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# Hybrid Court System in Kosovo: Has EULEX proven to be the device to strengthen the independence and effectiveness of the judiciary?



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# HYBRID COURT SYSTEM IN KOSOVO: HAS EULEX PROVEN TO BE THE DEVICE TO STRENGTHEN THE INDEPENDENCE AND EFFECTIVENESS OF THE JUDICIARY?

## I. BACKGROUND

In the twenty years since the end of the cold war, the European Union (EU) has gradually emerged as a prominent actor in state building, conflict management, and peacekeeping missions. Launched in 2008, the European Union Rule of Law Mission in Kosovo, or “EULEX”, is the largest civilian crisis-management mission under the EU Common Security and Defense Policy and the first fully integrated rule of law mission of the EU that balances executive functions with highly ambitious rule of law sector and capacity reforms.<sup>1</sup> Under EULEX, the CSDP mission assists Kosovo judicial and law enforcement authorities as mixed or “hybrid” panels in the development of sustainable, accountable, and professional legal institutions.

The EULEX justice component is one part of the mixed nationality or hybrid court approach that has operated in jurisdictions such as Bosnia-Herzegovina, Sierra Leone, Cambodia, and Timor-Leste, among others. Oftentimes, a direct consequence of conflict and mass social-trauma is the destruction, collapse, or compromising of legal and justice systems. The last two decades have seen a rise in *ad hoc* hybrid tribunal that signify a blend of national and international components in adjudicating war crimes, crimes against humanity, and other gross violations of human rights as part of wider peace-building and development efforts. In principle, the hybrid tribunal comprises foreign and domestic counterparts that apply a mixture of domestic law, international law or some combination of both. As neither a purely domestic or international tribunal, the hybrid courts, arguably, enhance legitimacy, domestic capacity building, and norm dissemination due to its unique blend of internationally supervised character and local location. Furthermore, these *ad hoc* tribunals are often distinct and separate entities that operate in parallel to the domestic judicial system, dealing with the most serious and sensitive crimes, and are generally not subject to appeal or oversight by domestic bodies such as high judicial councils.<sup>2</sup> In this sense, hybrid structures raise fundamental questions concerning the respective roles of international and national laws and actors: specifically, in the creation of oversight, complaint, and disciplinary procedures. Most commentators also see the limitations of the hybrid scheme as primarily a function of inadequate funding or the unique political and social context of a particular intervention, rather than as connected in some sense to their hybrid nature.<sup>3</sup> As the most recent addition to the hybrid tribunal scheme to date, the EULEX justice component attempts to support, reform and strengthen Kosovo’s rule of law structures, practices, and standards through a double mandate of executive adjudicative powers and capacity-building competences.

Over a decade since the 1999 Kosovo war, Kosovo has moved beyond an immediate post-conflict stage and has undertaken a long-term process of post-conflict legal redevelopment.<sup>4</sup> However, the international community largely regards the local judiciary as the weakest institution in Kosovo despite over a decade of an internationally supervised judicial reform

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<sup>1</sup> The EULEX structure exists as the Brussels-based strategic and political component, and the Pristina-based operational component.

<sup>2</sup> The Kosovo Judicial Council, itself a hybrid institution, does not have administrative authority over EULEX international jurists.

<sup>3</sup> Higonnet, “Restructuring Hybrid Courts.”

<sup>4</sup> Baylis, “Tribunal Hopping with the Post-Conflict Justice Junkies.”

process.<sup>5</sup> For example, the 2012 OSCE report observes, “the continued weakness of the local judiciary [and] accompanied by pressure exerted on local judges, calls for continued international involvement in the area of administration of justice in Kosovo.”<sup>6</sup> Compared to other manifestations of hybrid courts, which have operated as distinct and parallel panel structures, EULEX judiciary is fully integrated into the Kosovo legal framework, empowered to hear cases at all levels of Kosovo’s trial courts, and handles case-management jointly with local jurists at the discretion of the supervisory body, the Assembly of EULEX Judges.<sup>7</sup> In the words of a EULEX Judge, “we sit on panels as Kosovo judges.”<sup>8</sup> As a self-governing body comprised of international judges, the Assembly of EULEX Judges executes strategic case selection and case allocation functions by appointing international judges in circumstances where “there is a need to ensure the proper administration of justice.”<sup>9</sup> While most hybrid tribunals have been created in the context of humanitarian intervention and have focused on matters of international criminal law, EULEX has broad subject-matter jurisdiction and broad unilateral authority to reassign cases from local to international judges. Furthermore, unlike the EULEX’s hybrid court predecessor, the United Nations Interim Mission in Kosovo (UNMIK) hybrid panels, EULEX also has a legal obligation to strengthen law and justice sectors through Monitoring, Mentoring, and Advising (the so-called “MMA”) competencies.

While EULEX has provided crucial support to the consolidation of Kosovo’s rule of law institutions, EULEX has not undertaken necessary steps to ensure active engagement of Kosovo jurists in the adjudication of complex and serious crimes, and therefore has unsuccessfully facilitated the gradual transfer of competences to the Kosovo judiciary. Instead, EULEX has overwhelmingly exercised its executive functions and has failed to sufficiently design local-majority panels in serious and complex criminal cases. For example, only a small number of local judges sit as the majority on mixed panels that deal with complex or serious crimes in Kosovo’s first-instance courts. This is an unfortunate legacy given that local participation and ownership are necessary for developing an experienced and professional Kosovo judicial culture, and risks replicating the same mistakes under the UNMIK hybrid panels. While perhaps too early to tell whether majority international panels have risked encouraging local judicial dependence on international jurists, success in the long-term depends on a strong institution that is capable of handling difficult and controversial cases. Therefore, EULEX must continue to gradually shift to a more egalitarian approach and support Kosovo jurists who must be assured a driving seat in the judicial reform process.

## II. HYBRID COURTS: THEORY

Profound issues of policy and law emerge as countries and the international community devise criminal sanctions for allegations of human rights violations in post-conflict settings. Given the multiplicity of options in the rule of law intervention toolbox, no universally accepted road map exists for strengthening the independence and effectiveness of the judiciary in a post-conflict environment. As the limits of *ad hoc* international tribunals (e.g. International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda) have become increasingly

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<sup>5</sup> Biscop and Whitman, *The Routledge Handbook of European Security*.

<sup>6</sup> OSCE, “Independence of the Judiciary in Kosovo: Institutional and Functional Dimensions.”

<sup>7</sup> In 2011, the Kosovo Assembly adopted legislation that ended EULEX judges majority at the First Instance level but preserves the a majority of EULEX judges at the appellate level.

<sup>8</sup> Interview with EULEX Judge, 3/12/13 [emphasis added].

<sup>9</sup> Assembly of the Republic of Kosovo, “Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo,” Article 3.5.

evident,<sup>10</sup> despite undoubtedly contributing an impressive body of international criminal law jurisprudence, hybrid courts have gained prominence as an alternative strategy to cope with the challenge of trying mass crimes against the backdrop of weak national institutions.<sup>11</sup> In theory, the structure of hybrid tribunals should tap into the benefits of both domestic and international criminal justice while offering a middle-ground: capacity building, local ownership of rule of law making and nuanced, local understanding of the target state. Under this mixed panel arrangement, hybrid international-domestic judicial panels enable the international community to maintain normative link to the post-conflict domestic judiciary through the presence of internationally appointed professionals.<sup>12</sup> With the “hybrid” court framework utilized in six jurisdictions ranging from East Timor, Bosnia-Herzegovina Cambodia, Sierra Leone, and the predecessor to the EULEX, the United Nations Interim Mission in Kosovo (UNMIK) Regulation “64 Panels”, proponents argue that the hybrid courts are more conducive to skills transfer and more closely connected to ground-level realities than transnational judicial bodies and the *ad hoc* tribunals.

Hybrid courts, or mixed tribunals, arguably offer local “ownership” in the affected country, tap into domestic expertise of national judges, and guarantee international legal and professional standards.<sup>13</sup> Critics have argued that the transnational or expatriated justice systems, such as the International Court for the Former Yugoslavia or “ICTY”, are counterproductive to peacebuilding and reform efforts. Critics argue that international courts constitute “bystander” or “armchair” justice; potentially lacking the knowledge of local conditions, conflict dynamics, and legitimacy among local populations in many post-atrocity societies.<sup>14</sup> In particular, the tribunal location and international staff increase the court’s vulnerability to local-level de-legitimization.<sup>15</sup> A former ICTY spokesman asks, rhetorically, “how was this court [the ICTY] to do so other than by conducting lengthy, complicated trials in an insulated legal bubble, completely removed from the realities of a region ravaged by vicious fratricide?” and “[there must be] cold, objective, and comprehensive acceptance of the distance between the ICTY and us, the people it was supposed to serve.”<sup>16</sup> Therefore the very “international” nature of international trials renders them too far removed physically, culturally and politically from the scene of the crime. Eric Stover observes “international scholars, diplomats, and human rights advocates [and] those living in post-conflict [settings] evaluate the tribunal to different criteria.”<sup>17</sup> In this sense, therefore, international trials are predominately preoccupied with its own international, legal legitimacy rather than the legitimacy of its adjudication and rulings in the post-conflict setting. Ethel Higonnet observes, “removed from the location of the genocide or atrocities that they work on, international tribunal staff have an easier time privileging the idea of ‘establishing important precedent’ over helping people on the ground.”<sup>18</sup> In turn, international trials may have particularly divisive ramifications on re-establishing trust in public institutions and faith in the rule of law in post-conflict jurisdictions with traumatized and divided populations.<sup>19</sup>

Conversely, a post-conflict State’s own domestic judicial system is often damaged or severely comprised and faces a myriad of technical and material deficits. In some cases, new

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<sup>10</sup> Snyder and Vinjamuri, “Trials and Errors.”

<sup>11</sup> Dickinson, “The Promise of Hybrid Courts.”

<sup>12</sup> Skinnider, *Experiences and Lessons From “Hybrid” Tribunals*.

<sup>13</sup> Cockayne, “Hybrids or Mongrels?”

<sup>14</sup> Orentlicher, “Whose Justice?”

<sup>15</sup> Stover and Weinstein, *My Neighbor, My Enemy*.

<sup>16</sup> Hodzic, “Accepting a Difficult Truth: ICTY Is Not Our Court.”

<sup>17</sup> Fletcher and Weinstein, *My Neighbor, My Enemy*, 39.

<sup>18</sup> Higonnet, “Restructuring Hybrid Courts,” 2006 2005, 18.

<sup>19</sup> Report of the Secretary-General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies.”

regimes lack knowledge of international criminal law, standards of justice, and large deficits in professional qualifications, skills and culture.<sup>20</sup> Laura Dickinson observes, “even when local courts are authorized under domestic law to apply international humanitarian law, there is often such a limited base of familiarity with the norms in question that such authority is meaningless.”<sup>21</sup> In the immediate aftermath of conflict and mass abuses, the inability of many post-atrocity local courts to cope with criminal trials is also often due to exhausted resources and crippling damage sustained to physical infrastructure. For example, following the Rwandan genocide, fewer than fifty trained lawyers were capable of providing legal services.<sup>22</sup> Domestic tribunals are also often faced with a lack of political will for reform, a lack of confidence in the government, and a lack of independence within the justice sector. The Office of the High Commissioner of Human Rights observes, “In post-conflict situations, domestic courts often suffer from systemic problems that include inadequate laws, endemic corruption, incompetence [and] lack of access to justice.”<sup>23</sup> In other instances, new regimes threaten to employ show trials or overly zealous prosecutions for past crimes as “victors” justice.<sup>24</sup> Therefore, as neither purely international nor domestic judicial bodies, the hybrid panels, as a middle-ground, arguably avoid the disadvantages of purely domestic or international rule of law interventions. In this sense, hybrid tribunals should provide for substantial skills-transfer while bolstering respect for rule of law and trust in criminal adjudication in the present and long-term.

Locating these tribunals within the target country and in a local setting, the hybrid court scheme, firstly, seeks to resolve issues of capacity building. As a mixed international intervention, the hybrid tribunals can help ensure that the domestic jurists operate more effectively and efficiently, and consistent with international norms such as judicial independence, impartiality, application fair trial standards and general international law. In describing the underlying significance of capacity building, Ethel Higonnet observes, “even a time-limited transitional justice mechanism acquires greater credibility where it is able to impact a justice system in the long-run” and “a war crimes tribunal must strive to go beyond concocting an exit strategy that allows it to leave a country without any cases pending or staff unpaid.”<sup>25</sup> As countries emerging from conflict or authoritarian transitions suffer from weak or non-existent rule of law culture or institutions, hybrid tribunal staff can assist with a lack of basic technical or legal deficits, and help to adjudicate crimes fairly and completely. The combination of international and domestic staff working side-by-side allows for on-the job training, mentoring, and the transfer of technical skills and professional conduct. Laura Dickinson argues that the hybrid system creates a professional network “essential [in fostering] a transnational legal process that might result in the internationalization and interpenetration of [global] norms.”<sup>26</sup> Therefore, some commentators have likened the processes of developing local judicial capacity and learning to adjudicate impartiality as a process of “osmosis.”<sup>27</sup> To that end, if done properly, hybrid court mentoring can ensure that domestic jurists are knowledgeable about international law and standards, reasonably efficient, and are independent of political manipulation and corruption. Higonnet observes, “[hybrid tribunals] staffing procedures do a tremendous amount [b]ecause a large part

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<sup>20</sup> Such as the so-called “Kangaroo” court or “show trials” of former Romanian dictator Nicolae Ceausescu. See: Kritz, *Transitional Justice*, xxi.

<sup>21</sup> Dickinson, “The Promise of Hybrid Courts,” 295.

<sup>22</sup> Minow, *Between Vengeance and Forgiveness*.

<sup>23</sup> United Nations, *Rule-Of-Law Tools for Post-Conflict States*, 8.

<sup>24</sup> Higonnet, “Restructuring Hybrid Courts,” 2006 2005.

<sup>25</sup> *Ibid.*, 9.

<sup>26</sup> Dickinson, “The Promise of Hybrid Courts,” 22.

<sup>27</sup> King and Mason, *Peace at Any Price*, 109.

of a hybrid's staff are drawn from pools of local talent, hybrids create an invaluable opportunity for the best local litigators and judges to acquire international expertise."<sup>28</sup> Therefore, when hybrid tribunals close down, the local staff is eventually reabsorbed into the local judicial system and, in turn, infuses the rule of law system with the skills and knowledge obtained from the international intervention.<sup>29</sup>

Furthermore, political and practical realities of a country emerging from conflict or authoritarian transitions might place considerable constraints on the reform process. Particularly in the post-conflict setting, perpetrators continue to yield formal and informal authority, which they stand to lose through legal and political reforms, and remain at large.<sup>30</sup> Specifically, in the case of Kosovo, a small, close-knit society, politically sensitive and high-profile war crimes cases against ethnic Albanians pose enormous challenges for the independence and impartiality of Kosovo courts.<sup>31</sup> Therefore, the introduction of international jurists and staff under hybridity can help contend with political pressure and overcome concerns of local bias or lack of independence among the domestic judicial system given politically sensitive or serious crimes.<sup>32</sup> Here, it is presumed that international professionals will be less vulnerable to threats or local political and social pressure, and local jurists can defer to international judges in serious or sensitive cases to enhance independence of the judiciary. Therefore, hybrid tribunals enable a crucial link between the international community and domestic legal order to ensure the development of local courts into sustainable, legitimate judicial authorities. To that end, institutional reform and capacity building can improve the ability of institutions to function regularly and to resist future crises.<sup>33</sup>

The introduction of hybrid capacities also attempts to address the democratic deficit between local communities and international involvement, and build local support for the judicial process. William Prillaman observes, "Judges and court personnel are not value-neutral automaton who respond immediately to policy dictates; they, too, are self-interested actors who have considerable leeway in deciding, how, whether, and when to support the judicial reform process."<sup>34</sup> In playing a supporting role, rather than a controlling role, mixed panels can help guarantee a seamless changeover from internationalized processes to domestic leadership. In this sense, in designing the competences of hybrid panels themselves, the substantive partnership between internationals and domestic jurists should be consistently reinforced.

Conceivably, hybrid tribunal mechanics and structure gives rise to more extensive, localized interactions between international and national communities and greater attention to the political, social processes and consequences of the court's work. Given its closer proximity to the victim population, hybrid courts and their proceedings are more likely to be known and understood by the local population. Higonnet observes, "in order for the conviction to take root that past wrongdoings have been appropriately dealt with, people must in some small measure understand the justice mechanism in place" and "ultimately, it is essential to persuade them that appropriate punishments have been meted out."<sup>35</sup> Without domestic credibility and timely, accurate information, and local sensitivities, trials risk becoming "nothing more than a theoretical

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<sup>28</sup> Higonnet, "Restructuring Hybrid Courts," 2005, 13.

<sup>29</sup> Ibid.

<sup>30</sup> Snyder and Vinjamuri, "Trials and Errors."

<sup>31</sup> OSCE, "Independence of the Judiciary in Kosovo: Institutional and Functional Dimensions."

<sup>32</sup> Dickinson, "The Promise of Hybrid Courts."

<sup>33</sup> Ante, *State Building and Development*.

<sup>34</sup> Prillaman, *The Judiciary and Democratic Decay in Latin America*, 5.

<sup>35</sup> Higonnet, "Restructuring Hybrid Courts," 2006 2005, 12.

exercise in developing international humanitarian law.”<sup>36</sup> Furthermore, domestic staff can play an essential linguistic and cultural bridge between international jurists and the target state. As international actors and jurists are not necessarily well-versed in the total scope of a post-conflict settings history and relevant legal culture, international jurists learn valuable lessons from local counterparts and absorb essential information from their domestic interlocutors in, oftentimes, complex transitional and crisis situations.<sup>37</sup> Here, international judges and legal professionals can draw crucial insights from domestic counterparts regarding the local legal system, local facts, local culture, or any other relevant local information.<sup>38</sup> Higonnet writes, “since locals, unlike internationals, are inextricably tied to their country, their stake in communicating effectively and convincing indigenous populations of their perspectives may be greater than international counterparts.”<sup>39</sup> Along these lines, domestic leadership and collaboration in the rule of law reform can help prevent resentment against external imposition and provide a better basis for local buy-in and the sustainability of the post-conflict legal redevelopment process. UN Secretary General has observed that national legal reforms must be domestically owned and driven and that “no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable.”<sup>40</sup> Therefore, the hybrid system benefits from proximity to the target population and combines “principles and approaches designed to reconcile the local [experiences] and global [standards] at [the] normative level.”<sup>41</sup> To that end, hybrid or mixed panel post-conflict adjudication is intended to achieve broader extralegal goals than purely international or domestic criminal trials: transforming the post-conflict community and aligning local rule of law to reflect international norms and driving sustainable rule of law reforms.

### III. UNMIK: “RULING LIKE A MONARCHY”

Following the Kosovo war in 1999 and NATO-led intervention,<sup>42</sup> UN Security Council Resolution 1244 created the UN Interim Mission in Kosovo (UNMIK) to provide interim government and to prepare Kosovo for substantial self-governance.<sup>43,44</sup> However, for almost a decade, from 1999-2008 UNMIK delayed transferring power to local institutions and did little to build local capacities nor local ownership over the rule of law reconstruction process.<sup>45</sup> Higonnet observes “it is a mistake to assume that just by virtue of being there, international judges [can] serve as ‘on-site mentors’ to their local counterparts” and “especially when staff is deluged by work, operating

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<sup>36</sup> Stover and Weinstein, *My Neighbor, My Enemy*, 30.

<sup>37</sup> Ehrenreich Brooks, “The New Imperialism: Violence, Norms and the ‘Rule of Law.’”

<sup>38</sup> Baylis, “Tribunal Hopping with the Post-Conflict Justice Junkies.”

<sup>39</sup> Higonnet, “Restructuring Hybrid Courts,” 17.

<sup>40</sup> United Nations, *Rule-Of-Law Tools for Post-Conflict States*, 6.

<sup>41</sup> Quoted in *Ibid*.

<sup>42</sup> Following statutory discrimination against ethnic Albanians in Kosovo, the Kosovo Liberation Army (KLA), an ethnic-Albanian paramilitary organization, began to undertake significant armed operations in 1997 against Yugoslav security forces. A growing volume of KLA attacks was met by extensive Serbian military campaigns and harsh and arbitrary measures against the ethnic Albanian civilian population, that increasingly took the character of ethnic cleansing. As the humanitarian situation in Kosovo dramatically deteriorated in the period between 1997-1999, NATO commenced military action, and forced Yugoslav forces to withdraw from Kosovo in favor of United Nations international administration. See: Glenny, *The Balkans*.

<sup>43</sup> Gow, “Kosovo – The Final Frontier?”

<sup>44</sup> UN S.C. 1244 mandated that an international civil presence would “perform the basic civilian administrative functions [including the police and justice sector] where and as long as required.” UNMIK Regulation 1999/I states that “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and exercised by the Special Representative of the Secretary-General.” Quoted in Spornbauer, “EULEX Kosovo: The Difficult Deployment and Challenging Implementation of the Most Comprehensive Civilian EU Operation to Date,” 777.

<sup>45</sup> Visoka, “The Obstacles to Sustainable Peace and Democracy in Post-Independence Kosovo,” 4.

under time pressure, and lacking the necessary pedagogical/mentoring experience, the capacity-building facet of mixed-tribunals flounders.”<sup>46</sup> The domination of internationals, particularly UNMIK’s executive appointment powers in the judicial sector, failed to sufficiently make Kosovo jurists an equal partner in adjudication of war crimes and stifled an effective transition strategy in favor of Kosovo judges and local counterparts. Furthermore, the UNMIK “64” Panels, as the hybrid arrangement in Kosovo came to be known, created a balance of power between Kosovo Albanian and international judges. This in turn created perceptions among Kosovo judges, and the broader public, that UNMIK executives would interfere and manipulate the domestic judicial sector.<sup>47</sup> Ultimately, the main legacy of the UNMIK hybrid tribunals has been be the inherent tension between addressing the urgent need to secure order and justice in a post-conflict context while failing to build an independent and autonomous Kosovo justice system for the future.  
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In the nine years of UNMIK’s executive rule of law functions, the hybrid panels failed to develop local judicial capacity, and failed to adequately involve local actors in the adjudication of organized crime and war crimes. Principally, this was a major failing of trust and failing to reinforce substantive partnership, advisory and mentoring of local jurists. In his 2005 fact-finding report on the situation in Kosovo, Kai Eide, the Special Envoy of the UN Secretary General that “respect for rule of law is inadequately entrenched and the mechanism to enforce it are not sufficiently developed” and “there is little reason to believe that local judges and prosecutors will be able to fulfill in the near future the functions now being carried out by international personnel.”<sup>51</sup> When UNMIK had initially entered Kosovo six years earlier, in 1999, it found that the previous law enforcement and judicial structure had effectively collapsed—essentially requiring the complete recreation and reconstruction of the judiciary. Hansjorg Strohmeyer writes, “as a result of the policy of gross, government-sanctioned discrimination, applied with particular vigor since 1989, virtually no Kosovar Albanians remained in the civil service” and “most severely affected was the judicial sector: politically and ethnically motivated appointments, removals, and training.”<sup>52</sup> Furthermore, many of these Serbian and Montenegrin judges and magistrates, who had administered Kosovo’s justice system for the last decade, had either left Kosovo or refused to cooperate with UN structures.<sup>53</sup> Ten years of discrimination also engendered public distrust of the judicial system. The International Crisis Group observes, “Prejudice was institutionalized with the courts, which in turn generated disregard and disrespect for the judiciary among society as a whole.”<sup>54</sup> Therefore, UNMIK’s first attempts at hybrid tribunals began with minority international-jurist panels, where internationals did not form the

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<sup>46</sup> Higonnet, “Restructuring Hybrid Courts,” 2005, 15.

<sup>47</sup> ICTJ, “Lessons from the Deployment of International Judges and Prosecutors in Kosovo,” 2006.

<sup>48</sup> Hartmann, “International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping.”

<sup>49</sup> Ehrenreich Brooks, “The New Imperialism: Violence, Norms and the ‘Rule of Law’.”

<sup>50</sup> An ombudsman institution was created in 2000 to receive and investigate complaints from any person in Kosovo concerning human rights violations. However, when this institution was transferred to Kosovar control, it was deprived of its authority to accept and investigate complaints against UNMIK or KFOR. See: Narten, “Post-Conflict Peacebuilding and Local Ownership: Dynamics of External Local Interaction in Kosovo Under United Nations Administration.”

<sup>51</sup> Quoted in Spornbauer, “EULEX Kosovo: The Difficult Deployment and Challenging Implementation of the Most Comprehensive Civilian EU Operation to Date.”

<sup>52</sup> Strohmeyer, “Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor,” 49.

<sup>53</sup> During the Milosevic era (1989-1999) ethnic-Albanians were prevented from working in the civil administration and lacked experience, up-to-date knowledge and legal expertise. Furthermore, Kosovar Albanians were purged from judicial positions after Kosovo’s autonomy was revoked in 1989, ethnic Albanians were largely excluded from serving in the judicial system, and the local University did not allow Albanian students to attend law school in their own language. See: International Crisis Group, “Finding the Balance,” 6-8.

<sup>54</sup> *Ibid.*, 8.

voting majority on judicial panels and constituted panels as a 1:2 proportion of international-to-domestic judges.<sup>55</sup> In theory, designing panels with greater local competences and authority were expected to facilitate skills transfer between the international and domestic jurists. Furthermore, these panels existed as an emergency judiciary to deal with the ongoing violations promptly and effectively. In practice, however, international jurists were routinely outvoted by lay and professional judges, leading to unsubstantiated guilty verdicts against members of minority communities and questionable verdicts of acquittal against some Kosovo Albanian defendants.<sup>56,57</sup> Calin Trenkov-Wermuth observes, “the presence of only local and predominantly Kosovo Albanian jurists within the judiciary had created a problem for accountability and impartiality, precipitating a justice crisis.”<sup>58</sup> For example, domestic judiciary showed serious bias in the its prosecution of cases, such as prejudice in pre-trial detention, failing to call relevant witness, and failing to exercise due diligence.<sup>59</sup>

Given concerns regarding institutional independence of the judiciary and the shortage of sufficiently qualified and trained judges and prosecutors, UNMIK passed Regulation 2000/64 or the “Regulation 64 Panels.” Under this measure, the United Nations could unilaterally insert international judges and prosecutors into the criminal justice system alongside existing jurists.<sup>60</sup> By ensuring that international judges constituted the majority in designated cases, in a 2:1 international-to-local judge proportion, the special 64 panels transformed the judicial process from one controlled by local jurists to one dominated by the international community.<sup>61</sup> Under the special 64 panels, the accused, the defense counsel, and the prosecution had the right to petition UNMIK to intervene and assign international judges to domestic panels. Therefore the introduction of the 2:1 international-majority panels helped eliminate bias and curtail injustices that took place in the initial hybrid trials. In that sense, the 64 panels successfully ensured that domestic judges could not outvote international judges in controversial war crimes and inter-ethnic violence cases.<sup>62</sup> Nevertheless, the 64 Panels had “unlimited flexibility” to take new cases and cases already assigned to Kosovar jurists.<sup>63</sup> In practice, despite deliberate attempts to institutionalize hybridity in the UNMIK panels, UNMIK hybrid panels’ heavy-handed approach to case-selection limited UNMIK’s attempts to engender continuous training of court personnel and the progressive transfer international competences to local actors. The International Crisis Group reported, “however, there is no mechanism for mentoring of local judges by internationals” and “internationals and local judges have offices in different buildings [and] there is little interaction.”<sup>64</sup> In turn, the focus on preventing judicial bias had distracted from UNMIK’s capacity-building role despite Resolution 1244’s clear mandate to build democratic judicial institutions.<sup>65</sup> Therefore, while the special 64 Panels provided the advantage of an international panel, and gave UNMIK a method to ensure majority international control of voting, it had the

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<sup>55</sup> In the Kosovo system, a panel of judges, from three to five, hears a case and decides the verdict by a majority decision. Before the introduction of majority international panels under UNMIK Regulation 2000/64, international judges were simply outvoted by their colleagues. *Ibid.*

<sup>56</sup> United Nations, *Rule-Of-Law Tools for Post-Conflict States*, 31.

<sup>57</sup> ICTJ, “Lessons from the Deployment of International Judges and Prosecutors in Kosovo.”

<sup>58</sup> Trenkov-Wermuth, *United Nations Justice*, 58.

<sup>59</sup> International Crisis Group, “Finding the Balance.”

<sup>60</sup> ICTJ, “Lessons from the Deployment of International Judges and Prosecutors in Kosovo.”

<sup>61</sup> *Ibid.*

<sup>62</sup> Hartmann, “International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping.”

<sup>63</sup> *Ibid.*

<sup>64</sup> International Crisis Group, “Finding the Balance,” 14.

<sup>65</sup> A former UNMIK DOJ official admitted that “UNMIK understood for a long time that its job was *not* to develop Kosovar judicial authorities, but to handle high-profile cases—corruption, ethnic impunity, war crimes...out job was *not* to train or build capacity.” Scheye, “UNMIK and the Significance of Effective Programme Management,” 21.

tremendously negative impact upon the development of local judicial capacity and professionalism.

In the abstract, the theory underlying hybrid adjudication in Kosovo was as sound as far as enhancing local capacity and developing local ownership over war crimes adjudication. In principle, it gave local individuals an opportunity to gain valuable experience under the tutelage of international jurists that exercised continued oversight. In practice, however, international jurists were never in a position to mentor their counterparts, instead having to deal with immediate criminal needs, and did not have the resources to transfer skills and to delegate authority to the local judiciary.<sup>66</sup> According to Iain King and Whit Mason, the 64 Panels overworked international jurists, and afforded them little time to mentor local counterparts.<sup>67</sup> The International Center for Transitional Justice reports, “national judges and lawyers...would like more interactions, both informally and with respect to the substance of cases” and “in some trials, IJs [international judges] have interacted with their national counterparts for only *minutes* before trial.”<sup>68</sup> Despite obvious recognition of the importance of building local capacity, a legal obligation under UN Resolution 1244 to “establish” and “develop” justice and security institutions, UNMIK relied on international jurists to the detriment of local capacity building. In turn, the appointment of international jurists appeared *ad hoc* and arbitrary, and reinforced perceptions of manipulation of Kosovo’s judicial system by UNMIK.<sup>69</sup> Therefore, UNMIK failed to make concrete plans for hand-over and serious commitment to build local capacity through greater local participation in co-administration of the judicial system.

As in every postwar society, the socio-political landscape in Kosovo was characterized by immense complexity and contested authority between local and international actors. Local actors from the dominant Kosovo-Albanian community hoped for political self-determination and self-government that could lead to *de facto* statehood.<sup>70</sup> This manifested itself as demands for substantial autonomy over rule of law and law enforcement institutions, such as the judiciary, and the progressive transfer of administrative competencies to local actors.<sup>71</sup> Initially, the early stages of the UNMIK administration had “been legitimized as ‘good’ interim governance” and there was “popular identification of [UNMIK] as ‘liberators’ from Serbian rule and providers of urgently needed humanitarian goods.”<sup>72</sup> However, UNMIK’s competences and “reserved” powers were also expected to gradually shrink as they were matched by increasing local capacity. Despite transferring partial authority in sensitive areas such as the justice sector in the hybrid tribunals, large segments of the Kosovo-Albanian population and politicians openly agitated against UNMIK, and regarded UNMIK’s mandate as illegitimate and open-ended. Eric Scheye writes, “UNMIK did consult, but the process of partnership is about the quality of that participation rather than its mere occurrence.”<sup>73</sup> Incremental decisions to cede exclusive authority to Kosovar jurists and then repealing those decisions under the 64 hybrid Panels were also perceived by the general population as crisis-driven, confusing and incoherent.<sup>74,75</sup>

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<sup>66</sup> International Crisis Group, “Finding the Balance.”

<sup>67</sup> According to the authors, local judiciary would, on average, handle two war crimes trials a year. King and Mason, *Peace at Any Price*.

<sup>68</sup> ICTJ, “Lessons from the Deployment of International Judges and Prosecutors in Kosovo,” 2006, 17–18 [emphasis added].

<sup>69</sup> *Ibid.*

<sup>70</sup> Narten, “Post-Conflict Peacebuilding and Local Ownership: Dynamics of External Local Interaction in Kosovo Under United Nations Administration.”

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*, 10.

<sup>73</sup> Scheye, *UNMIK and the Significance of Effective Programme Management*, 26.

<sup>74</sup> Hartmann, “International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping.”

<sup>75</sup> Reydam, Wouters, and Ryngaert, *International Prosecutors*.

Therefore, the culture of imposition, and unilateral judicial appointments, rather than more inclusive processes, increased popular resentment towards the UNMIK judiciary and ultimately undermined rule of law reforms.

In conclusion, UNMIK was created without a clear timetable for hand-over to Kosovo counterparts or coherent strategy for developing a professional and accountable local justice sector.<sup>76</sup> Understandably, UNMIK was tasked with the enormous responsibility of establishing a justice system with the progressive transfer of power to local actors and institutions. Nevertheless, a local rule of law expert notes, “UNMIK was run like a monarchy and created a system where only one person simply decrees everything” and “UNMIK should have won its own legitimacy: but legitimacy is always won from the inside.”<sup>77</sup> Given tremendous pressure to achieve demonstrable results, UNMIK preferred to take executive judicial functions into its own hands rather than devolve responsibility to the local population.<sup>78</sup> However, under United Nations Resolution 1244, UNMIK was legally obligated to “establish” and “develop” democratic and autonomous institutions that deliver justice and security to all Kosovars. According to Iain King and Whit Mason, UNMIK’s focus on preventing local judges from issuing biased decisions distracted attention from developing the capacity of the local judiciary as a whole.<sup>79</sup> Therefore, in its nine years of UNMIK’s executive rule of law functions, the extended international involvement and the UNMIK hybrid panels failed to develop local judicial capacity, and failed to adequately involve local actors in the adjudication of organized crime and war crimes. This, in turn, reinforced perceptions that Kosovo’s jurists and judicial sector were interfered and manipulated by UNMIK.

#### IV. EULEX IN FOCUS

At present, EULEX is the largest civilian crisis-management mission under the EU Common Security and Defense Policy. Shortly before Kosovo’s declaration of independence, EULEX was created to “Monitor, Mentor, and Advise” or MMA all institutions related to the rule of law while retaining executive powers to adjudicate certain categories of serious and complex crimes. In criminal cases, as well as some civil cases, the “Regulation 64 Panels” have been substituted by international EULEX judges that operate within the domestic legal system and may sit on mixed panels with local judges upon the authorization of the Assembly of EULEX Judges. While EULEX has provided crucial support to the consolidation of Kosovo’s rule of law institutions, EULEX has not undertaken necessary steps to ensure active engagement of Kosovo jurists in the adjudication of complex and serious crimes, and therefore has unsuccessfully facilitated the gradual transfer of competences to the Kosovo judiciary. Instead, EULEX has overwhelmingly exercised its executive functions and has failed to design local-majority panels in serious and complex criminal cases. This is an unfortunate legacy given that local participation and ownership are necessary for developing an experienced and professional Kosovo judicial culture. In light of this, progress in local participation must be tracked given changes to the Justice component under the 2012 “Compact on Joint Rule of Law Objectives” and the scaling-down of EULEX executive functions.<sup>80</sup> As the 2012 Compact on Joint Rule of Law Objectives stipulates, the EULEX Justice component has separated executive and MMA functions, and has instituted

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<sup>76</sup> ICTJ, “Lessons from the Deployment of International Judges and Prosecutors in Kosovo.”

<sup>77</sup> Interview with Selim Selimi, local Rule of Law Advisor, 3/12/13.

<sup>78</sup> Caplan, “Partner or Patron? International Civil Administration and Local Capacity-Building.”

<sup>79</sup> King and Mason, *Peace at Any Price*, 109.

<sup>80</sup> “Compact on Joint Rule of Law Objectives for the Period Until 2014.”

less formalized peer-to-peer mentoring and coaching.<sup>81</sup> These recent reconfigurations, potentially a positive development, must be monitored given recent EULEX practice to encourage majority local panels, with 2:1 local-to-international majority, and the appointment of local presiding judges on mixed panels.<sup>82</sup> Lastly, significant progress has been made since UNMIK's tenure regarding the selection and appointment of judges, as local judicial candidates are now recruited and proposed by the hybrid Kosovo Judicial Council (KJC). However, in the perspective of at least one local KJC official, the EULEX has phased-out MMA functions prematurely.<sup>83</sup>

Furthermore, the long-term effectiveness the EULEX justice reforms ultimately depend on the legitimacy of mixed panels and its decisions. However, in the opinion of a local rule of law advisor, "perception of the people of EULEX is not sufficient" and "while EULEX benefits from the links to EU integration, people also expected more because they did not understand the nature of EULEX. EULEX wasted crucial time and did not sufficiently inform people of the basis, and limits of EULEX and its rule of law mandate."<sup>84</sup> The lack of a proactive outreach campaign, and the ambiguity of EULEX's mandate, has negatively impacted the perception of EULEX's role and responsibilities.<sup>85</sup> After the decade-long tenure with a UN mission with executive powers under UNMIK, EULEX has had to manage Kosovar expectations, given obvious associations with the European Union and possible prospects of EU accession, as well as communicate that its mandate and functions are narrower than UNMIK's broader rule of law competences. For example, the 2010 EULEX Programme Report subheading "building sustainable change together" underlines EULEX's commitment to sustaining rule of law institutions and Kosovo government's responsibility for administering political functions.<sup>86</sup> While documents and external communication strongly emphasize the principle of local ownership, the justice sector has failed to sufficiently involve local actors in majority local panels. Along these lines, EULEX failed to successfully communicate the mandate and purpose of EULEX rule of law functions. A reconfiguration and reassessment of the Press and Public Information Office (PPIO) strategy in 2011 came, in the words of an observer, "a little too late."<sup>87</sup> Therefore, as most of the rule of law competences handled by UNMIK are now assumed by EULEX, EULEX has inherited criticism and skepticism from local authorities and general population due to negative perception of the UN mission and unrealistic perceptions of EULEX's capabilities.<sup>88,89,90</sup> A EULEX judge observes, "It frustrates me. My colleagues and I are quite proud of our work. But there is mal-information and people believe that EULEX is the continuation of UNMIK, that EULEX has come to fill its pockets and over-rule Kosovo institutions."<sup>91</sup> In another characterization, EULEX has faced a "blank wall of dissension."<sup>92</sup>

EULEX operates under the overall authority and within the status-neutral framework of the United Nations and Resolution 1244.<sup>93</sup> The legal basis for the establishment of EULEX, the

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<sup>81</sup> Interview with EULEX official, Strengthening Division, 3/29/13.

<sup>82</sup> Ibid.

<sup>83</sup> Interview KJC Secretariat Official, 4/2/13.

<sup>84</sup> Interview with Selim Selimi, local Rule of Law Advisor, 3/12/13.

<sup>85</sup> Kosovar Center for Security Studies, "Kosovo Security Barometer (2012)."

<sup>86</sup> EULEX, "EULEX Programme Report 2010 [emphasis added]"

<sup>87</sup> Interview with Selim Selimi, local Rule of Law Advisor, 3/12/13.

<sup>88</sup> Whitman and Wolff, *European Union as a Global Conflict Manager*.

<sup>89</sup> For example, the prevalence of politicized street art and graffiti slogans such as "EULEX—Made in Serbia" and "EULEXSPERIMENT" communicate a cultural-political identity that opposes EULEX and international administration. Bojicic-Dzelilovic, Ker-Lindsay, and Kostovicova, *Civil Society and Transitions in the Western Balkans*.

<sup>90</sup> Phillips, "Violent Protests Against EU Mission in Kosovo."

<sup>91</sup> Interview with EULEX Judge, 3/12/13.

<sup>92</sup> Interview with EULEX Press and Public Information Office (PPIO) Officer, 4/3/13.

<sup>93</sup> United Nations, *United Nations Peace Operations*.

Joint Action of the Council of the European Union, henceforth “Joint Action”, explicitly mentions Resolution 1244 and is based on the assumption that UNMIK will remain in Kosovo until the Resolution is repealed or replaced. Therefore, EULEX has adopted the legal status of Kosovo prior to the declaration of independence while expressing the readiness of the European Union to play a leading role in the stabilization of the region in conformity with a European perspective.<sup>94</sup> The Joint Action establishes EULEX’s task to ensure the maintenance and promotion of all areas related to rule of law, public order, and security in Kosovo.<sup>95</sup> The Joint Action, building on the Ahtisaari plan, also outlines the composition of mixed judicial panels and exclusive competences of hybrid or “joint panels” over certain complex and sensitive crimes.<sup>96</sup> In addition to launching EULEX by EU institutions, the Kosovo government invited and welcomed a European Union-led rule of law mission in its declaration of independence in 2008 and subsequently adopted the Ahtisaari plan in the Kosovo constitution. Most recently, in 2012 an agreement was signed between the Kosovo Justice Minister, the EU Special Representative, and the head of EULEX under the Compact on Joint Rule of Law Objectives that defines EULEX priorities for the 2012-2014 mandate or Mission Implementation Plan (MIP), establishing technical obligations for local counterparts, and reconfiguring EULEX to promote locally driven rule of law management.<sup>97</sup> Furthermore, while the Assembly of EULEX Judges retains wide case-allocation authority and international EULEX jurists retain executive functions, EULEX has shifted formal MMA obligations to informal peer-to-peer mentoring on mixed panels and has created separate “strengthening” division that monitors and advises local interlocutors.<sup>98</sup> Furthermore, according to EULEX representatives, EULEX has begun the process of transferring executive competences to locally-driven panels and local presiding judges.<sup>99</sup>

Similar to the prior-UNMIK justice competences, adjudication of a case by EULEX judges is granted in cases where there is a need to ensure the proper administration of justice and suspicion of ethnically motivated crimes. EULEX judges retain certain executive powers to ensure that “serious crimes are properly” adjudicated and enforced.<sup>100</sup> In 2008, the competency of UNMIK and the SRSG to appoint judiciary personnel was reconfigured and transferred to the President of the Assembly of EULEX Judges, which functions as a self-governing body responsible for all issues related to administration and work of EULEX judges.<sup>101</sup> Under the Law on Jurisdiction, the President of the EULEX Assembly is entrusted with the allocation of criminal cases to international and local judges, which may, upon authority of the President of the Assembly, determine the composition of judicial panels. The President of the Assembly of EULEX Judges has the authority to disqualify a local judge and assign international judges to criminal proceedings upon the petition of EULEX Prosecutor, upon petition by any parties of a proceeding, or upon the written request of the President of the local court.<sup>102</sup> The President of the Assembly is also granted broad subject-matter jurisdiction for crimes related various complex and sensitive

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<sup>94</sup> Buffard and Hafner, *International Law Between Universalism and Fragmentation*.

<sup>95</sup> European Union, *Council Joint Action*.

<sup>96</sup> These include war crimes; terrorism; organized crime; corruption; financial and economic crimes; and other “serious” crimes *ibid.*, Art. 3(d).

<sup>97</sup> In the position of a stakeholder, the signing of the 2012 Compact, “has given EULEX fewer teeth.” Interview with former-EULEX Rule of Law Advisor, 4/2/13.

<sup>98</sup> EULEX Kosovo, “First Head of Strengthening Division Appointed.”

<sup>99</sup> Interview with EULEX official, Strengthening Division, 3/29/13.

<sup>100</sup> European Union, *Council Joint Action*, Art. 3.

<sup>101</sup> Assembly of the Republic of Kosovo, “Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo,” Art. 4.

<sup>102</sup> *Ibid.*, Art. 3.3. Furthermore, the President of the Assembly of EULEX Judges’ decision is final without the possibility of appeal. See, Art. 3.6.

crimes,<sup>103</sup> and where the victim is targeted because of “real or perceived” membership to a protected and minority group.<sup>104</sup> Lastly, the President of the Assembly of EULEX Judges is also granted authoritative administrative oversight “irrespective of the crime” and in “any stage of the relevant proceeding” where it is reasonably believed that assigning local judges to a sensitive case could “render the impartiality of the Kosovo judge doubtful” or “lead to a...serious miscarriage of justice.”<sup>105</sup> The law regulates the competences of EULEX jurists and makes clear the commitment of EULEX to maintain operational control of the most sensitive and complex cases in the rule of law system in Kosovo. Therefore, the framework is structured in a way to grant the Assembly of EULEX Judges extraordinary appointment powers and out of concerns that local jurists are still unable or unwilling to adjudicate cases in a fair, independent and impartial way.

Executive competences may also be interpreted as capacity enhancing, as the President of the Assembly of EULEX Judges is granted substantial discretion in designing hybrid panels and in delegating responsibility to local jurists compared to the predecessor UNMIK panels. Under Article 3 paragraph 7 of the Law on Jurisdiction, the President of the Assembly of EULEX Judges has the authority to either create a panel exclusively of international judges, with a majority of local judges,<sup>106</sup> or may entirely derogate from international panels and “decid[e] for grounded reasons that an EULEX judge is not assigned to the respective stage of the criminal proceeding.”<sup>107</sup> However, it is the stated position of the Assembly of EULEX Judges that the mixed panels offer the most convenient arena for effective MMA activities and MMA-based learning through “imitation”.<sup>108</sup> Along these lines, the position of the Assembly is that panels can perform MMA functions without appearing “intrusive or supervisory” but rather as “interactive” and “supportive”.<sup>109</sup>

In practice, however, the hybrid composition and nationality of the panel composition varies by type of crime (e.g. complex and sensitive crimes) with panels hesitatingly designed as local-majority panels for the most complex and serious issues such as corruption, organized crime and war crimes. <sup>110</sup> Principally, the composition of these panels should reflect a newly reconfigured EULEX practice to encourage majority, or 2:1 proportion, of local to international judges in first-instance courts in light of the 2012 the “Compact on Joint Rule of Law Objectives”.<sup>111</sup> However, in district courts such as Pristina, Peja and Mitrovicë/a, panels with a local majority comprise the minority of judgments and sit on an even more vast minority of serious and complex crimes such as corruption, abuse of an official position and organized crime. In the Pristina District court, from January 2009 to December 2012, only 2 of the total 36 criminal cases have a local majority, 2:1 composition on hybrid panels.<sup>112</sup> In the *Ilaz Kurtaliqui et al.* (2011), a majority-local panel with a EULEX judge presiding found the accused guilty of participation in structured organized crime and narcotic trafficking. In the only other majority local jurist panel, albeit, again with an international jurist acting as presiding judge, *Ap.-Kz.*

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<sup>103</sup> Ibid., Art. 3.3 (a–u).

<sup>104</sup> “[Victim is] selected because of their real or perceived connection...to its race, national, ethnic, or social origin, association with a national minority or with a political group, language, color, religion, sex, age mental or physical disability, sexual orientation, or similar factor” Ibid., Art. 3.4.

<sup>105</sup> Ibid., 4.1; and 3.5

<sup>106</sup> Ibid., Art. 3.7.

<sup>107</sup> Ibid., 3.2.

<sup>108</sup> Assembly of EULEX Judges, “Guidelines on Monitoring, Mentoring, and Advising (MMA) for EULEX Judges (2010),” 5; 8.

<sup>109</sup> Assembly of EULEX Judges, “Guidelines on Monitoring, Mentoring, and Advising (MMA) of EULEX Judges (2008),” 5.

<sup>110</sup> This only includes cases that have gone to completion and the judgments posted on the EULEX website. See, Court Judgments—Criminal Proceedings: <http://www.eulex-kosovo.eu/en/judgments/index.php>

<sup>111</sup> Interview with EULEX official, Strengthening Division, 3/29/13.

<sup>112</sup> EULEX (website), “Court Judgments: District Court of Pristina.”

(2012) the panel found the co-defendant guilty on charges of corruption and abuse of official position or authority. In the Prizren District court, 6 of the 19 criminal cases have had a majority local panel and in one case the District Court has had a local jurist act as the presiding judge.<sup>113</sup> In *Rexhep Krasniqi*, the only case with a local presiding judge, the majority local panel rejected the original indictment against the accused for abuse of official position or authority, and found that the statute of limitations had expired. In the Peja District Court, 6 of 33 cases have had a local majority panel but only first beginning in 2011.<sup>114</sup> Furthermore, cases such as *Agim Sylejmani* (2011), *Hakif Hamiti* (2011), *Atdhe Bekaj* (2011), and *Muhamet Bokaj et al.* (2011), which involved a local majority panel, ruled on relatively simple homicide or unauthorized possession of weapons charges. Only in two other cases, *Shefqet Kelmendi* (2012) and *Krasniqi et al.* (2012) did a local 2:1 majority sit on complex crimes cases of criminal association and organized crime. In the Gjilan District Court, 1 of the 4 criminal cases has involved a local-majority panel.<sup>115</sup> And lastly, the Mitrovice District Court has featured no local majority panels: instead, panel composition has either been a minority local panel, such as a 1:2 local-to-international composition, or instead has featured exclusively internationalized panels.<sup>116</sup> These 1:2 local-to-international composition tribunals have sat on 5 of 54 cases, including two complex cases of unauthorized transport of weapons, smuggling, and organized crime in *Jevro Pantelica* (2012) and *Hajriz Asllani et al.* (2012). Taking stock of the composition of EULEX mixed panels designed at the discretion of the President of the EULEX Assembly of Judges, only a small number of local judges sit as the majority on mixed panels that deal with complex or serious crimes.

While it is a positive trend that 2:1 majority local-to-international panels have adjudicated complex criminal cases, two major problems persist. Firstly, in many instances, local judges do not sit as a majority on any war crimes cases. This has inhibited the ability to develop local ownership over war crimes issues and, more generally, does not signal to the general population local participation in adjudication of sensitive transitional justice matters. Secondly, while the 2:1 local-to-international panels have adjudicated complex and locally sensitive corruption and organized crime cases, the Assembly of EULEX Judges has not exercised sufficient discretion in allowing for local-majority panels of complex crimes. As local Rule of Law expert Selim Selimi observes, “adjudication must be more of a partnership. Sustainability is always local. We have to ‘stand up’ on our own first.” and “As EULEX has dominated panels, this ends up creating a dichotomy and differentiates, or creates two systems.”<sup>117</sup> Along these lines, by creating a dichotomy between local and internationally dominated panels, EULEX may have negatively impacted the development of local experience and professionalism in the adjudication of complex criminal matters for the future. While maybe too early to tell whether majority international panels have risked dependence on international jurists, success in the long-term depends on a strong institution that is capable of handling difficult and controversial cases. EULEX must continue to gradually shift to a more egalitarian approach and support Kosovo colleagues who are supposed to be in the driving seat of the judicial reform process.

As envisioned by the Council Joint Action, EULEX judges also have capacity-building methodology and are obliged to monitor, mentor, and advise (MMA) national counterparts and provide training.<sup>118</sup> While these explicit legal obligations have now shifted to the “Strengthening

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<sup>113</sup> EULEX (website), “Court Judgments: District Court of Prizren.”

<sup>114</sup> EULEX (website), “Court Judgments: District Court of Peja/Peć.”

<sup>115</sup> EULEX (website), “Court Judgments: District Court of Gjilan/Gnjilane.”

<sup>116</sup> EULEX (website), “Court Judgments: District Court of Mitrovicë/a.”

<sup>117</sup> Interview with Selim Selimi, local Rule of Law Advisor, 3/12/13.

<sup>118</sup> *Ibid.*, Art. 2.4.

Division” of EULEX in late-2012, it is essential to take stock of the MMA performance in the first four years of EULEX’s operations; especially in light of ambiguities in what was required of international jurists in fulfilling their MMA obligations. As the 2010 EULEX report describes, EULEX had originally envisioned MMA to be “based on a rigorous adherence to the principle of ‘local ownership’ and ‘is designed to help Kosovo’s rule of law bodies to make changes themselves, rather than rely upon an international presence to do it for them.’”<sup>119</sup> In practice, however, no clear distinction could be drawn between executive and MMA functions as they frequently took place at the same time in the course of work with mixed panels.<sup>120</sup> Furthermore, oftentimes Mentoring functions would itself incorporate elements of Monitoring and Advising.<sup>121</sup> Articles 3.9 and 5.6 provide EULEX judges, in the performance of their MMA functions, with the authority to access and receive information with regards to any ongoing or closed criminal case in any court in Kosovo and irrespective if EULEX jurists have been assigned to the panel. Problematically, the Law on Jurisdiction introduces ambiguity regarding MMA functions and does not explicitly provide a legal definition of MMA roles and procedures.<sup>122</sup> To resolve this ambiguity, the Assembly of EULEX Judges adopted the “Guidelines on Monitoring, Mentoring, and Advising (MMA) for EULEX Judges” that enumerated best practices and soft requirements for international jurists promoting MMA. The Guidelines, in the first definition of these capacity-building responsibilities, explain that the MMA is a unitary activity that begins in successive stages and in the courts where EULEX judges exercise executive functions: first beginning with Monitoring, then Mentoring, and then the more intrusive Advising activities.<sup>123</sup> In explaining the development behind the “Guidelines”, former President of the Assembly of EULEX Judges explains that “we [the Assembly] had a deep reflection on what it means to MMA” and “we wanted to be careful not to endanger independence: we recommended that MMA should typically involve broad discussions on how a judge should behave, analyze a case, or discussions about analyzing a case or discussions about sentencing.”<sup>124</sup> As addressed by the Guidelines, the purpose of MMA is to allow EULEX to evaluate ongoing weaknesses and problems in the local judiciary and promote local ownership and accountability in Kosovo’s judicial system.

“Monitoring” was envisioned as a system of measuring performance and objective assessment of local jurists that is “not aimed to investigate misconduct of national judges” and “does not seek to review or criticize” the work of local jurists.<sup>125</sup> If “recurrent gaps” and weaknesses in the administration of justice and application of rule of law should persist during the Monitoring activity, then “Mentoring” can provide informal support through the exchange of experiences, information, and best practices between EULEX jurists and local judges. The Guidelines recommend mentoring techniques such as observing municipal and district court sessions, assistance in research, including providing articles, essays, and international conventions, and highlighting important jurisprudence and commentaries on new laws and codes, and referring local counterparts to a network of international colleagues with significant experience in similar cases or issue-areas.<sup>126</sup> Lastly, the Guidelines list “Advising” as providing professional counseling to the competent authority (e.g. President of the Courts) on topics and

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<sup>119</sup> EULEX, “EULEX Programme Report 2010.”

<sup>120</sup> EULEX, “Annual Report on the Judicial Activities of EULEX Judges (2010),” 22.

<sup>121</sup> Interview with former-EULEX Rule of Law Advisor, 4/2/13.

<sup>122</sup> Assembly of EULEX Judges, “Guidelines on Monitoring, Mentoring, and Advising (MMA) of EULEX Judges (2008).”

<sup>123</sup> Assembly of EULEX Judges, “Guidelines on Monitoring, Mentoring, and Advising (MMA) for EULEX Judges (2010).”

<sup>124</sup> Interview with former President of Assembly of EULEX Judges, 3/13/13.

<sup>125</sup> Assembly of EULEX Judges, “Guidelines on Monitoring, Mentoring, and Advising (MMA) of EULEX Judges (2008),” 5.

<sup>126</sup> *Ibid.*, 8.

issues areas directly arising from Monitoring and Mentoring.<sup>127</sup> The March 2012 report, for example, shows an “up” arrow and states that EULEX judges monitored the criminal registry and court processing, such as randomly selecting case files from the registry of the Kosovo courts, monitored whether parties are properly summoned, and identified shortcomings in detention on remand cases.<sup>128</sup>

Since October 2010, the MMA “Tracking Mechanism” has attempted to provide detailed and informative reports on outputs under each MMA action. However, EULEX provides no basis for the methodology of its qualitative evaluations and scoring mechanism that uses ⇔ (no change; little or no impact), ↑ (upward trend; improvement), and ↓ (downward trend).<sup>129</sup> In speaking with stakeholders, a former EULEX rule of law advisor assess, “MMA was very successful coaching. There were a number of institutions that were frankly hopeless that EULEX was able to transition to local control and judges.”<sup>130</sup> A current EULEX Judge also explains that mixed panels have contributed to *opinio juris*, secondary opinions, literature on the law, and have helped “define local legal traditions where there, frankly, were none.”<sup>131</sup> However, this same Judge explains that there was insufficient instruction and resources to conduct MMA before the restructuring under the 2012 MMA.<sup>132</sup> He explained, while he visited courts on a weekly basis, “a proper MMA structure should take time on a daily basis to discuss with local judges, on an equal level, their cases and to initiate new ideas.”<sup>133</sup>

EULEX also provides MMA functions to the Kosovo Judicial Council (KJC), the independent institution responsible for recruiting and proposing candidates for appointment and reappointment to judicial office, disciplinary proceedings against judges, and policies for the overall management and administration of the judicial system.<sup>134</sup> As an institution, the KJC is responsible for ensuring that Kosovo courts are independent and impartial, professional, and reflect the multi-ethnic nature of Kosovo.<sup>135</sup> Therefore, its competences also include promulgating regulations, and drafting internal rules and practices.<sup>136</sup> In an evaluation of the KJC, a local rule of law advisor noted “EULEX has planted a good seed. A measure of how well this seed has grown is the KJC’s successful implementation of the Law on Courts which has introduced significant reforms to the Kosovo judicial system.”<sup>137</sup> While the KJC has made significant strides setting the formal conditions for the independence and accountability of local jurists and overall management of the judicial system, the KJC, as a relatively nascent institution, has been criticized for not considering merit and integrity when selecting future judges, and has inconsistently confronted existing threats to the physical security of judicial actors. Therefore, at least in the perspective of one KJC official, “we [the KJC] are still in need of close mentoring.”<sup>138</sup> Furthermore, a EULEX official in the Strengthening Division noted that close a and daily mentoring will be needed to allow the KJC to fulfill its mandate.<sup>139</sup>

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<sup>127</sup> Ibid.

<sup>128</sup> EULEX Kosovo, “Monitoring, Mentoring, and Advising Tracking Mechanism.”

<sup>129</sup> With regards to these indicators, an observer noted: “some inputs are quantifiably objective, such as filling posts or number of indictments, whereas these representations combine objective elements and subjective interpretations.” Interview with former-EULEX Rule of Law Advisor, 4/2/13.

<sup>130</sup> Ibid.

<sup>131</sup> Interview with EULEX Judge, 3/12/13.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> EULEX Kosovo (website), “Kosovo Judicial Council.”

<sup>135</sup> Kosovo Judicial Council, “Kosovo Judicial Council” (website)

<sup>136</sup> EULEX, “EULEX Programme Report 2011.”

<sup>137</sup> Interview with Selim Selimi, local Rule of Law Advisor, 3/12/13.

<sup>138</sup> Interview KJC Secretariat Official, 4/2/13.

<sup>139</sup> Interview with EULEX official, Strengthening Division, 3/29/13.

Since 2008, EULEX has embedded international counterparts in the KJC, and installed “Advisors” in the KJC Secretariat and various KJC sub-committees.<sup>140</sup> Within the KJC’s exclusive administrative competences, EULEX maintains a minimally hybrid presence on the KJC where two of the thirteen seats are reserved for international jurists.<sup>141</sup> An international jurist sitting on the KJC explained how he advised his KJC colleagues against using purely quantitative assessments for the Regulation on the Evaluation on the Performance of Judges: “There was nothing [in the regulation] about the quality of judgments and I helped develop a whole catalogue of requirements about how to assess the quality of the work of the judge.”<sup>142</sup> EULEX also continues to monitor KJC meetings and KJC decision-making process, budget requests, and proposals for legislative amendments to ensure they are in line with European best practices, monitors the KJC website to ensure that quality translations exist for minority groups, and monitors the KJC’s appointment and selection process.<sup>143,144</sup> However, an Albanian KJC official noted that earlier periods of EULEX MMA of the KJC Secretariat were far more “fruitful and cooperative.”<sup>145</sup> He noted that “sitting together and coaching” and “shoulder-to-shoulder, going to the desk of a domestic legal officer and drafting reports and decisions together helped ensure the quality of KJC’s outputs as a whole.”<sup>146</sup> Instead, EULEX’s KJC practice has shifted entirely to monitoring and reporting. Given the increased focus on scaling-down EULEX executive and MMA functions under the 2012 “Compact on Joint Rule of Law Objectives”, the reconfiguration of EULEX’s capacity-building initiatives in the KJC should be monitored.

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<sup>140</sup> Interview KJC Secretariat Official, 4/2/13.

<sup>141</sup> Assembly of the Republic of Kosovo, *The Law on the Kosovo Judicial Council*.

<sup>142</sup> Interview with EULEX Judge, 3/12/13.

<sup>143</sup> Interview KJC Secretariat Official, 4/2/13.

<sup>144</sup> EULEX Kosovo, “Monitoring, Mentoring, and Advising Tracking Mechanism (2012).”

<sup>145</sup> Interview KJC Secretariat Official, 4/2/13.

<sup>146</sup> *Ibid.*

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## POLICY REPORTS

Policy Reports are lengthy papers which provide a tool/forum for the thorough and systematic analysis of important policy issues, designed to offer well informed scientific and policy-based solutions for significant public policy problems. In general, Policy Reports aim to present value-oriented arguments, propose specific solutions in public policy – whereby influencing the policy debate on a particular issue – through the use of evidence as a means to push forward the comprehensive and consistent arguments of our organization. In particular, they identify key policy issues through reliable methodology which helps explore the implications on the design/structure of a policy. Policy Reports are very analytical in nature; hence, they not only offer facts or provide a description of events but also evaluate policies to develop questions for analysis, to provide arguments in response to certain policy implications and to offer policy choices/solutions in a more comprehensive perspective. Policy Reports serve as a tool for influencing decision-making and calling to action the concerned groups/stakeholders.