that the "U.S. administration is more at home with an improvised process that sometimes skirts the frontiers of legality than with international agreements that impose firm reciprocal responsibilities." *Stick to the Prison Rules: The Geneva Convention Protects Us All*, THE GUARDIAN, Jan. 18, 2002, at 19. The administration later reversed course and accepted the applicability of the Geneva Conventions, but only as to Taliban fighters and not al Qaeda members. Katharine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1. Moreover, the administration continues to maintain that none of the detainees qualify as prisoners of war and that the detainees are not entitled to individualized hearings to determine their status. This only slightly less extreme position has continued to draw criticism, including a rare statement of disapproval by the International Committee of the Red Cross. See Thom Shanker & Katharine Q. Seelye, *Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions*, N.Y. TIMES, Feb. 22, 2002, at A12.

9. See *Indictment Chronicles 'Overt Acts' that it Says Led to Sept. 11 Attacks*, N.Y. TIMES, Dec. 12, 2001, at B6 (describing Moussaoui indictment).

transferred to military detention outside of the United States.<sup>10</sup> Suspects captured by other governments also face haphazard justice. Some are charged with crimes and will be tried, while others are simply held and questioned.<sup>11</sup>

Although some commentators support the administration's proposed use of military commissions,<sup>12</sup> few condone the indefinite detention of suspects without any form of adjudicatory procedure. Many criticize the use of the military commissions altogether, even if limited to suspects captured in the field of battle, or if established with protections for the rights of the accused.<sup>13</sup> Critics argue that, instead, suspects should be tried in existing domestic courts and that no new institutions are necessary.<sup>14</sup> Others, myself included, have suggested that some form of international forum would provide the best method for holding at least those most responsible for the September 11th attacks accountable for their actions.<sup>15</sup> Yet in light of this administration's hostility to international processes, it seems highly unlikely that, despite its advantages, a full-fledged international court will be used to try those accused of planning and carrying out the September 11th attacks.

Moreover, the question of where, and how, to try suspects raises a series of deeper questions about the role of criminal accountability in times of conflict and war. Scholars writing about the response to the September 11th attacks note that the current conflict, between the United-States-led coalition on the one hand, and terrorist organizations such as al Qaeda on the other, does not fit neatly into either a "war" paradigm or a "criminal justice" paradigm.<sup>16</sup> In such circumstances, what rights and procedures are due to individuals who have engaged in atrocities? What are the imperatives of victims who demand accountability? Do procedures to adjudicate individual criminal responsibility have a role to play in containing a current conflict, in deterring future conflict, or in inculcating norms? Do international proceedings do a better job of inculcating such norms, or are domestic processes better suited to that task? Is the effort to promote norms through international proceedings an exercise in imperialism? In a globalized world, does it even make sense to refer to international and domestic proceedings as distinct, or might such processes be better termed transnational?

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10. See Katharine Q. Seelye, *War on Terror Makes for Odd Twists in Justice System*, N.Y. TIMES, June 23, 2002, at A16.

11. See, e.g., Erlanger, *supra* note 3; Andrews, *supra* note 2.

12. See, e.g., Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18.

13. See Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002); George P. Fletcher, *War and the Constitution*, THE AMERICAN PROSPECT, Jan. 1-14, 2002, at 26.

14. See, e.g., Koh, *supra* note 13.

15. See, e.g., Dickinson, *supra* note 6; Anne-Marie Slaughter, *al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23; Richard Goldstone, *Prosecuting Al Qaeda: September 11 and Its Aftermath*, Crimes of War Project, Dec. 7, 2001, at <http://www.crimesofwar.org/expert/al-goldstone.html> (last visited Oct. 21, 2002); Michael P. Scharf, Editorial: *The Case for an International Trial of Al-Qaeda and Taliban Perpetrators of the 9/11 Attacks*, Am. Soc'y Int'l L., Spring 2002, at 12.

16. See, e.g., Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J. L. & PUB. POL'Y 457 (2002).

Significantly, these questions are precisely the ones that scholars in the emerging field of transitional justice have been asking over the past decade about mass atrocities in general. Although these scholars do not focus on the question of terrorism specifically, they study the ways in which societies that are attempting to confront past and lingering mass atrocities do so through a variety of means: criminal trials, truth commissions, civil compensation schemes, lustration programs, and so on.<sup>17</sup> An exploration of how the insights derived from this body of work might be applied to the problem of terrorism in the wake of September 11th would be a fruitful source of further research.

This Essay is an effort to initiate that process by examining an emerging transitional justice mechanism—the mixed domestic-international tribunal—and considering the role such tribunals might play in the fight against terrorism. Mixed tribunals, courts in which international and local judges sit side by side, have already been used with some degree of success in Kosovo and East Timor, and one has recently been established in Sierra Leone. The hybrid nature of these courts may be an advantage when considering issues of accountability in post-Taliban Afghanistan. A purely domestic process is probably impractical in light of the limited capacity of the indigenous legal system. And, given the sheer number of detainees and local distrust of international processes, a hybrid tribunal is more realistic than the establishment of a purely international court. Moreover, a hybrid local-international tribunal in this context may be politically palatable even to those within the Bush administration most in favor of military commissions and would at least pave the way for some form of multilateral justice mechanism in response to the September 11th attacks.

This brief Essay does not attempt to discuss all of these issues in detail. Instead, I hope to delineate the recent history of this emerging accountability mechanism and suggest its possible use in the current climate.<sup>18</sup> I will begin, first, by describing the nature of these tribunals in the most notable post-conflict contexts in which they have been used: Kosovo and East Timor. Second, I will compare these hybrid tribunals to international tribunals, on the one hand, and domestic tribunals, on the other, and explain why, in comparison to each, the mixed tribunals hold so much promise. Finally, I will discuss the implications of using such tribunals in a setting such as post-Taliban Afghanistan.

### I. Prior Use of Mixed Tribunals

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17. See generally, STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (1997); ALEX BORAINÉ, A COUNTRY UNMASKED (2000); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2002); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz, ed., 1995).

18. For a discussion of hybrid tribunals in the context of other emerging mechanisms for prosecuting violations of international humanitarian law, see Diane F. Orentlicher, *The Future of Universal Jurisdiction in the New Architecture of Transnational Justice*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND PROSECUTION OF INTERNATIONAL CRIMES (forthcoming 2003).

In Kosovo and East Timor, the international community worked with local populations to experiment with a relatively new form of accountability for past human rights violations: criminal trials before mixed domestic-international courts. For the most part, these courts emerged as ad hoc solutions in emergency situations, the product of innovative thinking and collaboration among a variety of international and local actors forced to make quick decisions and tough compromises in the face of severe political and economic constraints. In both of these instances, international actors stepped in to keep the peace in territories ravaged by conflict and mass atrocity, at a time when detainees suspected of committing those atrocities were languishing in makeshift detention facilities without any prospect of trial. Domestic courts were not functioning, and international courts were either ill-equipped to handle the number of cases at issue, or were unlikely to be established due to financial or political obstacles. Releasing the suspects into the general population would have led to violent reprisals, public outcry, and general mayhem. Under these circumstances, the establishment of hybrid domestic-international courts appeared to offer a reasonable solution to a pressing and seemingly intractable problem.

Because these courts are the result of on-the-ground innovation rather than grand institutional design, the precise form of each tribunal or set of tribunals has varied considerably. Nonetheless, in both Kosovo and East Timor the courts share an essential hybrid structure: 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. These judges apply domestic law that has been reformed to include international standards. This part discusses the process by which each hybrid court was established and the form that the court has ultimately taken.

#### A. Kosovo

In June of 1999, after the North Atlantic Treaty Organization (NATO)-led bombing campaign helped 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>19</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), to coordinate humanitarian and disaster relief, to facilitate the return of refugees, to promote human rights, to support the reconstruction of key infrastructure, to help establish substantial autonomy and self-government in Kosovo, and to facilitate a political process to determine Kosovo's future status.<sup>20</sup> UNMIK's responsibilities

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19. S.C. Res. 1244, U.N. SCOR, 54th Sess. 4011<sup>th</sup> mtg., U.N. Doc. S/RES/1244 (1999).

20. *See id.*; *see also* United Nations Mission in Kosovo, at <http://www.unmikonline.org/intro.htm> (last visited Oct 21, 2002). 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.*

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 United Nations (U.N.) authority.<sup>21</sup>

This task was not easily fulfilled. Much of the physical infrastructure of the judicial system—court buildings, law libraries, and equipment—was destroyed or severely damaged during the conflict.<sup>22</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 Serbian judges and lawyers mostly fled or refused to serve.<sup>23</sup> Detainees suspected of committing atrocities, once apprehended by U.N. security forces, were crowding prison facilities, with little prospect of trial.<sup>24</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 International Criminal Tribunal for the former Yugoslavia (ICTY) was also ill-equipped to handle such cases. The prosecutor for the ICTY made it clear that the international tribunal was not prepared to try any but those who had committed the worst atrocities on the widest scale.<sup>25</sup> As the detainees continued to languish in prison, many argued that the continued detention itself violated international human rights standards, and local frustration with the failure of the judicial process contributed to increasing ethnic violence.<sup>26</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>27</sup> The court was to have concurrent jurisdiction with the ICTY,

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21. 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 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 FLETCHER F. WORLD AFF. 107 (2001) [hereinafter Strohmeyer, *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 Strohmeyer, *Collapse*].

22. See Betts et al., *supra* note 21, at 376-77.

23. See Strohmeyer, *Collapse*, *supra* note 21, at 49-50, 53.

24. See *id.*

25. See Carla Del Ponte, Prosecutor of the ICTY, *Statement on the Investigation and Prosecution of Crimes Committed in Kosovo*, (Sept. 29, 1999) at <http://www.un.org/icty/pressreal/p437-e.htm> (last visited Oct. 21, 2002).

26. See Strohmeyer, *Collapse*, *supra* note 21, at 49. 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). OSCE LMS, Kosovo: Report No. 6: Extension of Time Limits and the Rights of Detainees: the Unlawfulness of Regulation 1999/26 (April 29, 2000) available at <http://www.osce.org/kosovo/documents/reports/justice/report6.pdf> (last visited Oct. 21, 2002).

27. See Betts et al., *supra* note 21, at 381.

but to focus on the less high-profile offenders that the ICTY lacked the capacity to try.<sup>28</sup> Yet due to a lack of resources and other political obstacles, the establishment of the court was repeatedly delayed.<sup>29</sup> In an effort to achieve similar results by different means, U.N. authorities, quietly and with little fanfare, issued a series of regulations allowing foreign judges to sit alongside domestic judges on existing local Kosovar courts, while also permitting foreign lawyers to team up with domestic lawyers to prosecute the cases.<sup>30</sup> The hope was that the infusion of foreign experts would jump-start the judicial process, providing badly needed capacity and independence.<sup>31</sup>

As of June 2002, Kosovo courts had held trials in seventeen cases.<sup>32</sup> Initially, international judges had minimal impact, as they did not comprise a majority on the trial panels.<sup>33</sup> A new UNMIK regulation enacted in December 2000 sought to rectify this problem, however,<sup>34</sup> and after that date all cases of war crimes have been held in front of courts composed of a majority of international judges, while prosecution has mostly been undertaken by international prosecutors.<sup>35</sup> The courts have faced difficulties 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>36</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>37</sup>

The substantive law applied in these cases was also a blend of the international and domestic. Initially, with little input from the local population, UNMIK authorities declared the applicable law in Kosovo to be Federal Republic of Yugoslavia/Serbian (FRY/Serbian) law, modified to conform to international human rights standards.<sup>38</sup> This decision outraged many ethnic Albanian Kosovars, who identified FRY/Serbian law as the law of the oppressive Serbian regime.<sup>39</sup> Kosovar Albanian judges refused to apply the law, resulting in widespread confusion.<sup>40</sup> In response, UNMIK issued new resolutions describing the applicable

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28. See Betts et al., *supra* note 21, at 381.

29. See Strohmeyer, *Multilateral Interventions*, *supra* note 21, at 119.

30. See Betts et al., *supra* note 21, at 381.

31. See OSCE, Mission in Kosovo, Department of Human Rights and the Rule of Law, Legal Systems Monitoring Section, *Report 9—On the Administration of Justice*, at 5-6 (Mar. 2002). [hereinafter March 2002 OSCE Report].

32. OSCE, Department of Human Rights and the Rule of Law, Legal System Monitoring Section, *Kosovo's War Crimes Trials: A Review*, September 2002, available at <http://www.osce.org/kosovo/documents/reports/justice/> (last visited Dec. 26, 2002) [hereinafter *Kosovo's War Crimes Trials*].

33. *Id.*

34. UNMIK Regulation 2000/64, Dec. 15 2000.

35. *Kosovo's War Crimes Trials*, *supra* note 32.

36. *Id.*

37. *Id.*

38. UNMIK Reg. 1999/1, U.N. Interim Adm. Mission in Kosovo (1999) available at <http://www.unmikonline.org/regulations/1999/reg01-99.htm> (last visited Oct. 21, 2002).

39. See Strohmeyer, *Multilateral Interventions*, *supra* note 21, at 112-13.

40. *Id.*



law to be the law in force in Kosovo prior to March 22, 1989.<sup>41</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.

#### B. East Timor

East Timor's path to mixed tribunals resembles Kosovo's, though the decision to use such courts was perhaps more self-conscious. In early September of 1999, just three months after the U.N. Security Council established the U.N. Mission in Kosovo, violence erupted in East Timor when nearly 80 percent of the population voted for independence from Indonesia in a popular consultation.<sup>42</sup> Local militias, backed by the Indonesian army and opposed to independence, went on a rampage, killing hundreds of people, raping and injuring many more, looting and burning public buildings and private homes, and forcing 200,000 people—approximately one-quarter of the population—over the border into Indonesian West Timor.<sup>43</sup> An Australian-led multi-national force helped to secure peace in the region,<sup>44</sup> paving the way for the United Nations Transitional Administration in East Timor (UNTAET), established in October of 1999.<sup>45</sup> Like UNMIK, UNTAET was charged with keeping the peace, providing civil administration for the territory, promoting human rights, supporting relief and reconstruction, and establishing institutions that would allow for self-government.<sup>46</sup> Like UNMIK, a central part of this mandate consisted of establishing a credible criminal justice system to help maintain law and order, which included providing meaningful accountability for serious violations of international humanitarian law that occurred before UNTAET was established, as well as such crimes committed following the creation of UNTAET.<sup>47</sup>

As in Kosovo, an accountability crisis was rapidly developing. The capacity of the local judiciary was perhaps even weaker than in Kosovo. Very few East Timorese were trained as lawyers at all, and those that were had no government experience, as most civil service posts had been reserved for Indonesians.<sup>48</sup> The physical infrastructure of the country had been almost completely destroyed during the period of looting prior to the arrival of the multi-national force.<sup>49</sup> Militia members suspected of committing mass atrocities were being held in makeshift

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41. UNMIK Reg. 1999/24, U.N. Interim Adm. Mission in Kosovo (1999) available at <http://www.unmikonline.org/regulations/1999/reg24-99.htm> (last visited); UNMIK Reg. 1999/25, U.N. Interim Adm. Mission in Kosovo (1999) available at <http://www.unmikonline.org/regulations/1999/reg25-99.htm> (last visited Oct. 21, 2002).

42. See Strohmeyer, *Collapse*, *supra* note 21, at 46 & n.2.

43. Report of the International Commission of Inquiry on East Timor to the Secretary-General, UN Doc. A/54/726-S/2000/59.

44. S.C. Res. 1264, U.N. SCOR, 4045th mtg., U.N. Doc. S/Res/1264 (1999).

45. S.C. Res. 1272, U.N. SCOR, 4057th mtg., U.N. Doc. S/Res/1272 (1999).

46. See *id.*; see also UNTAET Mandate, U.N. Trans'l Adm. in East Timor (1999), available at <http://www.un.org/peace/etimor/UntaetM.htm> (last visited Oct. 21, 2002).

47. See S.C. Res. 1272, *supra* note 45.

48. See Strohmeyer, *Collapse*, *supra* note 21, at 50.

49. See *id.* at 57.

prison facilities.<sup>50</sup> Yet, if no domestic court system existed to allow for meaningful trials, unlike Kosovo no international court existed either. There was no counterpart to the ICTY with jurisdiction over East Timor, and while many voices within the international community and within East Timor have called for the creation of such a court,<sup>51</sup> the establishment of one seems highly unlikely.<sup>52</sup> In addition, the members of the Indonesian military suspected of committing atrocities were not within the jurisdiction of East Timor, and while the newly democratic Indonesian government has conducted some trials,<sup>53</sup> these trials have been severely compromised and subject to widespread criticism.<sup>54</sup> Under these circumstances, the possibility of establishing hybrid courts looked particularly attractive. The Kosovo experience may have shaped the thinking of UNTAET officials, as many of the U.N. personnel in UNTAET had spent time in UNMIK.<sup>55</sup>

Ultimately, UNTAET established a process under which "serious crimes" were to be tried before three-judge panels, comprised of two international judges and one East Timorese judge, sitting within the jurisdiction of the District Court of Dili.<sup>56</sup> "Serious crimes" were defined as "war crimes," "crimes against humanity," and "genocide," as well as murder, sexual offenses, and torture, insofar as the latter

50. See Strohmeyer, *Collapse*, *supra* note 21, at 57.

51. See, e.g., Joaquim Fonseca & Yaya San Hak, *Prosecution of Crimes under an International Justice Process*, compiled in *Justice and Accountability in East Timor: International Tribunals and Other Options*, Report of a one-day seminar in Dili, East Timor, Oct. 16, 2001, at <http://etan.org/lh/misc/justconf4.html> (last visited Oct. 21, 2002); see also Charles Scheiner, U.N. Rep. Int'l Fed. for East Timor, *Letter to Kofi Annan on the Anniversary of East Timor's Vote Calls for International Tribunal*, Aug. 30, 2001, at <http://etan.org/ifet/ifetrib.html> (last visited Oct. 21, 2002).

52. See, e.g., Michael J. Jordan, *Hopes Dim for International Tribunal in Thoenes Case*, CHRISTIAN SCI. MONITOR, June 25, 2002, at 7.

53. See, e.g., U.N. Administrator of E. Timor faults Indonesian Tribunal, ASIAN POL. NEWS, May 7, 2001.

54. For a discussion of the Indonesian trials and their deficiencies, see 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).

55. For example, Hansjörg Strohmeyer, who served as the legal adviser to the special representative of the Secretary-General in Kosovo from June to August 1999, also served as the acting principal legal adviser to the United Nations Transitional Administration in East Timor from October 1999 to February 2000 and then as deputy principal legal adviser to the mission until June 2000. See Strohmeyer, *Collapse*, *supra* note 21, at 63 n. a1.

56. See Section 10 of UNTAET Regulation No. 2000/11 on the Organization of Courts in East Timor available at <http://www.un.org/peace/etimor/untaetR/Reg11.pdf> (last visited Oct. 21, 2002) [hereinafter Regulation No. 2000/11], which gives to the Dili District Court exclusive jurisdiction over the most serious crimes, including genocide, war crimes, and crimes against humanity. Regulation No. 2000/11 is further supported by UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction for Serious Crimes, promulgated on June 6, 2000 available at <http://www.un.org/peace/etimor/untaetR/Reg0015.pdf> (last visited Aug. 27, 2002). For an analysis of these provisions and the mixed tribunals they establish, see Suzannah Linton, *Rising from the Ashes: the Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 145-73 (2001); Strohmeyer, *Multilateral Interventions and Collapse*, *supra* note 19; Joel C. Beauvais, *Note, Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT'L L. & POL. 1101 (2001); see also UNTAET Press Office, Fact Sheet 7, Justice and Serious Crimes, Dec 2001, available at <http://www.un.org/peace/etimor/facts7.pdf> (last visited Oct. 21, 2002).

three crimes were committed between January 1, 1999, and October 25, 1999.<sup>57</sup> Prosecutors and investigators were again drawn from other countries, as well as the local population.<sup>58</sup>

By June of 2002, the serious crimes unit had issued forty-two indictments for 112 individuals and obtained twenty-four convictions.<sup>59</sup> Some criticized the initial indictments, most of which did not include charges of crimes against humanity, because such comparatively "minor" indictments failed to capture the magnitude of the crimes committed or the link to the Indonesian forces.<sup>60</sup> However, crimes against humanity charges have now been brought in a number of cases and have been added in several cases that initially involved only charges of individual crimes such as murder.<sup>61</sup> The next major trial to occur will involve charges of crimes against humanity, including acts of imprisonment, torture, inhumane acts, persecutions, three rapes, and four murders in a series of incidents that allegedly took place between May and September 1999 in the Lolotoe area near the West Timor border. Two of the three accused are alleged to have been commanders of the Kaer Metin Merah Putih militia, and the third was a former village chief. The trial began on March 4, 2002, and is proceeding at the time of the writing of this Essay, although it has been suspended several times due to staffing and other problems.<sup>62</sup> The serious crimes unit continues to be hampered by lack of funding, inexperienced personnel, and vacancies in key positions. For example, the appellate panel currently cannot function because too few judges have been hired, and the trial courts have had to suspend proceedings periodically because of a lack of personnel.<sup>63</sup> Nevertheless, despite these problems, trials are proceeding, and it appears that the hybrid court will continue to play a significant role in the process of accountability for human rights abuses, even now that East Timor has gained independence.

## II. Analysis of the Advantages and Disadvantages of Hybrid Courts

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57. Regulation No. 2000/11 *supra* note 56.

58. See, e.g., Strohmeyer, *Multilateral Interventions*, *supra* note 21, at 118; Sharifah al-Attas, *Picking Up the Pieces*, THE NEW STRAITS TIMES, Jan. 21, 2002, at 8 (interview with Malaysian prosecutor who works for the Serious Crimes Unit Prosecution office noting that other prosecutors come from Burundi, the United States, England, Brazil, Sri Lanka, and Canada); see also UNTAET Daily Press Briefing (Jan. 9, 2002), available at [www.un.org/peace/etimor/DB/db090102.htm](http://www.un.org/peace/etimor/DB/db090102.htm) (last visited Oct. 21, 2002) (announcing arrival of Siri Frigaard, from Norway, to take the position as the new chief prosecutor for the serious crimes unit).

59. Judicial System Monitoring Program, Summary of Serious Crimes Cases, available at [www.jsmp.minihub.org/trialsnew/htm](http://www.jsmp.minihub.org/trialsnew/htm) [hereinafter Summary of Serious Crimes Cases].

60. See, e.g., Linton, *Prosecuting Atrocities*, *supra* note 56; Human Rights Watch, *Human Rights Watch World Report 2002: Asia: East Timor*, available at <http://hrw.org/wr2k2/asia5.html> (last visited Dec. 26, 2002).

61. *Summary of Serious Crimes Cases*, *supra* note 59.

62. *Id.*

63. For an overview of the shortfalls of the special panels, caused in part by scarce resources, see Richard Dicker, Mike Jendrzyczk & Joanna Weschler, Human Rights Watch, *East Timor: Special Panels for Serious Crimes*, Aug. 6, 2002, available at <http://hrw.org/press/2002/08/etimor-ltr0806.htm> (last visited Dec. 26, 2002); see also David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future*, ASIA PACIFIC ISSUES available at <http://www.ewc.hawaii.edu/stored/pdfs/api061.pdf> (last visited Dec. 26, 2002).

The process leading to the establishment of the hybrid domestic-international courts in East Timor and Kosovo, while somewhat improvised and seriously under-funded, 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 and East Timor cases share enough similarities, however, that one can use them to draw a few tentative conclusions about the promise that mixed tribunals 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 and East Timor, 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 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. Moreover, different constituencies viewing the work of any court system may have different ideas about what constitutes its legitimacy. For example, the factors that establish legitimacy for national communities may be quite different from those that underpin legitimacy in the eyes of an international community standing outside a country and judging its legal process. It is beyond the scope of this brief Essay to provide a comprehensive overview of the various types of legitimacy problems facing juridical institutions in post-conflict societies.

Nonetheless, in most cases, to the extent that democratic institutions exist at all, they typically will have suffered severely during the conflict. With respect to the judiciary, the physical infrastructure often will have sustained extensive, crippling damage. In addition, the personnel are often likely to be severely compromised or lacking in essential skills. Judges and prosecutors may remain in place from the prior regime that may have backed the commission of widespread atrocities; the state may continue to employ those who failed to prosecute or convict murderers or torturers or ethnic cleansers. Alternatively, the new regime may replace 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 and East Timor might be said to represent one type of extreme case. In both, after the period of conflict that produced mass atrocities, no fully functioning domestic institutions existed. 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 U.N. 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. 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. And 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.

Moreover, in both Kosovo and East Timor, 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 systems were run by perceived oppressors, Serbs in the former case and Indonesians in the latter.<sup>64</sup> Ethnic Albanians were systematically excluded from the system in Kosovo as were East Timorese in East Timor.<sup>65</sup>

Even if a new local system can be established quickly, over-correction for these imbalances can create new problems. In the case of Kosovo, for example, after the conflict, it was easier to appoint ethnic Albanian judges than ethnic Serbian judges. Only a few Serbian judges were willing to serve, and, responding to pressure from Belgrade, even those who had been appointed stepped down in protest.<sup>66</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>67</sup> In fact, several judgments imposed against Serbian defendants by panels of ethnic Albanian judges were later thrown out by panels that included international judges, due to concerns about lack of due process and insufficient evidence.<sup>68</sup> In East Timor, this was less of a problem because most of the Indonesians had left, and the overwhelming majority of the population remaining after the conflict was pro-independence Timorese.<sup>69</sup> Nonetheless, a

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64. See Strohmeyer, *Collapse*, *supra* note 21, at 48-50.

65. See *id.* at 48-53.

66. March 2002 OSCE Report, *supra* note 31, at 5.

67. See 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 Oct. 21, 2002); *Multi-Ethnic Justice*, FOCUS KOSOVO, Dec. 2001, <http://www.unmikonline.org/pub/focuskos/dec01/focuskchron.htm> (last visited Oct. 21, 2001).

68. *Detentions: A Tale of Two Prison Groups*, FOCUS KOSOVO, Feb. 2002, at <http://www.unmikonline.org/pub/focuskos/feb02/focusklaw1.htm> (last visited Oct. 21, 2002).

69. See Strohmeyer, *Collapse*, *supra* note 21, at 50-53.

small segment of the population supported only limited autonomy for East Timor under the authority of Indonesia,<sup>70</sup> and many of those individuals were the ones to be put on trial for committing atrocities.<sup>71</sup> Thus, serious questions were raised about whether they could receive a fair trial under the newly-created Timorese system. Given these circumstances, in both Kosovo and East Timor, 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.

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 always will be. Moreover, establishing the legitimacy of an international institution within a country that did 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>72</sup> In light of the continuing ethnic tensions within the region, the creation of an international court based at the Hague, removed from the scene of the atrocities and run by international judges and staff, may have been necessary to create the kind of independence that would be required to impose individual criminal responsibility for atrocities on such a large scale. Certainly many segments of the local population, particularly the predominantly Muslim and Croat victims of the atrocities, supported the work of the ICTY.<sup>73</sup> Yet support within the Serbian population of any of the countries and regions that now comprise what was the former Yugoslavia has been more difficult.<sup>74</sup> And within all ethnic groups, the work of the court is often misunderstood.<sup>75</sup> In addition, some consider the ICTY an imposition of Western European powers and the United States and thereby tainted by imperialism.<sup>76</sup>

A recent empirical study of the perceptions of the ICTY within Bosnia and Herzegovina illustrates the point.<sup>77</sup> The study indicates that a wide cross-section of lawyers and judges from all ethnic groups and playing different roles within Bosnian society were ill-informed about the ICTY's work, and were often suspicious of its motives and its results.<sup>78</sup> Possible reasons for this lack of legitimacy include the location of the tribunal in the Netherlands, far from the local

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70. See Beauvais, *supra* note 56, at 1119-20.

71. Most of the atrocities were committed by pro-autonomy (anti-independence) militias, backed by Indonesian authorities. See Strohmeyer, *Collapse*, *supra* note 21, at 46.

72. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 2, U.N. Doc. S/RES/808 (1993); S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993).

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

74. See *id.* at 129-33.

75. See Joint Study, *supra* note 73 at 136-39.

76. See *id.* at 143-47.

77. See *id.* at 102.

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

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>79</sup> While no such study exists for Kosovo, similar problems might be expected there. Of course, over time, the perceived legitimacy of the ICTY may change as new generations of opinion-makers in the former Yugoslavia come to view the conflict and its aftermath in new ways. Indeed, the norms articulated by the ICTY may play a role in shaping such popular perceptions. Nevertheless, at least in the short term, the ICTY must grapple with ongoing local resistance.

In the case of East Timor, no international tribunal existed to handle even the most egregious cases. While many voices, both domestic and international, called for such a tribunal in the immediate aftermath of the atrocities of 1999, the chance that one will be established is minimal.<sup>80</sup>

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 and East Timor, often strongly support international justice in the wake of mass atrocities. Moreover, the international community does not always support the establishment of such institutions, and when it does, it is hard to say that there is one, monolithic international community. In truth there are multiple international communities—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-governmental organizations (NGOs) (such as human rights NGOs, humanitarian NGOs, or development NGOs), or 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 the globalized era, 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 face greater obstacles in establishing local legitimacy in the places from which the accused perpetrators come than 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 processes. In post-conflict situations, the need to develop local capacity in the justice sector is often an urgent problem. Kosovo and East Timor provide extreme examples. In both cases, the conflict virtually eliminated the physical infrastructure of the judiciary; court buildings, prisons, and equipment

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79. See Joint Study, *supra* note 73 at 144-47.

80. See, e.g., Jordan, *supra* note 52.

were destroyed.<sup>81</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>82</sup> Albanians had some training but little experience, because they had been almost completely excluded from the system for many years.<sup>83</sup> In East Timor, the capacity deficit was even more severe, as the Indonesians, who had staffed the judiciary and had essentially excluded the local Timorese from serving, had evacuated, and few Timorese had any legal training or experience.<sup>84</sup> Indeed, no East Timorese judges or prosecutors existed until UNTAET made its first appointments in 2000.<sup>85</sup> Under such circumstances, a domestic system cannot be established for a significant period of time, due to extreme lack of capacity in the local sector.

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 cannot run the system themselves, but a system run by the international community does not help improve the capacity of the local population.

### C. Advantages of Mixed tribunals

Mixed tribunals, as suggested by their use in Kosovo and East Timor, can offer at least partial responses to both these legitimacy and capacity problems. The sharing of responsibilities among international and local actors in the administration of justice, particularly with respect to accountability for serious human rights crimes, can help to establish the legitimacy of the process as well as strengthen the capacity of local actors.

In Kosovo and East Timor, the addition of international judges and prosecutors to cases involving serious human rights abuses may have enhanced the legitimacy of the process, at least to some degree, both with respect to the local population and the international community. In both Kosovo and East Timor, 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. Without normal political processes in place, of course, consultation is inherently difficult. When no elected officials exist to give advice, and civil society is badly damaged by years of oppression and conflict, there are no easy answers to the question of who should be consulted without creating impressions of bias. Nonetheless, in both circumstances, 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 framework for consultation that may have enhanced the general perception of the

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81. See Strohmeyer, *Collapse*, *supra* note 21, at 49-51.

82. See Strohmeyer, *Collapse*, *supra* note 21, at 49-51.

83. See *id.*

84. See *id.* at 50.

85. See Linton, *supra* note 56, at 133-34.



institution's legitimacy. By working together and sharing responsibilities, international and local officials necessarily consulted 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 this was most apparent, as the previous attempts at domestic justice had failed to win any support among Serbs.<sup>86</sup> Indeed, Serbian judges refused to cooperate in the administration of justice, and the verdicts in the cases tried by ethnic Albanians were regarded by the ethnic Serbian population as tainted.<sup>87</sup> In contrast, the verdicts of the hybrid tribunals garnered some support, even among Serbs.<sup>88</sup>

The sharing of responsibilities among local and international officials is not a complete cure for legitimacy problems, of course. 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 international prosecutors—some may charge that the international actors control the process, and that such control smacks of imperialism. In East Timor, some local actors involved in the criminal justice process criticized the mixed tribunal on these grounds.<sup>89</sup> On the other hand, too little international control may lead to concerns about the independence and impartiality of overly locally-controlled processes.<sup>90</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 mixed process offers advantages in the arena of capacity-building as well. The side-by-side working arrangements allow for on-the job training that is likely to be more effective than abstract classroom discussions of formal legal rules and principles.<sup>91</sup> And the teamwork can allow 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. In both Kosovo and East Timor, the hybrid courts have been given an enormous mandate without

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86. March 2002 OSCE Report, *supra* note 31 at 6.

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

88. *See id.*

89. *See* Linton, *supra* note 56, at 150.

90. *See* March 2002 OSCE Report, *supra* note 31, at 6. Efforts to establish a mixed tribunal in Cambodia initially 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.

91. *See* Beauvais, *supra* note 56, at 1157-1159.

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 fill posts as judges, prosecutors, and defense counsel.<sup>92</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 mixed tribunals is found in the support they garner. The U.N. has advanced similar efforts elsewhere. After many years of efforts, an accord has been reached to create a hybrid domestic/international court in Cambodia,<sup>93</sup> and the project to establish a free-standing hybrid court in Sierra Leone is well underway.<sup>94</sup> Even within the Bush Administration, which is generally resistant to the idea of international justice, there is strong support for mixed domestic-international tribunals such as the proposed special court for Sierra Leone.

### III. Hybrid Courts in Afghanistan?

The potential of hybrid courts to address some of the problems of accountability for mass atrocities in settings such as Kosovo and East Timor suggests that such courts could at least be considered in other circumstances. Of course, there are no uniform solutions to difficult problems of transitional justice, and a mechanism that has found success in one context cannot simply be imported to another. The outlook for the use of such courts is promising, however, and should be considered in future post-conflict situations. This last Part considers whether the use of such courts might make sense in post-Taliban Afghanistan.

In Afghanistan, as in Kosovo and East Timor, the international community intervened to help a country make a transition to democracy after a period of oppression and widespread human rights abuses. Of course, in Afghanistan, the primary motivation for the international intervention was to halt the terrorist activities of the al Qaeda network, which was extensively supported by the Taliban regime. Although the Taliban committed human rights abuses on a grand scale for many years, it was only after the attacks of September 11th that a U.S.-led multilateral military force intervened in the country, putting an end to the regime. Moreover, the ongoing commitment of the U.S. to nation-building in Afghanistan, in the wake of the military intervention, remains unclear.<sup>95</sup> Nonetheless, U.S.

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92. See, e.g., Beauvais, *supra* note 56, at 1160; Dickinson, *supra* note 54; Linton, *supra* note 56, at 149; *Kosovo's War Crimes Trials*, *supra* note 32.

93. See Mydans, *U.N. and Cambodia Reach an Accord for Khmer Rouge Trial*, *supra* note 90, at A5.

94. S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc. S/RES/1315 (2000), available at <http://daccess-ods.un.org/doc/UNDOC/GEN/N00/605/32/PDF/N0060532.pdf> (last visited Oct. 21, 2002).

95. In April, Bush appeared to reverse his pre-September 11<sup>th</sup> opposition to nation-building when he called for a new Marshall Plan to rebuild Afghanistan. See James Dao, *Bush Sets Role for U.S. in*

officials, as well as those from other governments who participated in the military intervention, and the international community more broadly, support efforts to promote peace and build democratic institutions in Afghanistan, goals similar to those articulated in Kosovo and East Timor.<sup>96</sup> If for no other reason, there is a widespread consensus that building rule of law in Afghanistan will make the region a less fertile breeding ground for future generations of terrorists.<sup>97</sup>

Indeed, the goals of promoting peace in Afghanistan by supporting the justice sector and ensuring accountability for human rights crimes intersect and overlap with the fight against terrorism. Establishment of rule of law institutions is critical to building a society where terrorism is an unacceptable option. Moreover, the attacks of September 11th could themselves be characterized as crimes against humanity, serious violations of international law that warrant individual criminal accountability.

As in Kosovo and East Timor, the success of these rule of law efforts depends on the establishment and development of a functioning judicial system. While the international community is not itself taking temporary charge of the civil administration, international support for the local justice system will be critical to ensuring its effectiveness. An important task for Afghan courts will be to hold those on all sides accountable for violations of the laws of armed conflict, as well as to try those responsible for serious crimes and human rights violations during the Taliban regime. Meaningful accountability and fair proceedings will not be possible without a significant contribution of funding and expertise by the international community. As part of that effort, a hybrid court, with domestic Afghan judges sitting alongside judges from other countries, could be established to try those accused of human rights crimes and violations of the laws of armed conflict.

The experience of using such courts in Kosovo and East Timor, where the hybrid process may have helped to address some of the legitimacy problems of purely international or purely local justice, suggests that they hold promise in a place such as Afghanistan where external solutions are often greeted with suspicion, but internal solutions are not workable. Like Kosovo and East Timor, there is a growing accountability crisis, with thousands of suspects imprisoned around the country in makeshift jails in poor conditions.<sup>98</sup> The United States took

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*Afghan Rebuilding*, N.Y. TIMES, April 18, 2002, at A1 [hereinafter Dao, *Bush Sets Role*]. In practical terms, however, it is far from clear that the administration is actively supporting robust nation-building. For example, the administration has not supported the expansion of the international security force in Afghanistan, currently only operating within Kabul, even though Afghan President Karzai and many humanitarian groups say such expansion is necessary for peace, security, and reconstruction of the country. James Dao, *Lawmakers Urge Bush to Expand Afghan Force Beyond Kabul*, N.Y. TIMES, June 27, 2002, at A11 [hereinafter Dao, *Lawmakers Urge Bush*].

96. See Dao, *Bush Sets Role*, *supra* note 95.

97. See Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes, Remarks at *Symposium, Reluctant Nation-Building: Securing the Rule of Law in Post-Taliban Afghanistan*, 17 CONN. J. INT'L L. 433 (2002).

98. David Johnston & James Risen, *U.S. Seeks DNA of All Captives in Afghan War*, N.Y. TIMES, March 3, 2002, at A1 (noting that 7,500-8,000 captured fighters are being held throughout

several hundred of these suspects into custody and brought them to Guantanamo naval base,<sup>99</sup> but it is estimated that many more remain detained in Afghanistan.<sup>100</sup> Their ongoing detention will undoubtedly continue to contribute to instability and unrest within Afghanistan, and it is unclear to what extent there are reasonable grounds to believe the detainees actually engaged in violations of international humanitarian law, committed human rights crimes, or were involved in terrorist acts, and to what extent they simply were captured as Taliban fighters. Yet the release of the suspects, without investigation or trial, could lead to even greater unrest.

In addition, such hybrid courts could aid in capacity-building. Currently, there is no centralized Afghan justice system. Justice in Afghanistan has been predominantly local, religious and tribal, in large part because the central state was weak and the country was in a virtually perpetual state of conflict for decades.<sup>101</sup> In addition, as in Kosovo and East Timor, the physical infrastructure of the court system has been decimated by conflict.<sup>102</sup> And during the Taliban regime, as in the regimes in Kosovo and East Timor prior to international intervention, large segments of the population have been excluded from the legal system.<sup>103</sup> As a result, the court system is extremely weak, and there is little prospect for trial of these suspects in state-run courts.<sup>104</sup>

Accordingly, an international-domestic hybrid court will be necessary if for no other reason than the sheer numbers of people awaiting trial. Moreover, as the Kosovo and East Timor experiences have made clear, support for the establishment of a strong judiciary is an essential foundation for lasting peace.<sup>105</sup> A hybrid domestic/international structure for some courts and for some prosecution efforts helps to provide both a vehicle for training of, and consultation with, the local population and helps to establish a degree of independence in cases involving intense ethnic conflicts and rivalries. Such a model may well be highly useful in Afghanistan, and important lessons can be learned from mistakes in Kosovo and East Timor. Certainly, in order to be successful, significant financial resources are required.

Finally, such a hybrid judicial process could provide the best way of assuring accountability and providing for a measure of deterrence for terrorism, human rights crimes, and violations of the laws of armed conflict. Moreover, while the United States might be unlikely to accept such a process for trying Taliban or al Qaeda leaders, it might be willing to accept and support such trials for low-level

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Afghanistan).

99. See 34 *More Detainees*, *supra* note 1.

100. See Johnston & Risen, *supra* note 98.

101. See William Spencer, Remarks at *Symposium, Reluctant Nation-Building: Securing the Rule of Law in Post-Taliban Afghanistan*, 17 *CONN. J. INT'L L.* 445 (2002).

102. See *id.*

103. See *id.*

104. See *id.*; see also U.S. INST. OF PEACE, *REBUILDING AFGHANISTAN: A FRAMEWORK FOR RESTORING SECURITY AND THE RULE OF LAW*, January 15, 2002, at [http://www.usip.org/rol/afghan\\_mainreport.html](http://www.usip.org/rol/afghan_mainreport.html) (last visited Oct. 21, 2002).

105. See Betts et al., *supra* note 21.

Taliban or al Qaeda operatives.

I should note that I am not suggesting that hybrid domestic-international tribunals could be, or should be, the *only* forum in which to hold suspected terrorists accountable for their actions. Other domestic, transnational, and international accountability mechanisms still have a role to play. Indeed, as noted previously, if a hybrid court in Afghanistan were established, it would probably be best-suited for trying lower-level al Qaeda and Taliban operatives for crimes committed on Afghan soil (or with at least a link to Afghanistan). As between a hybrid court within Afghanistan and other Afghani courts, distinctions could be based on the types of crimes committed, using the East Timor and Kosovo models. Relevant crimes might include crimes against humanity, violations of the laws of armed conflict, and perhaps crimes of international terrorism as defined under existing terrorism conventions. Because the hybrid court could also serve the goal of ensuring more general accountability for serious human rights abuses committed before or during the Taliban regime, as well as abuses associated with the Northern Alliance insurgency itself, the court should have a relatively broad mandate to hear other Afghanistan-based human rights crimes as well.

More broadly, this brief discussion of mixed domestic-international tribunals demonstrates one way in which the growing scholarship on transitional justice may be useful in considering various approaches to the task of ensuring accountability for terrorism and assessing the importance and impact of such approaches. Transitional justice scholars have amassed a body of knowledge concerning the wide variety of mechanisms both for establishing rule of law institutions that will be broadly accepted as legitimate and helping to develop the capacity of local justice systems, all while trying to secure the stability of a fragile new regime. This body of knowledge is a crucial resource in efforts to combat terrorism because it is only through a combination of accountability and the establishment of rule of law that we will have a chance of holding the forces of terror in check. As we consider various models of justice in the aftermath of the September 11th attacks, the lessons learned elsewhere about forging justice after mass atrocity provide a fertile ground for creative innovation.